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

In the Matter of Applications of	)	
	)	
PIONEER TELEPHONE COOPERATIVE, INC.	)	File Nos. 51618-CM-MP-96 and
	)	50905-CM-MP-96
For Authority to Modify Instructional Television	)	
Fixed Service Stations WMX712 and WMX716,	)	
Woodward, Oklahoma.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2003 **Released: August 22, 2003**

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

1. *Introduction*. In this *Memorandum Opinion and Order*, we address Petitions for Reconsideration[1] filed on December 4, 2000, by Nucentrix Spectrum Resources, Inc. (Nucentrix), seeking reconsideration of the dismissal of the above-captioned applications for authority to modify Instructional Television Fixed Service[2] (ITFS) Stations WMX712 and WMX716, Woodward, Oklahoma. For the reasons discussed below, we grant the Nucentrix Petitions in part and otherwise deny the Petitions.

2. *Background*. In 1963, the Commission established ITFS in the 2500-2690 MHz band on a shared basis with existing Fixed Service stations.[3] When the Commission established ITFS, it indicated that the service was envisioned to be used for transmission of instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students.[4] It also permitted ITFS licensees to use the channels for incidental purposes.[5] These incidental purposes included the transmission of cultural and entertainment material to those receiving locations; the transmission of special training material to selected receiving locations outside the school system such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments; the transmission of special material to professional groups or individuals to inform them of new developments and techniques in their fields and instruct them in their use; and to perform other

[1] Petitions for Reconsideration (filed Dec. 4, 2000) (Petitions). We will refer to the petition for reconsideration filed with respect to the B-Group application as the B-Group Petition, and we will refer to the petition for reconsideration filed with respect to the C-Group application as the C-Group Petition.

[2] Instructional Television Fixed Service stations are primarily used to provide educational and cultural materials in aural and visual form, to students in accredited public and private schools, colleges, and universities. However, wireless cable entities may apply for ITFS frequencies under certain circumstances. *See* 47 C.F.R. § 74.990.

[3] *See* Educational Television *Report and Order*, Docket No. 14744, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

[4] Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (*citing ETV Decision*, 39 FCC 846, 853 ¶ 25).

[5] *Id.*

related services directly concerned with formal or informal instruction and training.[6] In addition, when the ITFS facilities were not being used for such incidental purposes, the licensee could use them for administrative traffic (*e.g.*, transmission of reports, assignments and conferences with personnel);[7] however, individual stations, or complete systems could not be licensed solely for handling administrative traffic.[8]

3. In 1990, the Commission initiated a proceeding to review and simplify disparate technical, procedural, ownership and other requirements and restrictions in the three microwave radio services used in the provision of wireless cable service -- Multipoint Distribution Service (MDS),[9] Private Operational Fixed Service (OFS), and ITFS.[10] By affording wireless cable operators a more accommodating regulatory framework, the Commission aimed to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace. At the same time, the Commission wished to ensure that ITFS continued to be a useful tool for providing educational opportunities.[11]

4. On October 26, 1990, the Commission released a *Report and Order* that resolved most of the issues in that proceeding. The Commission, on October 25, 1991, adopted a proposal to permit use of available ITFS channels by wireless cable entities.[12] This proposal was implemented in the *Second Report and Order* as Section 74.990 of the Commission's Rules. In order to ensure that wireless cable use did not have a negative impact upon ITFS, the Commission established a series of requirements that must be met before ITFS channels could be used for wireless cable use.[13]

5. On February 12, 1992, Pioneer Telephone Cooperative, Inc. (Pioneer) filed two applications[14] for new ITFS stations on the B-Group[15] and C-Group[16] frequencies at Woodward,

[6] *Id.*

[7] *Id*.

[8] *Id*.

[9] The term MDS will generally be used to refer collectively to single channel (MDS) and multiple channel (MMDS) multipoint distribution service. The use of MMDS will specifically refer to that individual service in those cases where the distinction is significant. Single channel operations will be referred to as "MDS", where appropriate.

[10] *See* Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792 at ¶ 1 (1990) (*Second Report and Order*) (citing Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket Nos. 90-54 and 90-113, *Notice of Proposed Rule Making and Notice of Inquiry*, 5 FCC Rcd 971 (1990)).

[11] *Second Report and Order* at ¶ 1 (citing Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, Gen. Docket Nos. 90-54 and 90-113, *Report and Order*, 5 FCC Rcd 6410 (1990).

[12] *Second Report and Order* at ¶ 4 and ¶¶ 42-58; *see also Second Report and Order* at Appendix C; 47 C.F.R. § 74.990 (1991).

[13] *See* 47 C.F.R. § 74.990.

[14] File Nos. CIP-9201763 and CIP-9201764.

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

Oklahoma. The B-Group application was granted on June 2, 1995 and assigned call sign WMX712. The C-Group application was granted on August 25, 1995 and assigned call sign WMX716. Pioneer filed a timely certification of completion of construction for Station WMX716 on September 20, 1995.[17] On February 1, 1996, Pioneer submitted a Certification of Completion of Construction, FCC Form 494A, for Station WMX712.[18]

6. On February 2, 1996, Pioneer filed the above-captioned applications to relocate Stations WMX712 and WMX716 and increase transmitting antenna height. On April 3, 1996, Pioneer filed an application for Special Temporary Authority[19] (STA) to operate Station WMX716 at a new antenna tower specified in its modification application.[20] On August 28, 1997, Pioneer filed an application[21] for consent to the assignment of the licenses of Stations WMX712 and WMX716 from Pioneer to Heartland Wireless Commercial Channels, Inc. (Heartland). Its application was granted on March 6, 1998. On March 18, 1998, as required in the Consent of Assignment,[22] FCC Form 732-MDS, Heartland provided the Commission with notification of consummation of this assignment. On April 5, 1999, Heartland filed an application for authority to assign the licenses of its numerous MDS[23] and ITFS stations, including Stations WMX712 and WMX716, to Nucentrix Spectrum Resources, Inc. That application was granted on May 11, 1999. The transaction was consummated on May 12, 1999.[24]

7. On October 30, 2000, the staff of the Video Services Division of the former Mass Media Bureau dismissed the captioned B-group application and C-group application.[25] Public notice of the dismissal was given on November 2, 2000.[26] The applications were dismissed because (1) they were not filed during a window in which major change applications could be filed and (2) the conditional licenses

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[16] The C-group channels consist of the frequencies 2548-2554 MHz, 2560-2566 MHz, 2572-2578 MHz, and 2584-2590. *See* 47 C.F.R. § 74.902(a).

[17] On January 29, 2003, Nucentrix submitted a copy of the certification of completion of construction for the file number associated with Station WMX716. The certification that Nucentrix provided lists an incorrect grant date, no call sign, and does not have a readable date stamp. However, our fee records show that a fee payment for $2,100 (the fee for a certification of completion of construction) was received from Pioneer on September 20, 1995.

[18] File No. BLMPMDC-9650513.

[19] *See* Letter dated March 26, 1996, from Pioneer Telephone Cooperative, Inc. to Charles Gratch, Engineer, Federal Communications Commission. In light of our conclusion that the modification application is defective, we will dismiss the STA request.

[20] *See* File No. 50905-CM-MP-96.

[21] File No. 50855-CM-AL-97.

[22] The consent to assignment, FCC Form 732-MDS, dated March 6, 1998, states, "The actual consummation of voluntary transactions shall be completed within 45 days from the date hereof, and notice in letter form thereof shall be furnished to the Commission by the buyer within 10 days from the date of the consummation and shall show the date on which the acts necessary to effect the transaction were completed."

[23] An MDS station is one-way domestic public radio service rendered on microwave frequencies, 2596 MHz -2644 MHz, from a fixed station transmitting to multiple receiving facilities located at fixed points. *See* 47 C.F.R. § 21.2.

[24] *See* Broadband Licensing System database record for Stations WMX712 and WMX716.

[25] *See* Letters dated October 30, 2000 from Thuan V. Pham, Electronics Engineer, MMDS Section, Video Services Division to Richard Ruhl, Pioneer Telephone Cooperative, Inc. (dated Oct. 30, 2000) (Dismissal Letters).

[26] *See* MMB MDS Public Notice Report No. 195 (rel. Nov. 2, 2000).

for Stations WMX712 and WMX716 had been forfeited due to failure to file timely certifications of completion of construction.[27] Nucentrix filed the instant Petitions on December 4, 2000.

8. *Discussion*. In its Petitions, Nucentrix alleges that (1) the construction of Station WMX712 was completed before the deadline, (2) Station WMX716 has been operating under STA since April 3, 1996, and its license is still in full effect, and (3) the modifications proposed in its applications are minor changes[28] and do not have to be filed within an ITFS filing window. Nucentrix provides copies of the Certification of Completion of Construction for Station WMX712 and the Request for STA for Station WMX716. Nucentrix argues that because the Commission granted the application for consent to assign the license from Pioneer to Nucentrix, it has determined that the license for Station WMX716 was valid.[29]

9. Initially, we concur with Nucentrix that the subject licenses did not cancel for failure to construct. With respect to Station WMX712, Nucentrix has demonstrated that it filed a timely certification of completion of construction. With respect to Station WMX716, although Nucentrix did not mention this fact in its petition for reconsideration, our records indicate that Pioneer did file a timely certification of completion of construction.[30] Accordingly, we concur with Nucentrix that it was error to dismiss Pioneer's modification applications because of failure to complete the construction of the stations in a timely manner. We reverse the determination in the Dismissal Letters that the licenses for the stations had been forfeited.

10. In light of our conclusion that Pioneer filed a timely certification of completion of construction, we need not address Nucentrix's argument that the Commission determined that the license for Station WMX716 was valid when it granted an assignment application for that station. We nonetheless note that such argument is contrary to the well-established principle that a cancelled license cannot be validly assigned.[31]

11. With respect to the modification applications, we affirm the determination that the applications were subject to dismissal because they requested major changes to both stations. Section 74.911(c)(1) of the Commission's Rules states that "new and major change applications for ITFS stations will be accepted only on dates specified by the Commission."[32] Section 74.911(a)(1) of the Commission's Rules defines as a major change, *inter alia*, as any increase in the transmitting antenna height of 25 feet or more.[33] As currently licensed, Stations WMX712 and WMX716 have antenna

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[27] *See* Dismissal Letters.

[28] Nucentrix argues in both its B-Group and C-Group Petitions that (1) its modification applications propose for both Stations WMX712 and WMX716 to move the transmitters only about 500 meters, and (2) it does not propose to change channels, polarization, increase the EIRP, or increase the transmitting antenna height for either station. *See* B-Group and C-Group Petitions at 3. In fact, Nucentrix proposes to relocate its stations 6" in Latitude, 18" in Longitude (485m), and increase antenna radiation center by 104m (341.12'). *But see* ¶ 11 *infra.*

[29] *See* C-Group Petition at 2.

[30] *See* note 17, *supra*.

[31] *See* Robert D. Ryan, *Memorandum Opinion and Order*, 17 FCC Rcd 15530, 15532 ¶ 8 (2002) (an expired license cannot be assigned); A-1-A Repeater Company, *Memorandum Opinion and Order*, 16 FCC Rcd 9748 ¶ 7 (2001) (grant of assignment application set aside; Commission holds there was no authorization to assign because license had automatically cancelled); Ten Four Communications, *Memorandum Opinion and Order*, 16 FCC Rcd 1153, 1154 ¶ 6 (WTB PSPWD 2000) (once an authorization was cancelled, the station authorization did not exist and thus could not be assigned).

[32] 47 C.F.R. § 74.911(c)(1).

[33] 47 C.F.R. § 74.911(a)(1).

radiation centers 2,427 feet (739.8 meters) above mean sea level.[34] The applications propose to raise the antenna radiation centers for both stations to 2,557 feet (779.3 meters) above mean sea level.[35] Since Nucentrix is proposing to raise the antenna height by 130 feet, the proposed changes constitute major changes.[36] Because neither application was filed during a window during which major change applications could be filed, we affirm the dismissal of both applications.

12. ACORDINGLY, 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 Petitions for Reconsideration filed by Nucentrix Spectrum Resources, Inc. on December 4, 2000 ARE GRANTED in part and are otherwise DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 73.1635 of the Commission's Rules, 47 C.F.R. § 73.1635, the request for special temporary authority filed by Pioneer Telephone Cooperative, Inc. on March 26, 1996 IS DISMISSED.

14. 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

[34] *See* Licenses for Stations WMX712 and WMX716. The ground elevation is listed as 2,083 feet, and the radiation centers are listed as 344 feet above ground. The height of the radiation center above mean sea level is calculated by adding the two figures.

[35] *See* Applications, Section IV, Question 7 (ground elevation is 630.9 meters above sea level); Section VI, Question 5 (radiation center is 148.4 meters above ground).

[36] 47 C.F.R. § 74.911(a)(1).