

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

In the Matter of Application of)
BROADCAST CABLE BLOOMINGTON, INC.) File No. 50122-CM-P-90
For a Conditional License for a New Broadband)
Radio Service Station Operating on the E-Group)
Frequencies at Bloomington, Indiana)

ORDER ON RECONSIDERATION

Adopted: December 14, 2006

Released: December 15, 2006

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

I. INTRODUCTION

1. On May 3, 1993, Broadcast Cable Bloomington, Inc. (BCBI) filed a petition seeking partial reconsideration of the action taken by the Domestic Facilities Division of the Common Carrier Bureau on April 2, 1993, dismissing BCBI's captioned application for a Broadband Radio Service (BRS) station as unacceptable for filing. BCBI's petition is opposed by Affiliated MDS Corporation (Affiliated) and Indianapolis Cellular Television Co. (ICTV), and BCBI has replied. For the reasons discussed below, we deny BCBI's Petition.

1 Broadcast Cable Bloomington, Inc. Petition for Partial Reconsideration (filed May 3, 1993) (Petition).

2 Letter from James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau to Donald E. Paulson and Thomas P. Farrell (dated Apr. 2, 1993) (Letter Order).

3 Broadcast Cable, Inc. Application, File No. 50122-CM-P-90 (filed Dec. 29, 1989).

4 On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that transforms the rules governing the Multipoint Distribution Service (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. Unless otherwise noted, the citations to rules will be to those rules in effect during the operative time period.

5 The Letter Order also dismissed as defective an application filed by Affiliated to modify Affiliated's MMDS Station WHT673 at Bloomington, Indiana. BCBI does not contest this aspect of the Letter Order. Affiliated has since assigned the authorization for WHT673 to Wireless Cable of Indianapolis, Inc. (WCI). See Mass Media Bureau Multipoint Distribution Service Actions, Report No. 196, Public Notice (rel. Nov. 7, 2000). On February 24, 2005, pursuant to rules adopted in the BRS/EBS R&O & FNPRM, WCI notified the Commission that WHT673 had voluntarily discontinued service. WCI Notification of Discontinuance of Service Pursuant to §27.66 (dated Feb. 24, 2005).

6 Affiliated MDS Corporation and Indianapolis Cellular Television Co. Joint Opposition to Petition for Partial Reconsideration (filed May 18, 1993) (Joint Opposition).

II. BACKGROUND

2. On December 29, 1989, Broadcast Cable, Inc. (BCI) filed an application for a conditional license for a new multichannel multipoint distribution service (MMDS) station on the E-group channels at Bloomington, Indiana. BCI and BCBI filed a minor amendment to this application on September 13, 1991,⁸ substituting BCBI for the original applicant BCI, stating that the two companies have identical ownership.⁹

3. On April 2, 1993, the Domestic Facilities Division of the former Common Carrier Bureau (Division) dismissed BCBI's application as defective.¹⁰ The Division found that BCBI failed to comply with the requirements of Sections 21.902(c)(1), 21.902(c)(2), 21.902(c)(3), 21.902(f), and 21.902(g) of the Commission's Rules.¹¹ Section 21.902(c)(1) of the Commission's Rules required BCBI to file with its initial application "[a]n analysis of the potential for harmful interference within the 56.33 km (35 mile) protected service areas of any authorized or previously proposed incumbent station,"¹² which in BCBI's case included Affiliated's co-channel MMDS Station WHT673 at Bloomington.¹³ The Division noted that BCBI must engineer its station to provide to WHT673's protected service area at least 45 dB of cochannel interference protection, and that while BCBI's application provided a narrative discussion of interference to the station, BCBI's submission failed to show the desired-to-undesired signal ratios required by Sections 21.902(c) and 21.902(f).¹⁴ The Division further noted that, with respect to adjacent-channel MMDS Station WLW973 at Bloomington, licensed to Broadcast Data Corp. (Data), BCBI is required to provide to WLW973's protected service area an undesired-to-desired signal ration of less than 0 db, yet BCBI again failed to show the desired-to-undesired signal ratios of BCBI's signal within the protected service area of Station WLW973.¹⁵ Moreover, BCBI failed to comply with the requirement of Section 21.902(c)(3) that BCBI identify the areas within the protected service areas of Affiliated's station and WLW973 which would receive harmful interference, nor did BCBI submit an explanation of why its proposed station cannot be colocated with Station WLW973.¹⁶ In addition, the Division noted that BCBI failed to comply with the requirement of Section 21.902(g) that BCBI serve, on or before the date it filed its initial application, a copy of the required interference studies on each of the applicants, conditional licensees, and licensees of the stations studied, and that BCBI file a certificate of such service with its

(...continued from previous page)

⁷ Broadcast Cable Bloomington, Inc. Reply to Joint Opposition to Petition for Partial Reconsideration (filed May 28, 1993) (Reply).

⁸ Broadcast Cable, Inc. and Broadcast Cable Bloomington, Inc. Minor Amendment (filed Sept. 13, 1991) (Amendment).

⁹ Amendment at 1.

¹⁰ Letter Order, *supra*.

¹¹ 47 C.F.R. 21.902(c)(1), 21.902(c)(2), 21.902(c)(3), 21.902(f), and 21.902(g) (1989).

¹² 47 C.F.R. 21.902(c)(1) (1989).

¹³ Letter Order at 2. ICTV had an agreement with Affiliated to utilize WHT673 to provide a video relay service to be used in conjunction with a wireless cable service in and around Indianapolis. Joint Opposition at 1 n.1.

¹⁴ Letter Order at 2-3.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

initial application.¹⁷ Finally, the Division stated that, among other deficiencies, BCBI's maintenance showing fails to comply with the requirements of Section 21.15(e) of the Commission's Rules.¹⁸

4. BCBI argues that its application is not defective.¹⁹ BCBI contends that the Commission's Rules do not require a showing of actual signal ratios, but merely an analysis of the potential for harmful interference, which BCBI states it submitted.²⁰ BCBI argues that Figure 6 of Exhibit E to its application shows that along twelve radials within the protected service area contour of WHT673 the desired-to-undesired signal ratio is greater than 45 dB, as indicated by the term "PC," meaning the protected contour as calculated according to Section 21.902(d)(1) and (2) of the Commission's Rules.²¹ BCBI submits a declaration from Robert T. Bond attesting that the computer program that generated Figure 6 has been used repeatedly since the late 1970s to demonstrate non-interference.²² BCBI argues that the program complies with the requirements of the Commission's Rules, and contends, without citing any examples or support, that the Commission has granted applications that have used the program and its nomenclature.²³ BCBI maintains, therefore, that its application was treated differently from those of similarly situated parties, which cannot be justified.²⁴ BCBI also contends that the specification of the value of desired-to-undesired signal is of no consequence when the value exceeds the minimum, and thus the absence of specified values in BCBI's application is of no consequence.²⁵ BCBI also maintains that because Figure 6 shows that the stations are cross-polarized, are separated by 47 miles, and that the E.I.R.P. of the desired station exceeds that of the undesired station by 1.7 dB, it is clear that a desired-to-undesired signal study would show greater than 45 dB at all study points.²⁶

5. With respect to Station WLW973, BCBI again argues that it is not required to show the actual desired-to-undesired signal ratio values.²⁷ In addition, citing Section 21.902(c)(4) of the Commission's Rules,²⁸ BCBI contends that it is not required to show 0 db protection throughout WLW973's protected service area, but that BCBI need only provide this protection whenever possible.²⁹ BCBI states that, in accordance with Commission policy,³⁰ BCBI explained in its application that it is not

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 4 n.4. Former Section 21.15(e) of the Commission's Rules required an applicant to "submit a showing of the general maintenance procedures involved to insure the rendition of good public communications service." The showing was required to include the location and telephone number of the maintenance system, the manner in which technical personnel were made aware of malfunctions, and the appropriate time required to reach the station in case of emergency. 47 C.F.R. § 21.15(e) (1993).

¹⁹ Petition at 2.

²⁰ Petition at 3.

²¹ Petition at 3. *See also* Exhibit E to Application at Figure 6 at 2.

²² Petition at 3. *See also* Attachment III to Petition at 5.

²³ Petition at 3-4.

²⁴ Petition at 4.

²⁵ Petition at 4-5.

²⁶ Petition at 5.

²⁷ Petition at 6.

²⁸ 47 C.F.R. § 21.902(c)(4) (1989).

²⁹ Petition at 6.

³⁰ BCBI cites Amendment of Parts 21, 74 and 94 of the Commission Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS), *et al.*, GN Docket No. 80-113, *First Report and Order*, 98 FCC 2d 68, 118 ¶ 132 (1990).

possible to colocate BCBI's proposed facility with Station WLW973, because existing space was filled.³¹ BCBI argues that such an explanation has previously been accepted in granting an application,³² and the Commission should do so in BCBI's case as well.³³ BCBI states that it did submit a study – Figure 7 of Exhibit E to its application – made at 0.1 mile increments along 360 radials from the proposed transmitter site, which demonstrated a lack of any interference at 0.1 mile resolution.³⁴ Consequently, any interference occurring to WLW973 would be within 0.1 mile of BCBI's transmitter, an area of 0.03 square miles.³⁵ BCBI states that this area would fall within the radius of the tower's guy wires, and that there is no reason why such possible yet negligible adjacent channel interference should be a barrier to accepting BCBI's application.³⁶

6. BCBI also contends that the lack of an analysis of interference from Station WLW973 to BCBI's proposed station is not a reason to dismiss BCBI's application.³⁷ BCBI maintains that the applicant in *Austin* did not include such an analysis.³⁸ BCBI also claims it is willing to accept the minute interference that might be caused to it.³⁹ BCBI notes that it did serve its application on all studied parties, a copy of which is submitted as Exhibit IV.⁴⁰ BCBI contends that as it has elected non-common carrier status, no public service obligations are imposed upon it, and thus a showing of maintenance procedures involved to insure the rendition of good public service is not relevant to the decision whether to grant BCBI's application.⁴¹ In any event, claims BCBI, the Division has a practice of granting applications for BRS station licenses conditioned upon the later submission of a maintenance showing.⁴² With respect to other deficiencies allegedly found in BCBI's application, BCBI argues that the Division's failure to specify any such deficiencies bars the Division from raising them against BCBI.⁴³

7. On October 17, 1995, BCBI submitted letters of agreement from BCBI, Affiliated, and Data⁴⁴ stating that all three parties have agreed to engineer their facilities to minimize any potential interference and to accept what minimal amounts of interference may occur.⁴⁵ Subsequently, PCTV Gold, Inc. (PCTV), the authorization holder of the Bloomington, Indiana Basic Trading Area, notified the

³¹ Petition at 7. *See also* Exhibit E to Application at 6.

³² BCBI cites *Austin Movie and Sports Cable, Inc.*, *Memorandum Opinion and Order*, 4 FCC Rcd 6174 (CCB DFD 1989) (*Austin*).

³³ Petition at 7-8.

³⁴ Petition at 8. *See also* Exhibit E to Application at 6 and Figure 7.

³⁵ Petition at 8. *See also* Exhibit E to Application at 6.

³⁶ Petition at 8-9.

³⁷ Petition at 9.

³⁸ Petition at 9.

³⁹ Petition at 9.

⁴⁰ *Id.*

⁴¹ Petition at 10.

⁴² Petition at 10 n.14.

⁴³ Petition at 10.

⁴⁴ Letter from Broadcast Cable Bloomington, Inc. and Broadcast Data Corp. to Charles Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau (dated Oct. 1, 1995); Letter from Broadcast Cable Bloomington, Inc. and Affiliated MDS Corporation to Charles Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau (dated Oct. 1, 1995).

⁴⁵ Letter from Broadcast Cable Bloomington, Inc. to Charles Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau (dated Oct. 17, 1995).

Commission that BCBI had entered into an agreement with PCTV to lease all of the transmission capacity of the E Group channels, and urged grant of BCBI's petition and underlying application.⁴⁶

III. DISCUSSION

8. We are not persuaded by BCBI's arguments. At the time BCBI's application was filed, Section 21.902(b) of the Commission's Rules required a BRS applicant to engineer its proposed station to provide at least 45 dB of interference protection within the protected service areas of all other authorized or previously proposed co-channel station and at least 0 dB of interference protection within the protected service area of all other previously proposed or authorized adjacent channel stations.⁴⁷ BRS applicants were required to demonstrate these protections in interference studies submitted with their applications.⁴⁸ These interference showings are a significant requirement that the Commission has repeatedly emphasized.⁴⁹ Applications that do not contain an analysis of how the applicant intends to avoid interference in adjacent areas will not be considered acceptable for filing.⁵⁰ In performing these analyses, calculations must be performed properly and be adequately justified.⁵¹ Mere conclusions unsupported by proof or documentation have no probative value.⁵² BCBI's failure to supply detailed calculations for the desired to undesired signal ratios does not comport with the rules.⁵³ Even were we to accept BCBI's interpretation of the rules as applied to the methodology of BCBI's interference studies, BCBI's failure to identify the area in which interference may be expected – interference that BCBI acknowledges will occur – is fatal to its application. *Austin*, which BCBI relies upon, is readily distinguishable from this case because the applicant and its opponent had demonstrated their willingness to resolve potential interference problems cooperatively.⁵⁴ BCBI did not make such a showing at the time it filed its application or the present Petition.

9. Furthermore, BCBI's 1995 agreement with Affiliated and Data does not cure the deficiencies in its application. The Commission has affirmed that consent letters must be filed with the original application because “[c]onsidering consent letters that did not exist at the time the original

⁴⁶ Letter from Todd A. Rowley to Barbara Kreisman, Chief, Video Services Division, Mass Media Bureau (dated May 28, 1997).

⁴⁷ 47 C.F.R. § 21.902(b) (1989).

⁴⁸ 47 C.F.R. § 21.902(c)(1)-(3) (1989).

⁴⁹ *E.g.*, Tekkom Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 19545 (WTB PSPWD 2003); WYSE Wireless Partnership, *Order on Reconsideration*, 13 FCC Rcd 11007 (MMB VSD 1998); Oklahoma Western Telephone Company, *Order on Reconsideration*, 13 FCC Rcd 8472 (MMB VSD 1998); Family Entertainment Network, Inc., *Order on Reconsideration*, 9 FCC Rcd 566 (CCB DFD 1994); Austin Movie and Sports Cable, Inc., *supra*.

⁵⁰ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *et al.*, General Docket No. 80-112, CC Docket No. 80-116, *et al.*, *Report and Order*, 94 FCC 2d 1203, 1264 ¶ 150 (1983). *See also* 47 C.F.R. § 21.902(b)-(c) (1989).

⁵¹ *E.g.*, WYSE Wireless Partnership, 13 FCC Rcd at 11011 ¶ 11; Oklahoma Western Telephone Company, 13 FCC Rcd at 8475 ¶ 7; Telcast, Inc., *Order on Reconsideration*, 13 FCC Rcd 8467, 8470 ¶ 7 (MMB VSD 1998).

⁵² *E.g.*, WYSE Wireless Partnership, 13 FCC Rcd at 11011 ¶ 11; 101 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations, *Memorandum Opinion and Order on Reconsideration*, 9 FCC Rcd 7886, 7897 ¶ 46 (1994); Jim Bolton d/b/a MDS of Louisiana, *Memorandum Opinion and Order*, 2 FCC Rcd 3207 (CCB 1987).

⁵³ *E.g.*, Emerson College, *Memorandum Opinion and Order*, 19 FCC Rcd 4749, 4750 ¶ 7 (WTB BD 2004); Oklahoma Western Telephone Company, 13 FCC Rcd at 8475 ¶ 7; Telcast, Inc., *Order on Reconsideration*, 13 FCC Rcd 8467, 8470 ¶ 7 (MMB VSD 1998).

⁵⁴ *Austin*, 4 FCC Rcd at 6175 ¶ 11, 6176 ¶ 17.

application was filed encourages the filing of incomplete applications and places an undue burden on the Commission's limited resources."⁵⁵ Here, BCBI did not reach an agreement with Affiliated and Data until two years after its application was dismissed. Consistent with the Commission's holding, we find that the 1995 agreement does not provide a basis for reinstating BCBI's application.

10. We also affirm the holding that BCBI's application was defective for failure to submit a maintenance showing. Contrary to BCBI's claim that it need not submit a maintenance showing, both Section 21.15(e) of the Rules⁵⁶ and Item 18 of the application form require such a submission, with no exception stated for non-common carrier applicants. If BCBI believed that it had good cause for not complying with the rule, it should have filed a request for waiver.⁵⁷ However, in filing its application, BCBI did not claim exemption from this requirement, but simply noted that the location and telephone number of the maintenance center was "to be determined."⁵⁸ Again, BCBI cites no precedent to the contrary, but simply references an undocumented Division policy allowing submission of this information subsequent to filing an application.⁵⁹ Even if such policy were to exist, BCBI's application fails to demonstrate an intention to eventually supply the information.⁶⁰

IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we deny BCBI's petition for partial reconsideration, thereby affirming the dismissal of BCBI's captioned application as unacceptable for filing.

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration filed by Broadcast Cable Bloomington, Inc. on May 3, 1993 IS DENIED.

13. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

⁵⁵ See Educational Television Association of Metropolitan Cleveland, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 15117, 15120 (2003).

⁵⁶ 47 C.F.R. § 21.15(e) (1989).

⁵⁷ See Microband Corporation of America and American Telecasting of Portland, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 21947, 21951 (WTB BD 2004).

⁵⁸ Broadcast Cable, Inc. Application, File No. 50122-CM-P-90 (filed Dec. 29, 1989).

⁵⁹ Petition at 10 n.14.

⁶⁰ In light of our conclusion that there are two independent bases for dismissing BCBI's application, we need not address BCBI's remaining arguments or the other grounds relied upon by the Division for dismissing the application.