

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

In the Matter of)
DATA TRUCK, LLC) File No. BPIFH-2001420ABJ
Petition for Reinstatement of License of Multipoint)
Distribution Service Station WNTK287,)
Watertown, South Dakota)

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 2004

Released: February 20, 2004

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the reinstatement request of Data Truck, LLC (Data Truck) for Multipoint Distribution Service (MDS) Station WNTK287, Watertown, South Dakota (the Station). We deny the reinstatement request but, on our own motion, grant Data Truck special temporary authority (STA) to operate the Station for six months and invite it to file a de novo application for a station license pursuant to its Basic Trading Area (BTA) authorization for the Watertown BTA.

II. BACKGROUND

2. On August 6, 1996, the Video Services Division of the Mass Media Bureau (MMB) granted a petition for reinstatement and application for renewal filed by Northeast TV Cooperative, Inc. (Northeast TV) for MDS Station WNTK288, near Kranzburg, S.D., which then included two channels, H1 and H2. In November, 1999, the Commission authorized Northeast TV to assign the H2 channel at that location to Data Truck and granted a construction permit to Data Truck under call sign WNTK287. The First Construction Permit indicated that the license would expire on May 1, 2001. On January 11, 2000, the Commission issued a modified construction permit for WNTK287, authorizing a different transmitter site near Kranzburg. The Second Construction Permit also indicated that the license would expire on May 1,

1 Letter from Daniel R. Ball, Attorney, Video Services Division, Mass Media Bureau, to Marci E. Greenstein, Esq., Counsel for North East TV Cooperative, Inc., Renewal Application File. No. 51203-CM-R-96, Aug. 6, 1996 (Reinstatement Grant).

2 WNTK287 Construction Permit, File No. BPMD-19910517AAA (granted Nov. 9, 1999) (First Construction Permit); WNTK287 Assignment Grant, Nov. 22, 1999 (Assignment Grant). The record does not indicate why the First Construction Permit was issued before the Assignment Grant.

3 First Construction Permit at 1.

4 WNTK287 Construction Permit, File No. BPMD-19910517AAA (granted Jan. 11, 2000) (Second Construction Permit).

2001.⁵ On October 18, 2002, the Commission released a public notice indicating, *inter alia*, that its records showed that the license for WNTK287 had expired on May 1, 2001.⁶

3. On March 24, 2003, Data Truck filed a petition for reinstatement of Station WNTK287.⁷ In it Data Truck states that Northeast TV gave it a copy of the August 6, 1996, Reinstatement Grant before Data Truck purchased the Channel H2 authorization from Northeast TV, and that Northeast TV represented that it had a ten-year license, which Data Truck believed would expire in 2006.⁸ Data Truck states that it holds the MDS BTA authorization for the Watertown area and could prepare an application for this channel under that BTA authorization but that it would have to incur unnecessary expense to prepare such an application.⁹ Data Truck adds that Station WNTK287 is part of a two-way system that includes MDS channels 1 and 2A, operating under call sign WNTK287-H01, whose license expires in May 2011, and that it is the only two-way wireless system in Watertown, SD.¹⁰ Data Truck argues that, if the license for WNTK287 is not reinstated, it will be forced to shut down the only two-way wireless system in the area until it can prepare a new application and obtain a grant.¹¹

II. DISCUSSION

A. Petition for Reinstatement

4. 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 A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.¹⁴ 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.¹⁵ 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.¹⁶

5. Data Truck's license for Station WNTK287 expired on May 1, 2001 without further action by the Commission because Data Truck failed to submit a timely renewal application for the station. Data Truck was required to submit a renewal application for the Station between March 1, 2001 and April 1,

⁵ Second Construction Permit at 1.

⁶ FCC Public Notice, DA 02-2752, released Oct. 18, 2002.

⁷ Data Truck, L.L.C., Petition for Reinstatement of MDS Station WNTK287, FRN 0006-5543-15, filed Mar. 24, 2003 (Petition for Reinstatement).

⁸ *Id.* at 1-2.

⁹ *Id.* at 2.

¹⁰ *Id.*

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) (*Burlington*); Superior Broadcasting Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 7543 (DRB CCB 1992) (*Superior*); see also 47 C.F.R. § 21.44.

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

¹⁵ *Id.*

¹⁶ See 47 C.F.R. § 21.44(b)(1).

2001. However, Data Truck did not file its Petition for Reinstatement until March 24, 2003, and even then did not include a renewal application. Even if it had coupled a renewal application with the Petition for Reinstatement, the renewal application would have been untimely in accordance with Section 21.11(c) of the Commission's Rules.¹⁷

6. In light of Data Truck's failure to file a timely renewal application, it had another option under the rules to regain the authorization for Station WNTK287 – namely, to file a petition for reinstatement.¹⁸ Under the Commission's Rules, Data Truck had until June 1, 2001, thirty days after the license expiration date, to submit its reinstatement request. Data Truck, however, did not file the petition for reinstatement until March 24, 2003.¹⁹ Data Truck requests a waiver of the filing deadline set forth in Section 21.44 of the Commission's Rules for such a petition.²⁰

7. Because Data Truck failed to meet either filing deadline, a waiver is required for us to provide the requested relief.²¹ Pursuant to Section 21.19 of the Commission's Rules,²² an applicant seeking a waiver must make an affirmative showing that: (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.²³ 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.²⁴ The Commission has a strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.²⁵

8. We find that Data Truck 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."²⁶ Data Truck asserts that reinstatement is warranted in this case because: (1) it thought its license would not expire until 2006; (2) WNTK287 is an essential part of the only two-way wireless system in its area; (3) filing to revive the station pursuant to its BTA authorization would involve "unnecessary" expense, and (4) such a filing would require the station to be shut down while the application is pending.²⁷ However, Data Truck provides no adequate explanation for its managerial oversight. The Commission issued Data Truck two construction permits for the Station, and both of the permits clearly stated that the license would expire on May 1, 2001. It was unreasonable of

¹⁷ See 47 C.F.R. § 21.11(c); *Burlington*, 13 FCC Rcd at 775 ¶ 7.

¹⁸ See 47 C.F.R. § 21.44(b)(1).

¹⁹ See para. 3.

²⁰ See 47 C.F.R. § 21.44(b)(1).

²¹ See *Burlington*, 13 FCC Rcd at 775 ¶ 7; see also *Superior*, 7 FCC Rcd at 7543.

²² 47 C.F.R. § 21.19.

²³ *Id.*

²⁴ See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior*, 7 FCC Rcd at 7543 ¶ 4.

²⁵ See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

²⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

²⁷ Petition for Reinstatement at 1-2.

Data Truck to put more faith in verbal assurances from the assignor than in a printed instrument of authorization from the Commission.

9. Moreover, Data Truck's Petition for Reinstatement is apparently based in part on an unsupported assumption that because it holds the BTA authorization for Watertown, South Dakota, it would automatically be entitled to recover its right to transmit signals throughout the protected service area (PSA) of its expired Station, because its PSA was in the Watertown BTA. That assumption is not correct, for two reasons. Station WNTK294's PSA is within BTA 464 but extends into two adjacent areas, BTA 422 and BTA 199. Holding the authorization for BTA 464 would not provide Data Truck with an automatic right to recover the portions of a station's PSA that fall within other BTAs. Moreover, by allowing its station license to lapse, Data Truck has lost its grandfathered status with respect to any other properly licensed co-channel stations that are located within 35 miles of the WNTK294 transmitter site. In 1995, the Commission expanded the co-channel PSAs of MDS and ITFS site licenses from a radius of 15 miles to a radius of 35 miles, but grandfathered incumbent stations that were short-spaced with respect to each other under the new interference protection standards.²⁸ In this case, Data Truck's expired station is 34 miles from MDS station WNTK294, licensed to Condington Clark Electric Cooperative.

10. 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.²⁹ Data Truck filed its petition for reinstatement nearly two years after its license expired due to management failure. To allow the grant of a waiver in this context would eviscerate the reinstatement rule.³⁰ Accordingly, we deny Data Truck's waiver requests. In light of our denial of Data Truck's waiver request, its petition for reinstatement is subject to dismissal on the basis that it was untimely filed.³¹

11. If Data Truck chooses to file a *de novo* site license application pursuant to its BTA authorization, we will expect it to provide an electrical interference analysis showing the status of any incumbent MDS site licensees in the area that Data Truck seeks to serve. Other interested parties will have an opportunity to oppose such an application.³²

B. Special Temporary Authority

12. As noted above, Data Truck states that WNTK287 is an essential part of the only two-way wireless system in its area. Because of South Dakota's low population density, we are concerned

²⁸ Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, Gen. Docket No. 90-54, *Second Order on Reconsideration*, 10 FCC Rcd 7074 at 7075-7085, ¶¶ 2-31 (1995). See also Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order on Reconsideration*, 14 FCC Rcd 12,764 at 12,796-12,-797, ¶ 69 (1999) (*Two-Way Reconsideration*); Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, *Declaratory Ruling and Order*, 11 FCC Rcd 18839 at 18853-18854 ¶¶ 23-24 (1996) (*Digital Declaratory Ruling*).

²⁹ See *Burlington*, 13 FCC Rcd at 775 ¶ 16.

³⁰ See *WAIT*, 418 F.2d at 1159 (the Commission neither "must [n]or should tolerate evisceration of a rule by waivers."

³¹ See 47 C.F.R. §§ 21.11(c), 21.44(b)(1).

³² See 47 C.F.R. § 21.30.

that some of Data Truck's customers might not have access to alternative reasonably priced substitute services. To ensure that Data Truck's customers will not suffer from that company's management oversights, we will grant, on our own motion, a special temporary authorization (STA) allowing Data Truck to operate the facilities of former Station WNTK287 for a period of 180 days beginning with the date upon which this order is released. The Commission's rules provide that an STA may be granted for an initial period not to exceed 180 days.³³ Data Truck may seek an extension if it has filed a *de novo* license application that remains pending at the end of that period.

III. ORDERING CLAUSES

13. 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 Section 21.19 of the Commission's Rules, 47 C.F.R. § 21.19, the Petition for Reinstatement for Station WNTK287 filed by Data Truck, LLC., on March 24, 2003 IS DENIED.

14. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(f) and Section 21.25(b)(4) of the Commission's Rules, 47 C.F.R. § 21.25(b)(4), special temporary authority for Multipoint Distribution Service Station WNTK287 IS GRANTED TO THE EXTENT INDICATED HEREIN.

15. 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

³³ 47 C.F.R. § 73.1635(a)(4).

C:\MDA\Out\35866.doc