

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

In the Matter of Application of
BAYPOINT TV, INC.
To Construct a New Multipoint Distribution
Service Station on the F Group Channels in
Amarillo, Texas
File No. 1192-CM-P-83

ORDER ON FURTHER RECONSIDERATION

Adopted: August 11, 2004

Released: August 12, 2004

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

1. Introduction. In this Order on Further Reconsideration, we consider a petition for reconsideration filed on September 10, 2001 by Baypoint TV, Inc. (Baypoint). Baypoint seeks reconsideration of an August 10, 2001 letter denying its June 10, 1993 petition for reconsideration of the dismissal of its captioned application for a new Multichannel Multipoint Distribution Service (MMDS) station on the F Group channels at Amarillo, Texas. For the reasons stated below, we grant the Further Petition.

2. Baypoint filed the captioned application on September 9, 1983. Its application was selected as the winning bid under the then-extant lottery procedures in December of 1988. Following preliminary review of the application, on January 5, 1989, staff of the former Common Carrier Bureau sent a letter to Baypoint advising it of certain deficiencies in its application. Specifically, Baypoint was requested to provide, inter alia, (1) a lease, lease option agreement, or other concrete evidence of the availability of its transmitter site, and (2) an interference analysis. On January 19, 1989, Baypoint requested a sixty-day extension of time to respond. On March 15, 1989, Baypoint submitted an interference study demonstrating that it would not cause any interference to ITFS stations. At the same time, Baypoint indicated that it was obtaining a new site option, that it was working on collocation with adjacent channel licensees, that it was having its engineering consultant prepare an engineering statement addressing other technical concerns raised by the deficiency letter, and that a further amendment reporting the outcome of these activities would be filed in due course. Baypoint acknowledges that it "did not in so many words request a further extension of time in which to respond to the deficiency letter" but argues that the plain import of its March 15 filing was that it was actively engaged in producing the material

1 Petition for Reconsideration, File No. 1192-CM-P-83, filed Sep. 10, 2001 (Further Petition).
2 Letter from Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau to Baypoint TV, Inc. (Aug. 10, 2001) (Mass Media Letter).
3 Further Petition at 3.
4 Letter from Domestic Radio Branch, Domestic Facilities Division to Baypoint TV, Inc. (dated Jan. 5, 1989) (Return Letter).
5 Amendment (filed Mar. 14, 1989).
6 Id.

necessary to respond and that it would need more time to finalize the results and submit them to the Commission.⁷

3. On May 19, 1989, the former Common Carrier Bureau (CCB) dismissed Baypoint's application because Baypoint had not submitted concrete evidence of site availability or an interference study. On June 14, 1989, Baypoint filed a petition for reconsideration of the Dismissal Letter.⁸ At the same time, Baypoint amended its application to provide an option on Baypoint's transmitter site, an interference study, and a response to the other questions raised in the January 5, 1989 letter.⁹

4. On May 11, 1993, CCB's Domestic Facilities Division released an order denying the petition for reconsideration on the sole stated ground that Baypoint had not submitted concrete evidence of site availability as of the date of the Division's dismissal action.¹⁰ The *CCB Order* stated that, after requesting and receiving an extension of time, Baypoint had failed to provide all of the information necessary to complete processing of its application.¹¹ The *CCB Order* stated that Baypoint had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by Commission rules.¹² It did not assert that Baypoint had failed to file an interference study. Concerning the other unresolved issues, however, the CCB explained that Baypoint had a duty to submit curative amendments to its application within thirty days of the Division's written request or to obtain an extension of time, but that it had failed to do so.¹³

5. On June 10, 1993, Baypoint filed a petition for reconsideration of the *CCB Order*.¹⁴ Baypoint said it had filed an interference study before the March 20, 1989, extended deadline, and that it had answered the Bureau's remaining information requirements in an amendment filed on June 14, 1989, and a contingent amendment filed November 15, 1991.¹⁵ The Mass Media Bureau denied the petition on August 10, 2001.¹⁶ On September 10, 2001, Baypoint filed the instant Further Petition.

6. *Discussion.* Baypoint argues that the immediate dismissal of its application was inconsistent with the treatment of other applications. Specifically, Baypoint states that the former Domestic Facilities Division had adopted a policy of not requiring applicants to submit written site leases or options prior to grant but instead routinely granted applications conditioned upon the submission of such evidence within 90 days after grant.¹⁷

7. Due to the unique circumstances presented in this case, we will grant Baypoint's Petition. The former Common Carrier Bureau required Baypoint to submit a copy of its site lease during the processing of its application. In other cases, however, the former Common Carrier Bureau granted conditional licenses that required the conditional licensee to provide the site lease by a specified date after

⁷ Further Petition at 3.

⁸ Petition for Reconsideration (filed Jun. 14, 1989).

⁹ Amendment (filed Jun. 14, 1989).

¹⁰ Baypoint TV, Inc., *Order on Reconsideration*, 8 FCC Rcd 3141 ¶ 4 (CCB DFD 1993) ("*CCB Order*").

¹¹ *Id.* at 3141 ¶ 2.

¹² *Id.* at ¶ 4.

¹³ *Id.* at ¶ 5, citing VisionAire, Inc., *Order on Reconsideration*, 5 FCC Rcd 1952 (CCB 1990) (*VisionAire*).

¹⁴ Further Petition.

¹⁵ *Id.* at 3.

¹⁶ *Mass Media Letter*.

¹⁷ Further Petition at 10-11.

grant.¹⁸ Recently, the Commission ordered the reinstatement of an application that was dismissed for failure to provide a site lease.¹⁹ The Commission noted that the former Common Carrier Bureau had granted applications wherein the applicant failed to submit a copy of a site lease and required the conditional licensee to provide the site lease by a specified date.²⁰ While the Commission has the right to develop strict application processing criteria, “fundamental fairness also requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration.”²¹ In this case, given that many applications that did not provide site leases were conditionally granted, we conclude that such notice was not present. We also note that the former Mass Media Bureau has determined that not all site availability defects are grounds for return of an application.²² The Commission reached the same conclusion,²³ and the former Common Carrier Bureau often applied the same policy.²⁴ In denying Baypoint’s petition, the former Domestic Facilities Division followed a different procedure. Even though the *CCB Order* indicated that Baypoint’s only remaining deficiency at that time was a missing site lease, it did not grant the license conditional upon submission of evidence of site availability within thirty days thereafter. Instead, it took the position that the applicant was required to submit curative amendments within thirty days of a written request, before the application was granted. In support of that proposition, the Domestic Facilities Division cited the *VisionAire* case.²⁵ In *VisionAire*, however, the applicant had not only failed to submit evidence of site availability but also failed to perform a non-interference analysis.²⁶ Thus, *VisionAire* does not provide a precedent for dismissing an application where the only missing piece of information is evidence of site availability. If the former Domestic Facilities Division had followed the procedures normally followed by the CCB at that time, and later by the former Mass Media Bureau, it would have granted Baypoint’s application conditional upon submission of evidence of site availability.

8. Under these circumstances, we agree that the failure to submit the site lease with the original application alone was insufficient ground for dismissing the subject application.²⁷ For that reason, we grant the Further Petition and reinstate Baypoint’s application. Since Baypoint has provided a site lease, we do not need to delay processing its application or condition the grant of its application upon the filing of a site lease. We decline to consider Baypoint’s other arguments because it is unnecessary to reach those issues.

9. Accordingly, IT IS ORDERED that 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

¹⁸ See, e.g., authorizations for MDS stations WLW738, Aug. 16, 1993; WMI348, Aug. 31, 1992; WMI344, Aug. 31, 1992; WMI325, May 7, 1992; WMI872, Mar. 17, 1992; WMI884, Mar. 12, 1992; WMI362, Apr. 23, 1992; WMI331, Apr. 9, 1992; WMI824, Mar. 29, 1992; WMI284, Feb. 20, 1992.

¹⁹ Mester’s TV, *Memorandum Opinion and Order*, 18 FCC Rcd 13453 (2003), *recon. pending*.

²⁰ *Id.*

²¹ See *Salzer v. FCC*, 778 F.2d 869, 871-872 (D.C. Cir. 1985).

²² RuralVision South, Inc., *Order on Reconsideration*, 12 FCC Rcd 21721, 21723 n.5 (MMB VSD 1997); RuralVision Central, Inc., *Order on Reconsideration*, 11 FCC Rcd 7000, 7004 ¶ 13 (MMB VSD 1996); Allen Wheeler, *Order on Reconsideration*, 11 FCC Rcd 6955 n.3 (MMB VSD 1996).

²³ Mester’s TV, *supra*.

²⁴ Further Petition at 4.

²⁵ See n. 13 and accompanying text, above.

²⁶ *VisionAire* at ¶ 7.

²⁷ See *Salzer v. FCC*, 778 F.2d 869, 871-872 (D.C. Cir. 1985).

Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Baypoint TV, Inc., on September 10, 2001 IS GRANTED.

10. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), that the licensing staff of the Broadband Division SHALL PROCESS the application of Baypoint TV, Inc. for Multipoint Distribution Service station at Amarillo, Texas (File No. 1192-CM-P-83) consistent with this *Order on Further Reconsideration*.

FEDERAL COMMUNICATIONS COMMISSION

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