

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

In the Matter of Applications of
ORANGE COUNTY CHAIRMAN, BOARD OF
COUNTY COMMISSIONERS
For Renewal of License of Multipoint Distribution
Service Stations WFY742 and GW518,
Orlando, Florida
and
Petition for Reinstatement of MDS Licenses for
Stations WFY742 and GW518, Orlando, Florida
File Nos. 20031210AAA, 20031210AAB

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 2004

Released: October 8, 2004

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order we address the two pending applications filed by the Orange County Chairman, Board of County Commissioners (Orange County) for renewal of Multipoint Distribution Service (MDS) Stations WFY742 and GW518 (collectively, the Stations). We also address the requests made by Orange County for a waiver of Section 21.11(c) of the Commission's Rules. For the reasons discussed below, we deny Orange County's Reinstatement and Waiver Requests, and dismiss the Applications.

1 On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, et al.; WT Docket Nos. 03-66, et al., Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

2 See File Nos. 20031210AAA and 20031210AAB (filed Dec, 10, 2003) (Applications).

3 Letters from Joseph A. Belisle, Esq. to Federal Communications Commission (filed Dec. 10, 2003) (Reinstatement and Waiver Requests).

II. BACKGROUND

2. On July 21, 1995, Orange County was granted renewed authorizations to operate MDS Stations WFY742 and WGW518, Orlando, Florida.⁴ The stations are used to distribute Orange County's government access channel to cable television headends in Orange County.⁵ The government access channel is used to provide emergency information to local residents.⁶ The renewed licenses for the Stations carried an expiration date of May 1, 2001. Under the Commission's Rules pertaining to MDS, licensees must file their petitions for renewal applications between thirty and sixty days prior to the license expiration date.⁷ Orange County did not file a renewal application prior to the expiration of its licenses. According to Orange County, the failure to renew the license was the result of their "false impression that the annual reports it filed each year with the Commission were the only filings required to maintain its licenses."⁸

3. On December 10, 2003, Orange County filed the captioned renewal applications.⁹ Orange County also requested waiver of the filing deadlines contained in Section 21.11(c) of the Commission's Rules and reinstatement of the licenses under Section 21.44(b) of the Commission's Rules.¹⁰

III. DISCUSSION

4. As noted above, under the Commission's Rules pertaining to MDS, licensees must file their petitions for renewal applications between thirty and sixty days prior to the license expiration date.¹¹ If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.¹² A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.¹³ 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.¹⁴ 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.¹⁵

5. Orange County's licenses for the Stations expired on May 1, 2001 without any action by the Commission as a result of Orange County's failure to submit a timely renewal application. Orange County was required to submit renewal applications for the Stations between March 1, 2001 and April 1,

⁴ File Nos. BRMD-9157874, BRMD-9157873.

⁵ Reinstatement and Waiver Requests at 1.

⁶ *Id.*

⁷ See 47 C.F.R. § 21.11(c).

⁸ Reinstatement and Waiver Requests at 1.

⁹ Applications.

¹⁰ Reinstatement and Waiver Requests.

¹¹ See 47 C.F.R. § 21.11(c).

¹² 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.

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

¹⁴ *Id.*

¹⁵ See 47 C.F.R. § 21.44(b)(1).

2001. However, Orange County did not file its renewal applications until December 10, 2003. Thus, the renewal applications were untimely in accordance with Section 21.11(c) of the Commission's Rules.¹⁶

6. After failing to submit timely applications for renewal of the Stations, Orange County still had the opportunity to regain their licenses through a petition for reinstatement.¹⁷ Under the Commission's Rules, Orange County had until June 1, 2001, thirty days after the license expiration date, to submit its reinstatement request.¹⁸ However, request for reinstatement from Orange County was not received by the Commission until December 10, 2003.¹⁹ Therefore the petition for reinstatement is untimely in accordance with 47 C.F.R. § 21.11(c).

7. Because of Orange County's failure to submit in a timely manner either the application for renewal, a waiver is required for us to consider the petition for reinstatement despite its untimely submission.²⁰ 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.²¹ 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.²² The Commission has a strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.²³

8. We find that Orange County 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."²⁴ Orange County asserts that waiver of the reinstatement filing requirement is warranted because the failure to renew the license was the result of their "false impression that the annual reports it filed each year with the Commission were the only filings required to maintain its licenses."²⁵ Orange County argues that a waiver would benefit the community of Orange County, FL at large through its provision of disaster warnings and evacuation procedures, as well as its provision of programs which "aspire to address the problems, interests and needs of the citizens and the larger community."²⁶

9. 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 with case precedent.²⁷ We do not believe that

¹⁶ See 47 C.F.R. § 21.11(c); *Burlington*, 13 FCC Rcd at 775 ¶ 7.

¹⁷ See 47 C.F.R. § 21.44 (b)(1).

¹⁸ *Id.*

¹⁹ Reinstatement and Waiver Requests at 1.

²⁰ See *Burlington*, 13 FCC Rcd at 775 ¶ 7; see also *Superior Broadcasting*, 7 FCC Rcd 7543.

²¹ See 47 C.F.R. § 21.19.

²² See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior Broadcasting*, 7 FCC Rcd at 7543 ¶ 4.

²³ See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

²⁴ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

²⁵ Waiver and Reinstatement Request, *supra* at 1.

²⁶ *Id.*

²⁷ See *Burlington*, 13 FCC Rcd 775 ¶ 16.

Orange County's reasons and providing uninterrupted *unauthorized* service, warrant grant of a waiver.²⁸ Orange County has not shown how granting a waiver due to misunderstanding of the Commission's licensing renewal process will ensure that other parties will have a certain date after which they may file applications for an area covered by an expired license and ensures uninterrupted, *authorized* service to the public. In fact, Orange County has shown the opposite. Orange County filed its waiver request over two years after its license expired. To allow the grant of a waiver in this context would eviscerate the reinstatement rule.²⁹ Accordingly, we deny Orange County's Reinstatement and Waiver Request. In light of our denial of Orange County's waiver requests, its renewal applications are subject to dismissal on the basis that they were not filed in a timely manner.³⁰

10. In light of the fact that the Stations play a role in disseminating emergency information, however, we find that the immediate termination of the programming provided by the Stations would not be in the public interest. Rather, the public interest would be best served by granting Orange County limited STA to continue operating the facilities licensed under Stations WFY742 and WGW518 for six months. The purpose of this STA is to allow Orange County to continue to operate its facilities while it makes alternative arrangements for delivering its programming in the future. Upon expiration of the STA, Orange County shall cease all operations of the Stations. Any continued operation following the expiration of the STA will be unauthorized in violation of Section 301 of the Communications Act of 1934, as amended.

IV. CONCLUSION AND ORDERING CLAUSES

11. Orange County failed to adequately state why a waiver is warranted, and accordingly we deny the waiver requests, deny the Reinstatement Request, and dismiss the renewal applications. We grant Orange County an STA for six months to continue operating Stations WFY742 and WGW518 while it makes alternative arrangements for delivering its programming.

12. Accordingly IT IS ORDERED that pursuant to the authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 21.11 and 21.44(b) of the Commission's Rules, 47 C.F.R. §§ 21.11, 21.44, the requests for waiver and reinstatement filed with respect to Stations WFY742 and WGW518 filed by Orange County Chairman, Board of County Commissioners on December 10, 2003 ARE DENIED.

²⁸ 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.

²⁹ *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (the Commission neither "must [n]or should tolerate evisceration of a rule by waivers."

³⁰ *See* 47 C.F.R. §§ 21.11(c), 21.44(b)(1).

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 21.11 of the Commission's Rules, 47 C.F.R. § 21.11(c), that the licensing staff of the Broadband Division SHALL DISMISS the applications (File Nos. 20031210AAA and 20031210AAB) filed by Orange County Chairman, Board of County Commissioners on December 10, 2003.

14. This action taken under delegated authority pursuant to Sections 0.31 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