

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

In the Matter of the Application of )  
 )  
Robert D. Hostetler ) File No. 50074-CM-P-90  
 )  
For Authority to Construct and Operate a )  
New Multipoint Distribution Service Station )  
on the E Channels at Anchorage, Alaska )

ORDER ON RECONSIDERATION

Adopted: January 30, 1998

Released: January 30, 1998

By the Assistant Chief, Video Services Division:

I. INTRODUCTION

1. The Video Services Division has before it, pursuant to 47 C.F.R. § 1.106(a), a petition for reconsideration filed by Robert D. Hostetler (Hostetler) of the dismissal, pursuant to delegated authority, of an application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E channels at Anchorage, Alaska. For the reasons discussed below, we deny the reconsideration petition.

II. BACKGROUND

2. Hostetler filed the above-referenced application for a new MMDS station at Anchorage on November 27, 1989. A Commission staff review of the application revealed that the application was unacceptable for filing.<sup>1</sup> Consequently, the application was dismissed by letter dated July 31, 1995, which stated that the applicant (1) failed to include interference analyses, as required by 47 C.F.R. § 21.902, for all previously proposed or authorized MMDS or Instructional Television Fixed Service (ITFS) stations; (2) failed to comply with the technical

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<sup>1</sup> Section 21.20(a) of the rules, 47 C.F.R. § 21.20(a), sets forth the standards for acceptability of MDS applications for filing:

- Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
- (1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or
  - (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

requirements of 47 C.F.R. § 21.902; (3) failed to provide a written description of outage notification procedures, as required by 47 C.F.R. § 21.15(e); (4) failed to provide a list of the program input facilities, as required by 47 C.F.R. § 21.13(a)(3); and (5) filed for an area not open for filing pursuant to 47 C.F.R. § 21.901(d)(4) as the applicant did not meet the criteria established in *Public Notice, Common Carrier Bureau Opens Filing Period for Multichannel Multipoint Distribution Service Applications*, 3 FCC Rcd 2661 (Comm. Car. Bur. 1988) (1988 *Public Notice*).

3. The applicant filed a timely petition for reconsideration on September 8, 1995. On reconsideration, petitioner argues that his interference studies are adequate, the application was filed on an appropriate date, and the information regarding program input facilities and outage notification procedures meets the Commission's requirements. Petitioner further contends that if his interference studies are inadequate, the dismissal letter's failure to articulate the reasons does not comply with the Administrative Procedure Act. Finally, petitioner asserts that the Commission has adopted a "letter perfect" standard for determining the acceptability of his application without sufficient notice.

### III. DISCUSSION

4. Because we find dispositive petitioner's failure to submit required interference showings with his application and to give notice, by service of these studies to the parties required to be studied, it is unnecessary to address petitioner's other arguments regarding his application deficiencies. As discussed in detail below, interference analyses are necessary at the time of application filing due to the extensive planning and engineering involved in the MDS licensing process. In addition, service upon affected parties, as defined by 47 C.F.R. § 21.902(g), is provided for in the Commission's rules so that parties in interest have actual notice of the proposed station and sufficient time to respond if desired. Even if we were to accept petitioner's arguments concerning other deficiencies cited in the dismissal letter, Hostetler's application is still deficient due to the failure to comply with the requirements of 47 C.F.R. § 21.902.

5. Interference Protection. At the time this Anchorage application was filed, in order to demonstrate compliance with Section 21.902(b), and so that mutually exclusive determinations could be made, Section 21.902(c)(1) of the Commission's rules required that an MDS applicant include with the application an analysis of the potential for harmful interference with any authorized or previously proposed station if the applicant's proposed transmitting antenna had an unobstructed electrical path to any part of the protected service area of any other authorized or previously proposed cochannel station, or if the applicant's proposed transmitter was within 50 miles of the transmitter coordinates of any other authorized or previously proposed cochannel station. 47 C.F.R. § 21.902(c)(1) (1989). For adjacent channels, Section 21.902(c)(2) required that an MDS applicant include with the application an analysis of the potential for harmful interference if the applicant's proposed transmitting antenna had an unobstructed electrical path

to any part of the protected service area of any other authorized or previously proposed adjacent channel station. 47 C.F.R. § 21.902(c)(2) (1989). The applicant was also required to show what steps it has taken to comply with the requirements of Section 21.902(a), which required MDS applicants, licensees, and conditional licensees to make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel stations in the same area and cochannel stations in nearby areas. 47 C.F.R. § 21.902(a) (1989).

6. These interference showings are a significant requirement because the Commission understands that certain adjacent channel interference problems might arise. The Commission also anticipated that some authorized cochannel stations would be spaced more closely than ordinarily allowed and require careful planning and engineering. *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1264 (1983). Thus, the Commission stressed that "we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*" *Id.* (emphasis in original). See also 47 C.F.R. § 21.902(b)-(c). Because petitioner failed to make the required showings regarding interference protection, his application cannot be characterized as complete or in substantial compliance with the Commission's rules. See *New Channels Communications, Inc.*, 57 RR 2d 1600, 1602 (1985). "In the processing of MDS station applications, the interference analyses required by 47 C.F.R. Sec. 21.902 are crucial." *Dan S. Bagley, Jr.*, 7 FCC Rcd 4002, 4003 (Dom. Fac. Div. 1992).

7. Petitioner's application was properly dismissed for failure to comply with the Commission's interference protection requirements. In a *de novo* review on reconsideration, we have determined that Hostetler failed to file all seven of the analyses required by 47 C.F.R. § 21.902. Specifically, petitioner failed to file interference studies for: (1) the subsequently authorized 1983 MMDS station WMH736; (2) the subsequently authorized post-1983 MMDS station WMX529;<sup>2</sup> (3) four then-pending 1983 MMDS applications;<sup>3</sup> and (4) one pending, previously proposed, post-1983 MMDS application, File No. 50257-CM-P-88. For six of the previously-proposed stations requiring study, petitioner stated erroneously that there was no line of site to them. Our independent engineering study reveals that petitioner's proposed facility does

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<sup>2</sup> An exhibit submitted with the application indicated that WMX529 would collocate at Hostetler's transmitter site and WMX529 would file a change of location specifying the same geographic coordinates as Hostetler. At the time Hostetler's application was filed, his proposed site was .12 miles away from WMX529's site, and thus, Hostetler was required to include an interference analysis for WMX529. We note that on the date Hostetler's application was dismissed, WMX529 had not yet filed such a modification.

<sup>3</sup> Application File Nos. 05108-CM-P-83, 08222-CM-P-83, 14591-CM-P-83 and 05111-CM-P-83.

have line of site to those proposed stations. Thus, petitioner was required to submit interference studies for the proposed stations. Petitioner's erroneous assertion and failure to submit required interference studies demonstrates a lack of technical qualifications to operate an MMDS station. See 47 C.F.R. § 21.900(a).

8. We note that Hostetler failed to submit required interference analyses for authorized or previously proposed stations which had appeared on prior public notices.<sup>4</sup> Petitioner states that he filed the application in response to the *1988 Public Notice*, and argues that he submitted the interference studies that were specified in that public notice. The *1988 Public Notice* explicitly stated that applications would be subject to dismissal unless the applications substantially complied with the Commission's rules. In addition, the *1988 Public Notice* specifically referenced Section 21.902, which required applicants to file interference studies for all proposed or authorized stations within line of site and cochannels within 50 miles. Here, petitioner failed to file, among others, a study for WMX529 located a mere .12 miles away. Thus, petitioner was not excused from filing studies required by 47 C.F.R. § 21.902. See *20 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at Two Transmitter Sites*, 10 FCC Rcd 11233, 11236-38 (1995).<sup>5</sup>

9. We reject petitioner's contention that even if he omitted certain interference studies, the omission would have no regulatory significance where the interference studies involved applications that were dismissed or forfeited prior to the staff's review of petitioner's application.<sup>6</sup> Petitioner believes that the Commission was concerned with then-pending 1983 applications for stations in Kenai and Homer, Alaska. Petitioner points out that these applications were dismissed or forfeited before petitioner's application was reviewed by the staff. These circumstances would not excuse petitioner's failure to submit required interference studies as these station applications were pending at the time Hostetler's application was filed. Hence, Section 21.902 required petitioner to submit interference analyses with his application. Interference studies are necessary at the time of filing in order to determine mutual exclusivity. Without such studies a logjam

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<sup>4</sup> The application for WMX529 appeared on public notice on March 29, 1989. The application for WMH736 appeared on public notice on February 24, 1987. The four pending 1983 applications appeared on public notice on February 15, 1987. All three public notice dates were prior to the filing of petitioner's application on November 27, 1989. Application File No. 50257-CM-P-88, filed on June 23, 1988, appeared on a publicly-available staff listing of March 17, 1989.

<sup>5</sup> Our engineering review reveals that petitioner failed to design its proposed station to provide at least 45 dB of cochannel interference protection or at least 0 dB of adjacent channel interference protection, as required by Section 21.902(b), for authorized MMDS stations WMX529 and WMH736, and for MMDS stations proposed in five applications, File Nos. 05108-CM-P-83, 08222-CM-P-83, 14591-CM-P-83, 05111-CM-P-83 and 50257-CM-P-88. *R. Gardner Partners*, 10 FCC Rcd 11612, 11620 (1995).

<sup>6</sup> We note that previously-proposed MMDS station WMX529 was granted on October 26, 1995.

would be created, making it more difficult to reach final actions.

10. Notice to Affected Parties. In addition to submitting the required interference analyses to the Commission, an MDS applicant also must serve and submit a list of each required interference study upon the applicant, conditional licensee or licensee at each previously proposed or authorized station required to be studied, pursuant to 47 C.F.R. § 21.902(g). Petitioner failed to serve copies of the required interference analyses, as mandated by 47 C.F.R. § 21.902(g), on any of the required applicants, conditional licensees and licensees for stations stipulated to be studied by Section 21.902(c), thus depriving affected parties of notice and opportunity to be heard. In *Edna Cornaggia*, 8 FCC Rcd 5442, 5444 (Dom. Fac. Div. 1993), the return of a modification application was upheld for failure to comply with Section 21.902(g). "Due to this lack of service, the orderly process contemplated in the Commission's rulemaking order, in which Commission staff resolves interference problems after oppositions are filed, was negated." *Id.* Thus, this application was also properly dismissed as unacceptable for filing based on its failure to comply with the service requirements contained in Section 21.902(g).

11. Sufficiency of Statement of Reasons for Dismissal. Petitioner argues that the staff's dismissal letter did not articulate the dismissal reasons, and, thus, does not comply with the Administrative Procedure Act. We disagree. Section 21.20(a), which governs the disposition of defective applications, merely requires "a brief statement as to the omissions or discrepancies." The dismissal letter indicated several reasons why the application was unacceptable for filing and cited the relevant rule sections. We reject petitioner's contention that the dismissal letter was required to identify the stations not studied, by applicant name, file number and call sign.<sup>7</sup> We believe the reasons stated in the letter were sufficient for petitioner to understand the basis for the dismissal action. See *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994) (brief explanations of why applications were dismissed were adequate since explanations were sufficient for the parties and court to understand decision basis); *WAIT Radio*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969) ("[T]he agency is not required to author an essay for the disposition of each application."). See also *65 Applications for Authority To Construct and Operate Multipoint Distribution Service Stations at Three Transmitter Sites*, 10 FCC Rcd 11162, 11176 (1995).

12. Acceptability for Filing Standard. According to petitioner, the Commission adopted a "letter perfect" standard with respect to the acceptability of MDS applications without sufficient notice and opportunity for compliance. Petitioner cites two cases, *James River Broadcasting Corporation v. FCC*, 399 F.2d 581 (D.C. Cir. 1968), and *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968), for the proposition that the Commission must give sufficient notice before switching from the "substantial compliance" standard to a "letter perfect" standard.

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<sup>7</sup> Petitioner contends that the dismissal letter was insufficient because the staff did not fill in the blank spaces provided for licensees and applicants required to be studied. These blank spaces are for illustrative purposes only, as the language states, ". . . including but not limited to . . ."

Petitioner's reliance on *James River* and *Radio Athens* is misplaced. The decisions in both cases primarily rested upon the "substantially complete" criterion for acceptability of applications. See 47 C.F.R. § 1.227(b)(1). In contrast to the rules governing the *James River* applications, the standard specified by Part 21 is "acceptable for filing." See 47 C.F.R. § 21.31(b)(2). Section 21.20(a) of the Commission's rules sets forth two tests in which one or the other must be met in order for an application to be deemed "unacceptable for filing," and states that an application deemed unacceptable for filing will be returned to the applicant. See n.1, *supra*. Once the Part 21 rules were changed over 20 years ago, "*James River* [was] no longer applicable to applications filed under Part 21 of the Commission's rules. . . . [T]he standard for evaluating applications under Part 21 of the rules is not 'substantial completeness,' but rather 'acceptability for filing.'" *G.C. Cooper*, 8 FCC Rcd 7007, 7008 n.9 (Dom. Fac. Div. 1993) (citations omitted). Indeed, it was in response to *James River* that the Commission created the Part 21 standard in its present form:

[T]he application must be in a condition acceptable for filing, a revised requirement which we believe is, in light of case interpretation and past policy, less ambiguous than the present requirement of "substantial completeness." The present terminology has caused some processing confusion because it has been construed as establishing different standards for defective applications such that it is possible for a "skeleton" application to be otherwise unacceptable for filing and yet be "substantially complete" enough to be entitled to comparative consideration with a competing application.

*Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, 60 FCC 2d 549, 552 (1976) (referring to *James River* in footnote).

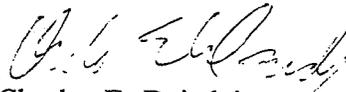
13. The Part 21 acceptability rules meet the "full and explicit notice" test discussed in *Radio Athens*. The Commission, in referring to the order adopting the change, *see id.*, explicitly stated that "all MDS applicants have been on notice since 1976 of the processing requirements for MDS applications and the requirement that the applications be in a 'condition acceptable for filing' in order to be entitled to comparative consideration." *New Channels Communications, Inc.*, 57 RR 2d at 1601 n.3 (1985). Sections 21.20(a) and 21.31(b) provide the criteria for rendering an application unacceptable for filing and depriving it of comparative consideration. See *Florida Cellular Mobil Communications Corporation v. FCC*, 28 F.3d 191, 198 (D.C. Cir. 1994) ("The Commission need not supply a separate 'shopping list' specifying that each separate rule violation may lead to dismissal. It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules."). Petitioner had full notice of the standard under which his application was evaluated. Moreover, the acceptable for filing standard is not a "letter perfect" standard as petitioner contends. See *North Florida MMDS Partners*, 10 FCC Rcd 11593, 11608 (1995).

14. Petitioner also asserts that the Commission should have given him a reasonable opportunity to correct his Anchorage application. As discussed above, since petitioner's application lacked interference analyses at the time of filing, the application did not substantially comply with the Commission's rules and was properly dismissed as unacceptable for filing pursuant to Section 21.20(a). See *101 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations*, 9 FCC Rcd 7886, 7899 (1994), *aff'd mem.*, *A/B Financial, Inc., et al. v. FCC*, No. 95-1027 (D.C. Cir. Dec. 26, 1995) (per curiam) ("[P]etitioners' applications were returned as unacceptable because they . . . failed to submit and serve the required interference studies at the time the application was initially filed, as specified by § 21.902."). Although petitioner claims that he was not given an opportunity to amend his interference analyses, this assertion is incorrect. Petitioner had ample opportunity to amend his application prior to his dismissal.<sup>8</sup>

#### IV. CONCLUSION

15. Conclusion. In view of all the foregoing considerations, we affirm the staff's dismissal of the above-referenced application. Reconsideration is not justified and reinstatement of the application is not warranted. Accordingly, IT IS ORDERED, that the reconsideration petition filed by Robert D. Hostetler IS HEREBY DENIED.<sup>9</sup> IT IS FURTHER ORDERED that the staff of the Video Services Division shall send a copy of the decision to the authorized representative for the petitioner by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION



Charles E. Dziedzic  
Assistant Chief, Video Services Division  
Mass Media Bureau

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<sup>8</sup> Subsequent to petitioner's filing but prior to its dismissal, the Commission imposed a freeze, effective April 9, 1992, on, among other things, the filing of most amendments to pending applications. *Notice of Proposed Rulemaking*, 7 FCC Rcd 3266, 3270 n.35 (1992). Section 21.23(a) which allows, under certain circumstances, amendments as of right was also changed to include "provided, however, that . . . the Commission has not otherwise forbidden the amendment of pending applications." 47 C.F.R. § 21.23(a). However, petitioner still had over two years, from November 27, 1989, to April 9, 1992, to amend his application to include information, such as interference studies, which should have been submitted with his application.

<sup>9</sup> On January 29, 1990, Echonet Corporation filed a petition to deny for petitioner's application. Due to our disposition of this reconsideration petition, we hereby dismiss as moot this petition to deny.