

II. BACKGROUND

2. On March 22, 1991, we granted Mester a license to operate MDS Station WNTA868 in Santa Barbara, California,⁹ with a transmitter site at coordinates 34-27-58 North Latitude, 119-40-37 West Longitude.¹⁰ On January 2, 1992, Mester filed three separate applications for new MDS stations on Channels 1,¹¹ 2A,¹² and H3¹³ at Santa Barbara, California. Each of Mester's applications specified the same transmitter site as the license for Station WNTA868.¹⁴ Additionally, Mester listed the antenna structure supporting Station WNTA868 as the structure where it would locate the antennas for the proposed stations in the Mester 1992 Applications. Finally, each of Mester's applications indicated that the sites were leased. However, it did not attach any site lease.¹⁵

3. Effective April 9, 1992, the Commission stopped accepting all applications for new MDS facilities and amendments to those applications (freeze).¹⁶ On April 29, 1993, the Domestic Facilities Division of the former Common Carrier Bureau returned the Mester 1992 applications because they failed to demonstrate site availability in accordance with the provisions of Section 21.15(a) of our rules.¹⁷ The Return Notifications indicated that Mester could not resubmit the applications until we terminated the filing freeze and that the Domestic Facilities Division would treat any corrected application as a newly filed application.¹⁸ On May 28, 1993, Mester filed a petition for reconsideration of the dismissal of its applications.¹⁹

4. In 1995, the Commission lifted the filing freeze when it announced competitive bidding procedures for the remaining MDS spectrum on a geographic area basis.²⁰ The former Mass Media Bureau conditionally granted Mester's Channel H3 application for Station WMX215 on September 6,

⁹ See File No. 785-CM-P-77 (granted Mar. 22, 1991).

¹⁰ *Id.*

¹¹ File No. 313-CM-P-92 (filed Jan. 2, 1992) (Mester Channel 1 Application).

¹² File No. 312-CM-P-92 (filed Jan. 2, 1992) (Mester Channel 2A Application).

¹³ File No. 314-CM-P-92 (filed Jan. 2, 1992) (Mester Channel H3 Application). The three applications will be collectively referred to as the Mester 1992 Applications.

¹⁴ See responses to FCC Form 494, Page 2, Question 14(c); Mester 1992 Applications, Blocks 7(a)-(k); *Division Letter* at 1.

¹⁵ See January 2, 1992 applications.

¹⁶ Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, *Notice of Proposed Rulemaking*, 7 FCC Rcd 3266, 3270-71 ¶¶ 19 and n.35 (1992).

¹⁷ Application Return Notification dated April 12, 1993 from Robert James, Chief, Domestic Radio Branch, Domestic Facilities Division to Mester's TV re: File No. 313-CM-P-92 (Channel MDS-1); Application Return Notification dated April 12, 1993 from Robert James, Chief, Domestic Radio Branch, Domestic Facilities Division to Mester's TV re: File No. 312-CM-P-92 (Channel MDS-2A) (collectively, "Return Notifications").

¹⁸ *Id.*

¹⁹ 1993 Petition.

²⁰ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, in MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9569 (1995).

1995.²¹ One of the conditions of the license required Mester to submit a fully executed deed, lease, or option agreement before the commencement of construction and no later than December 15, 1995.²²

5. On January 20, 2000, the Video Services Division of the former Mass Media Bureau denied Mester's 1993 Petition²³ because the applications did not contain certain required pieces of technical information²⁴ and the applications did not clearly cross-reference the station file for Station WNTA868.²⁵ In response to the Division's decision, Mester filed the AFR on February 22, 2000.²⁶

6. While Mester's 1993 Petition was still pending, the Commission conducted an auction of MDS spectrum. The auction closed on March 28, 1996.²⁷ WTCI was the winning bidder for the Santa Barbara – Santa Maria, California Basic Trading Area (BTA).²⁸ Pursuant to the procedures in effect, WTCI was then required to file by May 10, 1996 either (a) an application for authority to operate on at least one channel, or (b) a statement of intent to file such an application in the future.²⁹ WTCI filed an application for MDS Channel 1 in Santa Barbara on May 10, 1996, and Mester's TV did not file any objection to the application.³⁰ We granted WTCI a construction permit on August 16, 1996, on condition that it complete construction by August 16, 2003.³¹ WTCI's counsel acknowledges that the station has not been constructed but notes that we have issued a blanket extension of construction deadlines for MDS stations pending resolution of an ongoing rulemaking proceeding.³²

7. In ruling on the AFR, our *MO&O* reinstated Mester's applications, concluding that the company's failure to provide a copy of its existing site lease was not grounds for a return and that it should have been given an opportunity to amend its application to provide the site lease.³³ Although applicants have a duty to demonstrate reasonable assurance of site availability, the Commission had previously determined that "in lottery situations it is unreasonable to expect all applicants to have a lease or written option for the proposed site."³⁴ Moreover, we explained that in other, similar cases (including the Mester Channel H3 application), the Division granted applications where the applicant failed to submit a copy of a site lease and required the conditional licensee to provide the site lease by a specified

²¹ See License for Station WMX215 (AFR, Exhibit 4).

²² *Id.*

²³ *Division Letter.*

²⁴ *Id.* at 1. The application did not contain a site lease.

²⁵ *Id.* at 1-2, *citing* 47 C.F.R. § 21.13 (1991).

²⁶ AFR.

²⁷ Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas, *Public Notice* (rel. Mar. 29, 1996).

²⁸ *Id.* at 10.

²⁹ *Id.* at 5-6.

³⁰ AFR at 3.

³¹ Radio Station Authorization for MDS Station KNSC281, File No. BPMD-19960510SH, granted Aug. 16, 1996.

³² See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6825 ¶ 258 (2003) (*MDS/ITFS Notice*).

³³ *MO&O* at ¶ 6, *citing* AFR at 4-5.

³⁴ *MO&O* at ¶ 6, *citing* Revision of Part 21 of The Commission's Rules, CC Docket No. 86-128, *Report and Order*, 2 FCC Rcd 5713, 5721 ¶ 57 (1987).

date.³⁵ It further noted that the Division previously had determined that not all site availability defects are grounds for return of an application.³⁶ Based on those considerations, we agreed with Mester that the failure to submit the site lease with the original application alone was insufficient grounds for returning the subject applications and that it should have been given the opportunity either to amend its applications to provide the site lease or to provide such information by a date certain post-conditional license grant.³⁷ We reinstated Mester's applications and remanded this proceeding to the Wireless Telecommunications Bureau for processing of Mester's applications consistent with the *MO&O*.³⁸ On July 28, 2003, WTCI filed its Petition and its Informal Objection.³⁹

III. DISCUSSION

8. Section 1.106(b)(1) of our rules⁴⁰ provides that if a petition for reconsideration is filed by a person who is not a party to the proceeding, it shall show good reason why it was not possible for the petitioner to participate in earlier stages of the proceeding. We conclude that WTCI's Petition does not comply with that rule and must be dismissed because it could have presented its arguments at the time Mester filed its AFR. Indeed, WTCI should have been aware of Mester's application at the time it filed its own application for facilities in the same channel group. WTCI provides an unsupported assertion that our reference room did not contain a copy of Mester's Petition when WTCI participated in the auction.⁴¹ Whether that is true or not, however, such a copy is not the only resource that we made available for auction participants to determine the extent to which BTAs were burdened with licenses or applications. As described in the package of information made available to all participants in the MDS auction, the MDS Reference Center contained an MDS data base inventory, indexed by city and state, listing pertinent information such as licensee or applicant name, MDS channel or channel group, and antenna site coordinates.⁴² The reference center also had a computer terminal for on-line viewing of Commission MDS data base records, and we provided data via the Internet on authorized and proposed MDS stations.⁴³

9. Although we do not maintain retrospective snapshots of its databases, our Broadband Licensing System contains records showing the various actions taken regarding Mester's applications for MDS Channels 1 and 2A in Santa Barbara, including its May 28, 1993 petition for reconsideration and its February 22, 2000 Application for Review.⁴⁴ In the normal course of business, such entries are entered into our databases shortly after the relevant documents are filed. If WTCI had exercised due diligence before participating in the MDS auction, using all of the tools that we made available, it should have been able to discover that Mester's 1993 petition for reconsideration was still pending.

³⁵ *Id.*, citing AFR at Exhibit 6 (copies of conditional licenses requiring submission of site leases by a date certain after grant of the conditional license).

³⁶ *Id.*, citing RuralVision South, Inc., *supra*, RuralVision Central, Inc., *supra*, Allen Wheeler, *supra*.

³⁷ *Id.*, citing *Salzer v. FCC*, 778 F.2d 869, 871-872 (D.C. Cir. 1985).

³⁸ *Id.* at ¶¶ 8-9.

³⁹ Mester opposed the Petition and Informal Objection on August 12, 2003. Opposition to Petition for Reconsideration (filed Aug. 12, 2003); Mester's TV Informal Response to Informal Objection, filed Aug. 12, 2003 (Opposition to Informal Objection). WTCI filed a reply on August 25, 2003, pursuant to a request for extension of time filed on August 19, 2003. Reply (filed Aug. 25, 2003).

⁴⁰ 47 C.F.R. § 1.106(b)(1).

⁴¹ Informal Objection at 3.

⁴² Auction Procedures, Terms and Conditions at 21.

⁴³ *Id.* at 22.

⁴⁴ File Numbers BPMD-9200313 and BPMD-9200312.

10. WTCI says that WTCI filed an application for MDS Channel 1 in Santa Barbara on May 10, 1996, and that Mester did not file any objection to the application.⁴⁵ Because WTCI says it did not learn of Mester's pending application for the same channel until we released the *MO&O* in June 2003,⁴⁶ it therefore did not serve a copy of its application's interference study on Mester. At the time WTCI filed its application, Section 21.902(g)(1) of our rules required (and still requires) that applicants for MDS licenses serve electrical interference studies on all licensees, conditional licensees, and applicants for the stations required to be studied under the relevant technical standards.⁴⁷ WTCI should have considered Mester's applications because final action had not been taken on Mester's applications. Taken at face value, WTCI's Petition is a tacit admission that it did not comply with Section 21.902(g)(1). Because it did not do so, Mester did not learn of WTCI's application and, hence, did not have an opportunity to file a petition to deny it. Thus, it would be wrong to suggest that Mester did not exercise adequate vigilance to protect its application or that it deserves to accept the consequences of a construction permit awarded to WTCI.

11. If WTCI had reason to contest Mester's application or its petition for reconsideration, it could have raised its objections much earlier in the process. Readily accessible agency records showed that Mester's 1993 petition for reconsideration was pending when the MDS BTA auction commenced in 1995. WTCI should have considered that fact when preparing its bid. After WTCI was declared the winner of the Santa Barbara BTA in 1996, it had a subsequent opportunity to challenge the applications in 2000, when Mester filed its AFR.⁴⁸ Instead, WTCI remained silent until we granted the AFR and reinstated Mester's applications. For those reasons, we conclude that WTCI has failed to show good reason why it was not possible for it to participate in the earlier stages of this proceeding,⁴⁹ and dismiss its Petition.

12. We deny WTCI's Informal Objection, which raises the same issues as its Petition. Applicants for new MDS stations are only required to provide interference protection to "authorized or previously-proposed" stations.⁵⁰ Since Mester's applications were filed before WTCI's application, Mester was not required to protect WTCI's facilities. Instead, WTCI's application was apparently defective because it failed to serve Mester with a copy of its application.

13. We reject WTCI's argument that Mester's application did not contain the proper interference studies. While WTCI claims that Mester was required to study interference to stations within 100 miles of its proposed transmitter site,⁵¹ the rule in effect at the time only required Mester to study stations

if: (i) The proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilize(s), or would utilize, the same frequency; or (ii) if the proposed transmitter is within 50 miles of the coordinates of any such station; or (iii) if the great circle path between the proposed transmitter and the

⁴⁵ Petition at 3.

⁴⁶ *Id.* at 2.

⁴⁷ 47 C.F.R. § 21.902(g)(1) (1997 and 2003 editions).

⁴⁸ WTCI could have learned of the AFR by reviewing the Commission's Broadband Licensing System (BLS). The AFR was listed in BLS. Mester's was not required to serve the AFR on WTCI because WTCI had not previously participated in the proceedings involving Mester's applications. See 47 C.F.R. § 1.115(f) ("The application for review shall be served upon the parties to the proceeding.")

⁴⁹ See *Battery City Car and Limousine Service, Inc., Memorandum Opinion and Order*, 14 FCC Rcd 21089 (1999).

⁵⁰ 47 C.F.R. § 21.902(b)(3), (4).

⁵¹ Informal Objection at 4.

protected service area of any such station is 150 miles or less and 90 percent or more of the path is over water or within 10 miles of the coast or shoreline of the Atlantic Ocean, the Pacific Ocean, the Gulf of Mexico, any of the Great Lakes, or any bay associated with any of the above.⁵²

Because WTCI does not challenge Mester's assertion that there were no co-channel stations within 50 miles,⁵³ we conclude that Mester complied with that portion of the applicable rule. Furthermore, while Mester's application only referenced the Gulf of Mexico in its engineering exhibit (as opposed to all of the bodies of water referenced in the rule), we accept Mester's explanation that its engineer conducted the proper studies.⁵⁴ We note that WTCI does not point to any specific station or application that it believes should have been studied.

14. Moreover, we also reject WTCI's argument that the applications were improperly assigned to the John Mester Income Family Trust⁵⁵ as unsupported speculation. Mester states that it has always been and remains the applicant, and WTCI's allegations to the contrary are false.⁵⁶ Since WTCI fails to provide any concrete evidence that the applications were in fact assigned to a trust, we find no basis on which to dismiss Mester's application.

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 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Wireless Telecommunications, Inc., Debtor-in-Possession, on July 28, 2003 IS DISMISSED.

16. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, that the Informal Objection filed by Wireless Telecommunications, Inc., Debtor-in-Possession on July 28, 2003 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵² 47 C.F.R. § 21.902(c)(1), (2) (1992).

⁵³ Opposition to Informal Objection at 6.

⁵⁴ Opposition to Informal Objection at 7.

⁵⁵ Informal Objection at 3.

⁵⁶ *Id.*