

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

In the Matter of Applications of)
)
OKLAHOMA WESTERN TELEPHONE) File Nos. 20021231AAB, 20021231AAC,
COMPANY, INC.) 20021231AAD and 20021231AAE
)
For Renewal of Multipoint Distribution Service)
Stations WLK382, WNTC500, WNTC664 and)
WNTD797, Clayton, Oklahoma)
)

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 2004

Released: November 19, 2004

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a request for acceptance of a blanket request for reinstatement of four licenses of a Multipoint Distribution Service ("MDS") system in Clayton, Oklahoma, owned by Oklahoma Western Telephone Company, Inc. ("OWTC"). We also address related requests for waiver of various filing deadlines, including deadlines for filing of renewal applications, and a petition to deny filed by Nucentrix Spectrum Resources, Inc. ("Nucentrix"). For the reasons discussed below, we deny OWTC's waiver applications and its request for reinstatement, but we grant it special temporary authority to continue operating the Stations for six months.

1 See Letter from David A. Irwin, Esq., counsel to OWTC, to Federal Communications Commission, Wireless Bureau Applications (filed Dec. 31, 2002) (Reinstatement and Waiver Requests). OWTC styles its filing as a "blanket renewal application," but we treat it as a request for reinstatement because OWTC's licenses expired before it filed.

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). 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 The stations' call signs are WLK382, WNTC500, WNTC664 and WNTD797 ("the Stations").

4 On August 13, 2003, OWTC filed a supplemental pleading and motion to file a supplemental pleading ("First Supplemental Pleading"). On Sept. 8 and 9, 2003, respectively, OWTC submitted a supplemental pleading and motion for leave to file a supplemental pleading ("Second Supplemental Pleading") and an addendum to supplemental pleading ("Addendum to Second Supplemental Pleading").

5 Petition to Deny by Nucentrix, Feb. 14, 2003 (Petition to Deny).

II. BACKGROUND

2. On the dates shown in Table 1, OWTC was granted authorizations to operate the Stations. The Stations are used to provide entertainment television programming to a rural mountainous area whose reception of commercial broadcast stations is impaired by distance and terrain blockage.⁶ In 1997, the Stations were serving 396 subscribers;⁷ by 2003, the number of subscribers had declined to 264.⁸ The licenses carried an expiration date of May 1, 2001.

Table 1

Station Call Sign	Channels	Location	File No.	Date License Issued	Expiration Date
WLK382	MMDS Group E	Clayton, OK	20021231AAB	Sept. 29, 1995 (renewal)	May 1, 2001
WNTC500	MMDS Channel H2	Clayton, OK	20021231AAC	Aug. 30, 1999 (assignment)	May 1, 2001
WNTC664	MMDS Channel H1	Clayton, OK	20021231AAD	Mar. 30, 1995 (renewal)	May 1, 2001
WNTD797	MMDS Channel H3	Clayton, OK	20021231AAE	Aug. 30, 1999 (assignment)	May 1, 2001

3. 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.⁹ OWTC did not file a renewal application prior to the expiration of its licenses. OWTC states that it was under the erroneous impression that one of its consultants had prepared and filed renewal applications for all four of the Stations.¹⁰

4. On December 31, 2002, OWTC filed the captioned blanket renewal application for the Stations' licenses together with a request for waiver of Sections 21.3, 21.11 and 21.44 of the Commission's Rules.¹¹ We interpret the application as a request for reinstatement because the licenses expired before OWTC filed its application. OWTC justifies its request on the grounds that it provides local news and entertainment channels; public, educational and government access channels; and retransmitted local over-the-air television stations that provide urgent weather alerts, serving a sparsely populated area with no other means to receive such alerts.¹² OWTC states that its subscribers value its system highly because they are situated in an area where natural disasters such as tornadoes are prevalent.

⁶ Letter from Gary G. Beikmann, Manager, Monte R. Lee and Company Consulting Engineers, to Lynne J. Milne, FCC Common Carrier Bureau, Mar. 27, 1992 (WLK382 Station File).

⁷ Station WLK382 and WNTC664 1997 Annual Report.

⁸ Station WLK382 2003 Annual Report.

⁹ See 47 C.F.R. § 21.11(c).

¹⁰ See Reinstatement and Waiver Requests at 2.

¹¹ *Id.*

¹² *Id.* at 3.

OWTC says that there is no traditional cable television franchise in its service area, so that its customers have little alternative in obtaining reliable video services, especially services providing critical local programming.¹³ Finally, OWTC states that it has implemented internal controls to ensure that future renewal applications for these licenses will be filed on time.¹⁴

5. On February 14, 2003, Nucentrix filed a petition to deny OWTC's request for reinstatement, stating that, as the holder of geographic area licenses for MDS Basic Trading Areas ("BTAs") served in part by OWTC's Stations,¹⁵ Nucentrix has the exclusive right to file long-form applications to operate wireless cable television systems in any portions of those BTAs where the service areas of forfeited incumbent stations have been merged with the BTAs pursuant to Section 21.932(c) of the Commission's rules.¹⁶ OWTC urges us to reject the Petition to Deny on the grounds that Nucentrix has filed a voluntary Chapter 11 bankruptcy petition and that it would not be wise policy to allow a collapsing company to take over OWTC's MDS stations.¹⁷ In fact, the Commission has authorized assignment of the BTA authorizations in question to Nextel Communications, Inc.¹⁸

III. DISCUSSION

6. 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.¹⁹ If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.²⁰ A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.²¹ 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.²² 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.²³

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

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ The authorizations are for the Paris, Texas (BTA341), Fort Smith, Arkansas (BTA153), and McAlester, Oklahoma (BTA267) BTAs. Petition at 2.

¹⁶ Petition to Deny at 2.

¹⁷ Second Supplemental Pleading at 4.

¹⁸ See Wireless Telecommunications Bureau Grants Consent to Assign Multipoint Distribution Service Station Licenses, *Public Notice*, 19 FCC Rcd 6329 (WTB 2004).

¹⁹ See 47 C.F.R. § 21.11(c).

²⁰ 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.

²¹ *Burlington*, 13 FCC Rcd 772 ¶ 7 citing 47 C.F.R. § 21.44(b)(1) – (3).

²² *Id.*

²³ See 47 C.F.R. § 21.44(b)(1).

OWTC did not file its renewal applications until December 30, 2002. Thus, the renewal applications were untimely in accordance with Section 21.11(c) of the Commission's Rules.²⁴

8. After failing to submit timely applications for renewal of the Stations, OWTC still had the opportunity to regain their licenses through a petition for reinstatement.²⁵ Under the Commission's Rules, OWTC had until June 1, 2001, thirty days after the license expiration date, to submit its reinstatement request.²⁶ However, request for reinstatement from OWTC was not received by the Commission until December 30, 2002.²⁷ Therefore the petition for reinstatement is untimely in accordance with 47 C.F.R. § 21.11(c).

9. Because of OWTC's failure to submit in a timely manner either the application for renewal or a petition for reinstatement, a waiver is required for us to consider the petition for reinstatement despite its untimely submission.²⁸ 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.²⁹ 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.³⁰ The Commission has a strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.³¹

10. We find that OWTC 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."³² OWTC 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."³³ OWTC argues that a waiver would benefit the community of Clayton, Oklahoma 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."³⁴ It has also argued that it would be unwise public policy for us to allow a collapsing company to take over OWTC's call signs,³⁵ though it has subsequently acknowledged that Nucentrix has signed an agreement to sell its assets.³⁶

²⁴ See 47 C.F.R. § 21.11(c); *Burlington*, 13 FCC Rcd at 775 ¶ 7.

²⁵ See 47 C.F.R. § 21.44 (b)(1).

²⁶ *Id.*

²⁷ Reinstatement and Waiver Requests at 1.

²⁸ See *Burlington*, 13 FCC Rcd at 775 ¶ 7; see also *Superior Broadcasting*, 7 FCC Rcd 7543.

²⁹ See 47 C.F.R. § 21.19.

³⁰ See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior Broadcasting*, 7 FCC Rcd at 7543 ¶ 4.

³¹ See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

³² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

³³ Waiver and Reinstatement Request, *supra* at 1.

³⁴ *Id.*

³⁵ Supplemental Pleading at 4.

³⁶ Addendum to Second Supplemental Pleading.

11. 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.³⁷ We do not believe that OWTC's reasons and providing uninterrupted *unauthorized* service, warrant grant of a waiver.³⁸ OWTC 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, OWTC has shown the opposite. OWTC filed its waiver request more than a year after its license expired. To allow the grant of a waiver in this context would eviscerate the reinstatement rule.³⁹

12. We find no merit in OWTC's argument that it would be contrary to public policy to allow its call signs to fall into the hands of a company that has filed a voluntary petition for bankruptcy. Such a petition does not, by itself, signify that a company is necessarily preparing to cease operations. In any event, after OWTC made this argument, the BTA authorizations were assigned to Nextel Communications, Inc.

13. In sum, OWTC has provided no compelling public policy or other reason to waive our rules with respect to license renewals or petitions for reinstatement. Accordingly, we deny OWTC's Reinstatement and Waiver Request. In light of our denial of OWTC's waiver requests, its renewal applications are subject to dismissal on the basis that they were not filed in a timely manner.⁴⁰

14. In light of the fact that the Stations play a role in disseminating emergency information, however, and together with the likelihood that alternative services will not be in operation in the immediate future, 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 OWTC a limited STA to continue operating the facilities licensed under Stations WLK382, WNTC500, WNTC664, and WNTD797 for six months. The purpose of this STA is to allow OWTC to continue to operate its facilities while it makes alternative arrangements for delivering programming or other communication services in the future. Upon the expiration of any STA that has not been extended by the Commission, OWTC shall cease all operations of the Stations. Any continued operation following the expiration of such STA will be unauthorized in violation of Section 301 of the Communications Act of 1934, as amended.

IV. CONCLUSION AND ORDERING CLAUSES

15. OWTC failed to explain adequately why a waiver is warranted, and accordingly we deny the waiver requests, deny the Reinstatement Request, and dismiss the renewal applications. We grant OWTC an STA for six months to continue operating Stations WLK382, WNTC500, WNTC664, and WNTD797 while it makes alternative arrangements for delivering its programming or other communication services.

16. 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

³⁷ See *Burlington*, 13 FCC Rcd 775 ¶ 16.

³⁸ 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.

³⁹ 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."

⁴⁰ See 47 C.F.R. §§ 21.11(c), 21.44(b)(1).

to Stations WLK382, WNTC500, WNTC664, and WNTD797 filed by OWTC on December 30, 2002 ARE DENIED.

17. 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. 20021231AAB, 20021231AAC, 20021231AAD and 20021231AAE) filed by OWTC on December 31, 2002.

18. 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

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