

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

In the Matter of Application of )
WINBEAM, INC. ) File No. 20010323AAU
For Renewal of Broadband Radio Service )
Station WMH869, Elmira, NY )

ORDER ON RECONSIDERATION

Adopted: May 3, 2005

Released: May 3, 2005

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

I. INTRODUCTION

1. On August 2, 2004, WinBeam, Inc. ("WinBeam") filed a petition seeking reconsideration of the dismissal of an application for renewal of license for Broadband Radio Service Station WMH869, Elmira, NY. This application was dismissed by the Public Safety and Private Wireless Division (Division) of Wireless Telecommunications Bureau (WTB) on June 20, 2003, for failure to respond to an official Commission request for information. For the reasons discussed below, we grant the Petition and associated waiver request.

II. BACKGROUND

2. On March 25, 2002, the WTB assumed responsibility from the Mass Media Bureau for the administration of the Instructional Television Fixed Service (ITFS), Multipoint Distribution Service (MDS), and Multichannel Multipoint Distribution Service (MMDS) (collectively the "Services"). As the WTB began migrating data from the Broadband Licensing System (BLS) to the Universal Licensing System (ULS), it sought to ensure that it had a complete and accurate listing of all licenses, pending applications, and other pertinent legal matters. To that end, WTB released a public notice on October 18,

1 WinBeam, Inc., Petition for Reconsideration and Waiver Request (filed Aug. 2, 2004) (Petition). WinBeam filed a supplement on March 18, 2005. Supplement to Petition for Reconsideration and Waiver Request (filed Mar. 18, 2005) (Supplement). See also File No. BRMD-20010323AAU (filed Mar. 30, 2001).

2 Wireless Telecommunications Bureau Announces Action On Responses to Public Notice Regarding ITFS, MDS, and MMDS Pending Applications, Public Notice, 18 FCC Rcd 12277 (WTB 2003) (June Public Notice).

3 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, Report and Order and Further Notice of Proposed Rulemaking, WT Docket Nos. 03-66, et al., 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS and ITFS as the Broadband Radio Service (BRS) and the Educational Broadband Service, respectively. Because these rules are now in effect, we will use the new names of these services in the text of this order, except when referring to prior public notices, which use the old service names.

4 See Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, Public Notice, 17 FCC Rcd 18365 (WTB 2002); see also Wireless Telecommunications Bureau to Complete Conversion of MDS, MMDS, and ITFS Services to the Universal Licensing System, Public Notice, 19 FCC Rcd 2716 (WTB 2004).

2002, requiring all licensees, applicants, and petitioners to review and verify the information contained in six different tables that were attached to it.<sup>5</sup> The *October Public Notice* clearly warned all interested parties that:

**IT IS VERY IMPORTANT THAT ALL ITFS, MDS, AND MMDS LICENSEES AND APPLICANTS CAREFULLY REVIEW THIS PUBLIC NOTICE AND THE TABLES OF LICENSING INFORMATION DESCRIBED BELOW. FAILURE TO FOLLOW THE INSTRUCTIONS IN THIS PUBLIC NOTICE MAY RESULT IN THE CANCELLATION OF LICENSES AND/OR DISMISSAL OF PENDING APPLICATIONS.<sup>6</sup>**

In addition, the WTB required that all applicants respond in writing by December 18, 2002, if they desired the Commission to continue processing pending applications that were filed prior to March 25, 2002.<sup>7</sup> Although the WTB originally provided a sixty-day window (ending December 18, 2002) in which to comply with its request,<sup>8</sup> it later extended the filing deadline to February 21, 2003.<sup>9</sup>

3. On March 23, 2001, KA3B2 Television Partnership (“KA3B2”), WinBeam’s predecessor in interest to WMH869, timely filed an application for renewal of the station (“Application”).<sup>10</sup> The station for WMH869 was assigned to WinBeam in the spring of 2001.<sup>11</sup> Thus, at the time of the *October Public Notice*, WinBeam was the licensee for WMH869, but as WinBeam notes in its Petition, the Application was listed in the *October Public Notice* under the name of KA3B2 instead of WinBeam.<sup>12</sup> On June 20, 2003, the WTB released the *June Public Notice* in which it announced the action it had taken on the responses to the *October Public Notice*.<sup>13</sup> The *June Public Notice* dismissed without prejudice

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<sup>5</sup> Wireless Telecommunications Bureau Seeks To Verify ITFS, MDS, and MMDS License Status and Pending Applications, *Public Notice*, 17 FCC Rcd 20543 (WTB 2002) (*October Public Notice*). Specifically, the *October Public Notice* referenced six different tables of licensing information. Table A listed all ITFS licenses including main station and two-way stations shown in BLS. Table B listed all MDS and MMDS licenses, including Basic Trading Area (BTA) authorizations, main stations and two-way stations contained in BLS. Table C listed all granted modifications and construction permits for ITFS for which certifications of construction have not yet been filed. Table D listed all granted MDS/MMDS modifications and conditional licenses for which certifications of construction have not yet been filed. Table E listed all pending applications for ITFS, and Table F listed all pending applications for MDS and MMDS.

<sup>6</sup> *Id.* (emphasis in original).

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> Wireless Telecommunications Bureau Seeks To Verify ITFS, MDS, and MMDS License Status and Pending Applications – Request for Extension of Response Date, *Order*, 17 FCC Rcd 24620 (WTB PSPWD 2002) (extending the deadline to February 3, 2003); Letter from D’wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC, to Paul J. Sinderbrand, Esq., Wilkinson, Barker, and Knauer LLP (dated Feb. 20, 2003) (extending the deadline to February 21, 2003).

<sup>10</sup> Petition at 1.

<sup>11</sup> According to BLS (the database used by the former Mass Media Bureau to process applications), the Commission approved an application to assign the license authorization of station WMH869 from KA3B2 Television Partnership to WinBeam on April 27, 2001. *See* File No. 20000831AAD. The BLS indicated that the assignment was consummated on June 8, 2001. According to BLS, public notice announcing the grant of this application was released on May 2, 2001.

<sup>12</sup> Petition at 2.

<sup>13</sup> *See June Public Notice.*

pending ITFS, MDS, and MMDS applications where written affirmations requesting further processing were not received from the licensee or applicant.<sup>14</sup> In so doing, the WTB dismissed the application for renewal for Station WMH869.<sup>15</sup> The dismissed applications were clearly listed in Appendix B of the *June Public Notice* by licensee name, file number, call-sign, facility ID, and transmitter city and state, but again, the dismissed Application for renewal of WMH869 was listed under the name of the former licensee KA3B2.<sup>16</sup>

4. WinBeam acknowledges that it did not respond to the *October Public Notice* but states that the *October Public Notice* listed the Application under the name of KA3B2 rather than WinBeam.<sup>17</sup> WinBeam states that as a result of this error, WinBeam unintentionally overlooked its pending renewal application.<sup>18</sup> WinBeam claims, however, that its actions demonstrate that its intent was to continue processing the Application. WinBeam therefore seeks a waiver of the deadline imposed by the *October Public Notice*.

5. WinBeam states that even though it did not respond in the format required by the *October Public Notice*, it consistently made filings with the Commission expressing an interest in the processing of the Application.<sup>19</sup> It states that it filed a number of database corrections in January 2003, and continued to make all necessary regulatory filings for the license since the Application was dismissed, including regulatory fees for Fiscal Year 2003 and 2004, and a Section 21.911 annual report in February 2004.<sup>20</sup> On July 22, 2004, WinBeam's counsel discovered that the Application had been dismissed when preparations had been made for filing regulatory fees in July 2004.<sup>21</sup> The Petition was filed ten days later on August 2, 2004. WinBeam also asserts that the intent of the *October Public Notice* was not to take licenses away from licensees that had timely filed renewal applications as it had, but rather to relieve a backlog of pending applications, most of which had no further relevance to a licensee.<sup>22</sup>

### III. DISCUSSION

6. Section 405 of the Communications Act of 1934, as amended,<sup>23</sup> provides that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of."<sup>24</sup> For the purposes of Section 405, the terminal date of the thirty-day time period for filing petitions for reconsideration is determined in accordance with

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<sup>14</sup> See *id.* Specifically, Appendix A to the *June Public Notice* listed and dismissed those pending ITFS applications with a filing date prior to March 25, 2002, where the applicant/licensee had not responded to the *October Public Notice*. Appendix B to the *June Public Notice* listed and dismissed those pending MDS and MMDS applications with a filing date prior to March 25, 2002, where the applicant/licensee had not responded to the *October Public Notice*.

<sup>15</sup> See *id.*, Appendix B.

<sup>16</sup> See *id.*, Appendix B.

<sup>17</sup> Petition at 1-2.

<sup>18</sup> Petition at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> Supplement at 2 and n.7.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> 47 U.S.C. § 405 (1996).

<sup>24</sup> See also 47 C.F.R. § 1.106(f).

Section 1.4 of the Commission's Rules.<sup>25</sup> Section 1.4(b)(4) provides that if "a descriptive document entitled 'Public Notice' describing the action is released, the date on which the descriptive 'Public Notice' is released" establishes the commencement of public notice.<sup>26</sup> Thus, if a return or dismissal action is announced in a public notice document, petitions for reconsideration must be filed within thirty days from the date of public notice.

7. Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not, with one extremely narrow exception, waive or extend the filing period.<sup>27</sup> The Court of Appeals for the D.C. Circuit found that the "seemingly mandatory language of Section 405 does not prevent the entertainment of rehearing petitions beyond the statutory period where extraordinary circumstances indicate that justice would thus be served."<sup>28</sup> The Court reasoned that, "[i]n the face of defective personal notice, fairness considerations may indicate that the thirty day filing requirement should be waived or extended."<sup>29</sup> In such circumstances, the petitioner must demonstrate that the delay in filing is attributable to Commission error in giving notice and that it acted promptly upon discovering the adoption of the Commission's decision. Specifically, a petitioner has the burden to show: (a) when and how it received notice in fact; (b) that the time remaining was inadequate to allow it reasonably to meet the thirty day requirement (from date of issuance) of Section 405; and (c) that it moved for reconsideration promptly on receiving actual notice.<sup>30</sup>

8. We believe that the extraordinary circumstances presented in this case justify our acceptance of the instant petition because WinBeam has demonstrated that it falls within the narrow exception to the statutory provision prohibiting acceptance of untimely filings established by the Court of Appeals for the D.C. Circuit in *Gardner*.<sup>31</sup> Specifically, we find that the assignment of the license for Station WMH869 placed the WTB on notice of the need to correct the name of the applicant in the Commission's records. Due to a ministerial error, when the WTB released the *June Public Notice*,

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<sup>25</sup> 47 C.F.R. § 1.4.

<sup>26</sup> 47 C.F.R. § 1.4(b).

<sup>27</sup> See *Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) ("[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); see also *Metromedia Inc., Memorandum Opinion and Order*, 56 FCC 2d 909 (1975) (Commission may not waive 30-day filing period to accept a petition for reconsideration filed one day late); *Fortuna Systems Corp., Order on Reconsideration*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Specifically, the courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances. See, e.g., *Virginia Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (*Virginia Islands*).

<sup>28</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (*Gardner*).

<sup>29</sup> *Id.* In *Gardner*, the Court was very careful to explain that "the late filing in this case was due, in substantial measure, to the FCC's omission to give Petitioner personal notice of any kind. Having procured a copy of the Commission decision by his own efforts with approximately nine days remaining in the filing period, counsel endeavored to prepare a petition for rehearing which would be received before the 30 day period expired. The petition was mailed with one day remaining in the period, but did not arrive at its destination until five days later -- four days after the Section 405 period had expired." *Id.* at 1091-1092 (internal citations omitted).

<sup>30</sup> *Id.* at 1092 n.24. The Court emphasized that a defect in notice will only be of legal consequence where such delay in notice will make it impossible for the petitioning party to comply with the statutory deadline. *Id.* Moreover, the Court noted that it will be an extraordinary case where a petitioner can meet the burden set-forth in *Gardner* because interested parties often receive actual notice of decisions or rulings through items in the general or trade press before or without receiving personal notice. See *id.*

<sup>31</sup> See, e.g., *Gardner*, 530 F.2d 1091-1092; Roy M. Speer, *Memorandum Opinion and Order*, 16 FCC Rcd 3993 (1999) (*Speer*) (finding that the petitioner has satisfied the burden set-forth in *Gardner*); but see 21<sup>st</sup> Century Telesis Joint Venture, 318 F.3d 192, 199 (D.C. Cir. 2003) (where petitioner failed to offer any explanation for its failure to meet the deadline).

Appendix B still incorrectly stated that the applicant's name was KA3B2.<sup>32</sup> Although WinBeam could have been more diligent in responding to the *October Public Notice*<sup>33</sup> and reviewing the *June Public Notice*, we believe that, based on the facts presented in this particular instance, WinBeam would have timely filed a petition seeking reconsideration of the dismissal of its application if the *June Public Notice* correctly identified WinBeam as the applicant.<sup>34</sup> WinBeam has demonstrated that the delay in filing the petition is attributable to a ministerial error by the Commission staff and that it acted promptly upon discovering the adoption of the Commission's decision.<sup>35</sup> Specifically, WinBeam did not suspect that the application had been dismissed until it prepared to pay its regulatory fees for 2004. WinBeam promptly filed the instant Petition within ten days of learning of the dismissal.<sup>36</sup> We therefore find that WinBeam has satisfied the burden set forth in *Gardner*, thereby permitting us to consider and grant the instant petition.

9. We find that our decision sufficiently remedies the ministerial oversight of the Commission's staff in incorrectly listing the applicant's name in the *October Public Notice* as KA3B2 rather than as WinBeam.<sup>37</sup> The underlying purpose of the *October Public Notice* was to ensure that all information contained within the Commission's licensing records is accurate, current and comprehensive.<sup>38</sup> We find it is in the public interest to return the application to pending status, particularly given that dismissal was premised on our belief, based on the information before us, that there was no interest in pursuing this matter.<sup>39</sup> Accordingly, we will grant the instant petition and reinstate the Application.

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<sup>32</sup> See *June Public Notice*, Appendix B.

<sup>33</sup> Because KA3B2 had filed the renewal application for Station WMH869, and Station WMH869 had recently been assigned to WinBeam from KA3B2, we believe WinBeam should have been more thorough in reviewing the tables attached to the *October Public Notice* and *June Public Notice*. Nonetheless, we conclude, based upon the totality of the circumstances present here, that WinBeam has met the *Gardner* standard.

<sup>34</sup> See, e.g., *Gardner*, 530 F.2d at 1091 ¶ 9 (noting that the late filing was due, in substantial measure, to the Commission failing to give petitioner personal notice of any kind); Gary E. Stoffer, *Order*, 13 FCC Rcd 14056, 14059 ¶ 9 (WTB CWD 1998) (finding that, had the petitioner received prompt notification of the dismissal of his application, it was likely that he would have timely sought reconsideration prior to the expiration of the statutory thirty-day deadline); *Speer*, 16 FCC Rcd at 3999-4001 ¶¶ 7-11.

<sup>35</sup> See, e.g., *Gardner*, 530 F.2d at 1091-1092; *Speer*, 16 FCC Rcd at 3999-4001 ¶¶ 7-11; but see *Virginia Islands*, 989 F.2d at 1237 (Commission's refusal to entertain late-filed petition for reconsideration was justified because tardiness was caused by "miscommunications" within the firm of the counsel for the petitioner); *Adelphia Comm. Corp.*, *Order*, 12 FCC Rcd 10759 (1997) (refusing to consider late-filed petition for reconsideration where delay in filing was caused by petitioner's inability to obtain a copy of the Commission's Rules of Practice and Procedure).

<sup>36</sup> See, e.g., *Gardner*, 530 F.2d at 1092 n.24 (requiring petitioner to move for reconsideration promptly on receiving actual notice); *Speer*, 16 FCC Rcd at 3999-4000 ¶¶ 7-11 (accepting late-filed petition for reconsideration that was filed within thirty-days of petitioner receiving actual notice of Commission action).

<sup>37</sup> See *Speer*, 16 FCC Rcd at 4001 n.31.

<sup>38</sup> See *October Public Notice*, 17 FCC Rcd at 20543.

<sup>39</sup> See *Wireless Telecommunications Bureau Grants Petitions for Reconsideration of ITFS, MDS, and MMDS Applications That Were Dismissed without Prejudice on June 20, 2003, Public Notice*, 18 FCC Rcd 20522 (WTB PSPWD 2003) (*Reconsideration Public Notice*). In the *Reconsideration Public Notice*, the WTB granted thirty-one petitions for reconsideration filed by applicants whose applications were dismissed in the *June Public Notice*.

#### IV. CONCLUSION AND ORDERING CLAUSES

10. WinBeam has met its burden of demonstrating that it is entitled to a waiver of the statutory requirement that petitions for reconsideration be filed within thirty days of public notice of the action. Accordingly, we grant the Petition and reinstate the Application.

11. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed by WinBeam, Inc. on August 2, 2004 **IS GRANTED**.

12. **IT IS FURTHER ORDERED**, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.106, that the licensing staff of the Broadband Division **SHALL REINSTATE AND PROCESS** the renewal application for Station WMH869 filed on March 23, 2001 (File No. 20010323AAU) in accordance with this *Order on Reconsideration* and the Commission's Rules.

13. This action 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