

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

In the Matter of Application of
SAN DIEGO MDS COMPANY
For Renewal of License for
Multipoint Distribution Service Station WHT559,
San Diego, California
File No. 5790-CM-R-91

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 2004

Released: November 23, 2004

By the Commission:

I. INTRODUCTION

1. On December 15, 2003, San Diego MDS Company (San Diego MDS) filed an application for review of the November 13, 2003 decision of the former Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau (Division). The Division's decision denied San Diego MDS's petition for reconsideration of the May 30, 1996 dismissal of its application to renew Multipoint Distribution Service (MDS) Station WHT559, San Diego, California. For the reasons discussed below, we deny the AFR.

II. BACKGROUND

2. On April 24, 1974, San Diego MDS filed an application for a construction permit for a new MDS Station on Channel 2 at San Diego, California. That application was granted on November 29, 1983. On January 4, 1984, San Diego MDS was issued a license for Station WHT559.

3. On April 1, 1991, San Diego MDS filed an application to renew Station WHT559 along with a Contingent Request for Waiver of Section 21.303(d) of the Commission's Rules (Waiver Request). Section 21.303(d) of the Commission's Rules requires, in relevant part, that when a frequency is not used to render any service as authorized for a consecutive twelve month period, the licensee must submit its license for cancellation or show, in a waiver request, that it will use the frequency within the next six months. In the Waiver Request, San Diego MDS contended that Station WHT559 had been operating in compliance with Commission staff's interpretation of Section 21.303(d). San Diego MDS

1 Application for Review (filed Dec. 15, 2003) (AFR).

2 San Diego MDS Company, Order on Reconsideration, 18 FCC Rcd 23863 (WTB PSPWD 2003) (Order on Reconsideration).

3 File No. BPMD-7450092.

4 File No. BLMD-8450043.

5 San Diego MDS Company, Contingent Request for Waiver of Section 21.303(d) of the Commission's Rules (Apr. 1, 1991) (Waiver Request).

6 47 C.F.R. 21.303(d) (1988).

7 Waiver Request at 2.

stated that Commission staff had indicated that a waiver of section 21.303(d) was not necessary if the station was fully constructed and periodically broadcasting signals over the air from its transmitter.<sup>8</sup> San Diego MDS further stated that Commission staff had not required licensees to have customers.<sup>9</sup> San Diego maintained that it submitted the Waiver Request in case Commission staff intended to interpret Section 21.303(d) differently in the future.<sup>10</sup> San Diego MDS further conceded that although it had worked diligently to find a customer, it did not have one at the time the Waiver Request was filed.<sup>11</sup>

4. By letter, dated May 30, 1996, the Video Services Division of the former Mass Media Bureau denied the waiver request and dismissed the renewal application.<sup>12</sup> The Video Services Division rejected San Diego MDS's argument that the "periodic broadcasting of signals" constituted service under Section 21.303(d) of the Commission's Rules.<sup>13</sup> Specifically, the Video Services Division found the proposition unsupported, unconvincing, and contrary to the Commission's stated purpose in adopting the rule to ensure the efficient use of the spectrum.<sup>14</sup> In addition, the Video Services Division noted that San Diego MDS "had thirty days, beginning with the adoption of § 21.303(d) on November 9, 1987, to meet the requirements of that rule. [San Diego MDS] did not do so. Instead, [San Diego MDS] retained its license and provided no service whatsoever, except for 'periodically broadcast[ing] signals . . . ' for almost three and a half years before requesting waiver of § 21.303(d)."<sup>15</sup> The Video Services Division concluded that application of the rule in this instance reinforces the reporting requirements and reassigns the spectrum from those who have not provided service and makes it available to those wishing to do so.<sup>16</sup> The Video Services Division therefore denied the waiver request because allowing San Diego MDS to retain the license after years of non-use would frustrate the purpose of the rule and not be in the public interest.<sup>17</sup>

5. On July 1, 1996, San Diego MDS filed a petition for reconsideration of the May 30, 1996 dismissal of its application to renew Station WHT559.<sup>18</sup> San Diego MDS argued that the Commission cannot penalize applicants for attempting to comply with ambiguous requirements.<sup>19</sup> San Diego MDS maintained that Section 21.303(d) was ambiguous because the Commission never formally addressed what sort of use was required to avoid license cancellation.<sup>20</sup> Moreover, San Diego contended that in response to the lack of formal guidance from the Commission, it relied on the informal advice from the

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<sup>8</sup> *Id.* at 1. In its Application for Review, San Diego MDS states that it had broadcast color bars and/or test signals twenty-four hours a day. Application for Review at 2.

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

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 13. San Diego MDS indicated that it had received positive feedback after it had contacted several minority broadcasting executives about the possibility of utilizing MDS and MMDS in a multi-market communications network. *Id.*

<sup>12</sup> See Letter from Daniel R. Ball, Esq., Attorney, MDS Section, Video Services Division, Mass Media Bureau, FCC, to Mr. James E. Lindstrom, Partner, San Diego MDS Company (dated May 30, 1996) (Ball Letter).

<sup>13</sup> See Ball Letter at 1.

<sup>14</sup> See *id.* (internal citations omitted).

<sup>15</sup> *Id.* at 2. The Division found that the initial period of nonuse in this matter began on January 4, 1984. *Id.*

<sup>16</sup> See *id.*

<sup>17</sup> Ball Letter at 3.

<sup>18</sup> San Diego MDS Company, Petition for Reconsideration (filed Jul. 1, 1996) (Petition).

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 3.

Commission staff concerning the requirements of Section 21.303(d).<sup>21</sup> San Diego MDS maintains that it operated Station WHT559 in accordance with this informal advice from Commission staff.<sup>22</sup> Thus, according to San Diego MDS, the decision of the Video Services Division should have been overturned and its license to operate Station WHT559 should have been renewed.<sup>23</sup> San Diego further maintained that the Video Services Division had treated San Diego MDS differently from similarly situated applicants.<sup>24</sup> San Diego MDS provided information on three letter rulings by three Commission staff members.<sup>25</sup>

6. The Division denied San Diego MDS's request to overturn the decision of the Video Services Division.<sup>26</sup> First, the Division concluded that Section 21.303(d) of the Commission's Rules was not ambiguous as applied to San Diego MDS's situation.<sup>27</sup> Second, the Division concluded that parties before the Commission may not claim reliance on informal staff advice as an excuse for non-compliance with regulatory requirements.<sup>28</sup> The Division found that while the rule explicitly required San Diego MDS to provide "service," San Diego MDS did not explain how the periodic broadcasting of signals that no person received could possibly constitute "service" to any person.<sup>29</sup> Moreover, the Division continued, San Diego MDS's interpretation of the rule, which would allow a licensee to avoid license cancellation by broadcasting a signal once a year that nobody receives, was plainly inconsistent with the Commission's underlying purpose of ensuring that spectrum is used efficiently and effectively.<sup>30</sup> Moreover, the Division found that based on the record, it was unclear whether San Diego MDS in fact received advice that its operation complied with Section 21.303(d).<sup>31</sup> The Division also concluded that to the extent that any of the rulings cited by San Diego MDS may have been inconsistent with the Commission's clear policy, it was not bound to follow those decisions.<sup>32</sup> On December 15, 2003, San Diego MDS filed the instant AFR.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* at 1.

<sup>25</sup> *See Id.* at 6 and n.9. *See also* Letter from Paul J. Sinderbrand, Counsel, San Diego MDS Company to Magalie Roman Salas, Secretary, Federal Communications Commission at 2 (filed April 17, 1998) (Petition Supplement).

<sup>26</sup> *Order on Reconsideration*, 18 FCC Rcd at 23867 ¶ 12.

<sup>27</sup> *Id.* at 23865 ¶ 8.

<sup>28</sup> *Id.* at 23865-66 ¶ 9.

<sup>29</sup> *Id.* at 23865 ¶ 8.

<sup>30</sup> *Id.*, citing Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987) (*Part 21 Report and Order*).

<sup>31</sup> *Order on Reconsideration*, 18 FCC Rcd at 23865-66 ¶ 9.

<sup>32</sup> *See Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself), *cert. den.* 119 S.Ct 1045 (1999); *Amor Family Broadcasting Group, v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (even if internal inconsistency at a subordinate level were shown, the Commission itself would not be acting inconsistently) citing *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987); *Continental Cellular*, 6 FCC Rcd. 6834, 6836 n.25 (1991) (The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission's Rules).

### III. DISCUSSION

7. San Diego MDS maintains that Section 21.303(d) is ambiguous.<sup>33</sup> Specifically, San Diego MDS contends that the rule did not clearly define “service” and failed to provide sufficient notice of what was required in order to avoid license cancellation.<sup>34</sup> In addition, San Diego maintains that staff in the former Common Carrier Bureau, the former Mass Media Bureau, and the Wireless Telecommunications Bureau have, in the absence of formal guidance from the Commission, inconsistently interpreted Section 21.303(d) of the Commission’s Rules.<sup>35</sup> Consequently, San Diego MDS maintains, the Commission treated similarly situated applicants differently.<sup>36</sup> According to San Diego MDS, these actions were arbitrary and capricious and a violation of San Diego MDS’s right to due process.<sup>37</sup> San Diego MDS requests that the Commission overrule the Division’s decision and grant it a waiver of Section 21.303(d) of the Commission’s Rules.<sup>38</sup>

8. We reject San Diego MDS’ argument that it had insufficient notice of what constituted service under Section 21.303(d) of the Commission’s Rules. The U.S. Court of Appeals for the District of Columbia Circuit has held in determining whether a party has fair notice, the critical inquiry is whether “by receiving the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.”<sup>39</sup> In *Trinity Broadcasting*, the District of Columbia Circuit also explained that a licensee may not be penalized when the rules in question were unclear, the “agency itself struggles to provide a definitive reading of the regulatory requirements,” and the licensee’s interpretation of those rules was reasonable.<sup>40</sup> San Diego MDS maintains that Section 21.303(d) of the Commission’s Rules was unclear because the Commission did not formally address what sort of use was required to avoid license cancellation. We disagree.

9. On September 25, 1987, the Commission released the *Part 21 Report and Order* revising Part 21 of the Commission’s Rules, which governs the construction, licensing, and operation of common carrier domestic fixed radio facilities, including MDS. In the *Part 21 Report and Order*, the Commission expressly changed Commission policy regarding unused licenses in the domestic public fixed radio services. Before the *Part 21 Report and Order* was released, the Commission did not require licensees to submit an unused license for cancellation.<sup>41</sup> In changing this policy, the Commission stated that “[t]he comments have failed to convince us that requiring a licensee to submit an unused license for cancellation is, in and of itself, unreasonable.”<sup>42</sup> The Commission further explained that while it did not desire to discourage risk taking in the development of new technologies, it had, at the same time an obligation to

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<sup>33</sup> AFR at 4.

<sup>34</sup> *Id.* at 5-7.

<sup>35</sup> *Id.* at 8.

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

<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.* at 15.

<sup>39</sup> *General Electric Co. v. Environmental Protection Agency*, 53 F. 3d 1324, 1329 (D.C. Cir. 1995); *see also Trinity Broadcasting of Florida, Inc. et al. v. FCC*, 211 F. 3d 618, 628 (D.C. Cir. 2000) (“*Trinity Broadcasting*”).

<sup>40</sup> *Trinity Broadcasting*, 211 F.3d at 632.

<sup>41</sup> *Part 21 Report and Order*, 2 FCC Rcd at 5724 ¶ 82.

<sup>42</sup> *Id.* at ¶ 83.

ensure that spectrum is used efficiently.<sup>43</sup> Consequently, the Commission added Section 21.303(d) to Part 21.<sup>44</sup>

10. The plain language of the rule prohibits an MDS station from being non-operational for more than twelve consecutive months.<sup>45</sup> Although San Diego MDS contends that the Commission failed to articulate what constitutes “service,” we conclude that this is not a close case. In particular, we agree with the Division that it was clearly unreasonable for San Diego MDS to believe that the periodic broadcasting of signals that nobody received constituted “service” within the meaning of the rule. Such an interpretation is unreasonable; in order to provide a service a provider would, at a minimum, need a customer or other person to serve. Moreover, under San Diego MDS’ interpretation of the rule, a licensee could avoid license cancellation by broadcasting a signal once a year that nobody receives. This construction, however, is plainly inconsistent with the Commission’s underlying purpose of ensuring that spectrum is used efficiently and effectively.<sup>46</sup>

11. San Diego MDS argues that the Commission’s 1996 clarification of what constitutes “operation” is an admission that Section 21.303(d) of the Commission’s Rules was ambiguous.<sup>47</sup> That assertion is mistaken. The *Part 101 Report and Order* was not clarifying Section 21.303(d) of the Commission’s Rules. Instead, the rule being clarified was former Section 94.51 of the Commission’s Rules.<sup>48</sup> That rule for private operational fixed stations stated, “The station authorized must be placed in

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<sup>43</sup> *Id.* at ¶ 82.

<sup>44</sup> Section 21.303(d) states:

(d) If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed, under circumstances that do not fall within the provisions of paragraph (a), (b) or (c) of this section, or, if removal of equipment or facilities has rendered the station not operational, the licensee shall, within thirty days of the end of such period of nonuse:

(1) Submit for cancellation the station license (or licenses) to the Commission at Washington, DC 20554;

(2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or

(3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.

If any frequency authorization is cancelled under this paragraph, the Commission will declare by public notice the frequency (or frequencies) vacated.

<sup>47</sup> C.F.R. 21.303(d) (1988).

<sup>45</sup> *Id.*

<sup>46</sup> *See Part 21 R&O.*

<sup>47</sup> AFR at 7-8, *citing* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, 11 FCC Rcd 13449, 13464-65 ¶¶ 34-36 (1996) (*Part 101 Report and Order*).

<sup>48</sup> *See* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Notice of Proposed Rulemaking*, 10 FCC Rcd 2508, 2513-14 ¶¶ 13-14 (1995).

operation within twelve months from the date of grant or the authorization shall be invalid and must be returned to the Commission for cancellation.”<sup>49</sup> While former Section 94.51 addressed what must be done in order to meet the licensee’s initial buildout requirement, Section 21.303(d) addresses what happens “after construction is completed and a certification of completion of construction has been filed.” Finally, while the former Part 94 rule required that the station be “placed in operation,” Section 21.303(d) of the Commission’s Rules imposes a different requirement - the provision of service. We therefore conclude that the *Part 101 Report and Order* is inapplicable and does not support San Diego MDS’ position.

12. San Diego MDS maintains that its right to due process was violated because it was treated differently than similarly situated parties.<sup>50</sup> To support its argument, it submitted evidence concerning three licensees, Cleveland Microband Teleservices (CMT), Broadcast Data Corporation (BDC), and Wireless Holdings, Inc. and related companies (WHI). In reviewing these cases, we note that there is significant similarity between San Diego MDS’s situation and CMT’s and BDC’s situation. CMT filed a waiver request on April 5, 1991<sup>51</sup> and BDC filed a waiver request on April 1, 1991.<sup>52</sup> We do not believe that the actions granting waivers to CMT and BDC are precedent. We note that both of the rulings<sup>53</sup> granting waivers did not address the untimeliness of the waiver requests or the definition of service in Section 21.303(d).<sup>54</sup> Since the rulings did not address those issues, we cannot conclude that there was a reasoned analysis of the timeliness issue or of the definition of service. In any event, due process does not compel the Commission to follow erroneous decisions by Commission staff, particularly when the rulings in question do not analyze the relevant issues.<sup>55</sup> Furthermore, we do not believe that San Diego MDS’s situation is similar to WHI’s situation. WHI was reporting periodic outages that lasted less than twelve consecutive months, thus not implicating the requirements of Section 21.303(d) of the Commission’s Rules.<sup>56</sup>

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<sup>49</sup> 47 C.F.R. § 94.51 (1985).

<sup>50</sup> AFR at 9-12.

<sup>51</sup> Cleveland Microband Teleservices, Request for Waiver of Section 21.303(d) of the Commission’s Rules (filed Apr. 5, 1991).

<sup>52</sup> Broadcast Data Corporation, Contingent Request for Waiver of Section 21.303(d) of the Commission’s Rules (filed Apr. 1, 1991).

<sup>53</sup> Letter from Lynne Milne, Senior Attorney, MDS Section, Video Services Division, Mass Media Bureau to Mr. William F. Hoffman (dated Feb. 23, 1995); Letter from Stephen Svab, Attorney, MDS Section, Video Services Division, Mass Media Bureau to Robert F. Corazzini, Esq. (dated Nov. 21, 1997).

<sup>54</sup> Neither letter ruling from Commission staff indicated that the periodic broadcast of test signals or color bars constituted service under Section 21.303(d) of the Commission’s Rules. *See id.*

<sup>55</sup> *See e.g., See Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself), *cert. den.* 119 S.Ct 1045 (1999); *Amor Family Broadcasting Group, v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (even if internal inconsistency at a subordinate level were shown, the Commission itself would not be acting inconsistently) *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987); *Continental Cellular*, 6 FCC Rcd. 6834, 6836 n.25 (1991) (The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission’s Rules); *North Texas Media, Inc. v. FCC*, 778 F.2d 28, 33 (D.C. Cir. 1985) (“The initial improvident grant of a [short-spacing] waiver ... now described as an error, does not deprive the agency of authority to require future applicants to meet certain standards, in order to obtain such a waiver.”)

<sup>56</sup> In a letter, WHI Holdings, Inc informed the staff of the Video Services Division, Mass Media Bureau, that the following stations had been off the air: KFF81 was out of service for 45 days to relocate its transmitter to a new site; WNTA514 was out of service for at least two months because its transmission equipment was stolen and then was removed from service for another 28 days to repair equipment; WHT909 was out of service for five months because the transmitter failed and the vacuum tubes to repair it were out of production; and WJL36 was out of

(continued...)

13. As the Division stated in the *Order on Reconsideration*, after twelve consecutive months of non-use, Section 21.303(d) of the Commission's Rules explicitly required San Diego MDS to submit its license for cancellation, file an application for modification of the license to delete the unused frequency, or request a waiver and demonstrate that the frequency will be used (as evidenced by appropriate requests for service) within twelve months of the end of the period of non-use.<sup>57</sup> In the instant case, the twelve-month period of non-use began on January 4, 1984 when Station WHT559 was first authorized. Thus, San Diego MDS had thirty days from the effective date of Section 21.303(d) on November 9, 1987,<sup>58</sup> to submit its license for cancellation, file a modification application, or seek a waiver of the rule. Instead of complying with Section 21.303(d), however, San Diego MDS periodically broadcast test signals and color bars for almost three and a half years before requesting a waiver of Section 21.303(d) of the Commission's Rules on April 1, 1991. Although San Diego MDS maintains that it was merely following the advice of Commission staff, in reviewing the record we have not found any evidence that Commission staff maintained that periodically transmitting a broadcast signal that no one receives constituted an authorized service under Section 21.303(d) of the Commission's Rules.<sup>59</sup> Moreover, as we have stated many times, parties doing business before the Commission may not claim reliance on informal staff advice to excuse non-compliance with regulatory requirements.<sup>60</sup> Thus, we conclude that San Diego MDS' waiver request was untimely filed.

14. San Diego MDS asks the Commission to grant it a waiver of Section 21.303(d) of the Commission's Rules. As noted above, San Diego MDS' waiver request was untimely. Even if we reached the merits of the waiver request, however, we would conclude that the waiver request was properly denied. Under Section 21.19 of the Commission's Rules, the Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>61</sup> We do not agree with San Diego MDS that the underlying purpose of Section 21.303(d) of the rule, to prevent spectrum warehousing, would be frustrated with the Commission's affirmation of the *Order on Reconsideration*. On the contrary, application of the Commission's Rules in this case would further the underlying purpose. As stated above, San Diego MDS

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service for 40 days because of erosion under the mountain top transmitter. Letter from Robert J. Rini, Esq., Attorney, Rini, Coran & Lancellotta, P.C., to Charles Dziedzic, Assistant Chief, MDS Section, Video Services Division, Mass Media Bureau, Federal Communications Commission (dated Mar. 6, 1996). See also Letter from Daniel R. Ball, Esq., Attorney, MDS Section, Video Services Division, Mass Media Bureau, FCC, to Robert J. Rini, Esq., Rini, Coran & Lancellotta (dated Mar. 29, 1996).

<sup>57</sup> *Order on Reconsideration*, 18 FCC Rcd at 23865 ¶ 7.

<sup>58</sup> Common Carrier Services, Licensing, Construction, and Operation of Facilities, 52 Fed. Reg. 37775 (Oct. 9, 1987).

<sup>59</sup> We further note that the timing of San Diego MDS' waiver request, at renewal after three and a half years of unlawful conduct, constitutes a tacit admission of its failure to comply with the Commission's rules.

<sup>60</sup> See, e.g., Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4708 (1991) ("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."); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2852 (1990), *aff'd sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff."); Hinton Telephone Company, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11637 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

<sup>61</sup> 47 CFR § 21.19.

did not provide service for years, which prevented other entities from using this spectrum. We also disagree with San Diego MDS that there are unique factual circumstances in this case that render the application of section 21.303(d) inequitable, unduly burdensome, and contrary to the public interest. As we stated above, we do not believe that Section 21.303(d) was ambiguously interpreted by the Commission or by Commission staff. Moreover, San Diego MDS' argument that application of this rule would penalize pioneers in the MDS industry that took tremendous risks completely ignores the Commission's statements and rationale in the *Part 21 Report and Order*. Risk-taking in the wireless industry is not a unique factual circumstance. In fact, the Commission stated in the *Part 21 Report and Order* that "[w]e have no desire to discourage risk taking in new technologies"<sup>62</sup> The Commission continued, however, that the adoption of Section 21.303(d) was necessary to allow others to use the spectrum that was not being used to provide service and to allow the Commission to ascertain when spectrum is not being utilized or is being under utilized.<sup>63</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

15. For the reasons discussed above, we deny the application for review. We affirm the denial of San Diego MDS's request for waiver of Section 21.303(d) of the Commission's Rules and the dismissal of San Diego MDS's application to renew its license to operate Station WHT559.<sup>64</sup>

16. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Application for Review filed by San Diego MDS Company on December 15, 2003 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>62</sup> *Part 21 Report and Order*, 2 FCC Rcd at 5724 ¶ 82.

<sup>63</sup> *Id.*

<sup>64</sup> We recently eliminated Section 21.303 of the Commission's Rules as part of a comprehensive review of the rules relating to MDS and the Instructional Television Fixed Service. 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, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135 (rel. Jul. 29, 2004) at ¶¶ 231-239. The subsequent elimination of the rule has no bearing on this case because San Diego MDS' license was subject to cancellation during the time the rule was in effect.