

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

In the Matter of Applications of)	
)	
ALLIANCE FOR HIGHER EDUCATION)	
)	File No. 50423-CM-AL-(2)-98
For Authority to Assign Instructional Television)	
Fixed Service Licenses KWU29, Fort Worth, TX,)	
and KWU30, Dallas, Texas)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 2004

Released: March 11, 2004

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

1. *Introduction.* In this *Order*, we consider a petition to deny and for an order to show cause why licenses should not be revoked filed on July 2, 1998, by Dallas MDS Partners (Dallas MDS).¹ We also have before us Dallas MDS requests that we deny applications for assignment of channels from an Instructional Television Fixed Service (ITFS) operator, the Alliance for Higher Education (Alliance), to a commercial entity, CS Wireless Systems, Inc. (CS), that is affiliated with a multi-system MDS operator, Nucentrix Broadband Services, Inc.² We also address Dallas MDS' request for waiver of the deadline for it to express its interest in prosecuting its petition to deny.³ For the reasons stated below, we grant the Waiver Request, grant the Petition in part, dismiss the assignment application, and deny the request that we institute revocation proceedings against Alliance.

2. *Background.* In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations.⁴ 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.⁵ It also permitted ITFS licensees to use the channels for incidental purposes.⁶ These incidental

¹ Dallas MDS Partners Petition to Deny and for an Order to Show Cause Why Licenses Should Not Be Revoked, July 2, 1998 (Petition).

² See Applications of Alliance for Higher Education for Assignment of KWU-29, Fort Worth, Texas, and KWU-30, Dallas, Texas, to CS Wireless Systems, Inc., File No. 50423-CM-AL(2)-98, July 2, 1998 (Application). Nucentrix was formerly called Heartland Wireless Communications, Inc., and was so named when certain documents were filed in this proceeding. To avoid confusion, we refer to the company as Nucentrix throughout this order.

³ Request for Waiver (filed Dec. 19, 2002) (Waiver Request).

⁴ See *Educational Television Report and Order*, Docket No. 14744, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

⁵ 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 846, 853 ¶ 25).

⁶ *Id.*

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

3. In 1983, the Commission redesignated the E Group and F Group channels from ITFS to the Multichannel Multipoint Distribution Service (MMDS).¹⁰ The Commission took that action in an effort to spur the development of competition to cable television systems and to promote effective and intense utilization of the spectrum.¹¹ As part of its decision, the Commission allowed ITFS licensees currently operating on the E Group and F Group channels to remain operating, but prohibited all but *pro forma* assignment of such licenses:

We also reaffirm our decision prohibiting all but pro forma assignment of grandfathered ITFS licenses. This would include all ITFS licenses for E and F channels that either have been granted or were in the application stage as of May 26, 1983. Such a prohibition is consistent with the purpose of a grandfather provision, which is to protect specific interests of the public and of operating stations. For the public, grandfathering provisions protect against disruptions in existing services. For the operating station, grandfathering guards against economic dislocation and protects the reliance interest of the station in the spectrum as allocated. Neither such interest would be furthered by PBS's recommendation. Future assignees are not yet in operation, and so no existing service would be disrupted by the prohibition. In addition, a potential assignee would have no reliance interest to be protected; such an assignee would be preparing to operate in a market with full knowledge that MDS licensees could also be operating in the same channel group in that market.¹²

4. The Alliance is the licensee of grandfathered ITFS Stations KWU29, Fort Worth, Texas and KWU30, Dallas, Texas. On April 3, 1996, Dallas MDS obtained an authorization for MDS Station WMY464, operating on the E Group channels at Dallas, Texas.¹³ Subsequently, the Commission

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1209 (1983) (*E and F Group Reallocation Order*).

¹¹ *Id.*, 94 FCC 2d at 1228 ¶¶ 60-61.

¹² In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 133 ¶ 14 (1983) (*E and F Group Reallocation Reconsideration Order*).

¹³ File No. BPMD-8950164.

expanded the co-channel protected service areas (PSAs) of MDS and ITFS site licenses from a radius of 15 miles to a radius of 35 miles, but grandfathered incumbent stations that were short-spaced with respect to each other under the new interference protection standards.¹⁴ Under the new standards, the Alliance's E-Group Fort Worth ITFS station and the Dallas MDS E-Group station were short-spaced with respect to each other but grandfathered.

5. In the 1996 MDS auction, Nucentrix obtained the MDS Basic Trading Area (BTA) authorization for the Dallas-Forth Worth BTA.¹⁵ MDS BTA authorizations give their holders reversionary rights to any unoccupied or abandoned MDS channels in the BTA.¹⁶ Under normal circumstances, if the Alliance were to return its E and F Group channels in the Dallas-Forth Worth area to the Commission, the relinquished channels would revert to Nucentrix, which could reassign them to its affiliate, CS. In this case, however, much of the coverage area of the Alliance's Fort Worth station falls within the 35-mile PSA of Dallas MDS's station. If the Alliance were to return its licenses to the Commission, Nucentrix could claim the reversionary rights but would have to respect the 35-mile PSA of the Dallas MDS station. In effect, that portion of the Alliance's 35-mile PSA that overlaps with the Dallas MDS 35-mile PSA would go to Dallas MDS, not to Nucentrix.

6. On May 18, 1998, Alliance filed the captioned application to assign the licenses for Stations KWU29 and KWU30 to CS. That application did not request a waiver of the prohibition on assignments of grandfathered E and F channel ITFS stations. The applications were accepted for filing on June 3, 1998. Dallas MDS filed its Petition on July 2, 1998.¹⁷

7. On October 18, 2002, the Bureau released a Public Notice¹⁸ (*October Legal Matters Public Notice*) in which it sought to ensure that it had a complete and accurate listing of all pending legal matters in the ITFS and MDS. An Appendix (*October Appendix*) containing a list of all of the pending ITFS and MDS, and MMDS cases was attached to the *October Legal Matters Public Notice*. The *October Appendix* indicated the name of the applicant/licensee, the file number/call sign, the pleading type and filing date, the name of the petitioner, if not the applicant, and whether the file was complete. WTB required that all ITFS and MDS licensees, applicants, and other parties with pending pleadings relating to these services review and verify the information contained in the *October Appendix*. For legal matters with a filing date before March 25, 2002, WTB required that licensees, applicants, and other parties with pending pleadings respond in writing by December 17, 2002 if they desired that WTB continue processing these matters.

8. On November 25, 2002, counsel for Dallas MDS requested an extension of the deadline for responding to the *October Legal Matters Public Notice*, as well as a related public notice relating to

¹⁴ 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, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12796-12797 ¶ 69 (1999) (*Two-Way Reconsideration*); Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, *Declaratory Ruling and Order*, 11 FCC Rcd 18839, 18853-18854 ¶¶ 23-24 (1996) (*Digital Declaratory Ruling*).

¹⁵ See Petition at 2.

¹⁶ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, MM Docket No. 94-131, 10 FCC Rcd 9589 (1995) (*MDS Auction R&O*).

¹⁷ See Petition. Alliance and CS filed an Opposition on July 22, 1998. Opposition to Petition (filed Jul. 22, 1998) (Opposition).

¹⁸ Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS Pending Legal Matters, *Public Notice*, DA 02-2752, 67 Fed. Reg. 69529 (2002) (*October Legal Matters Public Notice*).

licenses and pending applications.¹⁹ On December 5, 2002, the former Public Safety and Private Wireless Division of the Bureau granted an extension of time to respond to the other public notice, but did not extend the deadline for responding to the *October Legal Matters Public Notice*.²⁰ That *Order* did not explicitly address the arguments made in support of the request for an extension of the *October Legal Matters Public Notice*.²¹ On December 19, 2002, Dallas MDS filed a response to the *October Legal Matters Public Notice* and its Waiver Request asking the Bureau to accept its response two days late.²²

9. *Discussion – Waiver Request.* Dallas MDS states that its counsel anticipated that the deadline for responding to the *October Legal Matters Public Notice* would be extended.²³ Dallas MDS argues that it made its filing as soon as possible and that the public interest would be served by allowing it to provide a complete record of all pleadings pending before it.²⁴

10. Pursuant to Section 21.19 of the Commission's Rules,²⁵ an applicant seeking a waiver must make an affirmative showing that: (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.²⁶ Based upon the record before us, we conclude that a waiver is justified, although not for the reasons offered by Dallas MDS. We reject the argument that the mere filing of a request for extension of time creates a reasonable expectation that the request will be granted. In this case, however, we note that the *Order* created an ambiguity by failing to explicitly respond to counsel's request for extension of time to respond to the *October Legal Matters Public Notice*. Under the Commission's Rules, if a motion for extension of time is filed more than seven days before the due date, the response shall not be due until two days after the Commission acts on the motion.²⁷ While the *Order* technically acted on the request, the ambiguity caused by the failure to explicitly respond to the request could have caused confusion. We therefore conclude that it would be inequitable to reject Dallas MDS's submission. Moreover, we conclude that the two-day delay did not prejudice any party. Accordingly, we grant Dallas MDS' Waiver Request.

11. *Petition to Deny.* Dallas MDS argues that the Commission has specifically ruled that it will allow E and F Group ITFS licensees to transfer their licenses only if the assignments are *pro forma*.²⁸ Dallas MDS avers that CS formerly leased channel capacity from the Alliance's Fort Worth and Dallas stations, that CS has terminated the leases, but that CS has continued using the Alliance stations for commercial purposes in contravention of Commission rules.²⁹ Dallas MDS also contends that the

¹⁹ Letter from James Stenger, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 25, 2002).

²⁰ Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS License Status And Pending Applications, *Order*, 17 FCC Rcd 24620 (WTB PSPWD 2002).

²¹ *Id.*

²² *See* Waiver Request.

²³ *Id.* at 2.

²⁴ *Id.* at 2-3.

²⁵ 47 C.F.R. § 21.19.

²⁶ *Id.*

²⁷ 47 C.F.R. § 1.46(b).

²⁸ Petition at 4-5, *citing* Amendment of Parts 2, 21, 74 and 94, *Order on Reconsideration*, 98 FCC 2d 129, 134 ¶ 14 (1984) (*1984 Reconsideration Order*).

²⁹ Petition at 4 and 6.

Alliance obtained its stations through an unauthorized transfer of control, under the guise of a mere name change that occurred in 1980.³⁰ On those grounds, Dallas MDS argues not only that we should deny the Alliance's application to transfer its Fort Worth license to CS, but that we should issue an order to show cause why the Alliance's Fort Worth and Dallas licenses should not be revoked.³¹

12. When the Commission reallocated the E and F Group channels from ITFS to MDS in 1983, it grandfathered incumbent ITFS licensees but specifically determined that it would not authorize E- and F-Group ITFS licensees to assign those licenses to other entities.³² The Commission reaffirmed that aspect of its decision on reconsideration.³³ An ITFS application that is patently not in compliance with the Commission's rules, regulations, or policies will be considered as defective and dismissed unless accompanied by a request for waiver.³⁴ In this case, despite the Commission's clear pronouncement that it would not allow non-*pro forma* assignments of grandfathered ITFS licenses, Alliance and CS did not seek a waiver of that prohibition. Accordingly, we will dismiss the application as unacceptable for filing.

13. We acknowledge the Alliance's and CS's argument in the Opposition that such transfers are in the public interest.³⁵ Since the Alliance and CS failed to request a waiver, however, we need not decide whether we would have granted a waiver if a waiver had been properly requested.

14. *Petition for Order to Show Cause.* Dallas MDS argues that Alliance obtained the licenses for Stations KWU29 and KWU30 in an unauthorized assignment in 1980 and that Alliance made misrepresentations when it claimed that there was a mere name change.³⁶ In response, Alliance states that there was no assignment of license because the license corporation continued in existence after the merger with a name change.³⁷ Alliance also states that, as far as it can determine, there was no transfer of control because 19 of the 29 directors of Alliance after the merger had been directors of the corporation prior to the merger.³⁸

15. We are not persuaded that we should issue an order to show cause why the Alliance's licenses should not be revoked. Although the Commission does not recognize a formal right to seek revocation of a license, it has treated such requests as informal requests for action under Section 1.41 of the Commission's Rules.³⁹ Even if Dallas MDS had established that Alliance had engaged in an unauthorized transfer of control, an unauthorized transfer of control does not provide a basis for instituting a revocation proceeding in the absence of misrepresentation or other intent to deceive the

³⁰ Petition at 7-10.

³¹ *Id.* at 10.

³² In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Service, *Report and Order*, 94 FCC 2d 1203, 1236 ¶ 85 (1983).

³³ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Service, *Order on Reconsideration*, 98 FCC 2d 129, 134 ¶ 14 (1984) (*1984 Reconsideration Order*)

³⁴ 47 C.F.R. § 73.3566(a) (1998).

³⁵ Opposition at 3-7.

³⁶ Petition at 8-10.

³⁷ Opposition at 10.

³⁸ *Id.*

³⁹ 47 C.F.R. § 1.41. See, e.g., Ronald Brasher, *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing*, 15 FCC Rcd 16326, 16328 n.1 (2000) (*Brasher*).

Commission.⁴⁰ In this case, Dallas MDS has presented no evidence that Alliance misrepresented facts to the Commission. A misrepresentation is a false statement of fact made with intent to deceive the Commission.⁴¹ In this case, Dallas MDS has presented no evidence that Alliance acted with any intent to deceive. Since Alliance could have taken assignment of the licenses in 1980, it had no motive to conceal the transaction from the Commission. We therefore decline to institute a revocation proceeding against Alliance.

16. Accordingly, IT IS ORDERED that pursuant to Sections 155 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 155 and 309, and Sections 0.131, 0.204(b), and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.204(b), 0.331, the "Petition to Deny and for an Order to Show Cause Why Licenses Should Not be Revoked" filed by Dallas MDS Partners on July 2, 1998 IS GRANTED to the extent indicated and is otherwise DENIED.

17. IT IS FURTHER ORDERED that the application for the Commission's consent to assign the licenses for ITFS Station KWU29 and KWU30 filed by the Alliance for Higher Education on May 18, 1998 (File No. 50423-CM-AL-(2)-98) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
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⁴⁰ See, e.g., Roy M. Speer, *et al.*, *Memorandum Opinion and Order and Notice of Apparent Liability*, 11 FCC Rcd 18393, 18428 ¶ 88 (1996).

⁴¹ Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 (1983).

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