

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 Distribution Service Station WPY40, Los Angeles, California	)	File No. BRMD-20010330AHW
	)	
For Renewal of License of Multipoint Distribution Service Station KFI79, Los Angeles, California	)	File No. BRMD-20010330ADO
	)	
For Renewal of License of Multipoint Distribution Service Station KFF79, Los Angeles, California	)	File No. BRMD-20010330AHV
	)	

**ORDER ON RECONSIDERATION**

**Adopted: November 27, 2006**

**Released: November 28, 2006**

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

**I. INTRODUCTION**

1. On January 6, 2005, MDS Digital Network, Inc. (MDS Digital) filed a petition seeking reconsideration<sup>1</sup> of the action taken by the Broadband Division (Division) of the Wireless Telecommunications Bureau on December 7, 2004.<sup>2</sup> The Division denied reconsideration of the action taken by the Public Safety and Private Wireless Division (PSPWD) of the Wireless Telecommunications Bureau on November 17, 2003.<sup>3</sup> PSPWD had granted a Petition to Deny and Petition for Declaration of License Forfeiture filed by Southern Wireless Video, Inc. (Southern)<sup>4</sup> against MDS Digital, thereby declaring that MDS Digital forfeited the Multipoint Distribution Service (MDS)<sup>5</sup> licenses for Stations

<sup>1</sup> MDS Digital Network, Inc., Petition for Further Reconsideration (filed Jan. 6, 2005) (PFFR).

<sup>2</sup> MDS Digital Network, Inc., *Order on Reconsideration*, 19 FCC Rcd 23675 (WTB BD 2004) (*MDS Digital II*).

<sup>3</sup> MDS Digital Network, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 24012 (WTB PSPWD 2003) (*MDS Digital I*).

<sup>4</sup> Southern Wireless Video, Inc., Petition to Deny and Petition for Declaration of License Forfeiture (filed Aug. 1, 2001) (Petition to Deny). The Petition to Deny 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* File Nos. BRMD-20010330AHW, BRMD-20010330ADO, and BRMD-20010330AHV (filed Mar. 30, 2001) (Applications).

<sup>5</sup> 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. Unless otherwise noted, the citations to rules will be to those rules in effect during the operative time period.

WPY40, KFI79, and KFF79, Los Angeles, California, as of June 24, 2000.<sup>6</sup> MDS Digital filed a petition seeking reconsideration of this action on December 17, 2003.<sup>7</sup> On December 7, 2004, the Division denied MDS Digital's Petition for Reconsideration.<sup>8</sup> For the reasons discussed below, we now deny MDS Digital's Petition for Further Reconsideration.

## II. BACKGROUND

2. The Commission granted its consent to the assignment of Stations WPY40, KFI79, and KFF79 from Microband Corporation of America to Mr. Earl S. Kim on November 23, 1990.<sup>9</sup> In 1999, Mr. Kim transferred the licenses to MDS Digital on a *pro forma* basis.<sup>10</sup> Mr. Kim serves as the president and sole employee of MDS Digital. Mr. Kim and, subsequently, MDS Digital, filed required annual reports regarding station activity for each station since 1991 for the previous calendar year.<sup>11</sup> These annual reports established that neither Mr. Kim nor MDS Digital had used Stations WPY40 and KFI79 to render any service since the stations were acquired, and also that neither Mr. Kim nor MDS Digital had used Station KFF79 to render any service since early in 1999.<sup>12</sup>

3. 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.<sup>13</sup> Southern alleged that the applications could not 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."<sup>14</sup> According to Southern, "[t]he licenses should be deemed forfeited because the Stations have voluntarily been dismantled and have been

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<sup>6</sup> *MDS Digital I*, 18 FCC Rcd at 24012. Because PSPWD declared the licenses for Stations WPY40, KFI79, and KFF79 forfeited as of June 24, 2000, it dismissed MDS Digital's pending renewal applications. *Id.*

<sup>7</sup> MDS Digital Network, Inc., Petition for Reconsideration (filed Dec. 17, 2003) (PFR).

<sup>8</sup> *MDS Digital II*, *supra*.

<sup>9</sup> See *Public Notice*, Report No. D-569-A (rel. Dec. 5, 1990).

<sup>10</sup> See Notice of Consummation (filed Dec. 9, 1999).

<sup>11</sup> Former Section 21.911(a)(3) of the Commission's Rules, 47 C.F.R. § 21.911(a)(3) (2003), required 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. This rule has since been eliminated. See *BRS/EBS R&O and FNPRM*, *supra*.

<sup>12</sup> *MDS Digital II*, 19 FCC Rcd at 23679 ¶ 7, 23682-83 ¶ 14; *MDS Digital I*, 18 FCC Rcd at 24014. See also 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); Station WPY40 1995 Annual Report (filed Mar. 1, 1996); Station WPY40 1996 Annual Report (filed Mar. 12, 1997); Station WPY40 1997 Annual Report (filed Mar. 11, 1998); Station WPY40 1998 Annual Report (filed July 12, 1999); Station WPY40 1999 Annual Report (filed Mar. 29, 2000); Station WPY40 2000 Annual Report (filed Mar. 1, 2001); Station WPY40 2001 Annual Report (filed Mar. 1, 2002); Station WPY40 2002 Annual Report (filed Feb. 28, 2003); Station KFI79 1995 Annual Report (filed Mar. 1, 1996); 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); Station KFI79 1999 Annual Report (filed Mar. 29, 2000); Station KFI79 2000 Annual Report (filed Mar. 1, 2001); Station KFI79 2001 Annual Report (filed Mar. 1, 2002); Station KFI79 2002 Annual Report (filed Feb. 28, 2003); Station KFF79 1999 Annual Report (filed Mar. 29, 2000); Station KFF79 2000 Annual Report (filed Mar. 1, 2001); Station KFF79 2001 Annual Report (filed Mar. 1, 2002); Station KFF79 2002 Annual Report (filed Feb. 28, 2003).

<sup>13</sup> See Petition to Deny.

<sup>14</sup> Petition to Deny at 2.

non-operational for a period of over thirty continuous days.”<sup>15</sup> Based on its field studies and on the annual reports submitted by Mr. Kim and MDS Digital, Southern contended that MDS Digital was required, pursuant to Section 21.303(d) of the Commission’s Rules,<sup>16</sup> to submit the licenses for cancellation, file a modification application, or request a waiver of the rule.<sup>17</sup> Southern therefore concluded that, because MDS Digital failed to take any of the permissible actions, the Commission should summarily dismiss the applications and deem the license forfeited.<sup>18</sup>

4. PSPWD 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 Rules<sup>19</sup> because it found that “the record clearly establishes that MDS Digital permanently discontinued operation of Stations WPY40, KFI79, and KFF79.”<sup>20</sup> Specifically, PSPWD 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.”<sup>21</sup> Accordingly, PSPWD concluded that, pursuant to Section 21.303(d) of the Commission’s Rules, “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.”<sup>22</sup>

5. MDS Digital sought reconsideration of this action on December 17, 2003.<sup>23</sup> MDS Digital argued that *MDS Digital I* contained factual errors which unduly prejudiced MDS Digital, that PSPWD ignored record evidence demonstrating that Mr. Kim expended extraordinary effort and resources in developing the stations, that Mr. Kim should not be penalized for factors outside of his control, that PSPWD unlawfully applied a strict enforcement and automatic cancellation standard without providing due notice, and that PSPWD’s decision to cancel the licenses was inconsistent with an earlier decision involving Cleveland Microband Teleservices, Inc.<sup>24</sup> In addition, MDS Digital argued that even if the Commission were to find MDS Digital in violation of Section 21.303, good cause exists to grant MDS Digital a waiver of the rule for six months.<sup>25</sup>

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<sup>15</sup> *Id.*, citing 47 CFR 21.44(a)(3) (2000). Southern provided 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 to Deny, Exhibits A, B, and C; see also Petition to Deny, 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).

<sup>16</sup> 47 C.F.R. § 21.303(d) (2000).

<sup>17</sup> Petition to Deny at 3.

<sup>18</sup> *Id.*

<sup>19</sup> 47 C.F.R. § 21.44(a)(3) (2000).

<sup>20</sup> *MDS Digital I*, 18 FCC Rcd at 24014 ¶ 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See PFR.

<sup>24</sup> *Id.* at 4-6, 14-18. MDS Digital cited to 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*).

<sup>25</sup> *Id.* at 18.

6. The Division denied MDS Digital's petition.<sup>26</sup> The Division found that the plain language of Section 21.303(d) required an applicant to render service once within a twelve-month period, and that it was clearly unreasonable for MDS Digital to believe that the periodic broadcasting of signals that no one received constituted "service" within the meaning of the rule.<sup>27</sup> The Division further noted that the plain language of the rule required that a licensee provide service, as opposed to attempting to provide service.<sup>28</sup> The Division disagreed with MDS Digital's assertion that it was treated differently than similarly situated parties, finding the cases referenced by MDS Digital to be significantly, factually distinct from MDS Digital's situation.<sup>29</sup> The Division found MDS Digital's waiver request, only filed in conjunction with its Petition for Reconsideration, to be untimely and insufficiently justified in any event.<sup>30</sup>

### III. DISCUSSION

7. MDS Digital contends that we should reconsider the Division's decision in *MDS Digital II* and, at a minimum, reinstate the license for Station KFF79 with a six-month waiver of Section 21.303(d) of the Commission's Rules.<sup>31</sup> MDS Digital argues that the Division's decision in *MDS Digital II* raises two new issues that justify further reconsideration.<sup>32</sup> First, MDS Digital contends that the Division improperly denied MDS Digital's request for a six-month waiver by ruling that the *CMTI Letter* that was the basis of MDS Digital's argument was erroneous and of no value as precedent.<sup>33</sup> MDS Digital argues that the Division was wrong to conclude that the *CMTI Letter* did not address issues relevant to this matter.<sup>34</sup> MDS Digital argues that the licensee in the *CMTI Letter* violated the same rule provision MDS Digital is accused of violating, yet Commission staff in that case granted a six-month waiver of the rule.<sup>35</sup> MDS Digital contends that while the Commission is not required to keep alive erroneous decisions, the Commission may not declare past policy to be in error, establish a new policy, and apply the new policy retroactively, particularly where such action results in disparate treatment among similarly situated parties.<sup>36</sup> MDS Digital cites *Melody Music, Inc. v. FCC*<sup>37</sup> for the proposition that the Commission may not treat similarly situated parties differently.<sup>38</sup>

8. Second, MDS Digital also challenges the conclusion in *MDS Digital II* that MDS Digital failed to demonstrate unique factual circumstances that render the application of the rule inequitable, unduly burdensome, and contrary to the public interest.<sup>39</sup> MDS Digital argues that the evidence it presented in fact demonstrated Mr. Kim's and MDS Digital's unswerving commitment to operating the

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<sup>26</sup> *MDS Digital II, supra*.

<sup>27</sup> *Id.*, 19 FCC Rcd at 23681 ¶ 12.

<sup>28</sup> *Id.*, 19 FCC Rcd at 23682 ¶ 12.

<sup>29</sup> *Id.*, 19 FCC Rcd at 23682 ¶ 13.

<sup>30</sup> *Id.*, 19 FCC Rcd at 23683 ¶ 15.

<sup>31</sup> PFFR at 1-2.

<sup>32</sup> *Id.* at 3.

<sup>33</sup> *Id.*, *CMTI Letter*.

<sup>34</sup> PFFR at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

<sup>38</sup> PFFR at 5.

<sup>39</sup> *Id.* at 7.

stations, and that Mr. Kim expended extraordinary effort and personal resources to develop the stations.<sup>40</sup> MDS Digital reiterates its previous arguments, and challenges the dismissal of the facts presented as commonplace business risks.<sup>41</sup> MDS Digital argues that *MDS Digital II* should be rescinded, and, at a minimum, the license for Station KFF79 should be reinstated with a six month waiver of Section 21.203(d) of the Rules, consistent with the *CMTI Letter*.<sup>42</sup>

9. We find MDS Digital's arguments to be unpersuasive. The Commission has held that it does not view the *CMTI Letter* as binding precedent because (1) the *CMTI Letter* did not address issues relating to the timeliness of the request and the definition of service contained in Section 21.303(d); and (2) 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.<sup>43</sup> In any event, CMTI's situation is factually distinguishable from MDS Digital's situation because CMTI demonstrated "that the station will be used to render service to the public within six months."<sup>44</sup> In contrast, neither Mr. Kim nor MDS Digital has ever presented a plan to demonstrate how any of the stations would be returned to service in a matter of months. Therefore, *Melody Music, Inc. v. FCC* does not warrant reconsideration of *MDS Digital II*.

10. We also reject MDS Digital's argument that the Division failed to properly apply the waiver standard of former Section 21.19 of the Rules.<sup>45</sup> Pursuant to that rule, a waiver could be granted if it were shown that: (i) the underlying purpose of the rule(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.<sup>46</sup> In addition to the fact that MDS Digital's waiver request was untimely filed (which is sufficient grounds alone to base the denial of MDS Digital's waiver request),<sup>47</sup> we also find that the waiver standard was properly applied. MDS Digital failed to demonstrate that the underlying purpose of Section 21.303(d) of the Commission's Rules, to prevent spectrum warehousing, would not be served by applying the rule in this instance. Nor did MDS Digital demonstrate that there are unique factual circumstances in this case that render the application of Section 21.303(d) inequitable, unduly burdensome, or contrary to the public interest. In adopting the rule the Commission noted that there was an element of risk taking in developing new technologies, which the Commission did not want to discourage.<sup>48</sup> At the same time, the Commission noted its obligation to ensure that spectrum is used efficiently.<sup>49</sup> MDS Digital asserts, but does not demonstrate, that the situation in which Mr. Kim and MDS Digital found themselves represented more than a commonplace business risk. That the Commission did not immediately declare the licenses forfeited when Mr. Kim and MDS Digital filed

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<sup>40</sup> *Id.* at 7-8.

<sup>41</sup> *Id.* at 8-9.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> See San Diego MDS Company, *Memorandum Opinion and Order*, 19 FCC Rcd 23120, 23125 ¶ 12 (2004).

<sup>44</sup> *CMTI Letter* at 2.

<sup>45</sup> 47 C.F.R. § 21.19 (2000).

<sup>46</sup> *Id.*

<sup>47</sup> MDS Digital only submitted its request with its PFR, on December 17, 2003, nearly three and a half years after MDS Digital's stations concluded a twelve-month period of non-use (on June 24, 2000), which latter date was the time any waiver request should have been submitted. 47 C.F.R. § 21.303(d) (2000).

<sup>48</sup> Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ (1987).

<sup>49</sup> *Id.*

required annual reports documenting the stations' failure to provide service does not render the forfeiture inequitable, unduly burdensome, or contrary to the public interest.

#### IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we deny the Petition for Further Reconsideration, thereby affirming the forfeiture of MDS Digital's licenses for Stations WPY40, KFI79, and KFF79 for failure to comply with Section 21.303(d) of the Commission's Rules.

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Further Reconsideration filed by MDS Digital Network, Inc., on January 6, 2005 IS DENIED.

13. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau