

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

In re Applications of)	
)	
GARY GOLDEN)	File Nos. BRMD-20010530AAA; BRMD-
)	20010530AAB
For Reinstatement and Renewal of Multipoint)	
Distribution Service Stations WMH477 and)	
WMI306, Longview, Texas)	
)	
and)	
)	
NUCENTRIX SPECTRUM RESOURCES, INC.)	File Nos. BPMD-20010802AAA; BPMD-
)	20010802AAB
For Authority to Construct and Operate New)	
Multipoint Distribution Service Stations on the E)	
and F Channel Groups at Marshall, Texas)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 2004

Released: October 26, 2004

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

I. INTRODUCTION

1. On May 30, 2001, Gary Golden filed applications seeking the reinstatement¹ and renewal of expired licenses to operate Multipoint Distribution Service² (MDS) Stations WMH477 (E Channel Group) and WMI306 (F Channel Group), Longview, Texas.³ On August 2, 2001, Nucentrix Spectrum Resources, Inc. (Nucentrix) filed a Petition to Deny against the applications.⁴ On August 6, 2001, Nucentrix also filed applications seeking authority to construct and operate new MDS stations on the E

¹ Application for Reinstatement and Renewal of MDS Licenses (May 30, 2001) (Application).

² 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) (*MDS/ITFS R&O & FNPRM*). 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.

³ File No. BRMD-20010530AAA (May 30, 2001) (E Group Channels); File No. BRMD-20010530AAB (May 30, 2001) (F Group Channels) (collectively, the Golden Applications).

⁴ Petition to Deny (Aug. 2, 2001) (Nucentrix PTD).

and F Channel Groups at Marshall, Texas.⁵ On September 7, 2001, Mr. Golden filed a Petition to Deny against the Nucentrix applications.⁶ For the reasons discussed below, we deny the petition to deny filed by Nucentrix against the Golden applications and reinstate the licenses for Stations WMH477 and WMI306. We also dismiss the petition to deny filed by Mr. Golden against the Nucentrix applications as moot.

II. BACKGROUND

2. On December 16, 1996, Mr. Golden acquired the licenses for Stations WMH477 and WMI306 via assignment from Fortuna Systems Corporation and Presco Corporation, respectively.⁷ At the time of the assignments, both licenses were due to expire on May 1, 2001. According to the Commission's records, no action was taken with regard to the licenses prior to expiration. On May 30, 2001, Mr. Golden filed, pursuant to Section 21.44 of the Commission's Rules,⁸ applications seeking the reinstatement and renewal of the expired licenses. The Application concedes that Mr. Golden received a timely notice reminding him to renew his licenses for Stations WMH477 and WMI306 before March 31, 2001.⁹ However, according to the Application, Mr. Golden did not review the notice until after March 31, 2001 because Mr. Golden and his wife had recently relocated to another state.¹⁰ In a statement attached to the Application, Mr. Golden explains that he has entered all relevant Commission filing deadlines in his personal calendar in both electronic and written form to insure timely filings in the future.¹¹ The Application contends that Mr. Golden has therefore satisfied the requirements for seeking reinstatement of an expired MDS license.¹² The Application concludes that Mr. Golden's continued operation of Stations WMH477 and WMI306 would be in the public interest because Stations WMH477 and WMI306 have been operating in the Longview, Texas community since Mr. Golden acquired the licenses in 1996 and because Mr. Golden has entered into excess capacity leases with ITFS applicants and licensees in the Longview market.¹³

3. On August 2, 2001, Nucentrix filed a Petition to Deny against the application.¹⁴ Nucentrix notes that the Commission has the discretion to determine if reinstatement would be in the

⁵ FCC File No. BPMD-20010802AAA (Aug. 2, 2001) (F Group Channels); FCC File No. BPMD-20010802AAB (Aug. 2, 2001) (E Group Channels) (collectively, the Nucentrix Applications).

⁶ Petition to Deny (Sept. 7, 2001) (Golden PTD).

⁷ See FCC File No. BALMD-9651153 (filed June 24, 1996; granted Nov. 1, 1996); FCC File No. BALMD-9651154 (filed Jun. 24, 1996; granted Nov. 1, 1996). The consummation date for the assignments was December 16, 1996.

⁸ 47 C.F.R. § 21.44(b) provides for the reinstatement of an MDS license if (1) the petition is filed within 30 days of the expiration of the license; (2) the petition explains the failure to timely renew the license; and (3) the petition sets forth the specific procedures established to insure timely filings in the future.

⁹ See Application at 1. 47 C.F.R. § 24.11(c) requires an MDS licensee to renew its license between thirty and sixty days prior to expiration.

¹⁰ Application at 1-2.

¹¹ Certification of Gary Golden (dated May 29, 2001) (Golden Certification). Therein, Mr. Golden also notes that he has provided his counsel with his current address to permit counsel to provide Mr. Golden with additional reminders. *Id.*

¹² Application at 2 (*citing* Line of Sight, Inc., *Order on Reconsideration*, 8 FCC Rcd 3145 (CCB DFD 1993) (*Line of Site*); Superior Broadcasting Corp., *Memorandum Opinion and Order*, 7 FCC Rcd 7543 (CCB DRB 1993) (*Superior*)).

¹³ Application at 2-3.

¹⁴ Nucentrix holds the MDS BTA authorization that includes Longview, Texas. Nucentrix states that it therefore has the exclusive right to file a long-form application to operate wireless cable television systems in those portions of the Longview-Marshall, Texas BTA where the service area of a forfeited incumbent has been merged with the BTA

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public interest.¹⁵ Nucentrix contends that Mr. Golden's explanation for failing to timely renew his licenses for Stations WMH477 and WMI306 is not a valid excuse for failing to meet his obligation.¹⁶ Moreover, Nucentrix alleges that "[a] physical investigation of the WMH477 and WMI306 site, including electronic monitoring of the stations' assigned E and F group channels, demonstrates that these stations are not in operation."¹⁷ Specifically, Nucentrix argues that, on July 19, 2001, Mr. Troy Willis, an RF Field Engineer, used frequency monitoring equipment to listen to each of the channels assigned to Mr. Golden and found no signals, transmission, or activity.¹⁸ In addition, Nucentrix asserts that Mr. Golden is not currently a lessee on the only tower at the site.¹⁹ Nucentrix therefore urges the Commission to deny the application.

4. Mr. Golden filed his Opposition to Petition to Deny on August 15, 2001.²⁰ Mr. Golden states that his "equipment has been operational in accordance with the FCC's rules since he acquired the Stations in 1996. Moreover, the equipment is currently and has been for the entire period that [Mr.] Golden has been the licensee, located at the Stations' licensed site."²¹ Mr. Golden attached declarations by Mr. Phillips,²² Mr. Goodman,²³ and Mr. Golden²⁴ to the Opposition. Mr. Golden contends that the

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pursuant to 47 C.F.R. 21.392(c). *See* Nucentrix PTD. As noted above, on August 2, 2001, Nucentrix also filed applications seeking authority to construct and operate new MDS stations on the E and F Channel Groups at Marshall, Texas. Nucentrix conceded in filing the applications that "[t]he Commission's decision in the ongoing proceeding on reinstatement of [Mr. Golden's] licenses will determine whether . . . [its own] Applications can be granted." Nucentrix, Opposition to Petition to Deny (filed Dec. 17, 2001).

¹⁵ *Id.* at 2 (citing 47 C.F.R. § 21.44(b)).

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 3. A declaration by Mr. Willis is attached to the PTD. *See id.*, Exhibit A ("Willis Declaration").

¹⁹ *Id.* at 3. To support its assertion, Nucentrix attached a declaration signed by Mr. Brandon J. Bullis, Vice-President, Spectrum Resources for Nucentrix Broadband Networks, Inc. *See id.*, Exhibit B ("Bullis Declaration").

²⁰ Opposition to Petition to Deny (filed Aug. 12, 2001) ("Opposition").

²¹ *Id.* at 1. In a declaration attached to the Opposition, Mr. Golden states that "[a]fter acquiring the Stations, I immediately pursued the installation and upgrade of the transmission facilities located at North Latitude 32 33' 45" and West Latitude 094 28' 41" in Marshall, Texas (the 'Site'), including the replacement of the transmitter located at the transmitter building at the Site, and modifications to the antenna located at the Site, both of which were owned at the time by Kinder Morgan." *Id.*, Exhibit C (Declaration of Mr. Gary Golden). Mr. Golden further explains that, since that time, Kinder Morgan leases the space from the current owner, American Tower. *See* Opposition at 5.

²² *See id.*, Exhibit A (Declaration of Mr. Herb Phillips) (Phillips Declaration). Mr. Phillips, a Telecommunications Technician for Kinder Morgan, Inc., states that he served as the Tower Site Manager for Kinder Morgan, Inc., at the site where the stations are located. Mr. Phillips declares that, for the three years preceding August 13, 2001, he has observed that (i) transmission equipment owned by Mr. Golden has [been] located within the building on a continuous basis; (2) the transmission equipment has continuously received power; (iii) the transmission equipment . . . has appeared to be operational, e.g., the display is functioning; and (iv) there is an antenna located on the tower which appears to be connected to the transmission equipment." *Id.*

²³ *See* Opposition, Exhibit B (Declaration of Mr. Steven Goodman) (Goodman Declaration). Mr. Goodman, Operations Supervisor for Kinder Morgan, L.P., states that he served as the Operational Supervisor for Natural Gas Pipeline Company of America, a subsidiary of Kinder Morgan, L.P., Inc., since 1993, and as supervisor at the site from 1993 to 1998. *Id.* Mr. Goodman declares that, on August 8, 2001, he toured one of the three transmitter buildings located at the site and observed that "(i) transmission equipment owned by Mr. Golden was located within the building; (2) the transmission equipment was receiving power; and (iii) there is an antenna located on the tower which appears to be connected to the transmission equipment." *Id.*

evidence set-forth by Nucentrix is insufficient to support a finding that he failed to operate in accordance with the Commission's Rules.²⁵ Specifically, Mr. Golden challenges the sufficiency of the two declarations attached to and relied upon by the PTD.²⁶ Mr. Golden asserts that the evidence set-forth in those declarations supports a host of alternative conclusions.²⁷ Mr. Golden concludes that, notwithstanding the allegations raised by Nucentrix in the PTD, the Commission should grant his application because he has fully complied with the specific procedures set-forth in the Commission's Rules governing the reinstatement of an expired MDS license.²⁸

5. On August 22, 2001, Nucentrix filed a Reply to Opposition to Petition to Deny.²⁹ Nucentrix contends that the Opposition and the declarations attached thereto fail to demonstrate that Stations WMH477 and WMI306 are "actually operating."³⁰ Nucentrix criticizes the Opposition's use of the NFL hypothetical. By relying on the NFL hypothetical, the Opposition conveniently avoids explaining why the stations were silent on July 19, 2001 or offering any indication as to actual programming transmitted by the stations.³¹ Nucentrix argues that, if the stations were only transmitting NFL programming during the football season, Mr. Golden would be obligated, pursuant to Section 21.911(a)(3)(v) of the Commission's Rules, to report "each period of time in which the station rendered no service as authorized, if the time period was a consecutive period longer than 48 hours."³² In addition, Nucentrix reaffirms its findings that Stations WMH477 and WMI306 are not operating in accordance with the Commission's Rules. Nucentrix contends that field investigations performed by Mr. Willis on August 8, 2001 and August 20, 2001 confirmed that Stations WMH477 and WMI306 were not operating as authorized.³³ According to Nucentrix, none of the measurements taken by Mr. Willis on

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²⁴ Mr. Golden declares that, on August 8, 2001, he toured the transmitter building located at the site and observed that "(i) transmission equipment for the Stations was still within the same transmitter building; (2) the transmission equipment was still receiving power; (iii) the display on the transmitter indicated that all systems were operating; (iv) there was no apparent damage to the transmitter; (v) the antenna for the Stations is still located on the same tower, at the same height; and (vi) the antenna appears to be connected to the transmission equipment with no apparent defects to the transmission line." Declaration of Mr. Golden at 1.

²⁵ *Id.* at 3.

²⁶ *Id.* For example, Mr. Golden notes that the Willis Declaration "provides no information as to the duration of the field measurements or whether the measurements were repeated at different times. No information is provided as to the specific methods used to make the field measurements, nor does the Declaration contain the actual results from the field examination. . . ." Opposition at 4.

²⁷ For example, the Opposition explains that "it would be completely permissible . . . for [Mr.] Golden to specialize in the provision of National Football League programming, or distant learning for an educational institution." Opposition at 5. According to the Opposition, Stations WMH477 and WMI306 remain in compliance with the Commission's Rules "[s]o long as the Stations are not silent for more than a year, [notwithstanding] the fact that the Stations were not transmitting on July 19, 2001, e.g., prior to the football season and/or during summer break." *Id.*

²⁸ *Id.* at 8.

²⁹ Reply to Opposition to Petition to Deny (Aug. 22, 2001) (Reply).

³⁰ *Id.* at 3. In fact, Nucentrix points-out that none of the affiants "even assert that the Stations are actually operating." *Id.* Moreover, Nucentrix questions whether any of the affiants even have the requisite expertise to state whether the equipment is correctly installed at the appropriate site. *Id.* at 2 (emphasis in original).

³¹ *Id.* at 2-4.

³² *Id.* at 4 (quoting 47 C.F.R. § 21.911(a)(3)(v)). Nucentrix notes that annual reports for the stations fails to list any such interruption. Nucentrix further notes that the public file for Station WMI306 does not contain annual reports for the years of 1998 or 2000. *Id.* (further noting that the public file for Station WMH477 only contains an annual report for the year of 1996).

³³ *Id.* at 5-7. A declaration by Mr. Willis is attached to the Reply. *See id.*, Exhibit A (Willis Reply Declaration).

either date revealed the existence of any transmissions from the tower site on any of the channels licensed to Mr. Golden under call-signs WMH477 and WMI306.³⁴ In addition, Nucentrix alleges the antenna installed at the site does not conform to that which Mr. Golden is licensed to use.³⁵

6. By letter, dated December 7, 2001, the Video Services Division (Division) of the Mass Media Bureau requested that Mr. Golden provide more information in support of his application.³⁶ Mr. Golden filed his response on January 7, 2001.³⁷ Mr. Golden therein states that, according to the Certificates of Completion of Construction, Stations WMH477 and WMI306 were constructed on February 2, 1993 and January 12, 1995, respectively.³⁸ He further declares that, at the time he acquired Stations WMH477 and WMI306 on or about December 16, 1996, he confirmed that the stations were “properly constructed and operational.”³⁹ Mr. Golden explains that, following his acquisition of the stations, he began re-transmitting off-air signals to thirty-two receive site locations in the Longview, Texas area.⁴⁰ According to Mr. Golden, “the equipment has not been removed or rendered nonoperational for any period of time. . . .”⁴¹ In addition, Mr. Golden declares that “[t]here are no known period[s] where the frequencies assigned to these stations were not used to render any service authorized for a period of twelve months after construction was completed.”⁴² When asked to provide copies of all annual reports filed, pursuant to Section 21.911 of the Commission’s Rules,⁴³ for Stations WMH477 and WMI306, Mr. Golden was only able to submit copies of annual reports filed for 1996, 1997, and 1999.⁴⁴

³⁴ Reply at 6.

³⁵ *Id.* at 5. Specifically, Nucentrix notes that “while the Applicant’s license specifies a nine foot Andrew 62351 transmitting antenna (now available as Model HMD24VC), no such antenna is present on the tower in question.” *Id.* Mr. Willis took and attached photos of the antenna to his declaration. *See* Willis Reply Declaration, Exhibit 2.

³⁶ Letter from Charles E. Dziedzic, Chief, Assistant Chief, Video Services Division, Mass Media Bureau, FCC to Mr. Gary Golden (Dec. 7, 2001) (First Staff Letter).

³⁷ Letter from Gary Golden to Magalie Roman Salas, Secretary, FCC (Jan. 7, 2001) (First Golden Letter). On January 22, 2002, Nucentrix filed Comments in Reply to Applicant’s Response to Letter of Inquiry. Comments in Reply to Applicant’s Response to Letter of Inquiry (Jan. 22, 2002) (Nucentrix Comments). Nucentrix therein states that, on four additional visits to the site location for Stations WMH477 and WMI306, it found no signal being transmitted. *Id.* at 3. Specifically, Mr. Willis electronically monitored the site on December 17, 2001, December 21, 2001, January 4, 2002, and January 10, 2002. *See id.*

³⁸ First Golden Letter at 1.

³⁹ *Id.*; *see also id.* at 2 (affirmatively responding that the facilities were constructed and located in accordance with the terms of the licenses, including authorized antenna model located at the proper site).

⁴⁰ *Id.* at 2. Specifically, Mr. Golden had antennas installed at individual schools “to enable the reception of off-air signals being rebroadcast by the Stations. This arrangement permitted the Stations to be operational in accordance with the Commission’s rules. . . .” *Id.* Mr. Golden notes that one receive site location was subsequently removed. *See id.*

⁴¹ *Id.* at 3; *cf.* 47 CFR § 21.44(a)(3). Mr. Golden insists that “[t]he Opposition did not state the Stations were not transmitting on July 19, 2001. . . . The Opposition was merely making the point that *if* the Stations re-transmitted broadcast NFL football programming in the fall, for example, a “snapshot” test on July 19, 2001 would not accurately assess whether the Stations were in compliance with the Commission’s rules.” First Golden Letter at 3.

⁴² *Id.*; *cf.* 47 CFR § 21.303(d). As evidence of confirmation of this statement, Mr. Golden notes that he periodically reviewed the stations and that he received no complaints from subscribers. *See* First Golden Letter at 3.

⁴³ 47 CFR § 21.911.

⁴⁴ *See* First Golden Letter at 4. Mr. Golden explains that he was unable to locate annual reports filed for the year 1998. *See id.* at 4. In addition, Mr. Golden argues that he did not submit annual reports for the year 2000 because of the pending status of his applications. *See id.* at 4. However, Mr. Golden filed the 2000 annual reports when he filed the First Golden Letter. All of the submitted annual reports for both Stations WMH477 and WMI306 report a

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However, according to the annual reports for both stations for the years of 2001 and 2002, Mr. Golden leased, effective as of November 6, 2001, all of the transmission capacity to Clearwire Technologies, Inc. (Clearwire), to conduct trials of MDS and ITFS equipment by several manufacturers.⁴⁵

7. On June 12, 2003, staff made a second request for additional information from Mr. Golden.⁴⁶ Mr. Golden filed his response on July 14, 2003.⁴⁷ Mr. Golden therein describes the procedures he has adopted to ensure the timely filing and record-keeping of Commission documents,⁴⁸ provides details of any changes that he has made to the facilities,⁴⁹ and specifies the names and locations of the thirty-one schools that were served by Stations WMH477 and WMI306 between January 1, 2001 and November 6, 2001.⁵⁰ In addition, Mr. Golden explains that, between January 1, 2001 and November 6, 2001, "each of the channels assigned to [Stations] WMH477 and WMI306 broadcast the off air signal from the local television station."⁵¹ Mr. Golden also attaches a copy of the lease agreement that became effective between Mr. Golden and Clearwire on November 6, 2001.⁵²

III. DISCUSSION

8. 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.⁵³ If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.⁵⁴ A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.⁵⁵ A timely filed petition for reinstatement must adequately explain the failure to file the renewal application on time, and specify the procedures the licensee has established to ensure timely filings in the future.⁵⁶ Section 21.44(b) of the Commission's Rules limits consideration of reinstatement petitions to those that are timely filed within thirty days of the expiration date of the license.⁵⁷

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total of 8760 hours (2190 hours per channel) of transmission service. Mr. Golden categorized all 8760 hours as entertainment.

⁴⁵ Mr. Golden reported a total of 35,040 hours (8760 hours per channel) of transmission service for both Station WMH477 and WMI306 for the year 2002.

⁴⁶ Letter from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC, to Mr. Gary Golden (dated Jun. 12, 2003) (Second Staff Letter).

⁴⁷ Letter from Mr. Gary Golden to Brian Michael Wondrack, Esq., Attorney-Advisor, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC (filed Jul. 14, 2003) (Second Golden Letter).

⁴⁸ *Id.* at 1. The procedures are discussed more fully below.

⁴⁹ *Id.*

⁵⁰ *Id.*, Attachment B.

⁵¹ *Id.* at 2.

⁵² *Id.*, Attachment D.

⁵³ See 47 C.F.R. § 21.11(c).

⁵⁴ See 47 C.F.R. § 21.44; see also Burlington Cablevision, Inc., *Order on Reconsideration*, 13 FCC Rcd 772 (VSD MMB 1998) (*Burlington*).

⁵⁵ See 47 C.F.R. § 21.44(b)(1)-(3); see also *Burlington*, 13 FCC Rcd at 775 ¶ 7.

⁵⁶ See 47 C.F.R. § 21.44(b)(1)-(3).

⁵⁷ See 47 C.F.R. § 21.44(b)(1).

9. Mr. Golden's licenses for Stations WMH477 and WMI306 expired on May 1, 2001 without further action by the Commission because Mr. Golden failed to submit timely renewal applications. In accordance with the Commission's Rules, Mr. Golden was required to submit renewal applications for the stations between March 1, 2001 and April 1, 2001. However, Mr. Golden failed to take any action with regard to Stations WMH477 and WMI306 prior to their expiration on May 1, 2001. Thus, the licenses for Stations WMH477 and WMI306 automatically expired as of the expiration date in accordance with Section 21.11(c) of the Commission's Rules.⁵⁸

10. Section 21.44(b) of the Commission's Rules, however, allows Mr. Golden to request reinstatement of the licenses.⁵⁹ Specifically, Section 21.44(b) provides that a license forfeited in whole or in part under the provisions of paragraph (a)(1) or (a)(2) may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity. Petitions for reinstatement filed pursuant to Section 21.44(b) will be considered only if the petition: (1) is filed within thirty days of the expiration date; (2) explains the failure to timely file such notification or application as would have prevented automatic forfeiture; and (3) sets forth with specificity the procedures which have been established to insure timely filings in the future.⁶⁰ In this case, we conclude that the licenses for Stations WMH477 and WMI306 should be reinstated because Mr. Golden has met each of the requirements for reinstatement.

11. With respect to the first requirement, Mr. Golden timely sought reinstatement of the licenses for Stations WMH477 and WMI306 on May 30, 2001. As the licenses expired on May 1, 2001, the reinstatement requests were filed within the permissible thirty day window for such requests. Second, Mr. Golden has also explained his failure to file timely applications to renew his licenses for Stations WMH477 and WMI306. We do not condone Mr. Golden for his neglect of the filing deadlines and remind Mr. Golden of his obligation to comply with all Commission filing deadlines.⁶¹ Section 21.44, however, does not preclude reinstatement in cases where a deadline is inadvertently missed, and reinstatement has been granted in cases where a licensee missed a deadline because of inadvertence.⁶² We therefore conclude that Mr. Golden has met the second prong of the rule. Third, we find that Mr. Golden has set forth specific procedures designed to ensure that he makes timely filings in the future. We believe that Mr. Golden's decision to enter all Commission filing deadlines into his personal calendar in both electronic and written form, retain and communicate with outside counsel regarding filing deadlines, and maintain duplicate records at his own office and at the office of his counsel are reasonable steps to ensure timely filings in the future.

12. We also find that it is in the public interest to reinstate Mr. Golden's licenses for Stations WMH477 and WMI306. In so doing, we find that the objections raised by Nucentrix are insufficient to justify denying Mr. Golden's requests for reinstatement.⁶³ According to Nucentrix, "Mr. Golden cannot

⁵⁸ See 47 C.F.R. § 21.11(c); see also *Burlington*, 13 FCC Rcd at 775 ¶7.

⁵⁹ 47 C.F.R. § 21.44(b).

⁶⁰ 47 C.F.R. §21.44(b)(1)-(3).

⁶¹ In this respect, we note that, according to Commission's records, no annual reports were filed for Stations WMH477 and WMI306 for the year 1998. Mr. Golden was also unable to locate copies of the 1998 annual reports. In addition, Mr. Golden untimely filed annual reports for Stations WMH477 and WMI306 for the year of 2000 on January 7, 2002 -- more than 10 months beyond the required filing date of March 1, 2001. Cf. 47 C.F.R. § 21.911 (requiring each MDS licensee to file an annual report with the Commission no later than March 1 of each year for the preceding calendar year and to retain a copy of each year's report in the principal office the licensee).

⁶² See, e.g., *Line of Site*, 8 FCC Rcd at 3145 ¶4; *Comm Speed Huntington, LLC, Memorandum Opinion and Order*, 19 FCC Rcd 6393 (WTB BD 2004) (*Comm Speed*).

⁶³ See 47 C.F.R. § 21.30.

demonstrate that the public interest would be served by reinstatement of his license” because he “has discontinued operation of his stations at this time.”⁶⁴ However, pursuant to Section 21.30 of the Commission’s Rules, a petition to deny must contain “specific allegations of fact . . . , which shall be supported by affidavit of . . . persons with personal knowledge thereof , and which shall be sufficient to demonstrate . . . that a grant of, or other Commission action regarding, the application would be *prima facie inconsistent with the public interest*. . . .”⁶⁵ We find that Nucentrix has failed to do so in this instance.

13. With respect to Nucentrix’s contention that Mr. Golden is not currently a lessee on the only tower at the site,⁶⁶ we find that Mr. Golden has submitted adequate documentation to demonstrate that Nucentrix is incorrect. Nucentrix relies on an affidavit submitted by Mr. Bullis, Vice-President, Spectrum Resources for Nucentrix Broadband Networks, Inc., whose personal knowledge in this matter was derived from a telephone call placed to staff at American Tower Corporation. Mr. Bullis’ hearsay affidavit does not comply with the “personal knowledge” requirement of Section 309(d)(1) of the Act.⁶⁷ Moreover, Mr. Golden attached two affidavits by staff of Kinder Morgan,⁶⁸ which according to Mr. Golden, is the former owner and current lessee of the tower site.⁶⁹ The affidavits by Mr. Phillips and Mr. Goodman, who both have personal knowledge in this matter, specifically state that Mr. Golden has maintained and operated facilities and equipment at the tower site throughout the period in question.⁷⁰ We therefore find that Nucentrix failed to demonstrate that Mr. Golden is not leasing or occupying space at the tower site.

14. We further find that Nucentrix fails to demonstrate that Stations WMH477 and WMI306 were silent or rendered nonoperational for the period of time necessary to demonstrate automatic cancellation of the licenses or to justify denial of the instant reinstatement application.⁷¹ With its petition to deny, Nucentrix submitted an affidavit by Mr. Willis, an RF Field Engineer, to the effect that on July 19, 2001, at 4:00 p.m., Mr. Willis used frequency monitoring equipment to listen to each of the channels assigned to Mr. Golden and found no signals, transmission, or activity.⁷² However, Nucentrix’s submission is insufficient to demonstrate that Mr. Golden voluntarily removed or altered the facilities, so as to render Stations WMH477 and WMI306 nonoperational for a period of thirty days or more.⁷³ In

⁶⁴ Nucentrix PTD at 3.

⁶⁵ 47 C.F.R. § 21.30(a)(3) (emphasis added).

⁶⁶ Nucentrix PTD at 3.

⁶⁷ See Manahawkin Communications Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 342, 356 ¶ 23 (2001).

⁶⁸ See Phillips Declaration; Goodman Declaration.

⁶⁹ See Opposition at 5-6.

⁷⁰ See Phillips Declaration; Goodman Declaration.

⁷¹ As noted above, Nucentrix contends that reinstatement would not be in the public interest because Mr. Golden has discontinued operation of Stations WMH477 and WMI306.

⁷² See Willis Declaration. Nucentrix submitted additional affidavits by Mr. Willis stating that on other, specific dates and times, Mr. Willis confirmed that Stations WMH477 and WMI306 were not transmitting signals. See Reply, Exhibit A (Willis Reply Declaration); Nucentrix Spectrum Resources, Inc., Comments in Reply to Applicant’s Response to Letter of Inquiry (filed Jan. 22, 2002), Exhibit A (Willis Comments Declaration). In addition, although not raised in the petition to deny, Nucentrix alleges in the Reply that the antenna installed at the site does not conform to that authorized for use by Stations WMH477 and WMI306. See Reply at 5; Willis Reply Declaration, Exhibit 2.

⁷³ See 47 C.F.R. § 21.44(a)(3). Similarly, the record in this proceeding fails to support cancellation or deletion of the frequencies assigned to Stations WMH477 and WMI306 pursuant to 47 C.F.R. § 303(d). Section 21.303(d) allows a frequency authorization to “be cancelled or deleted from a license for failure to render service as authorized

(continued...)

other services, the Commission has noted that sporadic monitoring of a frequency is insufficient to establish that a station has permanently discontinued operation.⁷⁴ We believe the same logic applies in this service. Moreover, Mr. Golden has specifically stated that the facilities, including the antenna, remain located and operated at the same site in accordance with the Commission's Rules.⁷⁵ Mr. Golden has submitted affidavits by Mr. Phillips and Mr. Goodman to support his assertion that no equipment has been removed from the site and that the equipment at the site remains operational.⁷⁶ We therefore find that, after careful development and consideration of the record in this proceeding, Nucentrix failed to demonstrate that our action in granting Mr. Golden's reinstatement application would be *prima facie* inconsistent with the public interest.

15. We dismiss Golden's petition to deny against the contingent Nucentrix applications as moot. On July 29, 2004, the Commission released the *MDS/ITFS R&O & FNPRM* which fundamentally restructured the band to provide MDS and ITFS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.⁷⁷ The Commission directed the Wireless Telecommunications Bureau to dismiss all pending applications to modify MDS or ITFS stations (including booster and hub stations), except for modification applications that could change an applicant's PSA, or applications for facilities that would have to be separately applied for under the rules adopted in the *MDS/ITFS R&O & FNPRM*.⁷⁸ Pursuant to that directive, the contingent Nucentrix applications were dismissed on September 20, 2004.⁷⁹ Accordingly, Golden's petition to deny is moot.

IV. CONCLUSION AND ORDERING CLAUSES

16. For the reasons stated above, we conclude that Mr. Golden has justified reinstatement of his licenses for Stations WMH477 and WMI306. In so doing, we deny the petition to deny filed by Nucentrix because it fails to demonstrate that the reinstatement of Mr. Golden's licenses for Stations WMH477 and WMI306 would be *prima facie* inconsistent with the public interest. We therefore reinstate the licenses for Stations WMH477 and WMI306 and direct processing of the pending renewal applications for those stations. Finally, we dismiss as moot Golden's petition to deny the contingent Nucentrix applications because those applications were recently dismissed as moot.

17. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.44(b) of the Commission's Rules, 47 C.F.R. §

(...continued from previous page)

during a consecutive period of twelve months at any time after completion of construction or if removal of equipment or facilities has rendered the station not operational." Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, *Notice of Proposed Rulemaking*, 8 FCC Rcd 1112, 1114 ¶ 16 (1993). Even if we were to, *arguendo*, accept Nucentrix's sporadic frequency tests, which were conducted on seven dates between July 19, 2001 and January 10, 2002, as evidence that Stations WMH477 and WMI306 were nonoperational on the dates in question, the necessary duration of time to trigger our authority to cancel or delete the frequencies pursuant to 47 C.F.R. § 303(d) would not have elapsed.

⁷⁴ See Brookfield Development, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 14385, 14391 ¶ 18 (2004) Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999);

⁷⁵ See, e.g., First Golden Letter at 1-3.

⁷⁶ See Phillips Declaration; Goodman Declaration.

⁷⁷ *MDS/ITFS R&O & FNPRM*.

⁷⁸ *Id.*, 19 FCC Rcd at 14191 ¶ 58.

⁷⁹ See Wireless Telecommunications Bureau Site-By-Site Action, Report No. 1947, *Public Notice* (rel. Sep. 29, 2004) at 8.

21.44(b), that the “Application for Reinstatement and Renewal of MDS Licenses” filed by Gary Golden on May 30, 2001 **IS GRANTED**, and the licenses for MDS Stations WMH477 and WMI306, Longview, Texas **ARE REINSTATED**.

18. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.30 of the Commission’s Rules, 47 C.F.R. § 21.30, the Petition to Deny filed by Nucentrix Spectrum Resources, Inc. on August 2, 2001 **IS DENIED**.

19. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the licensing staff of the Broadband Division **SHALL PROCESS** File Nos. BRMD-20010530AAA and BRMD-20010530AAB in accordance with this *Memorandum Opinion and Order* and the Commission’s Rules.

20. **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 21.30 of the Commission’s Rules, 47 C.F.R. § 21.30, that the Petition to Deny filed by Gary Golden on September 7, 2001 **IS DISMISSED AS MOOT**.

21. These actions are 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