

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

In the Matter of Application of
IOWA RURAL TV, INC.
For reinstatement and renewal of licenses of
Broadband Radio Service Station WLW851,
Ottumwa, Iowa
File No. 20021216AAC

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 2005

Released: January 19, 2005

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address Iowa Rural TV, Inc.'s (IRTV) petition for waiver and reinstatement and renewal with respect to IRTV's licenses for Broadband Radio Service (BRS) Station WLW851, Ottumwa, Iowa. For the reasons stated below, we deny IRTV's Petition.

II. BACKGROUND

1. In October 1993, IRTV launched a wireless cable television service in Batavia, Iowa, which is located within the Ottumwa, Iowa Basic Trading Area (BTA). IRTV commenced service

1 Petition for Waiver of Sections 21.44(b)(1) and 21.11(c) of the Commission's Rules and Reinstatement and Renewal of Licenses Nunc Pro Tunc (filed Dec. 16, 2002) (Petition). The Petition also addressed commercial Educational Broadband Service (EBS) Stations WMX648 and WMX649, Ottumwa, Iowa. The Petition has previously been granted with respect to those stations. See Eastern New Mexico University, Memorandum Opinion and Order, 19 FCC Rcd 19540 (WTB 2004).

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) (BRS/EBS 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. Because the new rules have become effective, we will no longer refer to these services as MDS and ITFS. Because IRTV filed its Petition prior to the effective date of the old rules, however, unless otherwise noted, any citations to rules will be to the version of rules in effect on December 16, 2002, when IRTV filed its Petition.

3 Petition at 2.

utilizing the stations in issue and their aggregate twelve channels.<sup>4</sup> IRTV's system serves approximately 1000 subscribers in rural areas and small towns in the Ottumwa BTA who lack access to cable television.<sup>5</sup> Due to IRTV's inadvertence, the licenses for these stations were allowed to expire, on May 1, 2001.<sup>6</sup> IRTV seeks reinstatement and renewal of its licenses. To effectuate IRTV's request, IRTV requested waiver of Section 21.44(b)(1) of the Commission's Rules,<sup>7</sup> which provided that an MDS license would forfeit automatically if a renewal application is not filed prior to the license's expiration date. IRTV further requests waiver of Section 21.11(c) of the Commission's Rules,<sup>8</sup> which requires a license renewal application to be filed within thirty (30) to sixty (60) days prior to the license's expiration date.

### III. DISCUSSION

3. IRTV admits that it cannot excuse its inattention to its responsibilities to maintain the status of its stations.<sup>9</sup> IRTV assures the Commission that this lapse was unintentional, that IRTV's record as a Commission licensee is otherwise unblemished, and that IRTV has taken specific remedial administrative procedures to ensure that it remain in compliance with all Commission rules.<sup>10</sup> IRTV notes as well that it is the holder of the BTA authorization for the service area in question, which, IRTV contends gives IRTV exclusive rights to develop BRS operations in the BTA.<sup>11</sup> IRTV argues that good cause exists to grant the requested waivers of the rules and to reinstate and renew IRTV's licenses. IRTV contends that strict applications of the deadlines contained in the rules, IRTV maintains, would serve neither purpose of the rules: providing a date certain after which another applicant may file for an expired license, and ensuring uninterrupted, authorized service to the public.<sup>12</sup> Because the authorization of the Ottumwa BTA was originally granted on December 17, 1998, IRTV notes that it has the exclusive right to develop and expand MMDS service within that BTA until December 17, 2003.<sup>13</sup> Accordingly, IRTV suggests that this is a unique case, in which a 2001 expiration date for IRTV's licenses could not be used by other parties as a date certain for filing new applications for the channels.<sup>14</sup> In addition, granting a waiver of the rules would serve the purpose of ensuring uninterrupted service, whereas failure to grant a

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<sup>4</sup> Station WLW851 operates on the four E-Group channels. ESPN, TNN, WGN, and ABC-family Channel are carried on Station WLW851. Petition at 2 n. 4. *See also* Iowa Rural TV, Inc. Annual Reports for Calendar Years 2000 and 2001 (filed Mar. 6, 2000; Apr. 2, 2001). Although IRTV was granted authority to assign these licenses to C.D.V., Inc. on April 23, 1997, *see Public Notice*, Report No. D-924-A (rel. Apr. 30, 1997), C.D.V., Inc. was granted authority to reassign these licenses to IRTV on April 21, 1999. *See Public Notice*, Report No. D-1039-A (rel. Apr. 21, 1999).

<sup>5</sup> Petition at 2.

<sup>6</sup> Petition at 2.

<sup>7</sup> 47 C.F.R. § 21.44(b)(1).

<sup>8</sup> 47 C.F.R. §21.11(c).

<sup>9</sup> Petition at 3.

<sup>10</sup> Petition at 3-4.

<sup>11</sup> Petition at 4.

<sup>12</sup> Petition at 5-6. IRTV cites Superior Broadcasting Corporation, *Memorandum Opinion and Order*, 7 FCC Rcd 7543 (CCB DFD 1992) (*Superior*); *Burlington Cablevision, Inc.*, 13 FCC Rcd 772, 778 (MMB VSD 1998) (*Burlington*); and Jonsson Communications Corp. d/b/a QuandraVision Digital Television, *Memorandum Opinion and Order*, 17 FCC Rcd 22697, 22698-99 (WTB PSPWD 2002).

<sup>13</sup> Petition at 6. *See also* 47 C.F.R. §21.930.

<sup>14</sup> Petition at 6.

waiver would not, and would frustrate the purpose of the rules.<sup>15</sup> IRTV reiterates that it regrets its lapse as a licensee, and notes that it has voluntarily taken steps to rectify its lapse in regulatory oversight immediately upon its discovery, and also to ensure that it will not be repeated.<sup>16</sup> IRTV argues that forfeiture of its licenses would be a severe blow to IRTV's subscribers, most of whom have no other viable or affordable access to multichannel video service, and for many of whom IRTV's system represents their only video outlet for news and public affairs programming.<sup>17</sup>

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.<sup>18</sup> If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.<sup>19</sup> A licensee may file a petition for reinstatement of a forfeited license within thirty days of the license expiration date.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

5. IRTV's licenses for Stations WLW851 expired on May 1, 2001 without further action by the Commission because IRTV failed to submit timely renewal applications for the stations. IRTV was required to submit renewal applications between March 2, 2001 and April 2, 2001.<sup>23</sup> However, IRTV did not file its Petition until December 16, 2002.<sup>24</sup> Thus, IRTV's renewal applications were untimely in accordance with Section 21.11(c) of the Commission's Rules.<sup>25</sup>

6. In light of IRTV's failure to file a timely renewal application, it had another option under the rules to regain its authorizations for the stations: IRTV could file a petition for reinstatement.<sup>26</sup> Under the Commission's Rules, IRTV had until May 31, 2001, thirty days after the license expiration date, to submit its reinstatement request. IRTV, however, did not file its Petition until December 16, 2002.<sup>27</sup> In

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<sup>15</sup> Petition at 6-7.

<sup>16</sup> Petition at 7-8.

<sup>17</sup> Petition at 8.

<sup>18</sup> 47 C.F.R. § 21.11(c).

<sup>19</sup> 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.

<sup>20</sup> *Burlington*, 13 FCC Rcd 772 ¶ 7 citing 47 C.F.R. § 21.44(b)(1) – (3).

<sup>21</sup> *Id.*

<sup>22</sup> 47 C.F.R. § 21.44(b)(1).

<sup>23</sup> The thirtieth day prior to the expiration of IRTV's licenses was April 1, 2001, which was a Sunday. Accordingly, IRTV had until the next business day, Monday, April 2, 2001, to file for renewal of its licenses. See 47 C.F.R. § 1.4(j).

<sup>24</sup> See Public Notice, Wireless Telecommunications Bureau Site-By-Site Accepted for Filing, Report No.1378 (rel. Jan. 2, 2003).

<sup>25</sup> 47 C.F.R. § 21.11 (c).

<sup>26</sup> 47 C.F.R. § 21.44(b)(1).

<sup>27</sup> See Petition.

seeking reinstatement and renewal of its licenses *nunc pro tunc*, IRTV requests a waiver of the filing deadline set forth in Section 21.11(c) of the Commission's Rules for filing a renewal petition.<sup>28</sup>

7. Because IRTV failed to meet either filing deadline, a waiver is required for us to provide the requested relief.<sup>29</sup> Pursuant to Section 21.19 of the Commission's Rules,<sup>30</sup> 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.<sup>31</sup> The Commission's 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.<sup>32</sup> The Commission has a strong interest in preserving the clarity of when other applicants may permissibly file for spectrum previously utilized by expired stations.<sup>33</sup>

8. We find that IRTV 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."<sup>34</sup> IRTV asserts that waiver, reinstatement, and renewal are warranted in this case because: (1) IRTV has taken steps to rectify its administrative lapses; (2) it is the holder of the BTA authorization in which the licenses are located; and (3) IRTV's subscribers lack other viable outlets for access to news and public affairs programming and multichannel video service. We note that even were we to excuse IRTV's serious lapses in oversight, IRTV's Petition is apparently based in part on the assumption that because IRTV holds the BTA authorization for Ottumwa, Iowa, IRTV would automatically be entitled to recover its right to transmit signals throughout the protected service area (PSA) of its expired stations, because the stations' PSAs were in the Ottumwa BTA. To the extent that IRTV is correct, the authorization for Station WLW851 is no longer necessary because of changes in the Commission's Rules. Specifically, in the *BRS/EBS R&O & FNPRM*, the Commission instituted geographic area licensing for BRS BTA authorization holders.<sup>35</sup> Accordingly, so long as licensees comply with the Commission's newly adopted technical rules, they may modify facilities within their BTA without prior Commission approval.<sup>36</sup> Accordingly, to the extent that IRTV can operate the

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<sup>28</sup> *Id.*

<sup>29</sup> See *Burlington*, 13 FCC Rcd at 775 ¶ 7; see also *Superior*, 7 FCC Rcd at 7543.

<sup>30</sup> 47 C.F.R. § 21.19.

<sup>31</sup> *Id.*

<sup>32</sup> See *Burlington*, 13 FCC Rcd at 778 ¶ 16; see also *Superior*, 7 FCC Rcd at 7543 ¶ 4.

<sup>33</sup> See *Burlington*, 13 FCC Rcd at 778 ¶ 16.

<sup>34</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

<sup>35</sup> *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14189-90 ¶¶ 54-55.

<sup>36</sup> It is not clear that, under the new rules, IRTV would be able to operate the facilities formerly licensed under Station WLW851 under the terms of its BTA authorization. Our analysis indicates that a portion of the geographic service area of Station WLW851 is contained in the Kirksville, Missouri BTA. We also note that Station WLW851 is located 49.72 miles (80.01 km) from BRS Station WMH621, Kirksville, Missouri, licensed to CDV, Inc., and has line of sight to this station. On the other hand, we note that the new rules allow a licensee to exceed the signal strength established at the border of their geographic service area if no affected licensee is providing service. See 47 C.F.R. § 27.55(a)(4) (2005). IRTV should thoroughly evaluate its facilities to determine whether modifications are necessary to comply with the new rules. We note that pursuant to a special temporary authorization (STA), IRTV

facilities formerly licensed under the license for Station WLW851 under the terms of its BTA authorization, the license for Station WLW851 is no longer required, and no purpose would be served by granting IRTV a waiver to renew that authorization.

9. It is possible that the authorization for Station WLW851 is not moot because of the impact that authorization would have on neighboring licensees. To that extent, we believe that granting the waiver request and reinstating 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. Reinstatement would also be inconsistent with case precedent.<sup>37</sup> We do not believe that IRTV's management failures and providing uninterrupted unauthorized service are sufficient grounds for grant of a waiver. IRTV has not shown how granting a waiver due to management failures will ensure that parties will have a date certain after which they may file applications for an area covered by an expired license and ensures uninterrupted, *authorized* service to the public. IRTV filed its petition for reinstatement over a year and a half after its license expired. To allow the grant of a waiver in this context would eviscerate the reinstatement rule.<sup>38</sup> Accordingly, we deny IRTV's waiver request. In light of our denial of IRTV's waiver request, its petition for reinstatement is subject to dismissal on the basis that it was untimely filed.<sup>39</sup>

10. Finally, we note that the Wireless Telecommunications Bureau granted IRTV's Petition with respect to EBS Stations WMX648 and WMX649.<sup>40</sup> That decision, however, was based upon a factor unique to EBS: *i.e.*, the staff's practice of granting late-filed EBS renewal applications for any reason.<sup>41</sup> As noted above, denial of IRTV's Petition is consistent with staff precedent relating to BRS.<sup>42</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

11. In view of the foregoing, we find that IRTV's requested waiver of Sections 21.44(b)(1) and 21.11(c) of the Commission's Rules, as well as reinstatement and renewal of IRTV's licenses for Station WLW851 is not in the public interest.

12. Accordingly IT IS ORDERED that pursuant to Sections 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 waiver, reinstatement, and renewal filed by Iowa Rural TV, Inc. on December 16, 2002 IS DENIED with respect to Station WLW851.

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

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may continue to operate the existing facilities until May 10, 2005. We believe that the STA should give IRTV sufficient time to evaluate its facilities under the new rules and make any required modifications.

<sup>37</sup> See *Burlington*, 13 FCC Rcd at 775 ¶ 16. While IRTV is correct that it was not as late as the applicant in *Burlington* (see Petition at 7), we believe its failure to file for over eighteen months was just as serious a lapse as the applicant in *Burlington*.

<sup>38</sup> See *WAIT*, 418 F.2d at 1159 (the Commission neither "must [n]or should tolerate evisceration of a rule by waivers.").

<sup>39</sup> See 47 C.F.R. §§ 21.11(c), 21.44(b)(1).

<sup>40</sup> See *Eastern New Mexico University*, *supra*.

<sup>41</sup> *Id.*, 19 FCC Rcd at 19543-44 ¶¶ 8-10.

<sup>42</sup> See *Burlington*, *supra*.

Commission's Rules, 47 C.F.R. § 21.11(c), that the licensing staff of the Broadband Division SHALL DISMISS the application (File Nos. 20021216AAC) filed by Iowa Rural TV, Inc. on December 16, 2002.

14. 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

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