



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

DA 05-657
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WIRELESS TELECOMMUNICATIONS BUREAU'S BROADBAND DIVISION GRANTS REQUESTS FOR WAIVER OF BRS AND EBS DISCONTINUANCE OF SERVICE RULES

In this *Public Notice*, the Broadband Division grants waivers of the Commission's discontinuance of service rules for the Broadband Radio Service (BRS)¹ and Educational Broadband Service (EBS) stations, in order to facilitate the transition to new rules.²

Under the rules that were in effect prior to January 10, 2005, Section 21.44(a)(3) of the Commission's Rules provided that a BRS license shall be automatically forfeited upon the voluntary removal or alteration of facilities, so as to render the station not operational for a period of 30 days or more.³ Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed...."⁴ The three potential actions are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver and an extension in the time permitted for resuming operation, pursuant to Section 21.303(d)(3).⁵ For EBS stations, prior to January 10, 2005, former Section 74.932(d) of the Commission's Rules required a licensee to forward a license to the

¹ 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. Because the new rules are now in effect, we will refer to these services by their new names.

² The Broadband Division recently granted similar requests for discontinuance waivers. *See* Wireless Telecommunications Bureau's Broadband and Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 20 FCC Rcd 54 (WTB BD 2005); Wireless Telecommunications Bureau's Broadband and Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 19 FCC Rcd 18752 (WTB BD 2004).

³ 47 C.F.R. § 21.44(a)(3).

⁴ *Id.*

⁵ *See* 47 C.F.R. § 21.303(d)(1)-(3).

Commission for cancellation in case of permanent discontinuance of operation.⁶ A station which had not operated for one year was considered to have permanently discontinued operation.⁷

The attachment to this public notice lists requests pending before the Broadband Division for waiver of former Sections 21.44(a)(3), 21.303(d), or 74.932(d) of the Commission's Rules. Grant of these waivers would allow the stations to remain silent beyond the time contemplated in the rules. For BRS licensees, pursuant to former Section 21.19 of the Commission's Rules,⁸ an applicant seeking a waiver must make an affirmative showing that: (a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.⁹ For EBS licensees, "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.'"¹⁰ Furthermore, "the applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary."¹¹ Based upon the record before us, we conclude that the waiver requests listed in the appendix have made a sufficient showing to justify a waiver.¹²

On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM* that fundamentally restructured the band to provide BRS and EBS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.¹³ Among other actions, the *BRS/EBS R&O & FNPRM* eliminated the discontinuance of service rules for the new BRS and EBS.¹⁴ The discontinuance of service rules no longer apply to non-common carrier BRS and EBS licensees. Because the discontinuance of service rules applied at the time the waiver requests were filed, however, the licensees require a waiver in order to avoid forfeiting their licenses. In order to facilitate the transition to the new rules, we will grant a waiver of the former rules.

Accordingly IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Sections 21.44, 21.303, and 74.932(d) of the Commission's Rules, 47 C.F.R. §§ 21.44, 21.303, 74.932(d) the waiver requests listed in the Appendix to this Public Notice ARE GRANTED, and the BRS and EBS stations listed in the Appendix ARE AUTHORIZED to remain silent.

⁶ 47 C.F.R. § 74.932(d).

⁷ *Id.*

⁸ 47 C.F.R. § 21.19.

⁹ *Id.*

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968) (*per curiam*)).

¹¹ *Id.* at 1157 n.9.

¹² Our decision to grant these waiver requests should not be construed as evidence that the Broadband Division agrees with the arguments made in the waiver requests. Instead, our decision to grant these waiver requests is based upon our independent review of the record as a whole.

¹³ *BRS/EBS R&O & FNPRM*.

¹⁴ *Id.*, 19 FCC Rcd at 14255-57 ¶¶ 231-239.

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, 0.331.

Action by the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau

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ATTACHMENT – GRANTED WAIVER REQUESTS

Licensee	Call Sign	Community of License	Date Waiver Request Filed
Belmont University	WLX820	Clarksville, Tennessee	2/16/2005
East West Communications, Inc.	WHT730	Driver, Virginia	11/18/2004
Immaculate Conception School	WNC405	Hackberry, Tennessee	9/17/2004
North American Catholic Educational Programming Foundation, Inc.	WLX647	York, Pennsylvania	11/30/2004
School Board of Volusia County	WBE795	Daytona Beach, Florida	10/18/2004
South Carolina Educational Television Commission	WHM931	Charleston, South Carolina	10/27/2004
State of Wisconsin – Educational Communications Board	WNC401	Oshkosh, Wisconsin	12/14/2004