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

In the Matter of the Application of	)	
	)	
Grand Alliance Natchez	)	File No. 531-CM-P-92
(F) Partnership	)	
	)	
For Authority to Construct and Operate a	)	
Multipoint Distribution Service Station on	)	
the H-3 Channel at Natchez, Mississippi	)	

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 petition for reconsideration of the return, pursuant to 47 C.F.R. § 1.106(a) on delegated authority, of an application for authority to construct and operate a Multipoint Distribution Service ("MDS") station on the H-3 channel at a Natchez, Mississippi transmitter site.[1] This application was filed with the Commission by Grand Alliance Natchez (F) Partnership ("Alliance") on January 9, 1992. The application was returned by the Domestic Facilities Division as unacceptable for filing by return notification letter dated October 6, 1993. On November 5, 1993, Alliance filed its petition for reconsideration. We will consider the petition for reconsideration in this order.

II. BACKGROUND

2. In order to implement the reallocation of the three H channels from the Private Operational-Fixed Microwave Service ("OFS") to the Multipoint Distribution Service, the Commission placed a freeze on the filing of H channel applications pursuant to Part 94 of the Commission's rules starting September 27, 1991, and ending January 2, 1992.[2] *Amendment of*

[1] Application File No. 531-CM-P-92.

[2] The decision to reallocate the H channels was based upon the belief that "[r]eallocation should significantly enhance the use of the H channels for MDS service and for use in the wireless cable systems . . . . Converting these channels to the same technical and procedural rules as the other MDS channels will considerably ease the administrative and operational burdens associated with the use of these channels for MDS operations, both for operators and for the Commission, and this change should increase utilization of these channels." *Amendment of Parts 21, 43, 74, 78, 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*

Parts 21, 48, 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, Second Report and Order, 6 FCC Rcd 6792, 6794, n.9 (1991) (hereinafter *Second Report and Order*). Effective January 2, 1992, Part 21 of the Commission's rules applied to H channel applications and authorizations.[3] *See Second Report and Order*, 6 FCC Rcd at 6818. Hence, for the above captioned application, which was filed on January 9, 1992, Part 21 of the Commission's rules apply.

III. PETITION FOR RECONSIDERATION

3. The Commission staff returned the above referenced H-3 channel application for a transmitter site at Natchez, Mississippi as defective and unacceptable for filing by an individual return notification letter.[4] The letter indicated that the application was returned because the applicant filed in an area not open for filing, pursuant to 47 C.F.R. § 21.901(d)(4), as the application did not meet the criteria established in *Public Notice, Common Carrier Bureau Opens Filing Period for Multichannel Multipoint Distribution Service Applications*, 3 FCC Rcd 2661 (Comm. Car. 1988) (hereinafter *1988 Public Notice*).[5] Based on *de novo* review on

---

Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, Further Notice of Proposed Rule Making, Gen. Docket No. 50-94, 5 FCC Rcd 6472 (1990).

[3] Any H channel applicant or licensee who wanted Part 94 rules (OFS rules) to apply in lieu of the Part 21 rules was required to submit a waiver request on or before January 2, 1992. *Second Report and Order*, 6 FCC Rcd at 6818. The Alliance application did not mention such a waiver request; hence, it was evaluated by Commission staff under Part 21 rules.

[4] Section 21.20(a) of the rules sets forth the standards for returning MDS applications as unacceptable for filing:

> Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
>
> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or
> (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

47 C.F.R. § 21.20(a).

[5] The *1988 Public Notice* reopened the filing window for E and F channel MDS applications, subject to certain location restrictions. The location restrictions announced in the *1988 Public Notice* do not apply to H channel applications. Thus, the Commission staff was incorrect in citing the *1988 Public Notice* as a basis for return of this application. It was harmless error nonetheless, as the Alliance application was deficient and unacceptable 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.").

reconsideration, we conclude that petitioner's application was properly returned for failure to meet the requirements for performance of interference studies, as required by section 21.902, due to failure to serve all affected parties with interference studies and failure to consider all authorized or previously proposed MDS stations.

4. In its petition for reconsideration, petitioner argues that the *1988 Public Notice* does not apply to its H channel application and that, at the time of its filing, there were no cochannel MDS stations or applications within 50 miles of its proposed site. Petitioner also argues that it complied with 47 C.F.R. § 21.902 in that its interference study demonstrated non-interference to proposed Instructional Television Fixed Service ("ITFS") stations.[6] Although Commission staff was incorrect in finding that Alliance failed to comply with the *1988 Public Notice*, *see supra* n.5, we find dispositive Alliance's failure to submit adequate interference showings with its application.

IV. DISCUSSION

5. 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 . . . ." *Amendments 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). Over ten years before the above-referenced application was 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.

---

[6] It was unnecessary to evaluate the ITFS interference analyses submitted by Alliance as the studies were not due yet because the Alliance application had not appeared on public notice. For MDS applications filed after December 29, 1991, as Alliance was, § 21.902(i) of the Commission's rules required an H channel applicant to submit an analysis demonstrating that operation of the applicant's transmitter will 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 H channel station's proposed transmitter site. Section 21.902(i)(2) required 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 was placed 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 Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service*, 6 FCC Rcd 6764, 6782 (1991); 47 C.F.R. § 21.902(i)(2)-(4) (1992).

R.L. Mohr, 85 FCC 2d 596, 606 (1981).[7] 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,[8] within the protected service areas,[9] and to demonstrate that protection in interference studies submitted with the applications.

6. At the time the Alliance application was filed, in order to demonstrate compliance with 47 C.F.R. § 21.902(b) 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[10] 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 was required to show what steps it has taken to comply with section 21.902(a), which requires, *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.

---

[7] The distance was extended in 1984 to the radio horizon with an unobstructed electrical path of the applicant's MDS station. *Amendments of Parts 21, 74 and 94 of the Commission's 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). Subsequent to the filing of this returned application, the distance was extended to 100 miles. *Amendment of Parts 1, 2 and 21 of the Commission's Rules*, 8 FCC Rcd 1444, 1448 (1993).

[8] MDS applicants consistently have been required to comply with § 21.902(b). In the *Family Entertainment* case, the Domestic Facilities Division upheld the return, as unacceptable for filing, of an application which demonstrated that the level of interference was within 0.16 dB of meeting the 45 dB cochannel standard. In so doing, it was stated that:

> [W]e reject FEN's claim that its applications should be granted because the level of interference . . . is *de minimis*. Section 21.902(b)(3) requires that an applicant demonstrate 45 dB of cochannel interference protection. In this rule provision, no reference is made to qualifying terms, degrees or levels, other than 45 dB at which interference would be deemed acceptable.

9 FCC Rcd at 568.

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

[10] 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).

§ 21.902(a) (1991).

7. Petitioner's application failed to demonstrate a lack of harmful interference to a previously authorized cochannel MDS station. In its original application and again, in its reconsideration petition, Alliance stated that "there are no cochannel or adjacent channel MDS stations or applications within 50 miles of the proposed transmitter site." However, petitioner's application proposed a transmitter antenna site that was within 4.92 miles of the previously authorized cochannel station, WNTI328, Application File No. 768743, at Natchez, Mississippi.[11] WNTI328 appeared on public notice as accepted for filing on November 30, 1990, over a year prior to petitioner's application's filing date, and was granted its station license on June 14, 1991, more than six months prior to petitioner's January 9, 1992, filing date. Thus, petitioner had adequate notice of the previously authorized cochannel station.

8. As discussed in ¶ 6, *supra*, applicants for new MDS stations on the H channels are required to file 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. *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 . . . . "). *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 [47 C.F.R. § 21.902] are crucial."). Thus, due to petitioner's failure to file interference analyses for the previously authorized MDS stations, we find that it failed to comply with section 21.902. Accordingly, petitioner's application was unacceptable for filing and properly returned.

9. Notice to Affected Parties. In addition, the applicant failed to serve, as required by section 21.902(g), all applicants, conditional licensees and licensees for stations required to be studied by 47 C.F.R. § 21.902(c), thus depriving affected parties of notice and an opportunity to be heard. Alliance did not serve the licensee of WNTI328 with a copy of an interference study for its station. In *Edna Cornaggia*, 8 FCC Rcd 5442, 5444 (Dom. Fac. Div. 1993), the return of a modification application was upheld for failure to comply with 47 C.F.R. § 21.902(g):

[11] While station WNTI328 was subsequently forfeited on June 14, 1992, at the time petitioner's application was filed, petitioner was required to include an interference analysis this station pursuant to § 21.902(b)-(c).

> The Commission makes provision for actual notice and an opportunity to be heard by parties in interest by requiring at Section 21.902(g) that microwave stations that might be affected by operation of an MDS station be served a copy of the required interference analysis for their station. Cornaggia admittedly failed to properly serve VisionAire with a copy of the interference analysis . . . . Due to this lack of service, the orderly process contemplated in the Commission's rulemaking order, in which Commission staff resolves interference problems after opposition are filed, was negated.

Hence, the above referenced application was also properly returned as unacceptable for filing due to failure to comply with the service requirements of 47 C.F.R. § 21.902(g).

V. CONCLUSION

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

11. Accordingly, IT IS ORDERED, that the reconsideration petition filed by Grand Alliance Natchez (F) Partnership, IS HEREBY DENIED.

12. 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