

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

In the Matter of Application of)	
)	
ALBION COMMUNITY DEVELOPMENT)	File No. BPLIF-19951017AB
CORPORATION)	Facility ID No. 81037
)	
For Authority to Construct New Instructional)	
Television Fixed Service Station On the B-Group)	
Channels, Binghamton, New York)	
)	

ORDER ON FURTHER RECONSIDERATION

Adopted: April 16, 2003

Released: April 24, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Further Reconsideration*, we address a petition for reconsideration filed on March 28, 2002 by Albion Community Development Corporation (Albion).¹ Albion seeks reconsideration of the denial by former Mass Media Bureau’s Video Services Division of Albion’s September 17, 1997 reconsideration petition regarding authority to construct a new Instructional Television Fixed Service (ITFS) station at Binghamton, New York. For the reasons stated below, we deny the Petition.

2. *Background.* On December 13, 1994, Grand Spectrum Alliance Elmira (F) Partnership (Grand Spectrum) was issued a construction permit for ITFS Station WMX691, Ashland, New York.² On December 12, 1995, Grand Spectrum certified completion of construction of Station WMX691.³ The construction certification was granted on May 22, 2000.⁴ On June 30, 2000, Grand Spectrum received consent to assign the license for Station WMX691 to Winbeam, Inc. (Winbeam).⁵ Station WMX691 operates on the B-group channels.⁶

¹ Petition for Reconsideration (filed Mar. 28, 2002) (Second Petition). 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). 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.*

² File No. BPMDC-9200427.

³ File No. BLMDC-9650261.

⁴ See ITFS Public Notice Report No. 167 (rel. May 25, 2000).

⁵ File No. BALMDC-20000417AAC.

⁶ The B-group channels consist of the frequencies 2506-2512 MHz, 2518-2524 MHz, 2530-2536 MHz, and 2542-2548 MHz. See 47 C.F.R. § 74.902(a).

3. Albion, on October 17, 1995, filed the above-referenced application to operate on the B-group channels in Binghamton, New York. The application appeared on public notice as tendered for filing on November 9, 1995.⁷ On August 18, 1997, the Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau (Branch) dismissed the above-referenced application because its proposed facility was predicted to cause harmful interference to the protected service area (PSA) of co-channel ITFS Station WMX691.⁸ On September 17, 1997, Albion requested reconsideration of the dismissal.⁹ Albion argued that although its application showed “*de minimus*” interference to Station WMX691’s PSA, Albion did not seek a consent letter because the Commission’s records did not indicate that the station was ever constructed.¹⁰ Accordingly, Albion concluded the station was abandoned or forfeited. On February 26, 2002, the Branch denied Albion’s First Petition.¹¹ In denying reconsideration, the Branch rejected Albion’s argument that Commission records indicated that Station WMX691 was never constructed.¹² The Branch indicated that Station WMX691¹³ was certified as constructed in 1995.¹⁴

4. Albion filed the instant Petition on March 28, 2002. Albion argues that Winbeam has consented to receive interference from Albion’s proposed station, contingent upon Winbeam entering into a lease agreement within ninety days of the date of the consent letter.¹⁵ Albion now contends because Winbeam is the only entity that would be adversely affected by its station and Winbeam has conditionally consented to accept interference,¹⁶ the Commission should now grant reconsideration and reinstatement of Albion’s application based on changed circumstances pursuant to Section 1.106(c)(1) of the Commission’s Rules.¹⁷ Alternatively, Albion argues that reconsideration is in the public interest because no party would be harmed and because a grant of its application would promote the development of advanced wireless systems in the Binghamton, New York area.¹⁸

5. *Discussion.* We note, as an initial matter, that Albion does not challenge the Branch’s ruling that its proposed facility would cause interference to Station WMX691. Section 1.106 of the Commission’s Rules requires petitions to cite the findings of fact and/or conclusions of law which the petitioner believes are erroneous, and state with particularity the respects in which such findings and conclusions should be changed.¹⁹ Albion provides no basis on which to conclude that the dismissal of its

⁷ See ITFS Public Notice Report No. 23631-A (rel Nov. 9, 1995).

⁸ See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Albion (dated Aug. 18, 1997). Public notice of the dismissal was given on August 26, 1997. See MMB ITFS Public Notice Report No. 44063 (rel. Aug. 26, 1997).

⁹ Petition for Reconsideration (filed Sep. 17, 1997). (First Petition)

¹⁰ See First Petition.

¹¹ See Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Albion (dated Feb. 26, 2002) (Reconsideration Letter).

¹² Reconsideration Letter.

¹³ The Reconsideration Letter erroneously referred to Station WLX691.

¹⁴ Reconsideration Letter.

¹⁵ Letter dated March 26, 2002 from George Bott to Mark Schoeppner, Winbeam, Inc. (Petition, Exhibit B).

¹⁶ See Second Petition at 4. Albion indicates that this is the sole basis given by the former Mass Media Bureau for dismissing Albion’s application.

¹⁷ 47 C.F.R. § 1.106(c)(1)

¹⁸ Second Petition at 4-5.

¹⁹ See Mike Gruss, *Order on Reconsideration*, 17 FCC Rcd 466 ¶ 3 (WTB PSPWD 2002); Federal Express Corporation, *Order*, 15 FCC Rcd 4289, 4293 n.40 (WTB PSPWD 2000). 47 C.F.R. § 1.106(d)(1).

application was improper. Consequently, we find that Albion has failed the threshold requirement to obtain reconsideration.

6. We nonetheless note that Albion contends that we should reinstate and grant its application due to changed circumstances. Albion asserts that the assignment of license for Station WMX691 from Grand Spectrum to Winbeam and Winbeam's consent to Albion's proposed operation constitute changed circumstances.²⁰ We disagree. Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three circumstances: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;²¹ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;²² or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.²³ In this case, we find that none of these circumstances is present. As Albion admits, Winbeam acquired Grand Spectrum's license for Station WMX691 in October 2001, or over four months before the Reconsideration Letter was issued. Albion could have attempted to obtain Winbeam's consent prior to the issuance of the Reconsideration Letter, which it failed to do. Further, it appears that Albion did not learn that Winbeam had acquired the license until after the Reconsideration Letter was released. Against this backdrop, we believe that by exercising due diligence, Albion could have presented the "changed circumstances" it now discusses prior to the issuance of the Reconsideration Letter. Accordingly, we conclude that Section 1.106(c)(1) of the Commission's Rules is therefore not applicable.

7. We also conclude that consideration of the consent letter Albion obtained from Winbeam, at this time, is not in the public interest. The Commission's Rules require applicants to submit consent letters from the affected parties with the original application.²⁴ Pursuant to Section 74.903 of the Commission's Rules,²⁵ an application for an ITFS station must protect previously proposed facilities from interference and will not be granted if interference is predicted to occur. Given that applications must be filed only during designated filing windows,²⁶ it is vital that applicants submit all necessary consent letters with the original application. Considering consent letters that did not exist at the time the original application was filed encourages the filing of incomplete applications and places an undue burden on the Commission's limited resources. As the Commission has stated before, "[w]e 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.'"²⁷ We consider the fact that such consent letter was proffered almost seven years after the subject application was filed to be decisionally significant. We believe that such time

²⁰ Second Petition at 2-4.

²¹ 47 C.F.R. § 1.106(c)(1)(i).

²² 47 C.F.R. § 1.106(c)(1)(ii).

²³ 47 C.F.R. § 1.106(c)(2).

²⁴ See, e.g., *Guadalupe Valley Electric Cooperative, Order on Reconsideration*, 11 FCC Rcd 7434, 7442-43 (1996); *In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1465-66 (1994); *Family Entertainment Network, Inc., Order on Reconsideration*, 9 FCC Rcd 566, 567-68 n.10 (1994).

²⁵ 47 C.F.R. § 74.903.

²⁶ See *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, Report and Order*, MM Docket No. 93-24, 10 FCC Rcd 2907 (1995).

²⁷ 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).

frame is inconsistent with the applicable provisions of the Commission's Part 74 rules regarding the substance of ITFS applications. We therefore decline to consider the consent letter Albion provided in its petition for reconsideration.

8. For the reasons discussed herein, we conclude that Albion has failed to meet the standard for consideration of its consent letter from Winbeam at this juncture. We therefore deny Albion's Petition.

9. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Albion Community Development Corporation on March 28, 2002 IS DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

