

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

In re Application of)	
)	
WIRELESS PROPERTIES OF VIRGINIA, INC.)	File No. 9203938
)	
For Authority to Construct and Operate an)	
Educational Broadband Service Station at)	
Strasburg, Virginia)	
)	

ORDER ON RECONSIDERATION

Adopted: February 9, 2005

Released: February 10, 2005

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

I. INTRODUCTION

1. On April 26, 2004, Wireless Properties of Virginia, Inc. ("WPV") filed a petition seeking reconsideration¹ of the dismissal its application to construct and operate a Commercial Instructional Television Fixed Service (ITFS) Station on the "B" channels in Strasburg, Virginia.² The application was 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.³ For the reasons discussed below, we grant 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").⁴ As the WTB began migrating data from the Broadband Licensing System (BLS) to the Universal Licensing System (ULS),⁵ it sought to ensure that it had a complete and accurate listing of all licenses, pending

¹ Wireless Properties of Virginia, Inc., Petition for Reconsideration (filed April 26, 2004) (Petition).

² See File No. BPMDC-9203938 (filed Apr. 6, 1992) (application).

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.⁶ 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.⁷

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, 2002.⁸ Although the WTB originally provided a sixty-day window (ending December 18, 2002) in which to comply with its request,⁹ it later extended the filing deadline to February 21, 2003.¹⁰

3. At the time that the WTB released the *October Public Notice*, WPV's application remained pending before the Commission.¹¹ On February 3, 2003, WPV filed the appropriate response, as required by the *October Public Notice*.¹² Specifically, WPV informed the Commission "that an application for a new station on the B group in Strasburg, VA was filed by American Telecasting, Inc. and remains pending. Licensee notified the Commission via an amendment to the original application that the name of the applicant had changed to Wireless Properties of Virginia, Inc. Licensee affirms that continued processing of application BPMDC-9203938 is requested and has submitted a copy of this

⁶ 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.

⁷ *Id.* (emphasis in original).

⁸ *See id.*

⁹ *See id.*

¹⁰ 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).

¹¹ The application was originally filed by American Telecasting, Inc. ("ATI") on April 6, 1992. However, on November 22, 1993, ATI filed a minor amendment to the application to change the name of the applicant from ATI to WPV. *See* Letter from William D. Freedman, Esq., Gurman, Kurtis, Blask, & Freedman, to William F. Caton, Acting Secretary, FCC (Nov. 22, 1993) (amendment). The amendment explained that the change in the applicant name was only *pro forma* in nature because Donald R. DePriest controlled both ATI and WPV. *See id.*

¹² Letter from Lee Rosen, President, Wireless Properties of Virginia, Inc., to FCC, MDS/ITFS Database Corrections (filed February 3, 2003) (WPV Response Letter).

application.”¹³ 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*.¹⁴ The *June 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.¹⁵ In so doing, the WTB dismissed the application that WPV desired for the Commission to continue processing.¹⁶ The dismissed application was 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, Commission staff inadvertently listed the dismissed application under the name of the former licensee – “American Telecasting, Inc.”¹⁷

4. According to WPV, it did not discover that the application had been dismissed until March 29, 2004 when an amendment filed by WPV on March 19, 2004 was returned.¹⁸ WPV filed the instant petition on April 26, 2004. WPV believes that the dismissal was merely an administrative error and that the application and the amendment should both be reinstated.¹⁹ Specifically, WPV contends that it fully complied with the Commission’s stated purpose of ensuring that its licensing records were accurate, current, and comprehensive by filing a timely response to the *October Public Notice* on February 3, 2003.²⁰ WPV notes that, in so doing, it notified the WTB that the Commission’s records need to be corrected to reflect that WPV, and not ATI, was the correct name of the applicant.²¹ Because it timely responded to the *October Public Notice* and informed the WTB of the correct name of the applicant, WPV concludes that it “had no reason to anticipate that the application was subject to dismissal and certainly had no reason to suspect that the application will be listed and dismissed under ATI’s name.”²² Therefore, WPV asserts that “[i]t would be unjust to penalize WPV since it clearly exhibited its continuing interest in the Application.”²³

III. DISCUSSION

5. Section 405 of the Communications Act of 1934, as amended,²⁴ 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.”²⁵ For the purposes of Section 405, the terminal date

¹³ *Id.*

¹⁴ 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*).

¹⁵ *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*.

¹⁶ *See id.*, Appendix B.

¹⁷ *See id.*, Appendix B.

¹⁸ *See* Petition at 3.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.* at 2-4.

²² *Id.* at 3-4.

²³ *Id.* at 3.

²⁴ 47 U.S.C. § 405 (1996).

²⁵ *See also* 47 C.F.R. § 1.106(f).

of the thirty-day time period for filing petitions for reconsideration is determined in accordance with Section 1.4 of the Commission's Rules.²⁶ 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.²⁷ 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.²⁸ 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."²⁹ 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."³⁰ 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.³¹

7. We believe that the extraordinary circumstances presented in this case justify our acceptance of the instant petition because WPV 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*.³² Specifically, we find that WPV timely responded to the *October Public Notice* by notifying the WTB of its desire for the continued processing of its application and, in so doing,

²⁶ 47 C.F.R. § 1.4.

²⁷ 47 C.F.R. § 1.4(b).

²⁸ 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*).

²⁹ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (*Gardner*).

³⁰ *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).

³¹ *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.*

³² 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 21st 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).

placed the WTB on notice of the need to correct the name of the applicant in the Commission's records.³³ Due to a ministerial error on behalf of the Commission staff, when the WTB released the *June Public Notice*, Appendix B still incorrectly stated that the applicant's name was ATI.³⁴ Although WPV could have been more diligent in reviewing the *June Public Notice*, we believe that, based on the facts presented in this particular instance, WPV would have timely filed a petition seeking reconsideration of the dismissal of its application if the *June Public Notice* correctly identified WPV as the applicant.³⁵ WPV 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.³⁶ Specifically, WPV had no reason to suspect that the application had been dismissed until an amendment it attempted to file was returned to WPV on March 29, 2003.³⁷ WPV promptly filed the instant petition within thirty-days.³⁸ We therefore find that WPV has satisfied the burden set-forth in *Gardner*, thereby permitting us to consider and grant the instant petition.

8. 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 ATI rather than as WPV.³⁹ 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.⁴⁰ As WPV timely stated its interest in continuing to prosecute its application on February 3, 2003 in response to the *October Public Notice*, 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

³³ See WPV Response Letter at 1. Despite the filing of a minor amendment on November 22, 1993 that sought to execute a *pro forma* change in the name the applicant from ATI to WPV, the Commission's records still reflected that the name of the applicant was ATI. See Amendment (explaining that the change in the applicant name was only *pro forma* in nature because Donald R. DePriest controlled both ATI and WPV).

³⁴ See *June Public Notice*, Appendix B.

³⁵ 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.

³⁶ 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).

³⁷ Of course, by that time, the deadline for filing petitions for reconsideration had passed. See, e.g., *Gardner*, 530 F.2d at 1092 n.24 (noting that a defect in notice will be of legal consequence where such delay in notice will make it impossible for the petitioning party to comply with the statutory deadline). The record is absent of any indication that WPV received actual notice of the dismissal prior to the return of its amendment on March 29, 2003. See *Gardner*, 530 F.2d at 1092 n.24 (noting that interested parties often receive actual notice of decisions or rulings through items in the general or trade press before or without receiving personal notice).

³⁸ 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).

³⁹ See *Speer*, 16 FCC Rcd at 4001 n.31.

⁴⁰ See *October Public Notice*, 17 FCC Rcd at 20543.

WPV was no longer interested in pursuing this matter.⁴¹ Accordingly, we will grant the instant petition and reinstate the application.

IV. ORDERING CLAUSES

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, the petitions for reconsideration filed by Wireless Properties of Virginia, Inc. on April 26, 2004 **IS HEREBY GRANTED**.

10. **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 File No. 9203938 **IS RETURNED** to pending status.

11. **IT IS FURTHER ORDERED**, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, that the licensing staff of the Broadband Division **SHALL PROCESS** File No. 9203938 in accordance with the this *Order on Reconsideration* and the Commission's Rules.

12. These actions 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

⁴¹ 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*.