

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

In the Matter of)	
)	
Application of ITV, Inc. To Renew the License for)	ULS File No. 0001654409
Station KIVD0011, San-Francisco-Oakland,)	
California, in the 218-219 MHz Service)	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2007

Released: January 31, 2007

By the Chief, Mobility Division:

I. INTRODUCTION

1. In this order, we address a Petition for Reconsideration (Petition) filed by ITV, Inc. (ITV)¹ regarding call sign KIVD0011, formerly licensed to ITV in the 218-219 MHz Service² for the San Francisco-Oakland, California, Metropolitan Statistical Area (MSA). ITV seeks reconsideration of the *ITV Decision*,³ in which the Mobility Division (Division) of the Wireless Telecommunications Bureau (Bureau) rejected ITV's substantial service showing for this license under sections 95.831 and 95.833 of the Commission's rules,⁴ denied ITV's alternative request for waiver of those rules, and dismissed its renewal application. In its Petition, ITV argues, *inter alia*, that the Division's dismissal of its renewal application and denial of its contingent waiver request were inconsistent with the treatment of other renewal and waiver requests, and therefore, its license should be reinstated with two additional years to meet its construction requirement.⁵ For the reasons stated below, we dismiss ITV's Petition.

¹ See Petition for Reconsideration filed by Richard S. Myers and Jay N. Lazrus, counsel to ITV, Inc., on June 29, 2005, ULS Application No. 0001654409. ITV also filed two supplements to the Petition. See Letters dated December 16, 2005 and May 22, 2006 from ITV counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission (ITV December 16, 2005 Letter and ITV May 22, 2006 Letter, respectively).

² The Interactive Video and Data Service (IVDS) was renamed the 218-219 MHz Service in 1998.

³ See Letter dated May 31, 2005 from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Buddy C. Stanley, ITV, Inc., 20 FCC Rcd 9548 (*ITV Decision*).

⁴ 47 C.F.R. § 95.831 ("Substantial service is defined as a service that is sound, favorable, and substantially above a level of service which might minimally warrant renewal."); 47 C.F.R. § 95.833(a) ("Each 218-219 MHz Service licensee must make a showing of "substantial service" within ten years of the license grant.").

⁵ Petition at 10-18.

II. BACKGROUND

2. The Commission granted ITV former license KIVD0011 on March 28, 1994.⁶ Commission rules then in effect required licensees to construct facilities to meet population benchmarks within one, three, and five years of grant, with renewal at the end of a five-year term.⁷ In 1999, the Commission replaced these requirements⁸ with a “substantial service” requirement to be assessed at renewal and extended 218-219 MHz license terms to ten years.⁹ However, the *218 MHz Flex Order* provided the extended ten-year license term to lottery licensees if they “timely filed renewal applications or timely filed waiver requests.”¹⁰ ITV properly filed for renewal of its initial five-year license term and, on April 12, 1999, the Bureau renewed KIVD0011 for an additional five years to achieve the ten-year license term provided for in the *218 MHz Flex Order*. Consistent with the relief in the *218 MHz Flex Order*, call sign KIVD0011 was afforded a new license expiration date of March 28, 2004, and ITV was required to meet the requirements in sections 95.831 and 95.833 (*i.e.*, demonstrate that it is providing substantial service within its license area) by that date or face license forfeiture.¹¹

3. ITV filed its Renewal Request on March 12, 2004, which also included a contingent

⁶ On September 15, 1993, the Commission held a lottery to select licensees for nine IVDS markets and ITV was selected for the authorization KIVD0011. *See* Commission Announces Tentative Selectees for Interactive Video and Data Service (IVDS) Lotteries, *Public Notice*, 8 FCC Rcd. 7053 (1993).

⁷ *See* Amendment of Parts 0, 1, 2 and 95 of the Commission’s Rules to Provide Interactive Video and Data services, *Report and Order*, 7 FCC Rcd 1630, 1641 (1992), *Memorandum Opinion and Order*, 7 FCC Rcd 4923 (1992), *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787 (1993).

⁸ We note that the prior one, three and five year construction requirements were waived or eliminated for the IVDS lottery license winners (one licensee did file a one-year benchmark showing pursuant to Section 95.833(b) of the Commission’s rules (received March 28, 1995)). *See* Interactive Video and Data Service (IVDS) Licenses - Additional Requests by Lottery Winners to Extend Construction Deadline, *Order*, 10 FCC Rcd 4546 (WTB 1995); Amendment of Part 95 of the Commission’s Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS), *Report and Order*, 11 FCC Rcd 2472 (1996) (eliminating the one-year construction requirement); Requests by Interactive Video and Data Service Lottery Winners to Waiver the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB, 1997) (waiving the three-year construction requirement); and Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (*218 MHz Flex Order*) (eliminating the three and five year construction requirements).

⁹ *218 MHz Flex Order* at ¶32, 15 FCC Rcd 1516 (1999).

¹⁰ *Id.* at ¶32. The Commission stated that “because of the unique circumstances of this case in that the proposed rule changes to the 218-219 MHz Service were inextricably tied to [the licensees’] construction requirements and the mechanisms used to satisfy those benchmarks, if the licensee has timely filed the appropriate license renewal form, we will extend the license term to ten years from the initial date of license issuance. If at the end of that time, the licensee has fully constructed its authorization and complied with all other Commission Rules, we will grant the license renewal. We will not grant any renewal application if the licensee fails to construct or place the station in operation before the end of the ten-year term.”

¹¹ *See* 47 C.F.R. §§ 95.831, 95.833, and 1.949. Section 95.833(c) states that “failure to demonstrate that substantial service is being provided in the service area will result in forfeiture of the license.”

request for waiver of the substantial service rules.¹² In its Renewal Request, ITV claimed that it and “commonly owned affiliate corporations” spent more than \$1.25 million to develop “equipment, business models, and end-user applications,”¹³ and requested that such expenditures be deemed substantial service. ITV stated that it tested equipment under experimental authorizations and demonstrated its technical feasibility, but it had no transmitters in operation. ITV reported that it had identified transmitter space, but it “had not been able to develop a business model which permits a . . . facility to operate . . . on a self-sustaining basis.” ITV contended that “[d]evelopment of the 218-[219] MHz Service is required nationally so that equipment manufacturers can reduce their costs as a result of mass-market economies of scale and . . . end users can expect to receive the same type of service in all major markets.”¹⁴ ITV also stated that it “sought other . . . 218-219 MHz Service licensees to similarly offer service, [but] the failure of the licensees to reach agreement . . . has prevented ITV from proceeding with its plans.”¹⁵ If its notification of substantial service is not accepted, ITV alternatively requested a waiver of the substantial service rules to continue its “development efforts.”¹⁶

4. In the *ITV Decision*, the Division found that ITV was not providing a service with the spectrum under its authorization and had not met the substantial service requirement that would have warranted renewal of its license.¹⁷ The Division also found that ITV presented no argument in support of its waiver request demonstrating how application of sections 95.831 and 95.833 would frustrate the underlying purpose of those rules, that ITV presented no unique or unusual factual circumstances that would warrant a waiver consistent with the public interest, and that grant of ITV’s waiver request would undermine the Commission’s policy goals to promote the development of the 218-219 MHz Service.¹⁸ Accordingly, the Division rejected ITV’s substantial service showing, denied its waiver request, dismissed its renewal application, and determined that the authorization for station KIVD0011 terminated automatically on March 28, 2004 for failure to comply with section 95.833.¹⁹

5. ITV filed its Petition on June 29, 2005. ITV claims that it is “similarly situated” to another 218-219 MHz Service licensee, San Francisco IVDS, that achieved renewal of its license and, therefore, should have its license renewed and construction deadline extended like that licensee.²⁰ ITV also argues that there is precedent for renewing licenses even if the licensee is not operating facilities at renewal. If it is determined that its license does not merit renewal, ITV alternatively argues that its waiver of the

¹² ULS File No. 0001654409, Exhibit A “Report of Substantial Service; Contingent Request for Partial Waiver of Sections 95.831 and 95.833 of the Rules” (filed March 12, 2004) (Renewal Request).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *ITV Decision*, 20 FCC Rcd at 9548.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Petition at 10, citing San Francisco IVDS, Inc., *Memorandum Opinion and Order*, 20 FCC Rcd 1960 (2005) (San Francisco IVDS).

substantial service requirement should be granted and presents additional arguments in support of its waiver request, as well as a promise to construct facilities within 24 months of renewal.²¹

III. DISCUSSION

6. As discussed below, we dismiss ITV's Petition as procedurally defective because we are not persuaded that we should consider additional facts presented for the first time in its Petition based on section 1.106(c)(2) of the Commission's rules.²² That rule provides that a "petition for reconsideration which relies on facts not previously presented . . . may be granted only" if "the designated authority determines that consideration of the facts relied on is required in the public interest."²³ The additional facts ITV relies upon relate to the alleged similarity in status and development efforts between ITV and those of San Francisco IVDS for its license under call sign KIVD0012. ITV claims that "some facts" relating to San Francisco IVDS were unknown to ITV upon filing its renewal application.²⁴ ITV argues that consideration of such facts would be in the public interest due to the struggling nature of the 218-219 MHz Service and its plan to continue to develop and provide service.²⁵

7. First, we note that ITV did not provide any justification supporting its initial waiver request, so any information provided in its Petition is new in the record.²⁶ We also note that *San Francisco IVDS* was decided by the Commission on January 28 2005, four months before the *ITV Decision*. The additional information ITV presents was a matter of public record and could have been presented via an amendment to its renewal application. It is well established that parties are not entitled to hold facts in reserve to contest a possible unfavorable decision. As the Commission has stated, "[w]e cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.'"²⁷

8. Under section 1.106(c)(2), we cannot grant ITV's petition for reconsideration unless we determine "that consideration of the facts relied on is required in the public interest," and that it has made a legally sufficient case.²⁸ We conclude that the public's well-recognized interest in the finality of the

²¹ Petition at 12.

²² Petition at 2, citing 47 C.F.R. § 1.106(c)(2).

²³ 47 C.F.R. § 1.106(c)(2). *See also* In Re Sagir, *Memorandum Opinion and Order*, 18 FCC Rcd 15967, 15973 ¶ 15 (2003) (finding "no benefit to the public interest under Section 1.106(c)(2) by considering . . . claims based on alleged new facts"); In Re Regents of the University of California, *Memorandum Opinion and Order*, 17 Rcd 1393, 1396 ¶ 9 (2002) (finding "no public interest reason to consider" petition pursuant to section 1.106(c)(2)).

²⁴ Petition at 2, n.2.

²⁵ Petition at 2.

²⁶ *See* Renewal Request at 1.

²⁷ *See* Canyon Area Residents, *Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

²⁸ 47 C.F.R. § 1.106(c)(2). *See also* In Re Sagir, *Memorandum Opinion and Order*, 18 FCC Rcd 15967, 15973 ¶ 15 (2003) (finding "no benefit to the public interest under Section 1.106(c)(2) by considering . . . claims based (continued. . . .)

agency's decisions would be ill served if we were to consider the information belatedly presented by ITV and therefore dismiss the Petition pursuant to section 1.106(c)(2).²⁹

9. As explained below, even if ITV's Petition were not procedurally defective, and were we to consider such additional facts, we believe that ITV has not demonstrated that it meets the substantial service requirement, or that it should have its license renewed and construction deadline extended via waiver. We reject ITV's claim that it is "similarly situated" to San Francisco IVDS and should, therefore, have its license renewed and construction deadline extended as did San Francisco IVDS. While there were several factors leading to the *San Francisco IVDS* decision, the primary factor was the "pendency of the 218-219 MHz Service rulemaking[,which] confused the licensee regarding the need to file a renewal application."³⁰ Had San Francisco IVDS timely filed its renewal application, as ITV had done, it would have been afforded the same regulatory relief from the *218 MHz Flex Order* (i.e., an extended license term until March 28, 2004, to meet its substantial service obligation). However, because its renewal application was untimely, the license automatically terminated on March 28, 1999.³¹ Ultimately, the Commission reinstated the San Francisco IVDS license for a full ten year license term. However, ITV incorrectly argues that such relief resulted in San Francisco IVDS being renewed without being subject to the substantial service requirement. In fact, San Francisco IVDS is required to meet its substantial service requirement in 2009, five years from license grant, which is the same amount of additional time ITV was afforded to meet its substantial service requirement.³² We note that ITV had no uncertainty regarding the legal status of its authorization and, in fact, filed its purported substantial service showing in 2004 (while San Francisco IVDS continued to seek reinstatement). We therefore reject ITV's argument that it is similarly situated with San Francisco IVDS and should be afforded similar relief.³³

10. We also find ITV's reliance on the *Winstar*, *Biztel*, *Havens*, *TeleGuam Holdings, LLC* (*TeleGuam*), and *Loral Spacecom Corporation* (*Loral*) decisions misplaced.³⁴ Both *Winstar* and *Biztel* demonstrated at renewal that they were providing service, while explaining why certain links may not have

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on alleged new facts"); In Re Regents of the University of California, *Memorandum Opinion and Order*, 17 Rcd 1393, 1396 ¶ 9 (2002) (finding "no public interest reason to consider" petition pursuant to section 1.106(c)(2)).

²⁹ We also note that ITV did not satisfy section 1.106(c)(1) of the Commission's rules, which permits consideration of facts in a petition for reconsideration "which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters," or "unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity." See 47 C.F.R. §§1.106(c)(1) and 1.106(b)(2)(i) and (ii).

³⁰ *San Francisco IVDS*, 20 FCC Rcd at 1964 ¶12.

³¹ In January 2005, the Commission determined that several former rulemakings "contributed to a confusing situation," regarding the need to file the renewal application and, therefore, reinstated San Francisco IVDS' license. *San Francisco IVDS*, 20 FCC Rcd at 1964-65 ¶9.

³² *Id.* at 1965 ¶9 n.42 and ¶16.

³³ We also conclude that neither *ICO Global* nor *Melody Music*, which require the Commission to explain apparent inconsistencies in decisions, compel a different result. See *ICO Global*, 428 F.3d 264, 269, citing, *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 and n.4 (D.C. Cir 1965).

³⁴ See ITV December 16, 2005 Letter at 3.

been operational during the entire license period.³⁵ Biztel demonstrated that it used its spectrum to provide actual service via a fluctuating number of stations,³⁶ while Winstar demonstrated that it was providing actual service using numerous licenses, with some facilities requiring temporary site relocation due to leasing issues or re-engineering.³⁷ TeleGuam was also providing service to the public and needed an extension to comply with the Commission's wireless local number portability (LNP) requirements.³⁸ Further, the *Loral* decision does not support ITV's argument. While the International Bureau had previously granted a milestone extension to Loral due to an in-orbit failure of one of its satellites, it terminated Loral's authorization finding that it "has not commenced physical construction of its satellite more than nine years after it was licensed."³⁹ Finally, we note that in *Havens*, the Division granted a three-year extension of the five-year construction requirement for certain licenses because, unlike the 218-219 MHz Service, no equipment was available to the Multilateration Location and Monitoring Service industry.⁴⁰ In contrast to the above case, a search of the Commission's equipment authorization database

³⁵ See Applications of Winstar Wireless Fiber Corp. for Renewal of Licenses to Provide Microwave Service In the 38.6 - 40.0 GHz Band, *Memorandum Opinion and Order*, 18 FCC Rcd 24674, 24683 (2003) (*Winstar*). In *Winstar*, the Bureau's former Public Safety and Private Wireless Division (PSPWD) granted the renewal applications of point-to-point microwave facilities within geographic slivers in which Winstar had the EA license for the larger, nearly all-inclusive existing area. *Id.* at 24683. See also Applications of Biztel, Inc. for Renewal of 39 GHz Licenses, *Memorandum Opinion and Order*, 18 FCC 3308 (2003), (*Biztel*). In *Biztel*, PSPWD found that Biztel met its substantial service requirement by providing microwave paths to customers, typically as a temporary solution to precede AT&T Corp's fiber build-out program. *Id.* at 3311.

³⁶ Biztel operates point-to-point microwave networks in the 39 GHz band to provide a variety of services, including wireless local loop service and backhaul and backbone service for wireless service providers. Rather than purchasing local access circuits from the incumbent local exchange carrier, Biztel provides microwave paths to customers, typically as a temporary solution to precede AT&T Corp.'s own fiber build-out program. Therefore, its service is dynamic and all of the paths may not have been operational throughout the entire license period. See *Biztel*, 18 FCC Rcd 3308.

³⁷ *Winstar*, 18 FCC Rcd 24681. Further, in *Winstar*, PSPWD concluded that "service providers use the 39 GHz band in a dynamic, customer-responsive fashion to meet service needs when they arise, and can quickly redeploy that equipment as customer needs evolve." *Id.* at 24683.

³⁸ See Telephone Number Portability, Petition of TeleGuam Holdings, LLC to Extend the Date for Implementation of Wireless-to-Wireless LNP on Guam, *Order*, 20 FCC Rcd 16,323 (2005). This case has no relevance to a licensee seeking renewal or an extension of time to construction facilities.

³⁹ See Loral Spacecom Corporation, Application for Extension of Milestone Dates, *Memorandum Opinion and Order*, 20 FCC Rcd 12050 at ¶16 (2005). The International Bureau concluded that "Loral's authorization would still be declared null and void for failing to meet the milestones as extended." *Id.* We find it is easy to distinguish why Loral was granted an extension of an early milestone requirement and ITV does not merit an extension of its substantial service requirement. Nevertheless, there is a similarity in the two cases in that both parties received early relief of regulatory requirements, but were expected to ultimately use their authorization to provide service and lost their authorizations when they failed to do so.

⁴⁰ Request of Warren C. Havens For Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB, MD 2004) (Havens). We also note that substantially greater relief was afforded to ITV when the Commission replaced its one, three, and five-year construction deadlines and five-year license term with a ten-year license term subject to a substantial service showing at renewal.

indicates that there is equipment available in the 218-219 MHz band⁴¹ and ITV has not demonstrated that it provided any service to the public during its ten-year license term. Therefore, we find ITV's reliance on these cases to support its request to be misplaced.

11. We also find ITV's contention that it had once operated a system during its initial license term to be insufficient to justify a finding of substantial service.⁴² First we note that ITV's initial Renewal Request merely stated that its "equipment has been tested . . . under experimental licenses" and "it could offer 218-219 MHz Service if its license is renewed."⁴³ In its Petition, ITV explains that it partnered with a technology developer to build a system prior to its three-year benchmark, but there is no indication that this deployment served any purpose other than as a test system.⁴⁴ We agree with ITV that the Commission, in Docket WT 03-66, stated that "prior service, even if discontinued, should be a factor that we take into account when making a determination as to whether substantial service has been met." However, the Commission qualified this statement by clarifying that it would "decline to adopt a rule stating that a licensee will have deemed to have provided substantial service if it met a safe harbor at any point during the license term," noting that "[t]he most significant consideration . . . is the licensee's current service."⁴⁵ Further, the Commission stated that "in order for a . . . licensee or lessee to provide substantial service, it must be providing service to customers . . . [and] the transmission of test signals . . . by a . . . licensee or lessee that has no customers . . . does not constitute substantial service." ITV fails to demonstrate it provided service to customers or that its system served any purpose other than testing and development. Therefore, we conclude that neither ITV's limited testing, nor its expenditure on "equipment, business models, and end-user applications,"⁴⁶ nor the overall record demonstrate that it provided substantial service sufficient to justify renewal of a 218-219 MHz Service license after 10 years.

12. ITV alternatively requests reconsideration of the denial of its request for waiver of the substantial service requirements,⁴⁷ arguing that the history of the 218-219 MHz Service and its equipment development efforts constitute unique and unusual circumstances, such that application of the construction requirements would be inequitable, unduly burdensome and contrary to the public interest.⁴⁸ The myriad of facts that ITV belatedly presented does not warrant a waiver of the construction rules. ITV repeats its claim that there is no viable 218-219 MHz Service options and it therefore requires more time to develop

⁴¹ Equipment searches for the 218-219 MHz band can be done at <https://gullfoss2.fcc.gov/prod/oet/cf/eas/reports/GenericSearch.cfm>

⁴² ITV May 23, 2006 Letter at 1-2.

⁴³ Renewal Request at 1.

⁴⁴ See Petition at 6-8. Further, there is no indication of how long ITV's single facility operated, only that operation had ceased prior to March 1999. ITV December 16, 2005 Letter at 2.

⁴⁵ See 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5735 (2006).

⁴⁶ *Id.*

⁴⁷ See Petition at 12-18.

⁴⁸ *Id.* at 15-16.

technology.⁴⁹ It also argues that we should, on our own motion, waive the construction rules for good cause.⁵⁰ ITV's arguments are unpersuasive. The purpose of the Commission's construction rules is to ensure that spectrum is used to provide service to the public and to provide a mechanism for recovery of the spectrum if a licensee fails to meet its requirements.⁵¹ We find that ITV's various expenditures do not justify a waiver and that the circumstances here are not so unique or unduly burdensome as to justify a waiver. While ITV pledges to deploy a new system within 24 months of renewal, it provides no explanation of what this deployment would consist of and whether this deployment would be another test system or one that serves the public.⁵² Given all the factors above, we find that the public interest would not be served by waiving the construction requirements in section 95.833 in this instance.⁵³

IV. CONCLUSION

13. 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(c) of the Commission's Rules, 47 C.F.R. § 1.106(c), that the petition for reconsideration filed by ITV, Inc., on June 29, 2005 is DISMISSED.

14. 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

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

⁴⁹ *Id.* at 14-15.

⁵⁰ *Id.* at 16-17.

⁵¹ Section 309(j)(4)(B) of the Communications Act states that the Commission shall "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment and rapid deployment of new technologies and services."

⁵² *Id.*

⁵³ 47 C.F.R. §95.833.