

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

In the Matter of Conditional License)	
)	
MMDS, INCORPORATED)	File No. 2497-CM-P-83
)	
Multichannel Multipoint Distribution Service)	
Station WHT709, Birmingham, Alabama)	

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 2003

Released: July 17, 2003

By the Commission:

I. INTRODUCTION

1. On September 8, 1993, MMDS, Incorporated (MMDS, Inc.) filed an application for review¹ of the August 9, 1993 decision of the Domestic Facilities Division of the former Common Carrier Bureau (Division). The Division's decision² denied MMDS, Inc.'s petition for reconsideration of the cancellation of its May 14, 1992, conditional license for Multichannel Multipoint Distribution Service Station WHT709, Birmingham, Alabama. For the reasons discussed below, we deny MMDS, Inc.'s Application for Review.

II. BACKGROUND

2. On May 14, 1992, MMDS, Inc. was granted a conditional license to operate Station WHT709 on the E-group channels in Birmingham, Alabama.³ The authorization contained three conditions that MMDS, Inc. had to satisfy before construction commencement and no later than August 15, 1992.⁴

3. The first condition required MMDS, Inc. to file an analysis demonstrating a lack of harmful interference for each ITFS licensee or construction permittee with a transmitter within fifty miles of MMDS, Inc.'s proposed transmitter site together with a request for declaratory ruling.⁵ MMDS, Inc. had to serve the interference analysis and request for declaratory ruling on the pertinent ITFS licensee before filing it at the Commission.⁶ In the alternative, MMDS, Inc. could file a consent statement by the pertinent ITFS licensee or permittee.⁷ The second condition required MMDS, Inc. to file a written description of emergency repair notification procedures by customers to the local maintenance center (location and telephone number)/or person responsible for the technical operation and the average repair

¹ Application for Review (filed Sept. 8, 1993) (AFR).

² MMDS, Incorporated, *Order on Reconsideration*, 8 FCC Rcd 5440 (CCB DFD 1993) (*MMDS Order*).

³ Radio Station Authorization, Call Sign – WHT709, File No. 2497-CM-P-83 (Authorization). The E channel group consists of the frequencies 2596-2602, 2608-2614, 2620-2626, and 2632-2638 MHz. 47 C.F.R. § 21.901(b)(4).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

response time.⁸ Finally, MMDS, Inc. had to file a fully executed financial certification.⁹ MMDS, Inc.'s failure to comply with the conditions would result in automatic forfeiture of this authorization on August 16, 1992.¹⁰

4. The Birmingham Board of Education (Board) is a grandfathered Instructional Television Fixed Service (ITFS) licensee on the E-group channels in Birmingham, Alabama. It operates Station KLC77,¹¹ broadcasting educational programming to approximately ninety schools, five days a week.¹² The Board uses an omni-directional transmitter on the E-group channels to transmit to school sites.¹³

5. On August 14, 1992, MMDS, Inc. filed documentation entitled "Compliance with Conditional License."¹⁴ This documentation contained three attachments: (1) Attachment 1 - Statement Concerning Co-Channel Interference (Co-Channel Interference Statement); (2) Attachment 2 - A written description of emergency repair procedures as well as the name of the person responsible for local maintenance; and (3) Attachment 3 - A fully executed financial certification.¹⁵ In its Co-Channel Interference Statement, MMDS, Inc. proposed to operate Station WHT709 in an omni-directional manner providing wireless cable services in Birmingham.¹⁶ MMDS, Inc. further stated that "[t]he omni-directional operation of the ITFS station and the MMDS station would result in mutually destructive interference."¹⁷ Consequently, MMDS, Inc. stated, it had begun preparation of an application for involuntary relocation of the Board's ITFS facilities to "suitable substitute spectrum."¹⁸ None of the documents MMDS, Inc. submitted contained either an analysis, which demonstrated a lack of harmful interference to the Board's station, or the Board's consent to MMDS, Inc.'s operation of Station WHT709.

6. On October 7, 1992, the Board filed a letter in which it argued that MMDS, Inc.'s August 14, 1992 documentation did not meet the requirements contained in the conditional license to operate Station WHT709. Specifically, the Board contended that the submission was defective because it did not contain an analysis demonstrating a lack of harmful interference to the Board's station or a consent statement from the Board.¹⁹ The Board further argued that any reliance by MMDS, Inc. "on the rules for involuntary migration of point-to-point facilities of an ITFS . . . [station was] completely misplaced because the Board does not utilize the E group frequencies sought by MMDS [Inc.] for point-to-point broadcasts."²⁰ On October 28, 1992, the Division released a *Public Notice* in which it gave notice that

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 5440 ¶ 2.

¹² Letter from Gaile Pugh Gratton, Lange, Simpson, Robinson & Somerville to Donna R. Searcy, Secretary, Federal Communications Commission (dated Oct. 7, 1992) (Gratton Letter).

¹³ *Id.* at 2.

¹⁴ MMDS, Inc., Compliance with Conditional Construction Permit (E-Group) Birmingham, Alabama, Compliance with Conditional License, Aug. 14, 1992.

¹⁵ *Id.*

¹⁶ Statement Concerning Co-Channel ITFS Interference (filed Aug. 14, 1992) (Co-Channel Interference Statement) at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 2.

¹⁹ Gratton Letter.

²⁰ *Id.*

MMDS, Inc. automatically forfeited its conditional license for Station WHT709 for failure to comply with the conditional license terms.

7. On November 30, 1992, MMDS, Inc. requested reconsideration of the Division's October 28, 1992 Public Notice, seeking reinstatement of its conditional license to operate Station WHT709.²¹ MMDS, Inc. maintained that its August 14, 1992 documentation was not associated with its application and therefore the Division did not consider it before canceling MMDS, Inc.'s conditional license to operate Station WHT709.²² Moreover, MMDS, Inc. argued that its August 14, 1992 documentation satisfied the conditions of its authorization to operate Station WHT709.²³ MMDS, Inc. also argued that it had a year from the date of its conditional license in which to either obtain the Board's concurrence for voluntary migration from the E-group channels or initiate the involuntary migration provisions of the rules.²⁴

8. On August 9, 1993, the Division denied MMDS, Inc.'s petition for reconsideration. The Division found that MMDS, Inc. did not file the required non-interference analysis or a petition for declaratory ruling.²⁵ In this connection, the Division noted that MMDS Inc.'s August 14, 1992 documentation discussed interference between the two stations, but did not demonstrate a lack of interference to the Board's station from MMDS, Inc.'s station.²⁶ The Division also noted that MMDS, Inc. did not file a modification application requesting a change of the due date for filing the specific documentation required by the conditional license.²⁷ Moreover, the Division found that MMDS, Inc. was not authorized under Sections 74.986 or 74.902(h) of the Commission's Rules to require the Board to migrate involuntarily to another frequency.²⁸ On September 8, 1993, MMDS, Inc. filed its AFR.

III. DISCUSSION

9. In its AFR, MMDS, Inc. contends that the Division's decision was procedurally and substantively flawed. MMDS, Inc. raises four reasons to reinstate its license. First, MMDS, Inc. argues that the Division wrongfully cancelled MMDS Inc.'s conditional license to operate Station WHT709 because the Division misplaced MMDS, Inc.'s August 14, 1992 documentation, which led the Division to conclude that MMDS, Inc. had not met the specific conditions set forth on the license.²⁹ Second, MMDS, Inc. asserts that its August 14, 1992 documentation satisfies the conditions on the license for Station WHT709. Third, MMDS, Inc. maintains that it detrimentally relied upon advice of the Division staff and did not request additional time to submit its documentation. Finally, MMDS, Inc. avers that it can force the Board's Station KLC77 to migrate to another frequency if interference considerations so require pursuant to Section 74.980 of the Commission's Rules.³⁰

²¹ MMDS, Inc., Petition for Reconsideration (filed Nov. 30, 1992) (Petition).

²² *Id.* at 1. *See also*, MMDS, Inc., Supplement to Petition for Reconsideration (filed Dec. 18, 1992) (Supplement).

²³ Petition at 1.

²⁴ MMDS, Inc., Supplement at 4.

²⁵ *MMDS Order*, 8 FCC Rcd at 5440 ¶¶ 1,5.

²⁶ *Id.*

²⁷ *MMDS Order*, 8 FCC Rcd at 5440 ¶ 5.

²⁸ *Id.* at 5440-41 ¶ 6.

²⁹ AFR at 6-7.

³⁰ AFR at 10-11.

10. We have reviewed the AFR and find that the Division properly decided the matters raised. We note, as an initial matter, that assuming *arguendo* that the Division's original cancellation of MMDS, Inc.'s conditional license for Station WHT709 occurred because its August 14, 1992 documentation was misplaced, we find that action would have been erroneous. However, in this instance, such error would now be deemed harmless because the Division has reviewed and acted on the substance of the information contained in the August 14, 1992 submission. Specifically, on reconsideration, the Division considered the August 14, 1992 documentation and concluded that such documentation was insufficient to meet the terms of the conditional license.³¹ Therefore, the *MMDS Order* concluded that MMDS, Inc. automatically forfeited the license for Station WHT709 because MMDS, Inc. had failed to comply with the express conditions on its license, not because of its failure to make any filing.³²

11. The *MMDS Order* correctly states that when MMDS, Inc. accepted its conditional license, it agreed to be subject to those conditions.³³ In *P&R Temmer v. FCC*,³⁴ the Court noted that, "[an] FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions." By accepting its license without protesting the special condition placed on the license, MMDS, Inc. agreed to be bound by the special condition.³⁵ Accordingly, MMDS, Inc. was required to submit by August 15, 1992, either (a) "an analysis demonstrating a lack of harmful interference for each ITFS licensee . . . with a transmitter site within 50 miles of the proposed MMDS transmitter site, together with a request for declaratory ruling," or (2) a consent statement by the ITFS licensee."³⁶ However, the record of this proceeding contains a statement by MMDS, Inc. that its proposed operation would cause interference to the Board's station and that it did not have the Board's consent.³⁷ Accordingly, by the express terms of its conditional license, MMDS, Inc. automatically forfeited its license on August 16, 1992.

12. Additionally, MMDS, Inc. asserts that contrary to the Division's statement that it could have filed an application to modify the conditional license to extend the deadline for submitting the necessary documentation,³⁸ Division staff indicated that it would not grant extensions of time to file the documentation.³⁹ As a result, MMDS, Inc. argues that it believed the Division staff would not grant a modification of the license to extend the deadline.⁴⁰ This argument is immaterial because it was incumbent upon MMDS, Inc. to comply with the terms of its conditional license or to seek additional time to comply with those conditions. MMDS, Inc.'s unsupported claim that it received informal staff advice that an extension of time would not be granted did not relieve it of that duty.⁴¹

³¹ See *Greater Boston Television, Inc. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (a court will not reverse a decision because of harmless errors).

³² *MMDS Order*, 8 FCC Rcd at 5440 ¶ 5.

³³ *Id.*

³⁴ 743 F.2d 918, 928 (D.C. Cir. 1984).

³⁵ 47 C.F.R. § 1.110.

³⁶ See Conditional License.

³⁷ MMDS Statement at 1.

³⁸ See *MMDS Order*, 8 FCC Rcd 5440 at ¶ 5.

³⁹ AFR at 8.

⁴⁰ *Id.*

⁴¹ See Daniel R. Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-73 ¶ 53 (continued....)

13. Finally, MMDS, Inc. argues that it should have had the option of submitting an application to modify involuntarily the Board's license to eliminate the interference problem.⁴² We need not decide whether MMDS, Inc. could have filed an application to modify involuntarily the Board's license because MMDS, Inc. did not file such an application before its license automatically forfeited. Assuming that MMDS, Inc. could have filed an involuntary modification application consistent with the Commission's Rules, it could have filed such an application as soon as it received its conditional license on May 14, 1992.⁴³ MMDS, Inc. had explicit notice that it would automatically forfeit its license on August 16, 1992, if it did not comply with the express terms of its conditional license or seek modification of those conditions. Clearly, if MMDS, Inc. intended to modify involuntarily the Board's license, it should have filed such an application before its license was automatically forfeited. Once MMDS, Inc. automatically forfeited its license, it had no standing to seek modification of the Board's operations.⁴⁴ Thus, the preparation and submission of a modification application after August 15, 1992, was not relevant to the conditions of the authorization and of no utility on import as of August 16, 1992.

IV. CONCLUSION AND ORDERING CLAUSE

14. MMDS, Inc. received a conditional license that required it to comply with certain terms by August 15, 1992. The conditional license explicitly stated that if MMDS, Inc. did not comply with such terms, the conditional license of MMDS, Inc. would automatically forfeit on August 16, 1992. MMDS, Inc. did not comply with the requirement that it submit either an interference study showing a lack of harmful interference study to the Board's station and a petition for declaratory ruling or a consent statement from the Board by August 15, 1992. Accordingly, we affirm the Division's conclusion that the conditional license for Station WHT709 was automatically forfeited on August 16, 1992.

15. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by MMDS, Incorporated on September 8, 1993 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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(1998) ("Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule.")

⁴² *Id.* at 9; *citing* Communications Tech Management of Texas, Inc., *Memorandum Opinion and Order*, 7 FCC Rcd 7256 (CCB DFD 1992).

⁴³ 47 C.F.R. § 74.986(b) (1992).

⁴⁴ *See id.* (only licensees, conditional licensees, permittees, or unopposed applicants have standing to seek involuntary modification of an ITFS license).