

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

In the Matter of Application of )
)
CENTRAL CATHOLIC HIGH SCHOOL ) File No. 20031008AAB
FOUNDATION )
)
For Renewal of License for Educational Broadband )
Service Station WLX894, Grand Island, Nebraska )
)

ORDER ON RECONSIDERATION

Adopted: November 27, 2006

Released: November 28, 2006

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 4, 2004, the University of Nebraska Foundation (UNF) and Gryphon Wireless, LLC (Gryphon) (jointly, Petitioners) filed a Petition for Reconsideration. The Petition seeks reconsideration of the Wireless Telecommunications Bureau's (Bureau's) October 5, 2004 grant of a Waiver Request submitted by Central Catholic High School Foundation (CCHSF) for Educational Broadband Service (EBS) Station WLX894 to allow consideration of a late-filed renewal application. For the reasons set forth below, we deny the Petition.

II. BACKGROUND

2. On April 24, 1992, both CCHSF and UNF filed applications for new EBS stations on the A group channels at Grand Island, Nebraska and Kearney, Nebraska, respectively. These applications were both granted on May 12, 1993, with the licenses scheduled to expire on May 12, 2003.

1 Petition for Reconsideration, University of Nebraska Foundation and Gryphon Wireless, LLC (filed Nov. 4, 2004) (Petition).

2 Request for Waiver, Central Catholic High School Foundation (filed Oct. 8, 2003) (Waiver Request).

3 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). 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 have taken effect, we will refer to EBS by its new name.

4 Waiver Request; Renewal Application.

5 File Nos. BPIF-19920424EK and BPIF-19920424EJ.

6 Stations WLX894 and WLX893..

3. CCHSF filed a renewal application for Station WLX894 on May 12, 2003.<sup>7</sup> However, this application was dismissed because it was lacking the Federal Communications Commission (Commission) Registration Number (FRN).<sup>8</sup> On August 18, 2003, UNF filed two applications for authority to construct response station hubs, which would allow them to utilize excess capacity on Station WLX893.<sup>9</sup> At this time, UNF also entered into an agreement with Gryphon to lease the extra capacity in order to provide internet and other broadband services in the area around Kearney, Nebraska.<sup>10</sup>

4. On October 8, 2003, CCHSF filed another application for renewal of license of Station WLX894, along with a request for waiver. On March 22, 2004, the Petitioners filed a petition to deny<sup>11</sup> CCHSF's Waiver Request and Renewal Application claiming that renewing the license for Station WLX894 would cause substantial interference with Station WLX893 licensed by UNF and utilized by Gryphon. On October 5, 2004, the Bureau issued the *MO&O*<sup>12</sup> granting 323 requests for waiver of Section 74.15(e) of the Commission's Rules, including CCHSF's Waiver Request.

5. In the *MO&O*, the Bureau addressed the Petition for Reconsideration<sup>13</sup> filed by Eastern New Mexico University (Eastern New Mexico).<sup>14</sup> The former Public Safety and Private Wireless Division of the Bureau had previously denied Eastern New Mexico's request for waiver to allow late filing of its renewal application.<sup>15</sup> Since there were 323 other late-filed applications pending, the Bureau chose to dispatch with all of these applications in the *MO&O*.<sup>16</sup> In the *MO&O*, the Bureau found that while the 323 applications did not strictly meet the standard necessary to grant a waiver request, it was in the public interest to grant the renewal applications.<sup>17</sup> The Bureau determined that staff of the former Mass Media Bureau had previously accepted almost every late-filed renewal application and did not apply the Commission's waiver standards.<sup>18</sup> The staff's failure to apply the Commission's waiver standards caused EBS licensees to be unaware of the actual standards.<sup>19</sup> Accordingly, Eastern New Mexico's waiver request and renewal application and the 323 other waiver requests and renewal applications were granted.<sup>20</sup>

6. On November 4, 2004, Petitioners filed the instant Petition. Petitioners claim that they relied to their detriment on the fact that CCHSF had not timely renewed their license and began providing

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<sup>7</sup> Renewal Application.

<sup>8</sup> Waiver Request; *See* 47 C.F.R. § 1.8005.

<sup>9</sup> File Nos. 20030820AAA, 20030820AAB. These applications were granted on March 18, 2004. *See* Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 1786 (rel. Mar. 31, 2004) at 12; Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 1782 (rel. Mar. 24, 2004) at 11.

<sup>10</sup> Petition for Reconsideration at 4.

<sup>11</sup> File No. BRIF-20031008AAB (Petition to Deny).

<sup>12</sup> Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004) (*MO&O*).

<sup>13</sup> *See* File No. 20020822AAC.

<sup>14</sup> *See MO&O*.

<sup>15</sup> Eastern New Mexico University, *Order*, 18 FCC Rcd 2448 (WTB &PVD 2003).

<sup>16</sup> *MO&O*.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

broadband service without the expectation of any co-channel interference.<sup>21</sup> The Petitioners also complain that the Bureau did not address the interference issues raised in their Petition to Deny and consequently must do so now.<sup>22</sup>

### III. DISCUSSION

7. Section 74.15(e) of the Commission's Rules requires that applications for renewal of EBS licenses be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."<sup>23</sup> If the licensee does not file a renewal by the appropriate renewal date they can attempt to obtain a waiver. When determining whether to grant the waiver the Bureau should consider the complete facts and circumstances involved, including the length of the delay in filing, the performance record of the licensee, the reasons for the failure to timely file, the potential consequences to the public if the license were to terminate and the performance record of the licensee.<sup>24</sup> Also, "An applicant...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.'"<sup>25</sup>

8. Petitioners argue that Bureau failed to address their Petition to Deny or any of the interference concerns raised therein. We conclude that Petitioners' arguments provide no basis for denying the Renewal Application. The presence of an adjacent licensee does not constitute a unique circumstance that would justify treating CCHSF differently from the other licensees afforded relief in the *MO&O*. Petitioners incorrectly assumed that their facilities are somehow entitled to heightened interference protection *vis-à-vis* CCHSF's facilities. UNF and CCHSF applied for and received their licenses at the same time. Nothing in either of the authorizations imposes special protection requirements on CCHSF. Under the new rules currently in effect, both CCHSF and UNF have a geographic service area and must limit their signal strength at the border of their respective areas, unless the parties agree otherwise.<sup>26</sup> While we encourage the parties to work together to resolve any potential interference issues, Petitioners have offered no support whatsoever for the proposition that a renewal application should be denied because of hypothetical interference concerns.<sup>27</sup>

### IV. CONCLUSION AND ORDERING CLAUSES

9. Petitioners have failed to establish that they are entitled to any special interference protection. Their detrimental reliance argument is without merit. Therefore, the Bureau must deny the Petition.

10. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and Section 1.106 of the

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<sup>21</sup> Petition at 2.

<sup>22</sup> Petition at 3.

<sup>23</sup> 47 C.F.R. § 74.15(e).

<sup>24</sup> Biennial Regulatory Review-Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 1185 (1999).

<sup>25</sup> *Order*, 18 FCC Rcd at 2449 ¶ 4, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*).

<sup>26</sup> 47 C.F.R. § 27.55(a)(4).

<sup>27</sup> Petitioners claim that they detrimentally relied on the fact that CCHSF did not file for a timely renewal of its license for Station WLX894 when determining whether to obtain the authority to construct new the facilities necessary to begin providing broadband service and internet access in that area. This argument is without merit.

Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by University of Nebraska Foundation and Gryphon Wireless, LLC on November 4, 2004 IS DENIED.

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), 309, and Section 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that the licensing staff of the Broadband Division SHALL PROCESS the application for renewal of license filed by Central Catholic High School Foundation (File No. 20031008AAB) in accordance with this *Order on Reconsideration* and the Commission's rules and policies.

12. These actions are 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, 1.106(b)(3).

FEDERAL COMMUNICATIONS COMMISSION

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Deputy Chief, Wireless Telecommunications Bureau