

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

In the Matter of)	
)	
LYNCHBURG MDS, L.L.C.)	File Numbers: BSTAMD-20000601AAB,
)	BLMPMD-9650880, BLMD-930455
License of Multipoint Distribution Service Station)	
WMI288 in Lynchburg, Virginia)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 2004

Released: February 20, 2004

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

1. *Introduction.* On August 1, 2001, the Commission issued a public notice that the license of Lynchburg MDS, L.L.C. (“Lynchburg MDS”)¹ for Multipoint Distribution Service (MDS) Station WMI288 at Lynchburg, Virginia, had been forfeited for failure to file a timely renewal application² On August 30, 2001, Lynchburg MDS filed a waiver request and petition for reinstatement of its license.³ For the reasons stated below, we deny the Petition and associated waiver request.

2. *Background.* The original construction permit for Station WMI288 was issued on March 5, 1992.⁴ On March 28, 1993, a license was issued for Station WMI288.⁵ Within one year thereafter, however, the licensee received notice from the owner of its transmitter location that the tower was scheduled to be demolished in March 1995 and that the licensee would have to vacate the premises.⁶ In May, 1994, ten months prior to the expected demolition date, the licensee filed a modification application seeking authorization to construct the station at another location.⁷ The Commission did not act upon the modification application before the tower was demolished, and the licensee ceased operation. Lynchburg MDS states that it immediately filed the appropriate notice under Section 21.303(a) of the Commission’s

¹ The original licensee for Station WMI288 was G/S Lynchburg F Settlement Group. On May 3, 2000, the Commission granted its consent to assign the license for Station WMI288 to Lynchburg MDS. For sake of clarity, we will use Lynchburg MDS to refer to the licensee of Station WMI288, regardless of the period.

² See FCC Public Notice, Mass Media Bureau Instructional Television Fixed Service/Multipoint Distribution Service Actions, Report No. 458 (released Aug. 1, 2001) (“Public Notice”).

³ Waiver Request and Petition for Reinstatement of License (filed Aug. 30, 2001) (“Petition”).

⁴ File No. BPMD-9152657.

⁵ File No. BLMD-930455.

⁶ Petition at 2.

⁷ *Id.*

Rules and that it subsequently maintained annual updates to the status of Station WMI288 as part of its required Section 21.911 filings.⁸

3. With its initial modification application still pending, in May 1996, the licensee filed another modification application requesting authority to relocate to an alternative transmitter site that it believed should satisfy any concerns the Commission might have over potential electrical interference with other stations.⁹ Another licensee, CFW, filed a petition to deny or dismiss, arguing that Lynchburg MDS' proposal would cause interference to CFW's station in Charlottesville, Virginia.¹⁰ Lynchburg MDS opposed the petition to deny and submitted engineering studies that it said demonstrated that operating Station WMI288 from the new proposed site would not cause interference.¹¹ In March 2000, Lynchburg MDS filed a minor modification application to relocate to still another potential transmitter site.¹² When CFW again filed a petition to deny, Lynchburg MDS voluntarily dismissed its latest modification application.¹³ Lynchburg MDS subsequently identified a fourth potential site for its transmitter, but this time it also chose to file a request for special temporary authority (STA) in the hope that, by actually operating the station, it would be able to demonstrate that it would not cause electrical interference.¹⁴ CFW filed another petition to deny alleging that the proposed facilities would cause interference to its station.¹⁵

4. The license for Station WMI288 expired on May 1, 2001. Lynchburg MDS had not filed a renewal application by that date. On August 1, 2001, the Commission issued the Public Notice announcing that the station's license had been forfeited for failure to file a timely renewal application.¹⁶ The Public Notice also dismissed Lynchburg MDS' pending modification application and STA request.¹⁷ Lynchburg MDS filed a late-filed renewal application on August 29, 2001. On the following day, it filed its Petition.

5. *Discussion.* Lynchburg MDS acknowledges that its renewal application was filed late. It seeks a waiver of the rule due to extenuating circumstances, including a mistaken belief that its license renewal deadline would not be tolled pending action on its pending modification application and its STA request.¹⁸ The company acknowledges that it should have filed a renewal application "out of an abundance of caution" but says it made a good-faith, albeit erroneous, determination that the renewal application was not necessary at the time.¹⁹ Lynchburg MDS also says that its faulty judgment call was

⁸ *Id.* at 2-3.

⁹ *Id.* at 3.

¹⁰ *Id.* at 3, *citing* Petition of CFW Licenses Inc. and CFW Cable Inc. (collectively, "CFW"), filed June 26, 1996, File No. 50880-CM-MP-96.

¹¹ *Id.* at 3.

¹² *Id.* 4.

¹³ *Id.*

¹⁴ The Commission's Broadband Licensing Service database indicates that the STA request was filed on June 1, 2000.

¹⁵ Lynchburg MDS, Station WMI288 Annual Report for 2002, Exhibit One at 3.

¹⁶ See FCC Public Notice, Mass Media Bureau Instructional Television Fixed Service/Multipoint Distribution Service Actions, Report No. 458, released Aug. 1, 2001("Public Notice").

¹⁷ *Id.*

¹⁸ Petition at 7.

¹⁹ *Id.*

affected to a significant degree by a need to economize on further legal expenditures.²⁰ The company pledges to file all required reports and renewals in the future, if necessary, regardless of whether or not it holds an authorization for a new transmitter site.²¹

6. Under the Commission's MDS rules, licensees must file their renewal applications between thirty and sixty days prior to the license expiration date.²² If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.²³ A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.²⁴ 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.²⁵ 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.²⁶

7. Lynchburg MDS's license for Station WMI288 expired on May 1, 2001, without further action by the Commission because Lynchburg MDS failed to submit a timely renewal application for the station. Lynchburg MDS was required to submit a renewal application for the Station between March 1, 2001 and April 1, 2001. However, Lynchburg MDS did not file its renewal application until August 29, 2001. Thus, the renewal application was untimely in accordance with Section 21.11(c) of the Commission's Rules.²⁷

8. In light of Lynchburg MDS's failure to file a timely renewal application, it had another option under the rules to regain the authorization for Station WMI288 – namely, to file a petition for reinstatement.²⁸ Under the Commission's Rules, Lynchburg MDS had until June 1, 2001, thirty days after the license expiration date, to submit its reinstatement request. Lynchburg MDS, however, did not file the petition for reinstatement until August 30, 2001.²⁹ In conjunction with its reinstatement petition, Lynchburg MDS requested a waiver of the filing deadline set forth in Section 21.44(b)(1) of the Commission's Rules for such petition.

9. Because Lynchburg MDS failed to meet either filing deadline, a waiver is required for us to provide the requested relief.³⁰ Pursuant to Section 21.19 of the Commission's Rules,³¹ 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

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7.

²² See 47 C.F.R. § 21.11(c).

²³ 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.

²⁴ *Burlington*, 13 FCC Rcd 772 ¶ 7 citing 47 C.F.R. § 21.44(b)(1) – (3).

²⁵ *Id.*

²⁶ See 47 C.F.R. § 21.44(b)(1).

²⁷ See 47 C.F.R. § 21.11(c); *Burlington*, 13 FCC Rcd at 775 ¶ 7.

²⁸ See 47 C.F.R. § 21.44(b)(1).

²⁹ See para. 4.

³⁰ See *Burlington*, 13 FCC Rcd at 775 ¶ 7; see also *Superior Broadcasting*, 7 FCC Rcd 7543.

³¹ 47 C.F.R. § 21.19.

application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.³² 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.³³ The Commission has a strong interest in preserving the clarity of its rules governing the dates upon which applicants may permissibly file for spectrum previously used by expired stations.³⁴

10. We find that Lynchburg MDS 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."³⁵ Lynchburg MDS asserts that waiver of the reinstatement filing requirement is warranted because the failure to renew the license was the result of a good-faith, but erroneous, determination on its part that the renewal application was not necessary while a modification application was pending, and because it was seeking to economize on legal fees.³⁶ Lynchburg MDS asserts that no further lapses in complying with the Commission's filing requirements will occur, now that it understands the renewal rules.³⁷ However, Lynchburg MDS provides no adequate justification for its managerial oversight. It does not explain why its management should have formed a belief that the pendency of a modification application or a desire to economize on legal fees would absolve it of responsibility to file a renewal application by the due date set out in the Commission's rules.

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 would be inconsistent with case precedent.³⁸ Pursuant to Section 21.932 of the Commission's rules, if the license for an incumbent MDS station is forfeited, absent the filing and grant of a petition for reinstatement pursuant to Section 21.44(b), the 35-mile protected service area of the incumbent station dissolves and the protected service area becomes part of the BTA surrounding it and any other BTAs within 35 miles.³⁹ We do not believe that Lynchburg MDS's failure to comprehend our renewal rule and a desire to economize on legal fees, warrant grant of a petition for reinstatement.⁴⁰ Our renewal rule is clear on its face and contains no suggestion that renewal obligations will be suspended while modification applications are pending. Lynchburg MDS has not shown how granting a waiver due to inability to understand our renewal rule or a desire to economize on legal fees will ensure that parties will have a date certain after which they may file applications for an area covered by an expired license. Lynchburg MDS filed its waiver request nearly four months after its license expired. To allow the grant of a waiver in this context would

³² *Id.*

³³ See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior*, 7 FCC Rcd at 7543 ¶ 4.

³⁴ See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

³⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

³⁶ Petition at 6-7.

³⁷ *Id.* at 7.

³⁸ See *Burlington*, 13 FCC Rcd 775 ¶ 16.

³⁹ 47 C.F.R. § 21.932. See also Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 9589, 9610-9611 ¶ 39 (1995); 47 C.F.R. § 21.925.

⁴⁰ Emphasis added. 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.

eviscerate the reinstatement rule.⁴¹ Accordingly, we deny Lynchburg MDS's waiver request. In light of our denial of Lynchburg MDS's waiver request, its renewal application and petition for reinstatement are subject to dismissal on the basis that they were untimely filed.⁴²

12. *Ordering Clauses.* 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 Waiver Request and Petition for Reinstatement of License filed by Lynchburg MDS, L.L.C. on August 30, 2001 IS DENIED.

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), the application for renewal of license for Multipoint Distribution Service Station WMI288 filed by Lynchburg MDS, L.L.C. on August 29, 2001, IS DISMISSED.

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

⁴¹ See *WAIT*, 418 F.2d at 1159 (the Commission neither "must [n]or should tolerate evisceration of a rule by waivers."

⁴² See 47 C.F.R. §§ 21.11(c), 21.44(b)(1).

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