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

In the Matter of	)	
	)	
RURALVISION CENTRAL, INC.	)	File Nos. 2-CM-P-92,
	)	62-CM-P-92, and 192-CM-P-92
Three Applications for Authority to	)	
Construct and Operate Multipoint	)	
Distribution Service Stations on the	)	
H Channels at Gates, Tennessee	)	

ORDER ON RECONSIDERATION

Adopted: December 11, 1997 **Released: December 16, 1997**

By the Assistant Chief, Video Services Division:

I. INTRODUCTION

1. The Video Services Division has before it a joint petition for reconsideration of the return, pursuant to 47 C.F.R. § 1.106(a) on delegated authority, of three applications for authority to construct and operate Multipoint Distribution Service ("MDS") stations on the H channels at a transmitter site at Gates, Tennessee.[1] These applications were filed with the Commission by RuralVision Central, Inc. ("RuralVision") on January 2, 1992. We will consider RuralVision's joint petition for reconsideration in this order.

II. BACKGROUND

2. To implement the reallocation of the three H channels from the Private Operational-Fixed Microwave Service ("OFS") to the MDS, the Commission placed a freeze on the filing of such applications pursuant to Part 94 of the Commission's rules starting September 27, 1991, and ending January 2, 1992. *Second Report and Order, Amendment of Parts 21, 43, 74, 78. and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 6 FCC Rcd 6792, 6794 n.9 (1991) (hereinafter *Second Report and Order*). As of January 2, 1992, the date the above-captioned applications were filed, Part 21 of

[1] The applications subject to this order are: Application File No. 62-CM-P-92 for the H-1 channel; Application File No. 2-CM-P-92 for the H-2 channel; and Application File No. 192-CM-P-92 for the H-3 channel.

the Commission's rules applied to H channel applications and authorizations.[2]

3. MDS Interference Studies. At the time the above-referenced applications were filed, section 21.902(b)(3) required each MDS applicant to engineer its proposed station to provide at least 45 dB of interference protection within the protected service areas[3] of all other authorized or previously proposed cochannel stations. 47 C.F.R. § 21.902(b)(3) (1991). In order to demonstrate compliance with this condition for use of an MDS frequency and so that mutually exclusive determinations could be made, section 21.902(c)(1) of the Commission's rules required that an MDS applicant include with the application an analysis of the potential for harmful cochannel interference[4] with any authorized or previously proposed station if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed cochannel station, or if the applicant's proposed transmitter was within 50 miles of the transmitter coordinates of any other authorized or previously proposed cochannel station. 47 C.F.R. § 21.902(c)(1)(1991). In addition, the applicant had to show what steps it had taken to comply with the requirements of section 21.902(a), which required, *inter alia*, MDS applicants, licensees, and conditional licensees to make exceptional efforts to avoid harmful interference with other users and to avoid blocking potential cochannel stations in nearby areas. 47 C.F.R. § 21.902(a) (1991).

4. ITFS Interference Studies. On reconsideration, we decline to evaluate the Instructional Television Fixed Service ("ITFS") interference analyses submitted by RuralVision as these were unnecessary since none of the Gates applications appeared on public notice. At the time petitioner filed its applications, ITFS studies were not due to be filed with the Commission or served on affected ITFS licensees until after the H channel application appeared on public notice.[5]

---

[2] Any H channel applicant or licensee who wanted Part 94 rules (OFS rules) to apply in lieu of the Part 21 rules had to submit a waiver request on or before January 2, 1992. *Second Report and Order*, 6 FCC Rcd at 6818. None of the above-captioned H channel applications mentioned such a waiver request; thus, all were evaluated by Commission staff under Part 21 rules.

[3] Section 21.902(d) defines the protected service area for MDS stations.

[4] Section 21.902(f) defines harmful interference as the ratio of desired signal to undesired signal present in the cochannel channel at the output of a reference receiving antenna oriented to receive the maximum desired signal. Cochannel harmful interference exists if a free space calculation determines that this ratio is less than 45 dB. 47 C.F.R. § 21.902(f).

[5] For MDS applications filed from December 30, 1991, through September 30, 1995, as the three above-referenced applications were, section 21.902(i) of the Commission's rules required, *inter alia*, that an H channel applicant submit an analysis demonstrating that operation of the applicant's transmitter would not cause harmful interference to any licensed or authorized adjacent G channel ITFS station with a transmitter site within 50 miles of the coordinates of the MDS H channel station's proposed transmitter site. Section 21.902(i)(2) mandated that ITFS analyses be filed with the Commission and served on each affected ITFS licensee and/or construction permittee on or before the 60th day after the H channel application appeared on public notice. *In the Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint*

III. JOINT PETITION FOR RECONSIDERATION

5. On January 2. 1992, RuralVision filed MDS applications for the H-1, H-2, and H-3 channels proposing the same transmitter site at Gates, Tennessee.[6] Commission staff returned each of the above-referenced H channel applications as defective and unacceptable for filing by individual return notification letters dated January 19, 1994. Each of the letters indicated that the applications were returned because the applicant: (1) failed to meet the requirements for performance of interference studies as required by 47 C.F.R. § 21.902, due to failure to serve all affected parties with interference studies and failure to consider all authorized or previously proposed MDS stations; (2) failed to specify type-accepted equipment, pursuant to 47 C.F.R. § 21.120; (3) failed to submit an updated fully-executed deed, lease, or option agreement, as required by 47 C.F.R. § 21.15(a);[7] (4) failed to submit sufficient, specific maintenance information, pursuant to 47 C.F.R.§ 21.15(e); and (5) failed to submit a copy of the FAA Notice of Proposed Construction or Alteration, as required by 47 C.F.R. § 21.15(d).[8]

6. In its February 18, 1994, joint petition for reconsideration, RuralVision makes arguments concerning the adequacy of its submitted interference analyses; the acceptability of the cited transmitters; the adequacy of its site availability documentation; the sufficiency of its maintenance information; and the adequacy of its FAA notification. Because we find dispositive RuralVision's failure to submit adequate interference showings with its applications, it is unnecessary to address petitioner's other arguments. As discussed in detail below, interference analyses are necessary at the time of application filing due to the extensive planning and engineering involved in the MDS licensing process.

Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, 6 FCC Rcd 6764, 6782 (1991) (hereinafter *Wireless Cable Reconsideration Order*); 47 C.F.R. § 21.902(i) (1992).

[6] *See supra* note 1.

[7] At the time the above-referenced applications were filed, § 21.15(a) required that if an applicant did not own the location on which it sought to construct its proposed station, the location's "availability for the proposed radio site shall be demonstrated." In a 1987 *Report and Order*, the Commission clarified this requirement as it applied to MDS applications: "[W]hen selection between mutually-exclusive applications is by the random selection process, it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site." *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Upon further examination of the petitioned applications on reconsideration, we find that the applications did meet the reasonable assurance test. However, it was harmless error, nonetheless, because RuralVision's applications were still deficient and unacceptable for filing for other reasons discussed herein. *See Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (The court will not upset a decision because of errors that are not material, "there being room for the doctrine of harmless error.").

[8] At the time the Gates applications were filed, § 21.15(d) stated that each application proposing a new antenna structure "shall indicate whether any necessary notification of the FAA has been made." Upon further examination of the petitioned applications, we find that Commission staff was incorrect in listing a violation of § 21.15(d) as a reason for return. However, it was harmless error, nonetheless, because these applications were still deficient and unacceptable for filing for other reasons discussed herein.

7. The Gates H channel applications proposed a transmitter antenna site that had an unobstructed electrical path to part of the protected service area of and/or was within 50 miles of previously authorized cochannel stations at Jackson, Tennessee,[9] Union City, Tennessee,[10] and Memphis, Tennessee.[11] The interference studies for these authorized stations were inadequate because RuralVision: (1) did not include free space calculations for the desired to undesired signal ratio to each reference receiving antenna within the protected service areas of the authorized stations, as required by 47 C.F.R. § 21.902(f); (2) used incorrect methodology in calculating the protected service area of the authorized stations; (3) indicated that the radio horizon was limited to 30.6 miles distant from its transmitter site, but did not submit required demonstrations to corroborate this assertion, such as calculations, shadow maps or terrain profiles; (4) failed to engineer the proposed station to provide at least 45 dB of cochannel interference protection, pursuant to 47 C.F.R. § 21.902(b)(3); and (5) used incorrect technical parameters for the transmitting antenna gain and the reference receiving antenna gain.

IV. DISCUSSION

8. Interference Protection. At the very inception of MDS, the Commission established the principle that subsequently filed applications must not cause harmful interference to any previously proposed or authorized MDS station. "Of course, the applicant for the second channel sought will be expected to demonstrate that his system is designed so that significant interference will not occur with respect to the first MDS channel. . . ." *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 621 (1974). (hereinafter *MDS Allocation Order*). Over ten years before the above-referenced applications were filed, the Commission explained its emphasis on this requirement for MDS applications:

> It is possible for co-channel interference generated by one MDS station to cause unacceptable distortion of another station's signal from as far away as 50 miles. Section 21.90[2](c) of our Rules therefore requires an MDS application to include an interference study containing an analysis of the potential for harmful interference with other MDS stations located within a 50 mile radius of the proposed station.

---

[9] Petitioner's proposed transmitter antenna site was within 50 miles of and had an unobstructed electrical path to part of the protected service area of: MDS station WNTH791, Application File No. 767689 for the H-1 channel and MDS station WNTI988, Application File No. 771066 for the H-2 and H-3 channels.

[10] Petitioner's proposed transmitter site was within 50 miles of MDS station WNTK889, Application File No. 775814 for the H-1, H-2 and H-3 channels.

[11] Petitioner's proposed transmitter site was within 50 miles of: MDS station WNEZ670, Application No. 749240 for the H-1 channel; MDS station WNTH952, Application File No. 749632 for the H-2 channel; and MDS station WNTI565, Application File No. 749612 for the H-3 channel.

R.L. Mohr, 85 FCC 2d 596, 606 (1981).[12] It also has been recognized that "the demonstration of interference protection, at the time of filing, aids the Commission in the public interest determination that an applicant is technically qualified to be an MDS/MMDS licensee." *Family Entertainment Network, Inc.*, 9 FCC Rcd 566, 567-68 n.10 (Dom. Fac. Div. 1994). Thus, section 21.902(b) requires all MDS applicants and licensees to provide 45 dB of cochannel interference protection and to demonstrate that protection in interference studies submitted with the applications.

9. Petitioner's applications failed to demonstrate a lack of harmful interference to existing MDS stations. As discussed in ¶ 3, *supra*, applicants for new MDS stations on the H channels are required to submit specific technical interference protection showings for cochannel stations at the time of filing. The interference analysis requirement is an imperative one which demands complete compliance at the time an application is filed for a proposed MDS site. Thus, the Commission stressed that "we expect applicants to address this problem in their applications. Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing." *Amendments 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,* 94 FCC 2d 1203, 1264 (1983); *see also* 47 C.F.R. § 21.902(b)-(c). Complete and adequate interference studies are necessary at the time of filing in order for determinations of mutual exclusivity to be made. Without them a logjam would be created, making it more difficult to reach final actions.[13]

10. At the time the applications were filed, RuralVision stated that "any cochannel MDS station more than 30.6 miles from the instant proposal can receive no interference, since no portion of its service area has an unobstructed electrical path from the instant proposal." As MDS cochannel stations in Jackson, Tennessee were 34.25 miles away from RuralVision's proposed Gates, Tennessee transmitter site, and thus, beyond the applicant's calculated radio horizon, applicant stated that there was no interference. However, our engineering analysis of petitioner's

---

[12] The distance was extended in 1984 to the radio horizon with an unobstructed electrical path from the applicant's MDS station to the protected service area of the authorized or previously proposed station. *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 Fixed Television Service and the Private Operational-Fixed Microwave Service (OFS),* 98 FCC 2d 68, 89-91 (1984) (hereinafter *MDS Technical Order*).

[13] *See Sioux Valley*, 3 FCC Rcd 7375, 7376 (Dom. Fac. Div. 1988) ("Traditionally, the classification of MDS applications as mutually-exclusive was determined by a review of each of the applicants' interference analyses. . .."). If the Commission allowed an indefinite time period for submitting interference studies, the staff would lack sufficient technical information for evaluating applications and would be unable to act on many applications until the studies were submitted. Furthermore, applicants may be tempted to wait as long as possible to submit interference studies so as to minimize the number that must be submitted. Widespread abuse of this tactic would lead to a stalemate where the Commission could neither grant nor return or dismiss any application. *See also Dan S. Bagley, Jr.*, 7 FCC Rcd 4002, 4003 (Dom. Fac. Div. 1992) ("In the processing of MDS station applications, the interference analyses required by [§ 21.902] are crucial.").

H-1, H-2, and H-3 applications reveals that the returned applications proposed a transmitter antenna site that had an unobstructed electrical path to part of the protected service areas of the following previously authorized MDS stations at Jackson, Tennessee, and would cause harmful interference to these stations: WNTH 791, Application File No. 767689 for the H-1 channel and WNTI988, Application File No. 771066 for the H-2 and H-3 channels. Similarly, as the previously authorized stations in Union City, Tennessee and Memphis, Tennessee were 42.17 and 47.66 miles away, respectively, from RuralVision's proposed Gates, Tennessee transmitter site, and thus beyond the applicant's stated 30.6 mile radio horizon, the applicant stated that there was no interference. Petitioner, however, failed to adequately demonstrate through calculations, shadow maps or terrain profiles interference protection to the previously authorized cochannel stations in Jackson, Union City, and Memphis, Tennessee. *See* ¶ 7, *supra.*

11. Petitioner requests that the Commission consider any problem regarding its inability to obtain the 45 dB desired to undesired signal ratio for MDS cochannel stations "as though it [the antenna] were offset differently from this proposal for purposes of interference." However, the 45 dB protection demonstration is required, pursuant to 47 C.F.R. § 21.902(b)(3), unless the affected MDS station licensee agrees to employ a transmitter frequency offset technique with the subsequently-filed applicant. *Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6770 ("We agree . . . that a 45 dB demonstration should still be required for MDS cochannel stations, unless there is a voluntary agreement between affected MDS station licensees to employ a frequency offset technique."). Petitioner submits no documentation from affected stations demonstrating such consent. Commission staff cannot rely on *intended* changes in an applicant's engineering proposal when evaluating the proposal; rather, staff may only review the application based on what the applicant actually submits in its application. Hence, petitioner failed to fulfill the requirements of our rules regarding the use of frequency offset techniques.

12. Therefore, we find that petitioner's applications were properly returned as unacceptable for filing for failing to submit adequate interference analyses, pursuant to 47 C.F.R. § 21.902(c). *See MDS Technical Order*, 98 FCC 2d at 93 ("An application that proposes cochannel or adjacent channel operation and does not contain a showing that the proposed operation will not cause harmful interference as described herein will not be accepted for filing."); *see also Family Entertainment,* 9 FCC Rcd at 567 ("[T]he filing of an interference analysis, which demonstrates lack of harmful interference, is considered a basic requirement in determining the acceptability of an application." In addition, our analysis of the interference studies that were submitted by RuralVision shows that these studies were inadequate. *See supra* ¶ 7. Thus, the Gates applications were properly returned as unacceptable for filing.

13. Curative Amendments/Disparate Treatment. In its reconsideration petition, RuralVision argues that its interference analyses were "substantially complete" and that it should be allowed to file "minor, curative amendments to resolve any potential conflict with the Jackson, Tennessee stations." In addition, petitioner states that "[i]n every other case to date, the FCC has given MDS applicants the opportunity to submit minor amendments to cure their applications." Petitioner asserts that the Commission violated administrative due process by failing to treat RuralVision applicants similarly to other MDS applicants who were given the opportunity to file

minor curative amendments. On reconsideration, RuralVision proposes to protect the cochannel facilities with which it harmfully interferes by changing its proposed antenna polarization. However, pursuant to section 21.23, a change in polarization of a transmitted signal is a major amendment. 47 C.F.R. § 21.23. Therefore, applicant's proposed change in polarization is not a "minor, curative amendment," and thus, RuralVision is not similarly situated to other MDS applicants who may have been given opportunities to file *minor* curative amendments. RuralVision's applications cannot be considered "substantially complete" as of their date of filing, since petitioner proposes a major amendment, after the return of its applications, to cure interference problems.

14. Lastly, petitioner argues that if the Commission seeks to prohibit applicants from filing minor, curative amendments in the form of interference studies, it must provide notice of this change in the Commission's processing of MDS applications. We note, however, that at the time of the Gates filings only pending applications were amendable as a matter of right. Specifically, section 21.23(a)(1) provided that any pending application could be amended as a matter of right if the application had not been designated for the random selection process. 47 C.F.R. § 21.23(a)(1). The RuralVision applications reviewed in this order have been returned by return notification letter and thus, by definition, are no longer pending. Therefore, they may not be amended as a matter of right. Although petitioner claims that they were not given an opportunity to file minor curative amendments to its interference analyses, this assertion is erroneous. RuralVision Central had ample opportunity to amend its applications by filing minor, curative amendments *prior* to their return by the Commission.[14] Although Commission rules allowed certain applicants, as of right, to amend their applications prior to return or dismissal by the agency, such rules provided no opportunity for amendment after the applications were returned.[15] Therefore, petitioner is incorrect in stating that "the FCC has suddenly decided to prohibit applicants from filing, minor curative amendments."

15. Petitioner cites four instances where Commission staff sent deficiency letters to applicants designated as tentative selectees following their participation in the random selection process, and allowed the tentative selectees to cure defects in their applications: *Stephen Communications Inc.*, 8 FCC Rcd 355 (Dom. Fac. Div. 1993); *T/V Communications Associates*, 7 FCC Rcd 7647 (Dom. Fac. Div. 1992); *Stephen C. Bailey*, 7 FCC Rcd 7252 (Dom. Fac. Div.

[14] Subsequent to the filing of the Gates applications, but prior to their return, the Commission imposed a freeze, effective April 9, 1992, on, among other things, the filing of most amendments to pending applications. *Notice of Proposed Rulemaking*, 7 FCC Rcd 3266, 3270 n.35 (1992). Section 21.23(a) which allowed, under certain circumstances, amendments as of right was also subsequently changed to include "provided , however, that . . . the Commission has not otherwise forbidden the amendment of pending applications." 47 C.F.R. § 21.23(a). However, RuralVision still had over three months, from January 2, 1992, to April 9, 1992, to amend its applications to include information, which should have been submitted with its applications.

[15] *See, e.g., Edna Cornaggia*, 8 FCC Rcd 5442, 5444 n.7 (Dom. Fac. Div. 1993) ("[I]t is no longer possible to amend an application which has already been dismissed. . . ."); *Earl V. Levels*, 8 FCC Rcd 5506 (Dom. Fac. Div. 1993) (curative amendments filed with petition for reconsideration, attempting to supply a missing interference showing and other missing information, not allowed).

1992); and *Microwave Video Services*, 7 FCC Rcd 7254 (Dom. Fac. Div. 1992). Petitioner apparently seeks to equate its return notification letters with the deficiency letters sent to tentative selectees, and argues that the Commission's refusal to permit it to file curative amendments in response to its return notification letters is a violation of administrative due process. However, returned applicants and tentative selectees are treated differently under Commission rules because returned applicants have been found unacceptable for filing by Commission staff, while tentative selectees have been found acceptable for filing prior to participation in a lottery. "[A]ll applications must be acceptable for filing in order to be included in a lottery." *Second Report and Order Amendments 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, Multipoint Distribution Service and the Private Operational-Fixed Microwave Service*, 57 RR 2d 943, 949 (1985) (hereinafter *MMDS Lottery Order*). Since tentative selectees have already been found acceptable for filing, only minor clarifications or additions should remain to be made to their applications. Hence, Commission staff may send deficiency letters to a tentative selectee to cure minor problems prior to grant of an application that was otherwise acceptable for filing. However, an application that has been adjudged unacceptable for filing is, by definition, defective and properly returned or dismissed by Commission staff.

16. The cited deficiency letters involved four applicants who filed their applications in 1983, participated in the random selection process, had been selected as tentative selectees for qualification review and were subsequently notified by Commission staff of deficiencies in their applications. The Commission staff provided an opportunity to cure such deficiencies by amendment within 30 days.[16] The deficiencies referred to in one of the letters appear to be deficiencies which, under the rules applicable at the time the application was filed, did not render the application unacceptable for filing. In the other three instances cited, the applications were unacceptable for filing but were nevertheless entered in their respective lotteries. After the applicants were chosen as tentative selectees, they were erroneously given an opportunity to amend their applications to cure the deficiencies which made them unacceptable for filing in contravention of the procedures established in the *MMDS Lottery Order*. However, the Commission is not bound by such staff aberrational errors. *See, e.g., 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."); *Quinnipiac College*, 8 FCC Rcd 6285, 6286 (1993); *Walter P. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd mem., Faber v. FCC*, 962 F.2d 1076 (D.C. Cir. 1992). Therefore, the fact that three tentative selectees in the cited instances may have been improperly given the opportunity to cure deficiencies in applications, which should have been dismissed as unacceptable for filing, does not compel the Commission to allow petitioner to amend its

[16] At the time of petitioner's application filings, section 21.23(a)(2) provided a 14-day period, after a lottery tentative selectee appeared on public notice, within which the applicant could make amendments to its application as a matter of right. In the cases cited, Commission staff provided the tentative selectees 30 days within which to cure deficiencies identified in the deficiency letters. *See* 47 C.F.R. § 21.23(a)(3).

applications after they were properly returned as unacceptable for filing, pursuant to established Commission rules and procedures.[17]

17. Notice of Change in Commission Policy. Petitioner also states that the Commission failed to provide prior notice of a purported change in Commission processing of MDS applications which applied a new, strict standard by which RuralVision applications were dismissed due to minor defects. We note that RuralVision's applications were defective and unacceptable for filing in that petitioner submitted incomplete interference analyses. Pursuant to section 21.20(a)(1) an application is defined as unacceptable for filing if it is "defective with respect to . . . informational showings." 47 C.F.R. § 21.20(a)(1). Interference analyses are informational showings, and Part 21 rules further state that "[a defective] application will be returned to the applicant with a brief statement as to the omissions or discrepancies." *Id.* Furthermore, as discussed in ¶¶ 8-12, *supra*, inadequate interference studies are not "minor defects."

18. Petitioner further contends that "the FCC has dismissed RuralVision's applications without providing RuralVision with an opportunity to cure the one minor defect that its applications contained . . . . [I]f the Commission wishes to prohibit MDS applicants from filing minor, curative amendments, it must provide prior notice of this change in its MDS application processing policies." Applicants for new MDS stations on the H channels are required to file specific technical interference protection showings for cochannel stations with their applications. While petitioner seeks, on reconsideration, to add additional technical information to the interference analyses submitted with its original applications, the Commission is under no obligation to accept curative showings after an application has been returned or dismissed. Indeed, there has been a series of cases denying attempts to submit such showings at that stage. *See* note 15, *supra*. Thus, we conclude that petitioner may not amend its applications upon the filing of a reconsideration petition, and its applications should not be reinstated *nunc pro tunc*.

19. Petitioner argues that the manner of the Commission's enforcement of its rules in effect represents new application policies or standards which required full and explicit notice, but that RuralVision was not provided the requisite notice, citing *Radio Athens, Inc., (WATH) v. FCC*, 401 F.2d 398 (D.C. Cir. 1968). Petitioner adds, referring to *McElroy Electronics Corporation v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), that the return actions evidence a lack of clarity in application standards. However, the Part 21 standard for acceptability of applications has long been whether an application is "acceptable for filing." *See* 47 C.F.R. §§ 21.31(b), 21.914. In referring to the *Domestic Public Radio Services Order*,[18] it was explicitly stated that "all MDS applicants have been on notice since 1976 of the processing requirements for MDS applications and the requirement that the applications be in a 'condition acceptable for filing' in

[17] We note that none of the tentative selectees referred to by the petitioners received the MMDS station licenses sought in the subject applications since they failed to cure the stated deficiencies in a timely manner.

[18] *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, 60 FCC 2d 549 (1976).

order to be entitled to comparative consideration." *New Channels*, 57 RR 2d 1600, 1601 n.3 (1985).[19] Moreover, in finding that inadequate demonstrations of interference protection constituted defects rendering petitioner's applications unacceptable for filing, "the staff was engaged in the interpretation of an existing rule, and consequently, prior notice of the action was not required." *Id.* Section 21.20(a) of the Commission's rules sets forth the two different tests under either of which an application is determined to be unacceptable for filing, and states that an application deemed unacceptable for filing will be returned to the applicant. 47 C.F.R. § 21.20(a).

20. The cited cases are also distinguishable on their facts. In *Radio Athens*, the application was reinstated in part because the duopoly ownership rule in question did not indicate that an application with a duopoly problem would be dismissed without consideration. 401 F.2d at 403. In *McElroy*, the court concluded that a Commission order was vague at best and not reasonably understandable. In contrast, sections 21.20(a) and 21.914 clearly indicate the criteria for rendering an application unacceptable for filing and depriving it of comparative consideration; hence, petitioner's applications were returned accordingly. *See Florida Cellular Mobile Communications Corporation v. FCC*, 28 F.3d 191, 198 (D.C. Cir. 1994) ("The Commission need not supply a separate 'shopping list' specifying that each separate rule violation may lead to dismissal. It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules.").[20] Thus, petitioner had full notice of the standard under which its applications were evaluated, and this standard is of sufficient clarity "to apprise an applicant of what is expected." *See McElroy*, 990 F.2d at 1358.

21. Petitioner further argues, citing *Greater Boston*, 444 F.2d at 852, that when an agency changes its policy, it must articulate its reasons for doing so, but that the Commission has yet to articulate the required "reasoned analysis" for its new policies. However, as discussed above, the Part 21 acceptability standard is long-established and the return of petitioner's applications is not at all indicative of a new policy or approach to evaluating applications. Furthermore, we find that the return notification letters sent to petitioners gave sufficient explanation of the reasons for

[19] Similarly, the interference study filing rule was adopted in a 1974 rulemaking order, *see MDS Allocation Order*, 45 FCC 2d 616 (1974), and it is a long-established policy that we need not allow minor, curative amendments after return of an application.

[20] In *Florida Cellular*, the D.C. Circuit affirmed the Commission's dismissal of Florida Cellular's application because the regulations clearly provided that multiple ownership interests in competing applicants were prohibited, and Florida Cellular was on notice that its application was subject to dismissal for non-compliance with FCC regulations. *Id.* at 193. The dismissal rule in question was § 22.20(a)(1993), which is a verbatim restatement of § 21.20(a), except that § 22.20(a)(2) calls for compliance with the Commission's rules and requirements while § 21.20(a)(2) specifies *substantial* compliance. The Part 22 rules directly descended from rules in Part 21. *See* 73 FCC 2d 830 (1979); *Domestic Public Fixed Radio Services and Public Mobile Radio Services*, 44 Fed. Reg. 60532 (1979). The court stated that "[t]he Commission's rules and orders put the applicants on notice that their applications would be subject to dismissal for failure to [substantially] comply with the FCC procedural and substantive rules." *Florida Cellular*, 28 F.3d at 198.

the return of the applications. Section 21.20(a), which governs the disposition of defective applications, merely requires "a brief statement as to the omissions or discrepancies." In each case, the return notification letters indicated at least one reason why the applications were unacceptable for filing, and cited the relevant rule section or Commission decision. *See* ¶ 5, *supra*. We have also now further explained, in this order, the deficiencies which properly rendered petitioner's applications unacceptable for filing. Thus, the basis for the return actions "may reasonably be discerned." *See Greater Boston*, 444 F.2d at 851.

22. RuralVision failed to file adequate interference studies and, thus, its applications for Gates, Tennessee were unacceptable for filing. Petitioner's applications were properly returned by return notification letters. Despite petitioner's allegations, no new, strict standard was applied to its applications; rather, it was held to the Part 21 rules which applied to H channel applications and authorizations as of January 2, 1992. All MDS applicants are charged with being familiar with Part 21 of the Commission's rules. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements of an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (D.C. Cir. 1961); *see also Donald E. Benson*, 8 FCC Rcd 1872, 1873 (Dom. Fac. Div. 1993).

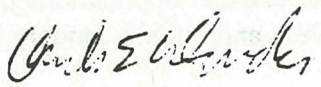
V. CONCLUSION

23. In view of all the foregoing considerations, we affirm the staff's return of the applications under consideration in this order. Reconsideration is not justified and reinstatement of the applications is not warranted.

24. Accordingly, IT IS ORDERED, that the joint reconsideration petition filed by RuralVision Central, Inc. IS HEREBY DENIED.

25. IT IS FURTHER ORDERED, that the staff of the Video Services Division shall send copies of the decision to the authorized representative by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION



Charles E. Dziedzic
Assistant Chief, Video Services Division
Mass Media Bureau