

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

In the Matter of Application of)	
)	
LOIS HUBBARD)	File No. 20031128AAA
)	
For Renewal of Multichannel Multipoint)	
Distribution Service Station WMI307, South)	
Bend, Indiana)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 2004

Released: October 26, 2004

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* we address the application of Lois Hubbard (Hubbard or Ms. Hubbard) for renewal of Multichannel Multipoint Distribution Service (MMDS)¹ Station WMI307, South Bend, Indiana (the Station) and associated request for waiver to allow consideration of her late-filed renewal application.² For the reasons set forth below, we deny the Waiver Request and dismiss the application.

II. BACKGROUND

2. On November 22, 1996, Jack G. Hubbard, husband of Ms. Hubbard³ was granted a license to operate MMDS Station WMI307, South Bend, Indiana.⁴ This license carried an expiration date of May 1, 2001. On April 2, 2001, Hubbard submitted a timely application for renewal of license.⁵

3. On October 18, 2002, the Wireless Telecommunications Bureau (WTB) released a Public Notice⁶ in which it sought to ensure that it had a complete and accurate listing of all licenses and pending

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 Petition to Accept Late-Filed Renewal Application *Nunc Pro Tunc* (filed Nov. 28, 2003) (Waiver Request).

³ The Commission authorized assignment of the license from Mr. Hubbard to Ms. Hubbard on February 10, 1999. *See* File No. BALMD-9950045 (granted Feb. 10, 1999).

⁴ File No. BLMD-9750082.

⁵ File No. BRMD-20010402ABD.

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 licensees and applicants in these services to respond to the *October Public Notice* was extended to February 3, 2003.⁷ This deadline was further extended to February 21, 2003.⁸

4. Hubbard failed to file a response to the *October Public Notice*. Accordingly, on June 20, 2003, Hubbard's renewal application was dismissed for failure to prosecute.⁹ Hubbard did not seek reconsideration of the dismissal of the renewal application.

5. On November 26, 2003, Hubbard filed the captioned application and Waiver Request. According to Ms. Hubbard, her attorney had left private practice to work for the Commission, and she did not read FCC Public Notices or have regular access to the Federal Register.¹⁰ Accordingly, she was unaware of the requirement to respond to the *October Public Notice*.¹¹

III. DISCUSSION

6. Under the Commission's rules pertaining to MDS, licensees must file their renewal applications between thirty and sixty days prior to the license expiration date.¹² If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.¹³ In this case, while Hubbard originally filed a timely renewal application, that application was dismissed for failure to respond to the *October Public Notice*. That dismissal is now final because Ms. Hubbard did not file a timely petition for reconsideration of the dismissal.

7. Accordingly, since Hubbard's request comes more than 30 days after the Public Notice of her license expiration, Hubbard must obtain a waiver of Section 21.44(b)(1) of the Commission's Rules to allow consideration of her untimely renewal application. 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.¹⁴ 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.¹⁵ The Commission has a

(...continued from previous page)

Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS, and MMDS License Status And Pending Applications, *Public Notice*, DA 02-2751, (WTB Oct. 18, 2002).

⁷ 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).

⁸ 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).

⁹ October Notice, *supra*, note 4.

¹⁰ Waiver Request at 2.

¹¹ *Id.*

¹² See 47 C.F.R. § 21.11(c).

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

¹⁴ 47 C.F.R. § 21.19.

¹⁵ See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior Broadcasting*, 7 FCC Rcd at 7543 ¶ 4.

strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.¹⁶

8. We find that Hubbard 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.”¹⁷ Hubbard asserts that waiving the reinstatement filing requirement is warranted because her original renewal application was timely, and it was never her intention to allow the station license to expire.¹⁸ The *October Public Notice* was an attempt by the Commission to verify the status of the licensees in the MDS and ITFS services. It was not, as Hubbard contends, an attempt to “pare down” the backlog of renewal applications at the Commission.¹⁹ As Mrs. Hubbard points out, the *October Public Notice* was not intended to be a game of “gotcha” with licensees,²⁰ as is evidenced by both the extensions of time allowed to file with the Commission and the group of reconsideration request that were granted in October, 2003.²¹ Had Mrs. Hubbard filed within that filing period, her petition would have been accepted and her renewal application restored to pending status. However, Mrs. Hubbard allowed that time period to lapse, forcing the instant action.

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.²² Hubbard’s explanation for her failure to timely file a request for reinstatement consists of her lack of knowledge regarding the *October Public Notice*.²³ Hubbard has not shown how granting a waiver due to unfamiliarity with Commission practice and procedures will ensure that parties will have a date certain after which they may file applications for an area covered by an expired license and ensure service to the public. The Commission has placed a great emphasis on its responsibility to provide service to the public in the most efficient, expeditious manner possible.²⁴ In doing so, the Commission has recognized the importance of requiring applicants to comply with its procedural requirements.²⁵ To allow the grant of a waiver in this context would eviscerate the reinstatement rule.²⁶

10. Mrs. Hubbard also cites the fact that counsel who had been assisting her left private practice to work at the Commission in February 2003.²⁷ Since the *October Public Notice* was released in October 2002, and the final deadline for responding to the *October Public Notice* was in February 2003, it

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

¹⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

¹⁸ Waiver Request at 5.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ Wireless Telecommunications Grants Petitions for Reconsideration of ITFS, MDS, and MMDS Applications That Were Dismissed Without Prejudice on June 20, 2003, *Order*, DA 03-3157 (rel. Oct. 18, 2003).

²² See *Burlington*, 13 FCC Rcd 775 ¶ 16.

²³ Waiver Request at 5.

²⁴ Hillebrand Broadcasting, Inc., MM Docket No. 85-13, *Order*, 1 FCC Rcd 419 ¶ 3 (1986).

²⁵ *Id.*

²⁶ See *WAIT*, 418 F.2d at 1159 (the Commission neither “must [n]or should tolerate evisceration of a rule by waivers.”

²⁷ Waiver Request at 5.

does not appear that counsel's decision to leave private practice was the proximate cause of Mrs. Hubbard's failure to respond to the *October Public Notice*. We therefore reject that argument.

11. Finally, Mrs. Hubbard represents that the licenses left by her husband are her primary source of financial support.²⁸ The record before us does not support the conclusion that Mrs. Hubbard is currently obtaining income from Station WMI307. The entity that was leasing Station WMI307 stopped paying Mrs. Hubbard approximately two years ago.²⁹ Moreover, Mrs. Hubbard believes that a new customer for the station will not appear until the band is transitioned pursuant to the *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 03-66, a process that could take up to three years.³⁰ We note that this decision does not have any impact on Mrs. Hubbard's other licenses. Moreover, Mrs. Hubbard does not provide any financial documentation to support her claim. Accordingly, we deny the Waiver Request.³¹

IV. CONCLUSION AND ORDERING CLAUSE

12. Hubbard has not provided an adequate explanation for its failure to respond to the *October Public Notice*. Accordingly, we deny her Waiver Request and dismiss her application.

13. 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 Commission's Rules, 47 C.F.R. § 21.44(b), the Petition to Accept Late-Filed Application *Nunc Pro Tunc* filed by Lois Hubbard on November 28, 2003 IS DENIED.

14. 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 application (File Nos. 20031128AAA) filed by Lois Hubbard on November 28, 2003.

15. 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

²⁸ Waiver Request at 5.

²⁹ Application, Exhibit A, p. 1.

³⁰ *Id.*

³¹ In light of our action dismissing the renewal application, Hubbard's request for waiver of Section 21.303(d) of the Commission's Rules to remain silent is moot.