

In the Matter of )  
 )  
BCW SYSTEMS, INC. )  
 )  
Request for Reinstatement of Multipoint )  
Distribution Service license WNTJ367, Malden, )  
Missouri )  
 )

## MEMORANDUM OPINION AND ORDER

**Adopted: September 27, 2004**

**Released: September 28, 2004**

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. In this *Memorandum Opinion and Order* we address an informal request of BCW Systems, Inc. (BCW) for re-instatement of the license to operate Multipoint Distribution Service (MDS) Station WNTJ367, Malden, Missouri.<sup>1</sup> For the reasons set forth below, we deny the Reinstatement Request.

## II. BACKGROUND

2. On May 20, 1991, BCW was granted a license to operate an MDS station WNTJ367 in Malden, Missouri.<sup>2</sup> This license carried an expiration date of May 1, 2001.

3. BCW's license to operate station WNTJ367 expired on May 1, 2001.<sup>3</sup> BCW submitted an application for renewal of its license on April 25, 2001.<sup>4</sup> On October 18, 2002, the Wireless Telecommunications Bureau (WTB) released a Public Notice<sup>5</sup> in which it sought to ensure that it had a complete and accurate listing of all licenses and pending applications in the Instructional Television Fixed Service (ITFS) and MDS. For pending applications filed prior to March 25, 2002, the WTB required that the applicant respond in writing by December 18, 2002 if continued processing was desired. The time for

<sup>1</sup> Letter from W.D. Hester to Secretary, Federal Communications Commission (filed May 5, 2004) (Reinstatement Request). We note that the Reinstatement Request should have been accompanied by a late-filed application for renewal of license along with a request for waiver. In light of our conclusion that reinstatement is not warranted, however, we do not believe any purpose would be served by requiring BCW to file a renewal application.

<sup>2</sup> File No. BPMD-771235.

<sup>3</sup> See 47 C.F.R. §21.44(b).

<sup>4</sup> File No. BRMD-20010425AAO.

<sup>5</sup> Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS License Status and Pending Applications, *Public Notice*, DA 02-2751, 67 Fed. Reg. 69010 (WTB 2002) (*October Public Notice*).

licensees and applicants in these services to respond to the *October Public Notice* was originally extended to February 3, 2003<sup>6</sup> and then further extended to February 21, 2003.<sup>7</sup>

4. BCW failed to file a response to the *October Public Notice*. Accordingly, on June 20, 2003, BCW's renewal application was dismissed for failure to prosecute.<sup>8</sup> BCW did not seek reconsideration of the dismissal of the renewal application.

5. On May 5, 2004, the Reinstatement Request was filed by W. D. Hester, a shareholder in BCW. According to Mr. Hester, the shareholders relied on a Mr. Pickney, the President of BCW, to take care of renewing the license.<sup>9</sup> The shareholders were led to believe "that everything was taken care of and the license was still active."<sup>10</sup> Mr. Hester further argues that the shareholders did not know who to contact or what procedures to follow in order to keep their MDS license current.<sup>11</sup>

### III. DISCUSSION

6. By rule, MDS licensees must file their renewal applications between thirty and sixty days prior to the license expiration date.<sup>12</sup> If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.<sup>13</sup> A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.<sup>14</sup> A timely filed petition for reinstatement must adequately explain the failure to timely file the renewal application, and specify the procedures the licensee has established to ensure timely filings in the future.<sup>15</sup> Section 21.44(b) of the Commission's Rules limits consideration of reinstatement petitions to petitions that are filed within thirty days of the expiration date of the license.<sup>16</sup> In this case, while BCW submitted a renewal application prior to the expiration of its license, that application was dismissed for failure to respond to the *October Public Notice*. While BCW could have filed a petition for reconsideration of the dismissal of its renewal application, it failed to do so.

7. Following the dismissal of the renewal application, BCW filed its Reinstatement Request. Under Commission Rules, BCW had until June 1, 2001, thirty days after the expiration of the previous

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<sup>6</sup> Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS License Status And Pending Applications – Request for Extension of Response Date Filed by Multipoint Distribution Service and Instructional Television Fixed Services Licensees, *Order*, DA 02-3371 (rel. Dec. 5 2002).

<sup>7</sup> Letter from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, to Paul J. Sinderbrand, Esq., Wilkinson Barker Knauer LLP (dated Feb. 20, 2003).

<sup>8</sup> Wireless Telecommunications Bureau Announces Action On Responses to Public Notice Regarding ITFS, MDS, and MMDS Pending Applications, *Public Notice*, DA 03-2057, 68 Fed. Reg. 417191-01 (WTB PSPWD 2003).

<sup>9</sup> Reinstatement Request.

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

<sup>11</sup> *Id.*

<sup>12</sup> See 47 C.F.R. § 21.11(c).

<sup>13</sup> Burlington Cablevision, Inc., *Order on Reconsideration*, 13 FCC Rcd 772 ¶ 7 (VSD MMB 1998) (*Burlington*); Superior Broadcasting Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 7543 (DRB CCB 1992) (*Superior*); see also 47 C.F.R. § 21.44.

<sup>14</sup> *Burlington*, 13 FCC Rcd 772 ¶ 7 citing 47 C.F.R. § 21.44(b)(1) – (3).

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

<sup>16</sup> See 47 C.F.R. § 21.44(b)(1).

license, to file a timely reinstatement request.<sup>17</sup> Accordingly, in order to consider its Reinstatement Request, BCW must obtain a waiver of Section 21.44(b)(1) of the Commission's Rules to allow consideration of its untimely Reinstatement Request.

8. We may grant such a waiver if the purpose of the rule will not be served or would be frustrated by its application in the case and that grant of the waiver is otherwise in the public interest.<sup>18</sup> The Commission's MDS reinstatement rule serves two purposes: to ensure that parties will have a date certain after which they may file applications for an area covered by an expired license; and to ensure uninterrupted, authorized service to the public.<sup>19</sup> The Commission has a strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.<sup>20</sup>

9. We find that BCW has failed to make the requisite showing that grant of a waiver is warranted under the circumstances presented. "An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."<sup>21</sup> BCW asserts that waiver of the reinstatement filing requirement is warranted because the failure to renew the license was the result of its President's oversight.<sup>22</sup> We believe that to grant the waiver request and reinstate the forfeited license, under the circumstances presented here, would frustrate the goal of providing a date certain upon which one may file an application for an area covered by an expired license and the goal of ensuring uninterrupted, authorized service to the public and would be inconsistent w/case precedent.<sup>23</sup> We do not believe that BCW's reasons warrant grant of a waiver.<sup>24</sup> BCW has not shown how granting a waiver due to management failures will ensure that parties will have a date certain after which they may file applications for an area covered by an expired license and ensures uninterrupted, *authorized* service to the public. In fact, BCW has shown the opposite. BCW has not provided any explanation for its failure to respond to the *October Public Notice*. To allow the grant of a waiver in this context would eviscerate the reinstatement rule.<sup>25</sup>

#### IV. CONCLUSION AND ORDERING CLAUSE

10. BCW has not provided an adequate explanation for its failure to respond to the *October Public Notice*. Accordingly, we deny its Reinstatement Request.

11. IT IS ORDERED that pursuant to the authority contained in Sections 4(i), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 and Section 21.44(b) of the

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<sup>17</sup> *Id.*

<sup>18</sup> 47 C.F.R. § 21.19.

<sup>19</sup> See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior Broadcasting*, 7 FCC Rcd at 7543 ¶ 4.

<sup>20</sup> See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

<sup>21</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

<sup>22</sup> Reinstatement Request.

<sup>23</sup> See *Burlington*, 13 FCC Rcd 775 ¶ 16.

<sup>24</sup> 47 C.F.R. § 21.19 requires a person seeking a waiver to demonstrate unique facts and circumstances. See *Burlington*, 13 FCC Rcd 780 ¶ 19.

<sup>25</sup> See *WAIT*, 418 F.2d at 1159 (the Commission neither "must [n]or should tolerate evisceration of a rule by waivers."

Commission's Rules, 47 C.F.R. § 21.44(b), the reinstatement request for Station WNTJ367 filed by BCW Systems, Inc. on May 5, 2004 IS DENIED.

12. 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

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau