

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

In the Matter of)	
)	
RON ABBOUD)	
)	
Licensee of Multichannel Multipoint Distribution Service Station WLW992, Omaha, Nebraska)	File No. 50226-CM-P-89
)	
Application for License and Renewal of Multichannel Multipoint Distribution Service Station WLW992, Omaha, Nebraska)	File Nos. BLMD-9151617, BRMD-9157909
)	
Licensee of Experimental Radio Station KI2XAD in the 2500 – 2690 MHz Band, Omaha, Nebraska)	File No. 2016-EX-PL-1991
)	
)	

ORDER ON RECONSIDERATION

Adopted: February 7, 2005

Released: February 7, 2005

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

I. INTRODUCTION

1. In this *Order on Reconsideration*, we address a Petition for Reconsideration and Request for Reinstatement of License (*Petition*) for Broadband Radio Service (BRS)¹ Station WLW992, Omaha, Nebraska, filed by Ron Abboud (Abboud) on December 15, 2003.² In an *Order* dated November 13, 2003, the former Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau (PSPWD or Division) found that Abboud's license for Station WLW992 was forfeited pursuant to Section 21.44(a)(1)³ of the Commission's Rules.⁴ For the reasons discussed below, we grant Abboud's

¹ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (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) (*BRS/EBS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules have taken effect, we will refer to BRS by its new name. Unless otherwise noted, the citations to rules will be to those rules in effect during the operative time period.

² Petition for Reconsideration and Request for Reinstatement of License filed by Ron Abboud (Dec. 15, 2003) (*Petition*). American Telecasting of Lincoln (ATL) filed an Opposition to Petition for Reconsideration and Request for Reinstatement of License (Jan. 15, 2004) (*Opposition*). Abboud filed a Reply to Opposition (Jan. 28, 2004) (*Reply*).

³ 47 C.F.R. § 21.44(a) (1994).

⁴ See Ron Abboud, *Memorandum Opinion and Order*, 18 FCC Rcd 23807 (WTB PSPWD 2003) (*Order*).

Petition in part, deny it in part, and conclude that Abboud's license for Station WLW992 is forfeited pursuant to Section 21.44(a)(3) of the Commission's Rules.⁵

II. BACKGROUND

2. On November 16, 1989, the Commission granted Abboud a conditional license to operate Station WLW992, in Omaha, Nebraska, with a transmit site location of 41° 12' 39" N, 96° 05' 14" W and a horizontal antenna polarization.⁶ On November 16, 1990, Abboud certified that he had completed construction of Station WLW992 by November 15, 1990.⁷

3. On May 16, 1991, Abboud requested special temporary authority (STA) to construct and operate an experimental low power, multichannel fixed transmitter from the top of the Omaha Inn at 108th and M Street in Omaha, Nebraska.⁸ In his STA request, Abboud acknowledged that his Station WLW992 was located at a different, but very close, site from the desired experimental site, and that he sought the requested authority to test the effectiveness of the temporary location as a "primary cell" for his experimental operations.⁹ Abboud's STA request was never granted. However, the Commission granted Abboud authorization for Experimental Station KI2XAD on November 15, 1991, effective until February 1, 1993, then extended the authorization until February 1, 1995.¹⁰ On November 21, 1991, Abboud filed an application for modification to change the location of Station WLW992, Omaha, to 41° 12' 41" N, 96° 05' 14" W with horizontal antenna polarization.¹¹ Commission records do not reflect that any action was ever taken on the application.

4. On July 30, 1993, Abboud's neighboring licensees, Wireless Entertainment Network (WEN), Inc.,¹² and Line of Site (LOS),¹³ requested that the Commission's former Common Carrier Bureau order Abboud to cease transmitting and require Abboud to show cause why the Commission should not revoke his authorization.¹⁴ In that request, the Petitioners alleged that Abboud's operations on WLW992 and KI2XAD were causing impermissible interference to LOS's station.¹⁵ On March 21, 1994, WEN and LOS supplemented their WLW992 Request by alleging that Abboud was not operating in

⁵ 47 C.F.R. § 21.44(a)(3) (1994).

⁶ The horizontal polarization is indicated on the Conditional License by the code "HMD 16HO-F." *See* Conditional License WLW992 (File No. 50226-CM-P-89) (granted Nov. 16, 1989).

⁷ *See* Certification of Completion of Construction for Station WLW992 (filed Nov. 16, 1990).

⁸ *See* Abboud Letter of Aug. 12, 1996 at exhibit Letter from James H. Yancey, Jr., Consultant for Ron Abboud to Experimental Radio Service, Federal Communications Commission (filed May 16, 1991) (STA Letter).

⁹ *Id.* at 2 *citing* 47 C.F.R. § 5.65 (1991).

¹⁰ *See* Radio Station Construction Permit and License for Experimental Radio Station KI2XAD, File No. 2016-EX-RL-1992, Nov. 15, 1991; *see also* Radio Station Construction Permit and License for Experimental Radio Station KI2XAD, File No. 2016-EX-RL-1992, February 1, 1993.

¹¹ *See* Application For a New or Modified Microwave Radio Station License Under Part 21 for Station WLW992, Omaha, NE (filed by Ron Abboud on Nov. 22, 1991) (WLW992 Modification Application) at Petition, Exhibit 2.

¹² WEN is a wireless cable system operator in the Omaha, Nebraska Metropolitan Statistical Area.

¹³ LOS has been the licensee of BRS Station WHT777 since 1983, and operates its station on the E Group channels.

¹⁴ Request to Compel Cessation of Service and Order to Show Cause filed by WEN and LOS (Jul. 30, 1993) (WLW992 Request). On August 19, 1993, Abboud filed a Motion to Strike. Motion to Strike (Aug. 19, 1993). *See also* Supplement to Motion to Strike (Aug. 20, 1993) Opposition to Motion to Strike (Sep. 1, 1993); Supplement to Opposition to Motion to Strike (Sep. 2, 1993); Answer to Complaint (Sep. 2, 1993).

¹⁵ WLW992 Request at 4.

compliance with his authorization.¹⁶ Concurrently with the WLW992 Request, and for the same reasons, WEN, LOS, and other neighboring licensees Libmot Communications Partnership (Libmot),¹⁷ Young Communications (Young),¹⁸ and Gould Communications (Gould)¹⁹ requested that the Commission's Office of Engineering and Technology (OET) order Abboud to cease transmitting and require Abboud to show cause why the Commission should not revoke his authorization for Experimental Radio Station KI2XAD.²⁰

5. On May 15 and July 22, 1996, the Commission's former Mass Media Bureau, Video Services Division sent letters of inquiry to Abboud in an effort to clarify the status of the operations of Station WLW992.²¹ In response, Abboud filed sworn declarations on May 28, 1996, June 17, 1996, and August 12, 1996.²² Abboud stated in his declarations that:

“Station WLW992 is [now] operating from the Omaha Inn, 108th and L St., Omaha, Nebraska, at coordinates ... 41 12 42 N and 96 04 54 W.”²³

¹⁶ Supplement to Request to Compel Cessation of Service and Petition for Order to Show Cause (Mar. 21, 1994) (WLW992 Supplemental Request); *See also*, Opposition to Supplement to Compel Cessation of Service and Petition for Order to Show Cause (Apr. 29, 1994); Supplement to Opposition (May 6, 1994); Request for Extension of Time to Reply to Opposition (May 11, 1994); Reply to Opposition to Supplement to Compel Cessation of Service and Petition for Order to Show Cause (Jun. 1, 1994); Motion to Strike (June 16, 1994); Opposition to Motion to Strike (June 22, 1994).

¹⁷ Libmot is the MDS licensee of Station WNTG452 on the H Group channels.

¹⁸ Young is an MDS licensee of Station WNTF452 on the H Group channels.

¹⁹ Gould is MDS licensee of Station WNTF307 on the H Group channels.

²⁰ Request to Compel Cessation of Service and Order to Show Cause filed by Libmot Communications Partnership (Libmot), Young Communications (Young), and Gould Communications (Gould), WEN, and LOS (filed July 30, 1993) (KI2XAD Request). On August 19, 1993, Abboud filed a Motion to Strike. Motion to Strike (Aug. 19, 1993). *See Also*, Opposition to Motion to Strike (Sept. 1, 1993); Supplement to Opposition to Motion to Strike (Sept. 2, 1993); Answer to Complaint (Sept. 2, 1993); Reply to Opposition to Motion to Strike (Sept. 10, 1993); Reply (Sept. 15, 1993); Supplement to Reply (Sept. 22, 1993). During the period July 30, 1993 through June 1994, Petitioners and Abboud filed a series of pleadings and motions with the Commission related to the above captioned matters. On September 8, 1994, the Ad Hoc Committee for Wireless Development Partners I (the Committee) filed four virtually identical pleadings styled “Petition to Cancel or Revoke License” each respectively against the following four Omaha licensees: LOS for BRS Station WHT777 (E-Group Channels), Young for BRS Station WNTF452 (Channel H1), Libmot for BRS Station WNTG 452 (Channel H2) and Gould for BRS Station WNTF307 (Channel H3), all stations Omaha, Nebraska. On October 21, 1994, the Omaha Licensees filed a Consolidated Opposition to Petitions to Cancel or Revoke License. The Committee's Petitions to Cancel or Revoke were dismissed for failure to respond to the December 18, 2002, Public Notice released by the Wireless Telecommunications Bureau. *See Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS Pending Legal Matters, Public Notice*, DA 02-2752, 67 Fed. Reg. 69529-04 (rel. Oct. 18, 2002) (*October Public Notice*).

²¹ *See* Letters from Daniel R. Ball, Attorney, Video Services Division, Mass Media Bureau, Federal Communications Commission to Ron Abboud, File No. 50226-CM-P-89 (filed May 15 and August 12, 1996) (VSD Letter of May 15, 1996) and (VSD Letter of August 12, 1996). Abboud filed responses to these letters on May 28, 1996, June 17, 1996, and Aug. 12, 1996. *See* Letters from Stephen Yelverton, Attorney for Ron Abboud to Daniel R. Ball, Attorney, Video Services Division, Mass Media Bureau, Federal Communications, File No. 50226-CM-P-89 (filed May 28, June 17, and Aug. 12, 1996) (Abboud Letter of May 28, 1996, Abboud Letter of June 17, 1996, and Abboud Letter of Aug. 12, 1996).

²² *See* Abboud Letter of May 28, 1996, Abboud Letter of June 17, 1996, and Abboud Letter of Aug. 12, 1996.

²³ Abboud Letter of June 17, 1996 at Question 1; Abboud Letter of August 12, 1996 at Question 4.

“Station WLW992 was originally constructed on November 15, 1990, at 11111 M St. It is authorized to operate on the F-Group channels.”²⁴

“Operations at the Omaha Inn location have used vertical polarization since about July 31, 1992. The experimental authorization, KI2XAD, did not specify or require horizontal polarization.”²⁵

6. The Division found that Abboud’s license for Station WLW992 forfeited pursuant to Section 21.44(a)(1) of the Commission’s Rules,²⁶ because Abboud was operating it at a different location and at a different polarization than was authorized pursuant to the station’s conditional license.²⁷ Further, the Division dismissed Abboud’s applications for covering license (File No. BLMD-9151617) and for renewal of license of Station WLW992 (File No. BRMD-9157909) filed on November 16, 1990, and March 29, 1991 respectively.²⁸ Moreover, the Division found that the pleadings filed with respect to Experimental Station KI2XAD were moot because the license for that station expired on February 1, 1995.²⁹

III. DISCUSSION

7. Abboud first argues that there was no basis in fact or law for the Division to conclude that the license for Station WLW992 was automatically forfeited pursuant to Section 21.44(a)(1) of the Commission’s Rules.³⁰ We agree. Section 21.44(a)(1) provided, in pertinent part, that a license shall be automatically forfeited if a certification of completion of construction has not been filed within five days of the expiration of the construction period.³¹ Abboud contends, and the record corroborates that Abboud indeed filed a timely certification of completion of construction.³² Therefore, Abboud’s license did not automatically forfeit pursuant to Section 21.44(a)(1).

8. We also find that the Division erroneously concluded that the certification of construction form “indicated that Station WLW992 was operating pursuant to the parameters on its conditional license, when in fact this was not the case.”³³ The *Order* further erroneously states that “Abboud’s previous certification of completion of construction was violative of Section 21.43(b).”³⁴ Finally, the *Order*

²⁴ *Id.*

²⁵ Abboud Letter of June 17, 1996 at Question 2, and Abboud Letter of August 12, 1996 at Question 4.

²⁶ 47 C.F.R. § 21.44(a)(1) (1994).

²⁷ *See Order*, 18 FCC Rcd at 23812 ¶ 13.

²⁸ *Id.* at 23813 ¶ 17. On June 20, 2003, the Division dismissed Abboud’s pending application File No. BLMD-9151617 with respect to Station WLW992 for failure to respond, when in fact Abboud did respond to the *October Public Notice*. *See* Wireless Telecommunications Bureau Announces Action on Responses to Public Notice Regarding ITFS, MDS, and MMDS Pending Applications, *Public Notice*, DA 03-2057 at Appendix B (rel. June 20, 2003) (*June Public Notice*). On October 10, 2003, that application was reinstated. *See* Wireless Telecommunications Bureau Grants Petitions for Reconsideration of ITFS, MDS, and MMDS Applications That Were Dismissed Without Prejudice on June 20, 2003, *Public Notice*, DA 03-3157 (rel. Oct. 10, 2003).

²⁹ *See Order*, 18 FCC Rcd at 23812 ¶ 14.

³⁰ 47 C.F.R. § 21.44(a)(1) (1994); *see Petition* at 2-3.

³¹ 47 C.F.R. § 21.44(a)(1).

³² *See* Certification of Completion of Construction WLW992 (filed Nov. 16, 1990).

³³ *Order*, 18 FCC Rcd at 23811-2 ¶ 12.

³⁴ *Id.* at 23810 ¶ 8.

concludes that Abboud's license forfeited because he failed to construct WLW992 as authorized, or, in the alternative, because he failed to file a timely modification application.³⁵ As stated above, the record reflects that Abboud's certification of construction form for Station WLW992 was timely filed.³⁶ There was no evidence before the Division to establish that the information contained in the certification of construction was incorrect when filed. Therefore, we conclude that all references in the *Order* to any defects in the certification of construction form or reliance on Sections 21.43(b) and 21.44(a)(1) as grounds for concluding that the license for WLW992 was forfeited are erroneous and hereby reversed. Furthermore, we find that Abboud's license was not forfeited as of December 16, 1990, thirty days after filing the construction certification.

9. We nonetheless find that Abboud's license for WLW992 has indeed forfeited pursuant to Section 21.44(a)(3) of the Commission's Rules.³⁷ Although, as indicated above, the Division cited Section 21.44(a)(1) as the basis for its decision, in concluding that Abboud was not operating Station WLW992 as authorized, we conclude that the license was actually forfeited pursuant to Section 21.44(a)(3). Section 21.44(a)(3) provides for the automatic forfeiture of a license upon the voluntary removal or alteration of the facilities so as to render the station not operational for a period of 30 days or more.³⁸ As discussed above, Abboud's conditional license for Station WLW992 specified a transmit site of 41° 12' 39" N, 96° 05' 14" W, a horizontal antenna polarization, and a street address of 11111 M Street in Omaha.³⁹ Abboud has acknowledged that he was not currently operating Station WLW992 from the transmit site listed on his license and stated that he moved Station WLW992 to a new location on or about July 31, 1992, and used vertical polarization since that time.⁴⁰ Because Abboud admitted in 1996 that he voluntarily moved the station in 1992, and it was not operational at the location specified on the license for several years, the license for Station WLW992 was automatically forfeited pursuant to Section 21.44(a)(3) as of August 30, 1992, thirty days after the station was relocated.⁴¹

10. Abboud further argues that the Division made a material error of fact when it concluded that Abboud "did not timely file an application for modification of the license to reflect the actual operation of the station at the new location."⁴² To support this contention, Abboud has submitted evidence that establishes that he did, in fact, file an application for modification of the license for Station WLW992 on November 22, 1991, before he moved the station to the new location in 1992.⁴³ While the Division did not correctly acknowledge that Abboud filed such an application, the mere filing of such an application would not provide Abboud with the authorization to relocate the station in the absence of affirmative evidence that such application was granted. Commission records do not indicate, nor does Abboud allege that the modification application was ever granted.⁴⁴ Therefore, although the Division's

³⁵ *Order*, 18 FCC Rcd at 23813 ¶ 15.

³⁶ See Certification of Completion of Construction WLW992 (filed Nov. 16, 1990).

³⁷ 47 C.F.R. § 21.44(a)(3).

³⁸ 47 C.F.R. § 21.44(a)(3).

³⁹ See Conditional License WLW992 (File No. 50226-CM-P-89) (granted Nov. 16, 1989) specifying a horizontal antenna polarization as indicated by code HMD16HO-F and Certification of Completion of Construction WLW992 (filed Nov. 16, 1990).

⁴⁰ See *Petition* at 3; see also Abboud Letter of June 17, 1996, and Abboud Letter of August 12, 1996.

⁴¹ 47 C.F.R. § 21.44(a)(3) (1994). See Warren Ache, *Memorandum Opinion and Order*, 9 FCC Rcd 2464 (1993).

⁴² See *Petition* at 4.

⁴³ See WLW992 Modification Application.

⁴⁴ We note that in certain circumstances, an application for minor modification can be deemed to have been granted without explicit Commission authorization on the twenty-first day following the date of public notice if the applicant is not notified to the contrary. See 47 C.F.R. 21.41(a). However, in response to a Commission request of October

conclusion that a timely modification application was never filed was factually inaccurate, it does not amount to a material error of fact that would support a change in the outcome of this proceeding.

11. In the Petition, Abboud also repeats his earlier argument that he explicitly requested permission to operate WLW992 at the new location in the STA letter, and the subsequent relocation “was done as a result of an STA and experimental authorization granted to Abboud on August 15, 1991 and November 15, 1991.”⁴⁵ Abboud further argues that because “neither the STA nor the experimental authorization explicitly rejected his alleged request to operate Station WLW992 at the new site, and because these authorizations encompassed the operating parameters for Station WLW992, he thus had a reasonable and good faith belief, even if mistaken, that such changes in the operation and location of Station WLW992 were under color of authority.”⁴⁶ We conclude that the Division correctly found Abboud’s arguments in this regard to be without merit. First, there can be no doubt as to what the STA authorized because it was never granted. Additionally, even assuming, *arguendo*, that the STA had been granted, Abboud’s alleged request in the STA letter to relocate the site cannot be interpreted as a specific request to relocate WLW992. Abboud’s STA letter was submitted in conjunction with the request for experimental authorization, yet Abboud indicated on the application for experimental authorization that such application was for a “new station”⁴⁷ even though the form provided him the opportunity to indicate that it was for “modification of an existing authorization.”⁴⁸ Further, on its face, the experimental license was very specific as to what was granted—an experimental radio station construction permit and license to operate Station KI2XAD.⁴⁹ Thus, we conclude that the Division properly found that neither the STA nor experimental license provided Abboud with the authority to relocate Station WLW992.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons stated above, we conclude that Abboud’s license for Station WLW992 is forfeited pursuant to Section 21.44(a)(3) of the Commission’s Rules because the record before us indicates that Abboud voluntarily removed and altered Station WLW992, so as to render the station not operational for a period of 30 days or more. To the extent that the Division found Abboud’s license forfeited pursuant to Section 21.44(a)(1), we conclude that such findings were erroneous and are reversed. Furthermore, we conclude that the Division properly found that Abboud did not secure proper authorization to relocate Station WLW992.

13. Accordingly IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the Petition for Reconsideration filed by Ron Abboud on December 15, 2003, is GRANTED IN PART and DENIED IN PART.

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18, 2002, Abboud had to resubmit his application and did so on December 16, 2002. *See* Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS and MMDS License Status and Pending Applications, DA 02-2751, 17 FCC Rcd 20538 (Oct. 18, 2002); *see also* WLW992 Modification Application. Inasmuch as Abboud admits to having relocated the station in July 1992, five months before resubmitting the modification application for processing, Abboud could not have benefited from Section 21.41(a) because the license for the station had already forfeited on September 1, 1992. Further, there is no evidence that the application ever went on public notice.

⁴⁵ *See Petition* at 4.

⁴⁶ *Id.*

⁴⁷ *See* Application for New or Modified Radio Station Authorization Under Part 5 of FCC Rules-Experimental Radio Service (Other than Broadcast) filed by Ron Abboud, Question 2(a).

⁴⁸ *Id.*

⁴⁹ *See* Radio Station Construction Permit and License for Experimental Radio Station KI2XAD, File No. 2016-EX-RL-1992, Nov. 15, 1991.

14. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.44(a)(3) (1994) of the Commission's Rules, 47 C.F.R. § 21.44(a)(3) (1994), the license for Station WLW992 IS DEEMED FORFEITED as of September 1, 1992.

15. 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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