

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

In the Matter of Application of
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.
For Authority to Construct New Instructional Television Fixed Service Station On the B Group Channels, Luquillo, Puerto Rico
File No. BPLIF-19950215DS

ORDER ON RECONSIDERATION

Adopted: February 19, 2004

Released: February 20, 2004

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

1. Introduction. We have before us a petition for reconsideration filed on April 17, 2002 by Hispanic Information and Telecommunications Network, Inc. (HITN). HITN seeks reconsideration of the dismissal of the above-captioned application for authority to construct a new Instructional Television Fixed Service (ITFS) station to operate on the B-group channels at Luquillo, Puerto Rico. For the reasons stated below, we deny the Petition.

2. Background. On February 15, 1995, HITN filed the above-captioned application. The application appeared on public notice as accepted for filing on April 26, 1995. On May 3, 1995, the application was amended to specify additional receive sites. On July 7, 1995, petitions to deny were filed against the application by American University of Puerto Rico (AUPR), licensee of co-channel Station WLX323, San Juan, Puerto Rico, and WHTV Broadcasting Corporation (WHTV), lessee of AUPR's excess channel capacity (collectively, the Petitioners). Petitioners allege that the proposed HITN facility would cause objectionable interference to the protected service area of Station WLX323, which transmits from a site approximately 21 miles from HITN's proposed facility. Additionally, Petitioners submit technical testimony to demonstrate that (1) HITN's receive sites R3 and R4 will suffer interference from existing co-channel Aguas Buenas facility (WLX323) as to render the sites useless, and

1 Petition for Reconsideration (filed Apr. 17, 2002) (Petition).

2 See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Service Division, Mass Media Bureau, Federal Communications Commission to HITN, c/o Rudolph J. Geist, Esq. (Mar. 12, 2002) (Dismissal Letter)

3 Application for new ITFS Station at Luquillo, Puerto Rico, File No. BPLIF-19950215DS, Facility ID No. 27377 (filed February 15, 1995) (the application). The application was amended on February 16, 1995 to specify proposed receive sites, request a protected service area and correct the proposed transmit site coordinates.

4 See ITFS Public Notice Report No. A-35 (rel. Apr. 26, 1995).

5 Petition at 2.

6 Petition to Deny (filed July 7, 1995).

7 Id.

(2) interference notwithstanding, the desired signal level to receive sites R2, R3 and R4 will be below accepted levels for a good picture quality.⁸

3. In opposition to the petition to deny, HITN states that it will upgrade the WLX323 receive antennas, and utilize precision offset equipment to eliminate any predicted interference to the station's protected service area.⁹ In a further effort to cure the predicted interference, HITN amended the application to replace the omnidirectional (Andrew Corp. model HMD12VO) transmitting antenna with a directional (Andrew Corp. model HMD8VC) transmitting antenna.¹⁰

4. Additionally, on September 15, 1995, HITN further amended its application to address Petitioners' claim that the desired signal levels for HITN's receive site would be below accepted levels for a good picture quality by requesting digital authority.¹¹ HITN claims that its proposed use of digital modulation techniques, which are more robust than analog modulation, coupled with the use of 4-QAM,¹² would allow for a receive site to obtain a clear picture with a signal-to-noise ratio as low as 10dB.¹³

5. In reply to HITN's opposition to the petition to deny, Petitioners maintain that HITN's frequency offset proposal would not eliminate the objectionable interference to the receive sites and protected service area of WLX323.¹⁴ Petitioners further state that because the antenna reorientation and increased line losses proposed by HITN, HITN's transmission facilities will not be capable of providing the intended service.¹⁵ Specifically, Petitioners state that all of HITN's proposed receive sites will receive a signal level from the proposed transmit station that is below accepted levels for a good picture quality.¹⁶

6. In view of the objections raised by the Petitioners, and after consideration of the various amendments filed on behalf of HITN's application, the Branch dismissed the application.¹⁷ The Branch determined that HITN's proposed facility, as amended, would no longer be capable of providing service to three of its four proposed receive sites.¹⁸ With respect to the remaining site, Escuela Luis Munoz Rivera (Rivera), the Branch further concluded that because HITN had failed to submit a letter of intended

⁸ *Id.* at Exhibit A: Technical Statement of du Treil, Lundin & Rackley, Inc. (dated April 9, 1996) (du Treil Statement). Receive site R2 is located at coordinates 18°-19"-22' N. Latitude 66°-17"-51' W. Longitude. Receive site R3 is located at coordinates 18°-25"-13' N. Latitude, 66°-11"-05' W. Longitude. Receive site R4 is located at coordinates 18°-27"-20' N. Latitude, 66°-03"-57' W. Longitude. *Id.* at Figure 1.

⁹ See HITN Opposition (filed August 4, 1995).

¹⁰ HITN Amendment (filed Sept. 13, 1995).

¹¹ See Petition at 2, citing HITN Amendment (filed Sept. 15, 1995). We also note that HITN further amended the application on February 16, 1996, to reorient the transmit antenna and decrease the power at the output of the antenna. *Id.*

¹² QAM (quadrature amplitude modulation) is a method of combining two amplitude-modulated (AM) signals into a single channel, thereby doubling the effective bandwidth. QAM is used with pulse amplitude modulation (PAM) in digital systems, especially in wireless applications.

¹³ Petition at 5 and Exhibit C: Engineering Statement of Delawder Communications, Inc. (dated April 16, 2002) (DeLawder Statement) (stating that the Commission allows modulation densities from 4-QAM to 64-QAM).

¹⁴ See Petitioners Further Supplement to Petition to Deny (April 16, 1996), citing du Treil Statement.

¹⁵ *Id.* at 3.

¹⁶ HITN Amendment (filed Sept. 15, 1995). We also note that HITN further amended the application on February 16, 1996, to reorient the transmit antenna and decrease the power at the output of the antenna. See Petition at 2.

¹⁷ Dismissal Letter, *supra* note 6. See MMB ITFS Public Notice Report No. 695 (rel. Mar. 18, 2002).

¹⁸ Dismissal Letter at 2.

use, or to provide information regarding that site's accreditation in the application, HITN had not established its eligibility pursuant to Section 74.932 of the Commission's rules.¹⁹ On April 17, 2002, HITN filed the instant petition for reconsideration of the Branch's action, arguing that dismissal of the above-captioned application was based on an erroneous conclusion that good faith cooperative technical amendments made by HITN to its application, to address concerns of petitioning parties, would so handicap its proposed facility as to render it unable to serve three of its four specified receive sites, and that HITN could not be qualified as an applicant based on service to the sole remaining serviceable receive site.²⁰ HITN then states, such a conclusion is technically incorrect and inconsistent with the public interest and the Commission's Statutory obligations.²¹

7. *Discussion.* Section 74.932(a) of the Commission's Rules states, in relevant part, that an ITFS license "will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization..."²² An applicant who seeks to establish its ITFS license eligibility by providing service to accredited institutional or governmental organizations "must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage."²³ If a receive site is unable to receive an applicant's signal because of interference from another station, the applicant cannot demonstrate that the receive site will be able to receive and use the educational programming.²⁴ In this case, using the definition of interference used in Section 74.903(b) of the Commission's Rules, the Branch concluded that HITN would be unable to serve its receive sites because of interference from other stations.²⁵

8. Pursuant to Section 74.903(a)(1) of our rules, interference is deemed present when the ratio of the desired-to-undesired signal is less than 45 dB.²⁶ HITN offers its own technical analysis²⁷ to refute the technical findings posed by the Petitioners and to support its contention that the Branch erred in dismissing its application.²⁸ HITN claims that, by using an enhanced performance antenna, it would be able to increase its signal-to-noise ratio and desired-to-undesired (D/U) ratio at the receive sites in question.²⁹ Further, HITN states that the Petitioners erred to the extent their analysis assumed that the

¹⁹ *Id.* See 47 C.F.R. § 74.932.

²⁰ Petition at 1.

²¹ *Id.*

²² 47 C.F.R. § 74.932(a).

²³ 47 C.F.R. § 74.932(a)(4). See, e.g., *Zion Lutheran School et al., Memorandum Opinion and Order*, 8 FCC Rcd 3606 ¶ 3 (1993) (stating that by failing to submit the appropriate letter of intended use, the applicant fails to demonstrate its qualifications and the application must be dismissed).

²⁴ See *Hispanic Information and Telecommunications Network, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 23872, 23876 ¶ 11 (WTB PSPWD 2003), *application for review pending*.

²⁵ See Dismissal Letter.

²⁶ See 47 C.F.R. § 74.903(a)(1).

²⁷ Petition at 2, citing du Treil Statement.

²⁸ HITN claims that the Branch relied on incorrect technical findings of the Petitioner's engineering analysis. Petition at 3. Petitioners' submitted analysis that indicated that there would be insufficient signal-to-noise ratio and desired-to-undesired signal ratio at the receive sites. See Further Supplement to Petition to Deny at 2 (filed April 16, 1996) referring to du Treil Statement.

²⁹ Petition at 4. HITN also states that because it is proposing digital modulation, the receive sites would be capable of receiving a clear picture with a signal-to-noise ratio as low as 10 dB. *Id.* at 5.

signal-to-noise ratio³⁰ needed to achieve a TASO Grade 4 or better picture of 35 dB, rather than the 23 dB ratio provided in our rules.³¹ With respect to enhancing the D/U ratios to a level of non-interference, we disagree.

9. Even if we were to assume HITN's proposed facility would provide a permissible signal-to-noise ratio as provided under our rules, HITN's technical analysis indicates that its facilities, as amended, would fail to satisfy the D/U ratio used to determine the existence of interference.³² Specifically, HITN's technical analysis demonstrates that even using the upgraded Mark MHP-25A120 receive antenna, the D/U ratio at the three receive sites in question would still be below 45 dB.³³ We therefore find that the Branch did not err by concluding that HITN's proposed facility, as amended, would no longer be capable of providing service to three of HITN's four specified receive sites.³⁴

10. We also find no reason to disturb the Branch's conclusion with regard to the fourth receive site (Rivera).³⁵ Section 74.932(a) of the Commission's rules states, in relevant part, that an ITFS license "will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization...."³⁶ An applicant who seeks to establish its ITFS license eligibility by providing service to accredited institutional or governmental organizations "must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage."³⁷ Because HITN failed to submit the requisite documentation to establish its ITFS eligibility as required by our rules, we find no error with the Branch's decision regarding the Rivera site.³⁸

11. Lastly, HITN suggests that the Petitioners' repeated oppositions to the application, notwithstanding the numerous amendments HITN filed to its application, are tantamount to "strike petitions."³⁹ We disagree. A strike pleading is a pleading filed in bad faith for the primary purpose of blocking, impeding, or delaying the grant of an application.⁴⁰ We find nothing to suggest that the

³⁰ The "Signal-to-Noise Ratio" is the ratio of the amplitude of the desired signal to the amplitude of the noise accompanying that signal. In an analog television receiver, a significant level of noise manifests itself in the viewed picture as what is commonly called "snow." The higher the signal-to-noise ratio, the less visible is snow.

³¹ Petition at 3. HITN states that when determining one's own service needs, the appropriate standard is the 23 dB signal-to-noise ratio. *Id.* citing In the Matter of Amendment of Parts 21, 74 and 94 of the Commission Rules and Regulations with Regard to the Technical Requirements Applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS), *First Report and Order*, 98 FCC2d 68 ¶¶ 68-72 (1984).

³² See DeLawder Statement.

³³ See DeLawder Statement. Specifically, HITN's own technical analysis indicates the following D/U ratios for each of the proposed receive sites identified in its application: RT2 (Escuela Segunda) = 15.9 D/U; RT3 (Bayamon Military Academy) = 30.6 D/U; and RT4 (Robinson School) = 41.9 D/U.

³⁴ Dismissal Letter at 2.

³⁵ See *id.* We note that HITN does not challenge the Branch's ruling on this issue.

³⁶ 47 C.F.R. § 74.932(a).

³⁷ 47 C.F.R. § 74.932(a)(4). See, e.g., *Zion Lutheran School et al., Memorandum Opinion and Order*, 8 FCC Rcd 3606 ¶ 3 (1993).

³⁸ Dismissal Letter at 2.

³⁹ Petition at 7.

⁴⁰ William P. Johnson and Hollis P. Johnson, d/b/a Radio Carrollton, *Decision*, 69 FCC 2d 1139, 1150 ¶ 24 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd mem. sub nom. Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. Oct. 15, 1980), *cert. denied*, 450 U.S. 1041 (1981).

pleadings filed by the Petitioners were in violation with the Commission's general practice rules governing pleadings filed in opposition to a pending application. In the absence of a demonstrable showing of abuse of the Commission's processes,⁴¹ we decline to entertain HITN's allegations on this issue.

12. *Conclusion.* In consideration of the record before us, we find that the Branch correctly concluded to dismiss the application based on its findings that (1) HITN's proposed facility, as amended, would no longer be capable of providing service to three of HITN's four specified receive sites, and (2) HITN failed to establish its ITFS eligibility for the remaining fourth site by not submitting the requisite documentation required under our rules. While we do not overlook the benefit HITN's proposed instructional Spanish language programming would likely offer to the public, we do not believe that a reinstatement of HITN's application, in derogation of our rules governing ITFS, would promote the public interest. For the reasons stated herein, we decline to disturb the Branch's action on this matter.⁴²

13. 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 and 74.932 of the Commission's rules, 47 C.F.R. §§ 1.106, 74.932, the Petition for Reconsideration filed by Hispanic Information and Telecommunications Network, Inc on April 17, 2002 IS DENIED.

14. 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
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⁴¹ The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process, *First Report and Order*, 4 FCC Rcd. 4780, 4793 n.3 (1989); see *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342, 6352 ¶ 41 (1988); Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Process, Notice of Proposed Rulemaking, 2 FCC Rcd. 5563, 5563 ¶ 2 (1987); see also Policy Regarding Character Qualifications In Broadcast Licensing, Report, *Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd. 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (strike pleadings, harassment of opposing parties, and violation of ex parte rules constitute abuse of process).

⁴² See *Zion Lutheran School et al.*, *supra*.