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

In the Matter of Application of	)	
	)	
HISPANIC INFORMATION AND	)	File No. BPLIF-19951016AT
TELECOMMUNICATIONS NETWORK, INC.	)	Facility ID No. 81077
	)	
For a New Station Construction Permit/License in	)	
the Instructional Television Fixed Service,	)	
Channel Group D1-D4 in Trenton, New Jersey	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2004 **Released: January 8, 2004**

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we consider an Application for Review filed on November 17, 1997, by Hispanic Information and Telecommunications Network, Inc. (HITN).[1] HITN requests Commission review of the staff's dismissal of the above-captioned application for authority to construct an Instructional Television Fixed Service (ITFS) station in Trenton, New Jersey. For the reasons stated herein, we deny HITN's AFR.

II. BACKGROUND

2. On May 12, 1994, HITN filed an application seeking an authorization to construct an ITFS station at Trenton, New Jersey.[2] On May 12, 1995, HITN amended its application by filing a supplemental interference analysis.[3] HITN's amended application appeared on public notice as tendered for filing on November 9, 1995.[4] The Commission's engineering staff reviewed the application and determined that the proposed operations would cause interference to receive sites licensed to Stations WLX250 and WLX823.[5] As a result of this determination, on June 9, 1997, the Distribution Services Branch (Branch) of the former Video Services Division (Division), Mass Media Bureau dismissed

[1] Application for Review (filed Nov. 17, 1997) (AFR).

[2] HITN prepared and filed this application simultaneously with and part of an application filed at the National Telecommunications and Information Administration.

[3] HITN Minor Amendment to ITFS D – Group in Trenton, NJ (filed May 12, 1995)(Amended Application).

[4] See ITFS Public Notice Report No. 23631A (rel. Nov. 9, 1995)

[5] New Jersey Public Broadcasting is the licensee for Station WLX250 and WHYY, Inc. is the licensee for Station WLX823.

HITN's application.[6] The Branch cited co-channel and adjacent channel interference conflicts as the basis for the application's dismissal.[7]

3. On July 9, 1997, HITN requested reconsideration of the Branch's dismissal of its application.[8] HITN argued that the Branch incorrectly concluded that the HITN application failed to demonstrate interference protection to the receive sites of Stations WLX250 and WLX823.[9] In support of its non-interference claim, HITN referenced interference studies from its amended application (Exhibits B and C).[10] Exhibit B is an adjacent channel interference study purporting to show the desired/undesired (D/U) ratios at Station WLX250's twenty receive sites. HITN concludes that the twenty receive sites meet the minimum 0 dB D/U ratio required by our Rules.[11] Exhibit C purports to be a co-channel interference study that shows the D/U ratios of Station WLX823's seven receive sites. HITN concludes that six of the seven sites meet the minimum 45 dB D/U ratio required by our Rules.[12] HITN asserted that it would pay for installation of an upgraded receive antenna at the remaining site (R6), to achieve a D/U ratio exceeding the required 45 dB.[13]

4. On August 4, 1997, the Branch denied HITN's First Petition.[14] In reaching its decision, the Branch cited HITN's technical showing and found that interference would be caused to four receive sites licensed to Station WLX250.[15] In addition, with regard to the WLX823 R6 receive site, the Branch determined that HITN had not identified an appropriate substitute antenna that would achieve the required D/U ratio. Therefore, HITN had not shown that an antenna upgrade would resolve interference to Station WLX823.[16]

5. On September 3, 1997, HITN sought further reconsideration of the Branch's dismissal of its application and denial of its First Petition.[17] In the alternative, HITN requested consideration of its Second Petition as an Application for Review under Section 1.115(b)(2)(iv) of our Rules.[18] HITN in its Second Petition conceded that its interference study for Station WLX250 was flawed because it failed to use the correct technical configuration for Channel C2 licensed to Station WLX250.[19] HITN included a

[6] Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission (FCC) to HITN, Attn: Jose Luis Rodriguez (Jun. 9, 1997) (Dismissal Letter) at 1.

[7] *Id*. *citing* 47 C.F.R. §§ 74.903(a)(1), (2).

[8] Petition for Reconsideration (filed Jul. 7, 1997) (First Petition).

[9] *Id*. at 2.

[10] *See* First Petition, Exhibit B and C; *See also* Amended Application Studies 2 and 3.

[11] *See* First Petition, Exhibit B; *See also* Amended Application Study 3.

[12] *See* First Petition, Exhibit C; *See also* Amended Application Study 2. The non-compliant receive site (R6) is located at coordinates 40º-04"-51' N. Lat, 74º-59"-52' W. Long.

[13] First Petition at 2.

[14] Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, FCC to Nancy Soto, Esq., HITN (Aug. 4, 1997) (Second Dismissal Letter).

[15] *Id*. at 2. The undesired signal is greater than the desired signal at four WLX250 receive sites, therefore the D/U ratio is less than the required 0 dB.

[16] Second Dismissal Letter at 1.

[17] Second Petition for Reconsideration (filed Sept. 3, 1997) (Second Petition).

[18] *Id*. at 1.

[19] *Id*. at 1-2.

revised interference study with its Second Petition.[20] The revised study contained a corrected technical configuration for the C2 channel. HITN, through numerous receive antenna upgrades for Station WLX250, concluded that it had resolved the interference concerns.[21] Several of HITN's proposed receive antenna upgrades require Station WLX250 to use twelve-foot dishes. HITN proposed a similar solution for Station WLX823's receive site R6.[22]

6. On October 16, 1997, the Division denied HITN's Second Petition.[23] The Division concluded that HITN's Second Petition was repetitious in violation of Section 1.106(k)(3).[24] With regard to HITN's alternative request to treat its Second Petition as an application for review, the Division concluded that the Commission's rules prohibit applicants for review from raising questions of law or fact upon which the designated authority has been afforded no opportunity to pass.[25] On November 17, 1997, HITN submitted the instant AFR.

III. DISCUSSION

7. HITN makes several arguments in its AFR which it believes warrants reinstating its application. First, HITN argues that its proposed facilities would potentially cause predicted interference to only one of the four channels in the previously authorized adjacent channel group.[26] Therefore, HITN argues that there is no basis to dismiss its application with respect to the other three channels.[27] Second, HITN claims that with respect to the predicted interference to the previously authorized Station WLX823 co-channel receive site R6, the Commission did not provide notice, of a new requirement, that applicants had to identify a specific antenna that would provide the necessary D/U ratio.[28] Further, HITN argues that the reason given for the Division's decision not to consider the technical information submitted by HITN has no basis in prior precedent or pertinent Commission rules, and is thus arbitrary and capricious.[29]

8. We reject HITN's arguments and deny the AFR. Although HITN agrees that the Branch made the correct determination as to harmful interference to adjacent Channel Station WLX250, it now seeks to modify its application by deleting one of the four requested D Group channels.[30] In this connection, HITN suggests that we grant it an authorization for the three D Group channels that would not cause interference.[31] However, HITN fails to specify the channel to delete from its application to make its proposed operations consistent with the applicable interference rules.[32] Channels D1 and D2 are

[20] *Id*. at Exhibit 1.

[21] *Id*. at 3.

[22] *Id*. at 3.

[23] Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, FCC to Benjamin Perez, Esq., Abacus Communications Company (Oct. 16, 1997) (Third Dismissal Letter).

[24] *See id*. at 1-2 *citing A.G.P., Inc.*, 11 FCC Rcd 4628, 4629 (1996).

[25] *See* Third Dismissal Letter at 2 *citing* 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c).

[26] AFR at 6-7.

[27] AFR at 1- 2.

[28] AFR at 8.

[29] *Id*. at 2.

[30] AFR at 6-7.

[31] AFR at 6.

[32] *Id*.

immediately adjacent to Channel C2.[33] Consequently, both channels D1 and D2 are predicted to cause interference to Channel C2. Therefore, HITN's proposal to delete one of the four requested D Group channels would not cure the interference problem because HITN's proposed operations on both Channels D1 and D2 are predicted to cause interference.[34]

9. Additionally, HITN's "channel deletion" proposal is defective because it had not presented it previously. Section 1.115(c) of our Rules provides that the Commission will not grant an application for review, which relies on questions of fact, or law, which the designated authority has been afforded no opportunity to pass.[35] HITN asserts that it notified the designated authority that the interference only affects one channel, and not all four. It is true that the interference potential identified in the course of this proceeding appears to affect one channel, however, HITN did not provide the designated authority with an opportunity to pass on whether a partial grant of the application would be appropriate. HITN specifically requested that the Division reverse the Branch and reinstate the application.[36] At no point earlier in this proceeding did HITN request that the Commission grant it a license for only three of the channels.

10. Further, we note that although HITN had four previous opportunities (application, amended application, First Petition and Second Petition) to suggest a partial grant of its application to the designated authority, HITN continued to request the complete grant of its application. Applicants must provide complete information at the earliest stage to minimize the need for reconsideration proceedings.[37] Requiring applicants to provide complete information at the time they originally file their application promotes the expeditious and efficient processing of all applications.[38] HITN has provided no reason why its proposed modification could not have been made earlier – either to the Branch or the Division. Under these circumstances, we believe that it would be contrary to our rules and precedent to allow HITN to make a supplemental showing at this juncture that a partial grant of its application would be appropriate when that showing could have been made earlier in the proceeding.[39]

11. HITN also maintains that it had no notice that applicants had to provide detailed information concerning the antenna it would use to provide the required interference protection to receive site R6 of Station WLX250.[40] Moreover, HITN asserts that it supplied this information in response to the Dismissal Letter.[41] However, when the Division denied HITN's Second Petition, HITN asserts the

[33] 47 C.F.R. § 74.902(a). Channel D1 band is 2554 - 2560 MHz, channel C2 band is 2560 - 2566 MHz and channel D2 band is 2566 –2572 MHz.

[34] *See* 47 C.F.R. § 74.903(a)(2).

[35] 47 C.F.R. § 1.115(c); *see also* Carol B. Ingram, et.al., *Memorandum Opinion and Order*, 11 FCC Rcd 4100 ¶ 3 (1996); Kenny D. Hopkins, 5 FCC Rcd 604, 605 ¶ 12 (1990).

[36] Second Petition at 1, 3-4. In fact, HITN insisted that it could achieve the D/U ratio at all sites. *Id*. at 3.

[37] *See* Canyon Area Residents, *Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) *quoting Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("We cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.")

[38] Carolyn S. Hagedorn, 11 FCC Rcd 1695, 1696 (1996); *see also* Payne of Virginia, Inc. 66 FCC 2d 633, 637 (1977) (The important public interest in "orderly adjudicative processes and administrative finality ... should not be sacrificed to consider additional evidence which seeks only to offset the party's oversight or lack of diligence ...").

[39] *See Payne*, 66 FCC2d at 637 *citing Fischer v. FCC*, 417 R.2d 551, 555 (D.C.Cir. 1969).

[40] *See* para. 7 *citing* AFR at 8. HITN refers to this antenna as "off-the-shelf".

[41] AFR at 8.

Branch introduced a new requirement as a condition precedent to the grant of its application.[42] We disagree. We find that HITN had notice of the antenna requirement.

12. Under the applicable rules and precedent, an ITFS application will be conditionally granted, if the applicant establishes that installation of a receiving antenna at an existing licensee's site with characteristics superior to those of the existing antenna will permit the applicant to provide service without interference to the existing licensee.[43] In this connection, the Commission has previously stated that applicants wishing to receive a conditional grant under these circumstances must submit interference calculations for both the existing antenna and the proposed antenna, along with an estimate of the reimbursement costs involved for each affected receive site.[44] Additionally, the applicant must supply the manufacturer, model number(s), co-polar and cross-polar gain patterns of the replacement antenna.[45] Accordingly, we find that HITN had notice that if it desired to modify an existing licensee's receive site, that it had to establish that installation of the new antenna would have characteristics superior to the existing antenna. We also find that HITN failed to satisfy this requirement because it did not identify an antenna that could provide the necessary 20 dB rejection of the unwanted signal.

13. Although HITN asserts that it provided this information after the dismissal of its application, we must have pertinent information to review applications at the earliest opportunity.[46] As indicated previously, requiring applicants to provide complete information at the time they originally file their application promotes the expeditious and efficient processing of all applications. Accordingly, we find the application was defective with regard to this showing. Consequently, we deny this portion of HITN's AFR.

14. HITN also asserts that the Division applied a new requirement to HITN's application at the petition for reconsideration stage.[47] The Division dismissed HITN's Second Petition on two grounds. First, the Division found the Second Petition was repetitious pursuant to Section 1.106(k)(3).[48] Second, the Division declined to treat the filing as an application for review because it contained facts which HITN did not provide to the delegated authority (interference abatement techniques).[49] We, however, do not believe that the Division applied a new requirement to HITN. In dicta,[50] the Division indicated that the Commission's records showed that the existing licensees had two-foot dishes, while HITN proposed modifying the antennas to twelve-foot dishes. The Division indicated that HITN had not supplied information concerning the acceptability of these modifications, *i.e.* consent of existing licensees, sturdiness of current structure to support increased antenna sizes.[51] The Division clearly and succinctly determined that the petition was repetitious and that it failed to satisfy the application for review procedural requirements. The Division did not require HITN to show that it had the consent of the

[42] *Id*.

[43] 47 C.F.R. § 74.903(a)(4); *see also* Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service, *Memorandum Opinion and Order*, 59 Rad. Reg.2d 1355 ¶ 80 (1986). The applicant must also bear the costs of upgrading the existing licensee's reception equipment at the site. *Id*.

[44] *Id*. ¶ 81.

[45] 47 C.F.R. § 74.903(a)(4).

[46] *See* para. 10 above.

[47] AFR at 8.

[48] Third Dismissal Letter at 1-2.

[49] *Id*. at 2.

[50] *Id*. at n.1.

[51] Third Dismissal Letter at 2 n.1.

existing licensees. Accordingly, we conclude that this argument is not a basis upon which any relief is warranted.

IV. CONCLUSION AND ORDERING CLAUSES

15. In light of the foregoing and the record before us, we conclude that grant of HITN's AFR is not warranted under the circumstances presented. Specifically, we find that HITN filed a deficient application which was properly dismissed.

16. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5) and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Hispanic Information and Telecommunications Network, Inc. on November 17, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary