

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

In re Applications of
MDS NUCENTRIX TRUST
For Additional Time to Construct Broadband
Radio Service Stations WMY407 and WMY408,
Tucumcari, New Mexico
File Nos. BEMD-9850304; BEMD-9850305

ORDER ON RECONSIDERATION

Adopted: January 31, 2005

Released: January 31, 2005

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

I. INTRODUCTION

1. On September 9, 2003, MDS Nucentrix Trust ("Nucentrix") filed a petition seeking reconsideration of the dismissal of applications to construct Multipoint Distribution Service (MDS) Stations WMY407 and WMY408, Tucumcari, New Mexico. The applications were dismissed by the Public Safety and Private Wireless 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 dismiss the Petition.

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

1 MDS Nucentrix Trust, Petition for Reconsideration (filed September 9, 2003) (Petition).

2 See File Nos. BEMD-9850304 (filed Mar. 12, 1998); BEMD-9850305 (filed Mar. 12, 1998).

3 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).

4 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 and the Educational Broadband Service, respectively. Because this case involves events that took place before the new rules took effect, we will use the former names of the services in the text of this order.

5 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).

applications, and other pertinent legal matters. To that end, WTB released a public notice on October 18, 2002 requiring all licensees, applicants, and petitioners to review and verify the information contained in the six different tables that were attached to it.<sup>6</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>7</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>8</sup> Although the WTB originally provided a sixty-day window (ending December 18, 2002) in which to comply with its request,<sup>9</sup> it later extended the filing deadline to February 21, 2003.<sup>10</sup>

3. At the time that the WTB released the *October Public Notice*, the licenses for MDS Stations WMI407 and WMI408 were held by Nucentrix.<sup>11</sup> On February 3, 2003, Nucentrix notified the WTB that it sought continued processing of two applications that did not appear on the table of pending applications.<sup>12</sup> Nucentrix informed the WTB each of these applications had a pending request for extension of time to construct.<sup>13</sup> Nevertheless, on June 20, 2003, the WTB released another public notice in which it announced the action it had taken on the responses to the *October Public Notice*.<sup>14</sup> The *June*

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<sup>6</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>7</sup> *Id.* (emphasis in original).

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

<sup>9</sup> *See id.*

<sup>10</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>11</sup> The licenses for MDS Stations WMI407 and WMI408 were originally awarded to RVS Holding Corp. (RVS) on November 30, 1995. However, on June 22, 2001, the licenses were assigned from RVS to Nucentrix. *See* Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Actions, *Public Notice*, Report No. 423 (rel. Jun. 27, 2001).

<sup>12</sup> Letter from David R. Hollowell, Trustee, MDS Nucentrix Trust, to FCC, Database Corrections (filed February 3, 2003) (Nucentrix Letter).

<sup>13</sup> *See id.* Nucentrix attached copies of the extension requests with its letter.

<sup>14</sup> 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*).

*Public Notice* dismissed without prejudice pending ITFS, MDS, and MMDS applications where written affirmations requesting further processing were not received from the licensee or applicant.<sup>15</sup> In so doing, the WTB dismissed the applications that Nucentrix had brought to the attention of the Commission with regard to Stations WMY407 and WMY408.<sup>16</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. However, staff inadvertently listed the dismissed applications under the name of the former licensee – “RVS Holding Corporation.”<sup>17</sup>

4. Although Nucentrix recognizes that petitions for reconsideration of a final Commission action must be filed within thirty days from the date of public notice of the final Commission action, it contends that the instant petition is timely because Nucentrix did not receive proper notice of the dismissal.<sup>18</sup> Specifically, Nucentrix notes that the Commission incorrectly listed RVS as the MDS licensee of record with regard to Stations WMY407 and WMY408 when it dismissed the pending applications in the *June Public Notice*.<sup>19</sup> Nucentrix contends that, while it reviewed the *June Public Notice* “for decisions regarding its licenses. . . , [it] did not anticipate that the decision would be issued under the name of the former licensee, and thus did not receive proper notice of the Commission’s action.”<sup>20</sup>

### III. DISCUSSION

5. Section 405 of the Communications Act of 1934, as amended,<sup>21</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>22</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 Section 1.4 of the Commission’s Rules.<sup>23</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>24</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.

6. 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>25</sup> The

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<sup>15</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>16</sup> See *id.*, Appendix B.

<sup>17</sup> See *id.*, Appendix B.

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

<sup>19</sup> See Petition at 2.

<sup>20</sup> See Petition at 3.

<sup>21</sup> 47 U.S.C. § 405 (1996).

<sup>22</sup> See also 47 C.F.R. § 1.106(f).

<sup>23</sup> 47 C.F.R. § 1.4.

<sup>24</sup> 47 C.F.R. § 1.4(b).

<sup>25</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.*,

(continued....)

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>26</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>27</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>28</sup>

7. The dispositive issue in this case is whether the staff’s error in listing the applications under the old licensee name allows us to waive Section 405 of the Act pursuant to *Gardner*. We conclude that Nucentrix has failed to demonstrate that it falls within the exception to Section 405 established by *Gardner* because it has failed to offer any explanation as to how and when it was placed on actual notice of the dismissal of their applications.<sup>29</sup> It is important for a petitioner to affirmatively plead such circumstances because a defect in notice will be of legal consequence only where such delay in notice will make it impossible for the petitioning party to comply with the statutory deadline.<sup>30</sup> While it is unfortunate that the public notice listed the wrong applicant name, Nucentrix could have reviewed the *June Public Notice* and determined that the applications had been dismissed by reviewing the file number. In the absence of a showing as to how Nucentrix became aware of the dismissal of its applications, it is impossible to state precisely whether Nucentrix acted promptly in filing the instant petition.<sup>31</sup> In the

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*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>26</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (*Gardner*).

<sup>27</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>28</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>29</sup> See *Gardner*, 530 F.2d at 1092 n.24 (requiring petitioners to explain the circumstances surrounding their being placed on actual notice of the Commission’s action). Indeed, 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>30</sup> See *id.*

<sup>31</sup> Cf., e.g., *Gardner*, 530 F.2d at 1092 n.24 (requiring petitioner to move for reconsideration promptly on receiving actual notice); Roy M. Speer, *Memorandum Opinion and Order*, 16 FCC Rcd 3993 (1999) (*Speer*) (accepting late-filed petition for reconsideration that was filed within thirty days of petitioner receiving actual notice of Commission action); but see *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) (affirming rejection of petition where petitioner failed to offer any explanation for its failure to meet the deadline).

absence of an adequate showing, we conclude that Nucentrix's petition must be dismissed as untimely pursuant to Section 405 of the Act.

#### IV. CONCLUSION AND ORDERING CLAUSES

8. Nucentrix has not 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 must dismiss its Petition.

9. 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 MDS Nucentrix Trust on September 9, 2003 **IS DISMISSED**.

10. 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  
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