

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

In the Matter of )
WBSWP LICENSING CORPORATION ) File Nos. 9750026, 20011012AAG,
Applications for Extension of Time to Construct, ) 20030807AAB
Certification of Completion of Construction, and )
Renewal of Broadband Radio Service Station )
WMI841 )
And )
SCHOOL BOARD OF PALM BEACH COUNTY )
FLORIDA )
Request for Extension of Mandatory Negotiation )
Period )

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 2007

Released: January 29, 2007

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

I. INTRODUCTION

1. On April 14, 2005, the School Board of Palm Beach County, Florida (Palm Beach) filed a petition for reconsideration of the Wireless Telecommunications Bureau's (Bureau) actions granting applications for extension of time to construct and for renewal of license for Broadband Radio Service (BRS) Station WMI841, licensed to WBSWP Licensing Corporation (WBSWP), a subsidiary of Sprint Nextel Corporation, as well as accepting WBSWP's certification of completion of construction for Station WMI841. Also, on October 22, 2006, Palm Beach filed a request to defer or extend the mandatory negotiation period specified in Section 27.1216(b) of the Commission's Rules for major overlaps between Station WMI841 and Palm Beach's grandfathered Educational Broadband Service

1 See Petition for Reconsideration (Petition), File Nos. 9750026, 20011012AAG, 20030807AAB (filed Aug. 6, 2004) (Petition).

2 File No. 9750026 (Extension Application).

3 File No. 20030807AAB (Renewal Application).

4 File No. 20011012AAG (Construction Certification).

5 47 C.F.R. § 27.1216(b).

(EBS) Station KHU90.<sup>6</sup> For the reasons stated below, we dismiss the Petition, grant the Extension Request in part, and clarify the process for WBSWP and Palm Beach to divide their geographic service area if they do not reach a negotiated agreement.

## II. BACKGROUND

2. Palm Beach has been the licensee of KHU90, a grandfathered EBS station in Boynton Beach, Florida operating on the E channel group, since 1974. In 1983, the Commission redesignated the E and F Group ITFS channels from the EBS service to BRS usage.<sup>7</sup> The Commission took this action in an effort to spur the development of BRS to promote effective and intense utilization of the spectrum leading to its highest valued use.<sup>8</sup> As part of its decision, the Commission grandfathered EBS licensees operating on the E Group and F Group channels subject to the following limitations:

Grandfathered [EBS] stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from [BRS] transmissions.

In this fashion, all facets of grandfathered EBS operations were frozen as of May 26, 1983.<sup>9</sup>

3. On May 28, 1992, People's Choice TV, Inc. was issued a construction permit to operate a BRS station on the same site as Palm Beach, subject to demonstrating protection to Palm Beach's operations.<sup>10</sup> On December 28, 1993, Sprint filed an application to displace Station KHU90 to the D channel group.<sup>11</sup> That application was mutually exclusive with an application filed by Florida Atlantic University (FAU) for a new EBS station on the D channel group.<sup>12</sup>

4. In 1995, Palm Beach and Sprint entered into a leasing agreement.<sup>13</sup> In that connection, on May 24, 1995, Sprint, Palm Beach, FAU, and other parties filed a settlement agreement that attempted

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<sup>6</sup> Letter from Edwin N. Lavergne, Esq. and Donna A. Balaguer, Esq. to John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau (Aug. 22, 2006) (Extension Request).

<sup>7</sup> See In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*E and F Group Reallocation Order*).

<sup>8</sup> *Id.* at 1228-29 ¶¶ 61-63.

<sup>9</sup> See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 132-33 ¶ 12 (1983).

<sup>10</sup> File No. BPMD-8305624 (granted May 28, 1992). In 1996, the authorization was assigned to WBSWP. File No. BALMD-9350734 (granted Jul. 1, 1996).

<sup>11</sup> At the time, Section 74.986 of the Commission's Rules allowed the filing of involuntary station modification applications in order to avoid interference. The party filing the application would be required to make the modifications at its own expense.

<sup>12</sup> Petition at 2.

<sup>13</sup> Petition at 2.

to resolve the mutual exclusivity between the applications and other pending applications.<sup>14</sup> As part of that agreement, Palm Beach filed a voluntary application to colocate their facilities and to split the D channel group between Palm Beach and FAU.<sup>15</sup> Sprint also filed an application to relocate Station WMI841 to the same transmitter site used by Station KHU90.<sup>16</sup> At the urging of the parties (including Palm Beach),<sup>17</sup> that application was granted on October 15, 1998.<sup>18</sup> As a result, Sprint and Palm Beach were authorized to operate at the same site.

5. On October 3, 1996, WBSWP filed an application for extension of time to construct WMI841.<sup>19</sup> On October 12, 2001, Sprint submitted a certification of completion of construction for Station WMI841.<sup>20</sup> On August 7, 2003, at the request of Bureau staff, WBSWP submitted an application for renewal of license of Station WMI841.<sup>21</sup> No petitions to deny or informal objections were filed against these applications.

6. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rule Making* 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.<sup>22</sup> Among other changes, the Commission instituted geographic area licensing for BRS and EBS licensees. 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.<sup>23</sup> In those instances where co-channel geographic service areas overlapped, the overlap area was split by drawing a chord between the intersection points of the respective service areas (a process known as “splitting the football”).<sup>24</sup> In the case of overlaps between grandfathered EBS stations operating on the E and F channel groups and overlapping incumbent BRS stations, the Commission sought further comment on the appropriate mechanism for addressing those overlaps.<sup>25</sup>

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<sup>14</sup> Market Settlement Agreement (filed May 24, 1995).

<sup>15</sup> File Nos. 19950524DN, 19950524DE.

<sup>16</sup> File No. BMPMD-9550711.

<sup>17</sup> Petition at 2.

<sup>18</sup> See Public Notice, Report No. D-1008-A (rel. Oct. 15, 1998) at 9.

<sup>19</sup> Extension Application.

<sup>20</sup> Construction Certification.

<sup>21</sup> Renewal Application.

<sup>22</sup> 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, *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*).

<sup>23</sup> 47 C.F.R. §§ 27.1206(a)(1), 27.1209(b).

<sup>24</sup> 47 C.F.R. § 27.1206(a)(1).

<sup>25</sup> *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14288-14291 ¶¶ 333-343.

7. On February 22, 2005, the Bureau granted the Extension Request. On March 11, 2005, the Bureau accepted the Construction Certification and granted the Renewal Application. Public notice of these actions was given on March 16, 2005.<sup>26</sup> Palm Beach filed the Petition on April 14, 2005.<sup>27</sup>

8. In 2006, the Commission held that the Market Settlement Agreement could not be implemented because it failed to consider two mutually exclusive applications on the G channel group.<sup>28</sup> The Commission held that “[b]ecause the Marketwide Settlement Agreement contemplated a series of interdependent channel switches and transmitter site relocations, the failure of the Marketwide Settlement Agreement to resolve the mutual exclusivity on the G channel group renders the agreement defective.”<sup>29</sup> Accordingly, it affirmed the dismissal of the applications filed pursuant to that agreement, including the applications filed by Palm Beach and FAU.<sup>30</sup>

9. At the same time, the Commission held that it would generally use the “splitting the football” mechanism to address overlaps between grandfathered EBS stations operating on the E and F channel groups and overlapping incumbent BRS stations.<sup>31</sup> In the case of service area overlaps greater than 50%, however, the Commission established a ninety-day mandatory negotiation period “where both the BRS and EBS licensees have an explicit duty to work to accommodate each other’s communications requirements.”<sup>32</sup> If, at the end of the negotiation period, no agreement was reached, the Commission held that the splitting the football mechanism would be used.<sup>33</sup> On October 22, 2006, Palm Beach filed the Extension Request for a ruling that the mandatory negotiation period does not begin to run until its Petition is acted on.<sup>34</sup>

### III. DISCUSSION

#### A. Petition

10. Palm Beach states that while it “has no real desire to undermine or oppose” the actions taken,<sup>35</sup> it wishes to preserve its rights in case the Market Settlement Agreement is not approved.<sup>36</sup> Palm Beach asks that the applications be placed back in pending status for consideration in conjunction with the Market Settlement Agreement “or provide some other mechanism to preserve the relative rights of the two parties in the event that the pending reconsideration requests and the KHU90 displacement

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<sup>26</sup> See Wireless Telecommunications Bureau Site-By-Site Action, Report No. 2095, *Public Notice* (Mar. 16, 2005) at 9-10.

<sup>27</sup> Petition.

<sup>28</sup> 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, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5704 ¶ 237 (2006) (*BRS/EBS 3<sup>rd</sup> MO&O*).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*, 21 FCC Rcd at 5749 ¶¶ 347-349.

<sup>32</sup> *Id.*, 21 FCC Rcd at 5750 ¶ 350.

<sup>33</sup> *Id.*

<sup>34</sup> Extension Request.

<sup>35</sup> Petition at 1.

<sup>36</sup> Petition at 3-4.

application are not granted.<sup>37</sup> WBSWP responds that the actions were not dependent on the grant of the Market Settlement Agreement and that Palm Beach has failed to show that the Bureau's actions were erroneous.<sup>38</sup>

11. Section 1.106(c) of our rules provides that, if a party that has not hitherto participated in a proceeding chooses to file a petition for reconsideration, the petition may only be granted if (1) the petition relies on events which have occurred or circumstances which have changed since the last opportunity to present such matters, (2) the petition relies on facts 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, or (3) consideration of the facts relied on is in the public interest.<sup>39</sup> A petitioner must also show good reason why it was not possible for it to participate in the earlier stages of the proceeding.<sup>40</sup> We conclude that Palm Beach has not made that showing. Palm Beach was aware of WBSWP's filings and apparently supported those filings prior to its concern that the Market Settlement Agreement might be rejected.<sup>41</sup> The Commission's decision to reject the Market Settlement Agreement was a foreseeable event that does not give Palm Beach cause to participate after action has been taken. "We 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."<sup>42</sup> Accordingly, we dismiss the Petition for failure to comply with Section 1.106(c) of the Commission's Rules.

12. If we considered the merits of the Petition, we would find no basis for reversing the actions. Palm Beach does not allege any error in the processing or grant or acceptance of the Extension Request, Renewal Application, and Construction Certification, and we find no such error. To the extent Palm Beach objects to the original decision to license Station WMI841, we find that Palm Beach waived such objections by supporting the original grant of the Station WMI841 authorization. Finally, to the extent Palm Beach objected to the Commission's decisions in the rulemaking proceeding, its remedy would have been to file a petition for reconsideration in the rulemaking proceeding. Palm Beach did not file such a petition. Accordingly, we find no basis for reversing the grant and/or acceptance of the Extension Request, Renewal Application, or Construction Certification.

## **B. Extension Request**

13. Palm Beach contends that the validity of the Station WMI841 license has not been resolved.<sup>43</sup> Palm Beach argues that it would "be difficult and unproductive for either party to negotiate when the respective legal rights of the parties are not clear."<sup>44</sup> Palm Beach also asserts that the parties cannot "split the football" because their service areas are identical.<sup>45</sup> WBSWP disagrees with Palm

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<sup>37</sup> Petition at 4.

<sup>38</sup> Opposition to Petition for Reconsideration, WBSWP Licensing Corporation (filed Apr. 28, 2005) at 3-5.

<sup>39</sup> 47 C.F.R. §§ 1.106(b)(2), (c).

<sup>40</sup> 47 C.F.R. § 1.106(b)(1) states: "If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it ... shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."

<sup>41</sup> Petition at 2.

<sup>42</sup> *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

<sup>43</sup> Extension Request at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Beach's assertions regarding the validity of the Station WMH841 license but does not object to extending the negotiation period.<sup>46</sup>

14. Palm Beach is correct that the process for applying the "splitting the football" mechanism established by the Commission in this case is unclear because both WBSWP and Palm Beach have the identical service area. Splitting the football assumes that the licensees have different but overlapping service areas and requires that a line be drawn between the intersection points of the service area. Here, since the service areas are identical, the intersection points are not obvious. We agree with Palm Beach that it is unreasonable to require the parties to conclude a negotiation period without knowing what the position of the parties will be in the absence of an agreement.

15. Under these circumstances, we clarify the process by which the parties can determine the intersection points to split the service area between Palm Beach and WBSWP if the parties fail to negotiate an alternative solution. This mechanism for establishing the intersection points in any case where the parties have identical service areas will provide both parties -- as in other "splitting the football" cases -- with an equal service area and involves both parties in the creation of those areas. The process is as follows:

- Within ten days of the release of the order, WBSWP shall serve both Palm Beach and the Bureau with a proposed division of the service area. WBSWP's proposed division shall result in the creation of two areas equal in size.
- Within ten days after WBSWP serves its proposed division, Palm Beach shall select which of the areas created by WBSWP it will choose as its default geographic service area, if the parties do not reach an alternative solution. Palm Beach shall serve its selection on WBSWP and the Bureau.
- The parties will have ninety days after Palm Beach chooses its area to negotiate an alternative solution. We remind WBSWP and Palm Beach that in negotiating, the parties "have an explicit duty to work to accommodate each other's communications requirements."<sup>47</sup> If the parties do not negotiate an alternative solution within that ninety-day period, the Bureau will split the service areas in the manner defined by the parties under the first part of the process outlined here.

Accordingly, Palm Beach's request for an extension of the mandatory negotiation period is granted to the extent indicated, conditioned on the use of the mechanism established in this *Memorandum Opinion and Order* for establishing the intersection points for "splitting the football".

#### IV. CONCLUSION AND ORDERING CLAUSES

16. We dismiss Palm Beach's Petition as an untimely attempt to seek reconsideration of actions that it previously supported. In any event, Palm Beach has not provided a basis for reversing the grant of WBSWP's applications. We grant Palm Beach's request for an extension of the mandatory negotiation period, conditioned upon the use of a mechanism to split the service area if the parties are unable to negotiate an alternative solution.

17. Accordingly 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 of the Commission's Rules, 47

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<sup>46</sup> Letter from Robert H. McNamara, Director, Spectrum Management to John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau (Oct. 11, 2006).

<sup>47</sup> *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5750 ¶ 350.

C.F.R. §§ 1.106, that the petition for reconsideration filed by the School Board of Palm Beach County on April 14, 2005 IS DISMISSED.

18. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, and Section 27.1216(b) of the Commission's Rules, 47 C.F.R. § 27.1216(b), that the request for extension of the mandatory negotiation period filed by the School Board of Palm Beach County on October 22, 2006 IS GRANTED, and the time for WBSWP and Palm Beach to negotiate an alternative division of their service area IS EXTENDED until ninety days after Palm Beach makes the selection described in Paragraph 20, *infra*.

19. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, and Section 27.1216(b) of the Commission's Rules, 47 C.F.R. § 27.1216(b), that within ten days of the release of this *Memorandum Opinion and Order*, WBSWP shall serve both Palm Beach and the Bureau with a proposed division of the service area. WBSWP's proposed division shall result in the creation of two areas equal in size.

20. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, and Section 27.1216(b) of the Commission's Rules, 47 C.F.R. § 27.1216(b), that within ten days after WBSWP serves its proposed division, Palm Beach shall select which of the areas created by WBSWP it will choose as its default geographic service area if the parties do not reach an alternative solution.

21. 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.

FEDERAL COMMUNICATIONS COMMISSION

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