

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

In re Applications of	)	
	)	
SAVANNAH COLLEGE	)	File No. BPLIF-951020AN
OF ART AND DESIGN	)	
	)	
For Construction Permit and License in the	)	
Instructional Television Fixed Service on the G-	)	
Group Channels at Bloomingdale, Georgia	)	
	)	
DIOCESE OF SAVANNAH	)	File No. BPLIF-951020BZ
	)	
For Construction Permit and License in the	)	
Instructional Television Fixed Service on the A-	)	
Group Channels at Savannah, Georgia	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 29, 2003**

**Released: December 17, 2003**

By the Commission: Chairman Powell issuing a separate statement; Commissioners Abernathy and Adelstein issuing a joint statement; Commissioners Copps and Martin dissenting and issuing separate statements.

**I. INTRODUCTION**

1. We have before us an application for review filed by the Diocese of Savannah (the Diocese) and the Savannah College of Art and Design (SCAD) on March 8, 1999.<sup>1</sup> In the AFR, the Diocese and SCAD seek review of the denial by the Video Services Division (Division) of the former Mass Media Bureau<sup>2</sup> of petitions for reconsideration of the dismissal of the above-captioned applications. The Diocese and SCAD filed the captioned applications for construction permits and licenses in the Instructional Television Fixed Service (ITFS) on, respectively, the A-Group channels at Savannah, Georgia and the G-Group channels at Bloomingdale, Georgia.<sup>3</sup> For the reasons discussed herein, we deny the AFR.

<sup>1</sup> Application for Review (filed Mar. 9, 1999) (AFR).

<sup>2</sup> Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, to Robert J. Rini, Esq., Rini, Coran & Lancellotta, P.C. (dated Feb. 5, 1999) (Letter). Effective March 25, 2002, the Commission transferred regulatory functions for the Instructional Television Fixed Service and the Multipoint Distribution Service/Multichannel Multipoint Distribution Service from the Mass Media Bureau to the Wireless Telecommunications Bureau (Bureau). *See* Radio Services Are Transferred From Mass-Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002). Accordingly, the Bureau's Public Safety and Private Wireless Division assumed all regulatory duties associated with these services effective March 25, 2002. *Id.*

<sup>3</sup> FCC File Nos. BPLIF-951020AN (Oct. 20, 1995) (SCAD Application); BPLIF-951020BZ (Oct. 20, 1995) (Diocese Application). Bloomingdale is a suburb of Savannah, Georgia. For ease of reference, we herein collectively refer to the Diocese and SCAD as the "Savannah applicants."

## II. BACKGROUND

2. In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations.<sup>4</sup> When the Commission established ITFS, it indicated that the service was envisioned to be used for transmission of instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students.<sup>5</sup> It also permitted ITFS licensees to use the channels for incidental purposes.<sup>6</sup> These incidental purposes included the transmission of cultural and entertainment material to those receiving locations; the transmission of special training material to selected receiving locations outside the school system such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments; the transmission of special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use; and to perform other related services directly concerned with formal or informal instruction and training.<sup>7</sup> In addition, when the ITFS facilities were not being used for such incidental purposes, the licensee could use them for administrative traffic (*e.g.*, transmission of reports, assignments and conferences with personnel);<sup>8</sup> however, individual stations, or complete systems could not be licensed solely for handling administrative traffic.<sup>9</sup>

3. Currently, ITFS spectrum is licensed utilizing a site-based approach. Since the 1990s, the Commission has provided ITFS licensees with greater technical flexibility. Specifically, in 1993, the Commission allowed ITFS licensees to shift their required educational programming onto fewer than their authorized number of channels by “channel loading,” *i.e.*, an ITFS licensee could move all of its ITFS program requirements onto one of its four channels so that it could lease the remaining three channels on a twenty-four hour basis to a wireless cable operator.<sup>10</sup> In 1996, the Commission permitted ITFS licensees to employ digital technologies.<sup>11</sup> In 1998, the Commission allowed ITFS licensees to construct digital two-way systems capable of providing high-speed, high capacity broadband service, including two-way Internet service via cellularized communication systems.<sup>12</sup>

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<sup>4</sup> See *Educational Television Report and Order*, Docket No. 14744, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

<sup>5</sup> Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (*citing ETV Decision*, 39 FCC 846, 853 ¶ 25).

<sup>6</sup> *Id.*

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service, *Report and Order*, MM Docket 93-106, 9 FCC Rcd 3,360 ¶ 2; *see also* 47 C.F.R. § 74.931(e)(9).

<sup>11</sup> See *Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, *Declaratory Ruling and Order*, 11 FCC Rcd 18839 (1996).

<sup>12</sup> Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112 (1998), *recon.*, 14 FCC Rcd 12764 (1999), *further recon.*, 15 FCC Rcd 14566 (2000).

4. On December 23, 1991, Effingham County Middle School (Effingham)<sup>13</sup> and Statesboro High School (Statesboro)<sup>14</sup> (collectively, the Pembroke Permittees) filed applications to construct and operate new ITFS stations in Pembroke, Georgia on the A-Group<sup>15</sup> and G-Group<sup>16</sup> channels, respectively. On July 24, 1992, those applications were granted and Effingham and Statesboro were issued construction permits for ITFS Stations WLX599 and WLX601, respectively. On September 14, 1995, Effingham<sup>17</sup> and Statesboro<sup>18</sup> filed applications for major changes to their respective construction permits. Effingham and Statesboro were each thereafter granted four extensions of time to complete the construction of their authorized facilities, with the last extensions expiring on January 17, 1997 and March 18, 1997, respectively.<sup>19</sup>

5. On October 20, 1995, the Diocese and SCAD filed applications for construction permits and licenses to operate ITFS stations on, respectively, the A-Group channels at Savannah, Georgia and the G-Group channels at Bloomingdale, Georgia. In their cover letter, the Diocese and SCAD indicated that the Commission's acceptance of their applications was "contingent upon" the Commission taking favorable action on a pending consolidated petition to deny filed against the Pembroke Permittees' request for extension of time to construct their facilities. On July 15, 1998, the two applications were dismissed<sup>20</sup> because the proposed facilities were not shown to be able to protect ITFS Stations WLX599 and WLX601.<sup>21</sup> On August 14, 1998, the Diocese and SCAD filed petitions for reconsideration of the dismissal of their applications.<sup>22</sup> In the PFRs, the Diocese and SCAD argued that the Savannah applications should not have been dismissed because the Pembroke Stations were not entitled to protection, as their construction permits expired prior to the filing of the Savannah applications of the Diocese and SCAD.<sup>23</sup> Further, they contended that Commission staff ignored material misrepresentations made by the Pembroke Permittees in their application filings.<sup>24</sup>

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<sup>13</sup> See FCC File No. BPLIF-911223DH (Dec. 23, 1991).

<sup>14</sup> See FCC File No. BPIF-911223DA (Dec. 23, 1991).

<sup>15</sup> The A-group channels consist of the frequencies 2500-2506 MHz, 2512-2518 MHz, 2524-2530 MHz, and 2536-2542 MHz. See 47 C.F.R. § 74.902(a).

<sup>16</sup> The G-group channels consist of the frequencies 2644-2650 MHz, 2656-2662 MHz, 2668-2674 MHz, and 2680-2686 MHz. See 47 C.F.R. § 74.902(a).

<sup>17</sup> See FCC File No. BMPLIF-950914KD (Sept. 14, 1995).

<sup>18</sup> See FCC File No. BMPLIF-950914IU (Sept. 14, 1995).

<sup>19</sup> See File Nos. BEIF-19950918D; BEIF-19950918DK.

<sup>20</sup> See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Diocese of Savannah and Savannah College of Art and Design (dated July 15, 1998) (Pendarvis Letter).

<sup>21</sup> Pursuant to 47 C.F.R. § 74.903(b), an application for a new ITFS station must protect previously proposed facilities from interference.

<sup>22</sup> The Diocese of Savannah, Petition for Reconsideration (filed Aug. 14, 1998); The Savannah College of Art and Design, Petition for Reconsideration (filed Aug. 14, 1998) (collectively these petitions are referred to herein as the "PFRs").

<sup>23</sup> PFRs at 2-4. According to the PFRs, the construction permits expired on September 17, 1995. *Id.* at 2. The PFRs state that the applications for extension of time filed by the Pembroke Permittees on September 18, 1995 were untimely filed and should not have been acted on by the Commission. *Id.*

<sup>24</sup> Specifically, the Diocese and SCAD faulted the Pembroke Permittees for failing to ascertain the availability of the Pembroke Permittees proposed tower sites prior to filing modification applications on September 14, 1995. *Id.* at 4-6. The Diocese and SCAD noted that the specification of a transmitter site is an implied representation that reasonable assurance had been obtained. *Id.* at 5-6 (internal citations omitted). According to the PFRs, the site

(continued....)

6. The Division, by letter dated February 5, 1999, denied the PFRs. As a preliminary matter, the Division noted that the Savannah applicants did “not dispute that their proposed facilities would cause harmful interference to the Pembroke stations.”<sup>25</sup> However, the Division rejected the contention that because the Pembroke Permits expired prior to the filing of the Savannah applications, the Pembroke Stations were not entitled to interference protection.<sup>26</sup> Rather, the Division found that timely applications to reinstate the expired permits were filed with respect to the Pembroke Stations.<sup>27</sup> In addition, the Division explained that while a construction permit or an extension of a permit expires pursuant to the terms stated therein, the cancellation of an expired permit requires a separate staff action.<sup>28</sup> The Division concluded that, “[a]t the close of the filing window in which the Savannah applicants submitted their applications, the Pembroke authorizations, although expired, were still outstanding and not subject to mutually exclusive applications.”<sup>29</sup> The Diocese and SCAD then timely filed the instant AFR on March 8, 1999.

7. On October 17, 2002, the Chief, Public Safety and Private Wireless Division (PSPWD), Wireless Telecommunications Bureau deemed the construction permit for Effingham’s Station WLX599 forfeited as of January 17, 1997 because the last extension of time to construct that facility had expired as of January 17, 1997, and no subsequent request for extension of time to construct had been filed.<sup>30</sup> Because the construction permit had been deemed forfeited, PSPWD also dismissed as moot a petition to dismiss or deny filed by the Diocese and Wireless Cable of Florida, Inc. (WCF) against Effingham’s major modification application.<sup>31</sup> Also, on December 3, 2002, PSPWD deemed the construction permit for Statesboro’s Station WLX601 forfeited as of March 18, 1997 because the last extension of time to construct that facility had expired on March 18, 1997, and no subsequent request for extension of time to construct had been filed.<sup>32</sup> Because the construction permit had been deemed forfeited, PSPWD dismissed as moot a petition to dismiss or deny filed by SCAD and WCF against Statesboro’s major modification application.<sup>33</sup> No party sought reconsideration or review of PSPWD’s actions.

### III. DISCUSSION

8. In the AFR, the Diocese and SCAD argue that the Division made a factual error in determining that the Pembroke Permittees filed “timely applications to reinstate” their construction

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specified by the Pembroke Permittees in their modification applications is not available. *Id.* at 4-5. The PFRs therefore conclude that the Pembroke Permittees were guilty of misrepresentation and lack of candor by filing their modification applications without first inquiring as to the availability of their proposed site. *Id.* at 5.

<sup>25</sup> Letter at 1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2 (citing *Amendment of Section 73.3598*, 102 FCC 2d 1054, 1058 n.11 (1985)).

<sup>29</sup> *Id.* The Division declined to consider, as part of this proceeding, the allegations of misrepresentation and lack of candor raised by the Diocese and SCAD. *Id.* The Division noted that cancellation of the Pembroke Permits would not have resulted in the reinstatement of the Savannah applications. *Id.* The Division also noted that the allegations were also raised in the context of reinstatement and modification applications filed by the Pembroke Permittees. *Id.* at n.2. The Division therefore found it inappropriate and unnecessary to consider the allegations in this proceeding. *Cf id.* at 2.

<sup>30</sup> Effingham County Middle School, *Letter*, DA 02-2771 (WTB PSPWD rel. Oct. 17, 2002).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> Statesboro High School, *Letter*, DA 02-3323 (WTB PSPWD rel. Dec. 3, 2002).

<sup>33</sup> *Id.* at 2.

permits.<sup>34</sup> The Diocese and SCAD also repeat their argument that the Pembroke Permittees demonstrated a lack of candor by filing extension applications that were premised on the relocation of their facilities “to tower space which the licensees had failed to obtain reasonable assurance and indeed had taken no meaningful steps to investigate whether such space was available.”<sup>35</sup> Finally, the Diocese and SCAD argue that if the Division had properly followed Commission policy in declining to cancel the Pembroke licenses *nunc pro tunc* as of September 18, 1995, the policy should be changed because it is inconsistent with the educational purposes of ITFS.<sup>36</sup>

9. We affirm the Division’s action in this matter. First, the Division correctly found that, at the close of the permissible filing period during which the Diocese and SCAD submitted their applications in October 1995,<sup>37</sup> the Pembroke authorizations, although expired, had not been cancelled.<sup>38</sup> The Diocese and SCAD were fully aware that the Commission had taken no final action with respect to the Pembroke licenses when they filed their applications.<sup>39</sup> Indeed, the Division reinstated the applications and extended the construction period. We see no reason to revisit at this time the Mass Media Bureau’s decision to grant the reinstatement applications. Therefore, the frequencies were unavailable to applicants filing for new licenses. As such, the Division correctly noted that, even if the Commission were to cancel the Pembroke Permits, the Savannah Applications would not be reinstated.<sup>40</sup> We find nothing in the AFR to persuade us otherwise.

10. The Diocese and SCAD indicated in cover letters accompanying their applications that the Commission’s “acceptance” of their applications was “contingent upon” the Commission taking adverse action against the Pembroke Stations.<sup>41</sup> If the Commission were to take the requested action, the Diocese and SCAD argue, the Savannah Applications would then not cause interference to any existing station (*i.e.*, because the Pembroke Permits would have been terminated prior to the filing of the Savannah Applications), and the Savannah Applications could be accepted for filing and granted.<sup>42</sup> The Commission’s Rules, however, have long provided that contingent applications will not be accepted for

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<sup>34</sup> AFR at 4-5.

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.* at 8-9.

<sup>37</sup> 47 C.F.R. § 74.911(c)(1) (1995) indicates that filing periods for applications for new ITFS stations will be accepted only on dates specified by the Commission in a public notice to be released not fewer than sixty days before the commencement of the filing period. *See* Amendment of Part 74 of the Commission’s Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 2907 (1995) (*ITFS R&O*).

<sup>38</sup> Letter at 2. The cancellation of an expired permit requires a separate staff action. *See Amendment of Section 73.3598*, 102 FCC 2d 1054, 1058 n.11 (1985).

<sup>39</sup> *See, e.g.*, AFR at 2-3. Indeed, the AFR states that the Diocese and SCAD submitted letters with their applications disclosing that their proposed operations would cause harmful interference to the Pembroke Stations. *See* AFR at 3. The AFR notes that the Diocese and SCAD also therein referenced a pending petition to deny that was filed against the Pembroke Stations’ pending applications. *See id.* In fact, as discussed below, the Diocese and SCAD indicated in cover letters accompanying their applications that the Commission’s “acceptance” of their applications was “contingent upon the outcome of a petition to deny” that had been filed against the Pembroke Permittees.

<sup>40</sup> Letter at 2; *see also* 47 C.F.R. §§ 73.3591; 73.3593 (1995).

<sup>41</sup> *See* Letter from Sarah H. Efird, Esq., Rini, Coran & Lancellota, P.C., to William F. Caton, Acting Secretary, FCC (Oct. 20, 1995); Letter from Sarah H. Efird, Esq., Rini, Coran & Lancellota, P.C., to William F. Caton, Acting Secretary, FCC (Oct. 20, 1995) (collectively, Cover Letters). Specifically, the “acceptability” of the Savannah Applications was “contingent upon the outcome of the [consolidated] petition to deny filed by Wireless Cable of Florida, Inc. against the application[s] of” the Pembroke Permittees for extensions of time to construct their facilities.

<sup>42</sup> *See, e.g.*, AFR at 7.

filing.<sup>43</sup> The reason for the rule against contingent applications is that it avoids burdening the Commission's resources with applications that cannot be processed until the applicable contingencies are resolved, which may never occur.<sup>44</sup> Savannah's applications therefore not only proposed operations that would interfere with a preexisting authorization, they violated the Commission's Rules prohibiting contingent applications.

11. In addition, we believe that Diocese and SCAD applications could not be granted because they failed to demonstrate that they would protect the Pembroke stations from harmful interference, as required under our rules.<sup>45</sup> Under our rules, ITFS licensees and permittees hold authorizations that provide their operations with specified level of protection from harmful interference.<sup>46</sup> Therefore, pursuant to the Commission's Rules, the Diocese and SCAD were required to demonstrate when they filed their applications for using the Group A and G channel groups in Pembroke, Georgia that they would not cause harmful interference to existing stations. The Diocese and SCAD never attempted to make such a demonstration, nor did they attempt to obtain consent from the Pembroke Permittees. Instead, they took the position that their applications should be processed contingent upon the cancellation of the Pembroke Permits. The failure of the Diocese and SCAD to make such a showing meant that the Commission could not act favorably on their applications.

12. We also agree with the Division's decision not to consider the argument that the permittees lacked candor in their extension applications. We agree because, even if those allegations were correct, it would not justify reinstatement of the Diocese's and SCAD's applications. Subject to narrow exceptions not applicable here, a finding of lack of candor cannot be made without a full adjudicatory hearing and an opportunity for the licensee to present evidence that it was candid with the Commission.<sup>47</sup> If we had determined that there was a substantial and material question of fact as to whether the Pembroke Permittees had indeed lacked candor, we would have been required to designate their extension applications for an evidentiary hearing.<sup>48</sup> The Diocese and SCAD have cited no authority for the proposition that the Commission can cancel a license *nunc pro tunc*, based upon an unproven allegation of lack of candor.

13. Finally, we reject the argument that the Commission should change its policy and cancel the Pembroke Permits, *nunc pro tunc*, to September 18, 1995 – the date on which the Pembroke Permittees filed their extension applications.<sup>49</sup> In the AFR, the Diocese and SCAD contend that the *nunc pro tunc* cancellation of the Pembroke Permits would allow the Commission to process and grant the Savannah applications.<sup>50</sup> We believe that the Commission's practice is appropriate and reasonable because it provides all potential applicants with the opportunity to file for unassigned channels. The approach recommended by the Diocese and SCAD would be unfair to other educational institutions and organizations that were interested in obtaining ITFS spectrum but that failed to file because they relied on the Commission's licensing records (which showed the Pembroke Permits as expired but not canceled). Moreover, we believe that the proposed policy change would only encourage the filing of speculative

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<sup>43</sup> See 47 C.F.R. § 74.910 (applying 47 C.F.R. § 73.3566, broadcast rule barring contingent applications, to ITFS).

<sup>44</sup> See Contingent Applications in the Broadcast Services, *Report and Order*, 22 RR 299 (1961); Amendment of Sections 1.517 and 1.520 of the Commission's Rules, *Report and Order*, 61 F.C.C. 2d 238 (1976).

<sup>45</sup> 47 C.F.R. § 74.903(b).

<sup>46</sup> See, e.g., 47 C.F.R. § 74.903(a)(5).

<sup>47</sup> Westel Samoa, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 6342, 6346-47 ¶ 14 (1998).

<sup>48</sup> See 47 U.S.C. § 309; *RKO General, Inc. v. FCC*, 670 F.2d 215, 231-36 (D.C. Cir. 1981).

<sup>49</sup> AFR at 7.

<sup>50</sup> *Id.*

applications and place an undue burden on the Commission's scarce resources by encouraging applicants to file applications in the hope that existing construction permits will be cancelled *nunc pro tunc* in the application process.<sup>51</sup>

#### IV. ORDERING CLAUSE

14. 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 the Diocese of Savannah and the Savannah College of Art and Design on March 8, 1999 **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>51</sup> Moreover, to the extent that the Diocese and SCAD seek cancellation of the Pembroke Stations' licenses on the basis of lack of candor, their argument is inconsistent with the provisions of the Communications Act, as amended, mandating an evidentiary hearing.

**SEPARATE STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: Applications of Savannah College of Art and Design and Diocese of Savannah for Construction Permit and License in the Instructional Television Fixed Service on the G-Group Channels at Bloomingdale, Georgia and A Group Channels at Savannah, Georgia, File No. BPLIF-951020AN*

I fully support the action taken by the Commission in this *Memorandum Opinion and Order*. Indeed, it is the only decision that could be reached consistent with the Commission's Rules, long-standing precedent, and the public interest. The Diocese and SCAD filed applications for ITFS channels that they knew were not available for licensing at that time because the Commission had previously assigned those ITFS channels to the Pembroke Stations. In order for the Commission to grant those applications, we would have to ignore two fundamental rules – the rule against contingent applications, and the rule that requires applicants to show at the time they initially file their applications that they will not cause interference to existing licensees or previously proposed stations.

First, the Savannah Applications clearly state that their “acceptability” is contingent on the Commission's willingness to grant a petition to deny that was then-pending against applications filed by the Pembroke Permittees to reinstate their construction permits. The Commission's Rules, however, have long provided that “contingent” applications will not be accepted for filing. The reason for the rule against contingent applications is that it avoids burdening the Commission's resources with applications that cannot be processed until the applicable contingencies are resolved, which may never occur. In fact, that is precisely what occurred here.

Second, under the Commission's Rules, ITFS licensees and permittees (like virtually all radio station licensees, except those that operate on a secondary basis) are given authorizations that entitle them to specified levels of protection from harmful interference. The Commission's Rules therefore require new ITFS applicants such as the Diocese and SCAD to demonstrate, at the time of filing, that their proposed operations will not cause interference to existing licensees and permittees. In fact, in its filing, the Diocese acknowledged that their applications would have resulted in harmful interference to the operations of previously proposed ITFS stations (*i.e.*, the Pembroke Stations).

I fully support and welcome the expeditious introduction of additional ITFS services and regret the procedural errors that were made in this case. However, the facts of this case bar us from supporting the award of the subject licenses and ensuring the productive use of this spectrum. The Commission cannot legally reinstate an application that was flatly inconsistent with its rules. It simply is not in the public interest to sacrifice the principles of fair play on the hope and expectation that petitioners, who have not followed the rules, might begin service in the near term. Such an approach would only encourage parties in the future to submit defective applications under the most tenuous of circumstances, on the gamble that the existing impediments to a grant (here, a mutually exclusive – and previously granted – permit) will be removed on a *nunc pro tunc* basis sometime before Commission staff acts on the defective application.



**JOINT STATEMENT OF  
COMMISSIONERS KATHLEEN Q. ABERNATHY AND JONATHAN S. ADELSTEIN**

*Re: Applications of Savannah College of Art and Design and Diocese of Savannah for Construction Permit and License in the Instructional Television Fixed Service on the G-Group Channels at Bloomington, Georgia and A Group Channels at Savannah, Georgia, File No. BPLIF-951020AN*

Upon reviewing the record in this proceeding, it is evident that numerous procedural mistakes were made. Unfortunately, we cannot change this fact. At this point our responsibility is to determine whether the Diocese of Savannah (Diocese) and the Savannah College of Art and Design (SCAD) filed valid applications for the A-Group channels at Savannah, Georgia and the G-Group channels at Bloomingdale, Georgia. Based on the record in this proceeding, it is clear that the applications were filed on a **contingent** basis. In fact, the cover letters of both applications specifically stated the applications were contingent on the favorable ruling of a separate filing, an outcome which in fact did not occur. Since the Commission's rules expressly provide that contingent applications will not be accepted for filing, we are voting to support today's decision.

We regret the facts of this case bar us from supporting the award of the subject channels to SCAD and the Diocese and ensuring the productive use of this spectrum. However, we cannot legally reinstate an application that was fundamentally flawed.

We agree with the dissent that the Commission should not allow valuable spectrum to lay fallow, especially spectrum designated for educational broadcasting. That is why we are pleased that the Chairman has included as a top priority concluding the MMDS/ITFS Rulemaking Proceeding, as well as improving the efficiency of our licensing processes. With these efforts, we are hopeful that the Commission in the future will not have to address unfortunate situations like this one.

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*RE: Applications of Savannah College of Art and Design and Diocese of Savannah for Construction Permit and License in the Instructional Television Fixed Service on the G-Group Channels at Bloomington, Georgia and the A-Groups Channels at Savannah, Georgia*

This proceeding is a dispute over whether the Diocese of Savannah, Georgia (“the Diocese”), and the Savannah College of Art and Design (“SCAD”) should be allowed to use currently unused spectrum to serve their students. The Commission decides today that they should not be allowed to use this spectrum and that it should continue to lie fallow. Because I disagree with this curious decision, I dissent.

At the heart of today’s decision is the Instructional Television Fixed Service (“ITFS”). ITFS was established to give schools access to spectrum resources so they could use technology as an educational tool. It is the only spectrum specifically reserved for educational purposes. While some school districts have not used this program to its potential, schools around the country have built important networks that provide a wide array of educational programs to their students. Today’s decision centers on the use of ITFS licenses in Savannah.

Commissioner Martin has laid out a strong legal justification for the position that the Dioceses and SCAD could and should have access to this spectrum. I will focus on putting the issue into perspective. A quick timeline is instructive.

- In 1992 the Commission granted Effingham County Middle School and Statesboro High School construction permits to build ITFS Stations. These schools never began construction of their ITFS facilities. Nonetheless, the FCC granted these permittees extensions four times, starting in 1995 and continuing through 1997. The spectrum remained unused for this entire period.
- In 1995, the Diocese and SCAD noticed that the spectrum was not being used. They therefore requested permission from the Commission to use it for educational purposes. They noted that the original permittees had not met their requirement to use the spectrum, and that the use of the spectrum by the Diocese and SCAD would be “contingent upon” the FCC recognizing this and allowing them to provide service where the original permittees had not.
- After delaying for three years, the FCC denied the Diocese and SCAD request in 1998. Why would the Commission refuse to give permission to educators who wanted to provide service to their students in the place of permittees who had left the spectrum unused for six years? The FCC said that they needed proof that the Dioceses and SCAD operations would not interfere with the non-existent operations of the original permittees – even though the original permittees had never built a system!
- In the meantime, the original permittees continued to leave the spectrum unused. Finally, in 2002, after the spectrum had lain fallow for ten years, the Commission rescinded the permits for Effingham and Statesboro for failure to build out a system. This is exactly what the Diocese and SCAD had requested they do four years earlier.
- And now that the Commission has revoked the permits of parties that did not use the spectrum will they grant permission to educators who have every intention of using public spectrum for their students? No. Even though no one else is using the spectrum, the FCC will not allow the Diocese and SCAD, or any other school, to use it because it says the window for filing for applications has closed!

That means the Diocese and SCAD were denied use of the spectrum when the window was open because they might interfere with a system that had not been built and never would be built. And when this ghost system's permit was finally rescinded a decade later the Diocese and SCAD were denied use of the spectrum because the window was closed. This is a perplexing result.

So now the ITFS spectrum in Savannah has lain fallow for more than a decade. No school has been able to take advantage of this great program. And because of the Commission's decision, no school will be able to use the spectrum for the foreseeable future. Instead the spectrum will remain unused, and probably eventually will be transferred to a private company instead of a school based on the argument that ITFS licensees did not do enough with their spectrum. But as we see in this proceeding, even when a school was ready and willing to build out an ITFS system, our interpretation of FCC rules and procedures could get in the way.

As Commissioner Martin forcefully demonstrates, we have the legal ability to fix this problem. I fail to see how our refusal to do so serves the public interest.

**DISSENTING STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*RE: Applications of Savannah College of Art and Design and Diocese of Savannah for Construction Permit and License in the Instructional Television Fixed Service on the G-Group Channels at Bloomington, Georgia and the A-Groups Channels at Savannah, Georgia*

I respectfully dissent from this decision to dismiss the applications of the Diocese of Savannah and the Savannah College of Art and Design. In this instance, the spectrum designated for educational and religious broadcasting is lying fallow – a wasting resource that can never be recaptured. Meanwhile, the majority dismisses the applications of the Diocese of Savannah and the Savannah College of Art and Design – the only parties which have ever applied to make good use of that spectrum. I cannot agree that their real operations would somehow interfere with the *imaginary* operation of certain “Pembroke Permittees,”<sup>1</sup> whose permits already expired and have been forfeited. Neither the letter nor the spirit of the Commission’s regulations dictate such a result.

1. Here is the unfortunate history of these licenses:

a. The Pembroke Permittees never constructed, let their licenses expire without explanation, and yet the Media Bureau reinstated those licenses without those permittees ever even filing a reinstatement request. In 1992 the Commission awarded these channels to the Pembroke Permittees – parties which *never* constructed or made use of their permits. First, the Pembroke Permittees allowed their permits to expire on September 17, 1995 without requesting an extension of time. The rules required any such request to be filed at least 30 days *prior* to the end of the construction deadline.<sup>2</sup> Furthermore, applications filed later than 30 days prior to the expiration may be accepted only “upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.”<sup>3</sup> Not only did the Pembroke Permittees file for an extension of time 31 days late – on September 18, 1995 – but also after expiration and without any explanation for the late filing. The Media Bureau did not act on this late-filed request for one full year. Then, on September 18, 1996, the Media Bureau simply granted the request, without any explanation as to why such an improper request should be granted. The Bureau also failed to address how the request could be granted without any showing, as required by our rules.

In 1999, in response to a petition for reconsideration filed by the Diocese and SCAD, the Media Bureau, on its own, recharacterized the 1996 late-filed extension of time request (which could not have been granted under the rules) as a request for “reinstatement,” (which could be filed after a license had lapsed). In a bold act of revisionist history, the Media Bureau declared that although the Pembroke licenses had expired on September 17, 1995, they were still entitled to interference protection from any subsequent applicant *because* the Pembroke Permittees “filed timely applications to *reinstate* the expired permits on September 18, 1995, as permitted by section 73.3534(e)” (emphasis supplied).<sup>4</sup> No matter that the application itself made no mention of “reinstatement.” Indeed, FCC Form 307, the form the Pembroke Permittees used to file their request for an extension of time, contains two places where they

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<sup>1</sup> The Pembroke Permittees are Effingham County Middle School and Statesboro High School, in Pembroke, Georgia, and were represented before the FCC by Washington counsel.

<sup>2</sup> 47 C.F.R. § 73.3534(a) (1995).

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

<sup>4</sup> February 5, 1999 letter from Mass Media Bureau, Video Services Division, to Savannah applicants rejecting their petition for reconsideration.

could have indicated their intent to request a reinstatement. Box 3, “purpose of application” allows the applicant to check either 3a (additional time) or 3b (construction permit to replace expired permit). The Pembroke permittees checked box 3a (additional time) and left box 3b (replace expired permit) blank. Box 7 likewise allows the applicant to choose between 7a (an “extension of time”) and 7b (an “application to replace an expired permit.”) The Pembroke Permittees chose 7a (extension of time) and specifically rejected 7b (request for reinstatement, which, by the way, also required an explanation of the applicant’s failure to submit a timely extension application) as “not applicable.” Still the Media Bureau chose to characterize the post-expiration extension of time request as a “reinstatement” request, even though a “reinstatement” was never requested, and indeed, was specifically rejected by the applicants themselves.

Between the time of the Bureau’s 1996 grant of the Pembroke Permittees’ extension of time request and the Bureau’s 1999 declaration turning the extension of time grant into a “reinstatement” grant, the Media Bureau had also granted the Pembroke Permittees various other extensions of time finally expiring on March 18, 1997. After 1997, the Pembroke Permittees did not bother to ask for any more extensions. Finally, in 2002, ten years after the permits were first awarded, the Wireless Bureau declared those same Pembroke permits forfeited, and cancelled the licenses retroactively to 1997 when the original extensions expired.

b. In 1998, the Media Bureau rejected the applications by the Diocese/SCAD to construct ITFS stations because their proposal would cause interference to the Pembroke Permittees, whose licenses had expired in 1997 and who had not requested a reinstatement or any extension of time. In October of 1995, during a five-day filing window open for ITFS applications (the one and only opportunity available to apply for these channels) the Diocese and SCAD filed applications to use these channels for educational and religious programming. In conjunction with their applications, they provided an analysis candidly declaring that their operation would cause interference to the planned Pembroke operations. The Diocese and SCAD also indicated that they were attempting to secure consent regarding interference for the proposed operations. The Media Bureau did not act on the Savannah applications for three years.

On May 12, 1998, the Diocese/SCAD applications were finally accepted for filing, and then, strangely, two months after the acceptance, they were dismissed.<sup>5</sup> The reason for the dismissal? Failure to protect the Pembroke Permittees from interference. This dismissal was particularly strange given that the Pembroke permits had already expired one year earlier without any further request for an extension of time or reinstatement, and thus lacked any indication that there ever had been or ever would be any operation on the Pembroke licenses with which to interfere.

2. I would have chosen to reverse the Media Bureau’s 1998 dismissal of the Diocese/SCAD applications or, alternatively, reverse the Media Bureau’s improper grant of an extension of time in 1996 and grant the Savannah applications.

It is within this Commission’s complete discretion to reverse the Bureau’s 1998 dismissal of the Diocese/SCAD applications. The dismissal was based solely on potential interference with the nonexistent facilities of the expired Pembroke Permits. As such, the dismissal was not valid in 1998, and is now also incompatible with the Wireless Bureau’s later forfeiture and cancellation of the Pembroke Permits retroactive to 1997. Similarly, it is within this Commission’s discretion to reverse the Media

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<sup>5</sup> Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC, to Diocese of Savannah and Savannah College of Art and Design (dated July 15, 1998).

Bureau's 1996 improper grant of an extension of time to the Pembroke Permittees and to cancel those licenses *nunc pro tunc*, effective September 18, 1995, when the licenses expired.<sup>6</sup>

The majority concludes that as a technical matter, the Savannah applications were improper at the time they were filed because they interfered with the proposed Pembroke operations. The majority further concludes that although the Pembroke licenses had expired, they had not yet been "cancelled" by the Bureau, and accordingly the Diocese and SCAD should not ever have filed. I respectfully disagree. First, the Diocese/SCAD applications were not immediately rejected, and were, ultimately, accepted for filing, an indication that they were properly filed. Second, the rules in place only required an interference analysis, which the Diocese/SCAD provided.<sup>7</sup> Their interference analysis candidly declared that their operations would cause harmful interference to the proposed Pembroke operations. The rules, importantly, do not require immediate dismissal in the face of interference.<sup>8</sup> Third, when the Savannah applicants filed, they included a "statement regarding interference" indicating that they were in the process of negotiating interference consents. It is my understanding that the Mass Media Bureau sometimes accepted for filing such applications where interference negotiations were underway but not yet finalized. Accordingly, it would have been reasonable for any applicant in the process of negotiating an interference consent to apply. Fourth, at the time they applied, the Diocese/SCAD were aware that the Pembroke licenses had already expired, and that the Pembroke licensees had neither timely requested an extension of time, nor requested a reinstatement. Fifth, the Media Bureau's 1998 dismissal was not based on the rationale that the expired Pembroke licenses had not yet been separately "cancelled" by the Bureau, but instead was based only on the rationale that the Savannah operations would cause interference to the Pembroke operations on a going forward basis. Accordingly, in my view it was reasonable and proper for the Diocese/SCAD to apply during the only five-day filing window ever available to them.

Alternatively, the majority states that the Savannah applications violate the rule prohibiting contingent applications. This argument is based on a sentence in the cover letter accompanying the Savannah applications which states that "it is the applicant's understanding that acceptance of this application is contingent upon the outcome of a petition to deny" filed against the Pembroke Permittees by a commercial provider that had intended to lease the Diocese/SCAD proposed facilities. In my view, this argument is a red herring. It seems unusual to deny this application based on a sentence in the cover letter. I believe it would be more appropriate to base the decision on the actual application itself, which to me appears to have been appropriately filed, and does not indicate that it is somehow contingent on another proceeding. Furthermore, this rationale was never used previously by the Bureau to reject the Savannah applications.

Finally, the majority states that to cancel the Pembroke Permits *nunc pro tunc* to September 18, 1995, the date they expired, would require a change in policy. The majority also states that this would be

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<sup>6</sup> The rules require that such a cancellation be effective "as of the expiration date." 47 C.F.R. § 73.3599 (1995) ("a construction permit *shall be declared forfeited* if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC *as of the expiration date*") (emphasis supplied).

<sup>7</sup> 47 C.F.R. § 74.903(b) (1995).

<sup>8</sup> Furthermore, prospective applicants and existing licensees were "required to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission." 47 C.F.R. § 74.903(c). This further suggests that any interference issues would ultimately be resolved by the Commission, and not result in an automatic dismissal of the prospective applicant's application.

unfair to other potential applicants who may have applied but failed to file because they relied on the Commission's licensing records (which showed the Pembroke Permits as expired but not cancelled). I respectfully disagree with both rationales. First, the Commission's rules *require* a permit to be declared forfeited *as of the expiration date* if the station is not ready for operation in the required timeframe.<sup>9</sup> Here, the Pembroke stations were not ready in the required timeframe and as a result, the Commission's rules require the forfeiture to have been effective as of the expiration date. Accordingly, a *nunc pro tunc* cancellation effective September 18, 1995, which in turn would allow the Savannah applications to be processed, would not reflect any change in policy. Indeed, it would require a change in our rules to cancel the permits as of any other date.

I also disagree that granting the Savannah applications would be unfair to potential applicants who may otherwise have filed applications but for the Pembroke Permits which were still reflected in the Commission's records. No other party other than the Diocese/SCAD have come forward at any time requesting to make use of those ITFS channels, and no other party has ever protested the Savannah applications, even during the period where they went on public notice as "accepted for filing." Also, at the time the ITFS filing window was open, any party could have seen that the Pembroke permits had expired without a request for a reinstatement and without a timely request for an extension of time. Given the unique facts of this case, the majority's suggestion that such an approach would only encourage the filing of speculative applications is, I believe, speculative itself. Indeed, under such circumstances I would encourage applicants to apply to make productive use of resources that are otherwise lying fallow.

I believe that as a matter of policy and under our rules, it would have been better to reverse the prior decision of the Media Bureau and grant the application of the Diocese and SCAD. Accordingly, I dissent.

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<sup>9</sup> 47 C.F.R. § 73.3599 (1995) ("a construction permit *shall be declared forfeited* if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC *as of the expiration date*") (emphasis supplied).