

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

In the Matter of)
WIRELESS PROPERTIES OF VIRGINIA, INC.) File No. 9203937
Application for New Educational Broadband)
Service Station on the A Channel Group at)
Strasburg, Virginia)

ORDER ON RECONSIDERATION

Adopted: January 29, 2007

Released: January 29, 2007

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

I. INTRODUCTION

1. On April 16, 2004, Wireless Properties of Virginia, Inc. (WPV) filed a petition seeking reconsideration of the action taken by the former Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (Branch) of the Wireless Telecommunications Bureau on March 12, 2004, dismissing its application for a new commercial Educational Broadband Service (EBS) Station on the A channel group at Strasburg, Virginia. For the reasons discussed below, we grant the Petition and reinstate the Application.

II. BACKGROUND

2. On April 6, 1992, American Telecasting, Inc. (ATI) filed an application for a new commercial EBS Station on the A channel group at Strasburg, Virginia. On November 22, 1993, an amendment substituted WPV for ATI as the applicant. On March 25, 2002, the WTB assumed

1 Petition for Reconsideration and Reinstatement (filed Apr. 16, 2004) (Petition).

2 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.

3 See Letter, Ref. No. 2624352 (Mar. 15, 2004) (Dismissal Letter). Public notice if the dismissal was given on March 17, 2004. See Wireless Telecommunications Bureau Site-by-Site Action, Report No. 1778 (rel. Mar. 17, 2004) at 13.

4 Application (filed Apr. 6, 1992) (Application).

5 Letter from William D. Freedman, Esq. to William F. Caton, Acting Secretary, Federal Communications Commission (filed Nov. 22, 1993).

responsibility from the Mass Media Bureau for the administration of the Instructional Television Fixed Service (ITFS), the Multipoint Distribution Service (MDS), and the Multichannel Multipoint Distribution Service (MMDS).⁶ As the WTB began migrating data from the Broadband Licensing System (BLS) to the Universal Licensing System (ULS),⁷ 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, 2002, requiring all licensees, applicants, and petitioners to review and verify the information contained in the six different tables that were attached to it.⁸ On January 29, 2003, WPV submitted the Application, as amended, in response to the Public Notice.⁹

3. On November 12, 2003, the Branch returned the Application because the proposed tower structure appeared to require registration with the Commission and obtaining FAA clearance.¹⁰ The Return Letter specifically warned WPV, “Amending your application without making all the necessary changes and/or providing the requested information may result in dismissal of your application pursuant to Section 73.3568. If you do not file an Amendment within 60 days of the date of this letter, your application will be dismissed.”¹¹

4. WPV did not file an amendment within the required period. Instead, on January 13, 2004, WPV’s counsel submitted a letter informing the Commission that the proposed transmitter site “needed to be relocated to accommodate FAA clearance . . .”¹² WPV expressed an intent to amend its application to specify a new transmitter site but reported that additional interference consent letters were needed.¹³

5. On March 16, 2004, the Branch dismissed the Application for failure to file an amendment within the time contained in the Return Letter.¹⁴ On March 19, 2004, WPV attempted to

⁶ 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) (*BRS/EBS R&O and FNPRM*).

⁷ 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).

⁸ 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.

⁹ Letter from Wireless Properties of Virginia, Inc. to Federal Communications Commission (Jan. 29, 2003).

¹⁰ Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Wilkinson Barker Knauer LLP, (Nov. 13, 2003) (Return Letter).

¹¹ Return Letter.

¹² See Letter from Lee J. Rosen to Mary Shultz, Federal Communications Commission (filed Jan. 13, 2004) (Rosen Letter).

¹³ Rosen Letter.

¹⁴ Dismissal Letter.

submit an amendment substituting a new transmitter site.¹⁵ The Post-Dismissal Amendment was returned on March 29, 2004.¹⁶ WPV filed the Petition on April 16, 2004.¹⁷

III. DISCUSSION

6. WPV explains that it attempted to amend its application by January 13, 2004, but was unable to do so because of the changed interference environment, the need for new engineering studies, and the need to obtain consent letters.¹⁸ WPV distinguishes its situation from another case where an application was dismissed for failure to respond, arguing that WPV did respond and worked diligently to prepare an amendment after the Commission informed it that an amendment was necessary.¹⁹ WPV states that it filed its initial application in 1992 but that the Commission took no action on it for more than ten years.²⁰ During that interval, it adds, the Commission changed its interference protection requirements.²¹ The Return Letter, issued in 2003, gave WPV sixty days either to obtain consents from additional licensees in the surrounding area or make arrangements for a different transmitter location.²² WPV says that it had to arrange for additional engineering studies, revise the technical parameters of its proposed transmitter, and obtain consents from other affected parties before it could submit the required amendment.²³

7. Recently, the Bureau reinstated on reconsideration three EBS renewal applications that were dismissed for failing to respond to return notices.²⁴ The Bureau concluded that while the dismissals were clearly correct, licensees might have been unaware of the consequences of the failure to respond because of the lenient treatment licensees received from the former Mass Media Bureau. Commission licensing records indicate that former staff accepted virtually all explanations for untimely filing from EBS licensees. The Bureau also noted that if the licenses were cancelled, no educator would be able to use the frequencies for possibly several years. While this case involves an application for a new station, under the unique circumstances of this case, we find that a similar result should apply and that affirming the dismissal of the Application would be inequitable, unduly burdensome, and contrary to the public interest.

¹⁵ Letter from Mary N. O'Connor Esq. to Federal Communications Commission (Mar. 19, 2004) (Post-Dismissal Amendment).

¹⁶ Petition at 3.

¹⁷ Petition.

¹⁸ Petition at 2-3.

¹⁹ Petition at 3. The case that WPV attempts to distinguish is Nevada MDS, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 4754 (WTB BD 2004).

²⁰ Petition at 1.

²¹ *Id.* at 3. In 1999, the Commission expanded the co-channel protected service areas (PSAs) of MDS and ITFS site-based licenses from a radius of 15 miles to a radius of 35 miles, but grandfathered incumbent stations that were short-spaced with respect to each other under the new interference protection standards. See Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12796-12797 ¶¶ 69 (1999) (Two-Way Reconsideration); Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, *Declaratory Ruling and Order*, 11 FCC Rcd 18839, 18853-18854 ¶¶ 23-24 (1996) (Digital Declaratory Ruling).

²² *Id.* at 3.

²³ *Id.*

²⁴ See Junior College District of Metropolitan Kansas City, Missouri, *et al.*, 21 FCC Rcd 13770 (WTB 2006) (*JR College District*).

8. We will therefore grant the Petition and reinstate WPV's Application. We will reinstate the application as originally filed and not consider the amendment. While the information called for in the Return Notice was required at the time, the information is no longer necessary because of the change in the BRS and EBS rules. Specifically, under the new rules, BRS and EBS incumbent licensees now have a 35-mile radius geographic service area and may place transmitters anywhere within their geographic service area.²⁵ Accordingly, we can process WPV's Application as originally filed and grant WPV a geographic service area centered around its originally proposed transmitter site. WPV can then place transmitters within its geographic service area, subject to compliance with the appropriate technical rules. We note that if the Application is granted, WPV, like all EBS licensees, will be required to demonstrate substantial service by May 1, 2011.²⁶

IV. CONCLUSION AND ORDERING CLAUSES

9. For the reasons discussed above, we grant WPV's Petition and direct our staff to process its Application for a new commercial EBS Station in Strasburg, Virginia, in accordance with the Commission's rules and policies.

10. 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 Reconsideration and Reinstatement filed by Wireless Properties of Virginia, Inc., on April 16, 2004 IS GRANTED.

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) and 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the Broadband Division SHALL REINSTATE AND PROCESS the captioned application (File No. 9203937) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

12. 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

²⁵ 47 C.F.R. §§ 27.1206(a)(1), 27.1209(b).

²⁶ 47 C.F.R. § 27.14(e).