

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

In the Matter of )
)
WIRELESS PROPERTIES OF VIRGINIA, INC. )
Assignor )
)
And ) File Nos. 0002695270, 0002755676
)
NEXTEL SPECTRUM ACQUISITION CORP. )
Assignee )
)
Applications for Assignment of Broadband Radio )
Service Stations WMY290 and WMY291, Martinsburg, )
West Virginia and Educational Broadband Service )
Station WQCP982, Strasburg, Virginia )

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 July 31, 2006, Wireless Properties of Virginia Inc. (WPV) filed an application1 for Commission approval of the assignment of Broadband Radio Station (BRS) Stations WMY290 and WMY291 to Nextel Spectrum Acquisition Corp., a wholly owned subsidiary of Sprint Nextel Corp. (Sprint Nextel). On August 22, 2006, WPV filed another application2 for approval of the assignment of Educational Broadband Service (EBS) Station WQCP982 to Sprint Nextel. On August 23, 2006, NTELOS Licenses, Inc. (NTELOS) filed a petition to deny the Martinsburg Application.3 On October 10, 2006, NTELOS submitted a Petition to Deny the Strasburg Application.4 On October 11, 2006, Warren Havens (Havens), individually and as the President of Intelligent Transportation & Monitoring Wireless LLC, AMTS Consortium LLC, Telesaurus VPC LLC and Telesaurus Holdings GB LLC filed a Petition to Deny and in the alternative an Informal Request to Dismiss or Deny5 the Applications. For the reasons discussed below, we deny the NTELOS Martinsburg Petition, dismiss the NTELOS Strasburg Petition, and dismiss the Havens Objection.

1 File No. 0002695270 (filed Jul. 31, 2006) (Martinsburg Application).

2 File No. 0002755676 (filed Aug. 22, 2006) (Strasburg Application).

3 Petition to Deny, NTELOS Licenses, Inc. (filed Aug. 23, 2006) (NTELOS Martinsburg Petition).

4 Petition to Deny, NTELOS Licenses Inc. (filed Oct. 10, 2006) (NTELOS Strasburg Petition).

5 Petition to Deny and in the Alternative Informal Request to Dismiss or Deny, Warren Havens (filed Oct. 11, 2006) (Havens Objection).

## II. BACKGROUND

2. WPV has been the licensee of BRS Stations WMY290 and WMY291 since February 10, 1999.<sup>6</sup> It has also been the licensee of commercial EBS station WQCP982 since April 27, 2005.<sup>7</sup> On July 31, 2006, WPV filed an application seeking Commission consent to assign those stations to Sprint Nextel.<sup>8</sup> Public notice of the acceptance for filing of the Martinsburg Application was given on August 9, 2006.<sup>9</sup> On August 22, 2006, WPV filed a separate application for Commission consent to assign Station WQCP982 to Sprint Nextel.<sup>10</sup> On September 19, 2006, Sprint Nextel filed a Request for Waiver<sup>11</sup> of Section 27.1201 of the Commission's Rules so that it might be eligible to be assigned this license. Public notice of the acceptance for filing of the Strasburg Application was given on September 27, 2006.<sup>12</sup>

3. On August 23, 2006, NTELOS filed the NTELOS Martinsburg Petition.<sup>13</sup> On September 5, 2006, WPV submitted an Opposition<sup>14</sup> to the NTELOS Martinsburg Petition. On October 10, 2006, NTELOS filed the NTELOS Strasburg Petition.<sup>15</sup> On October 11, 2006, Havens filed the Havens Objection.<sup>16</sup> WPV filed a Consolidated Opposition to the NTELOS Strasburg Petition and the Havens Objection on October 23, 2006.<sup>17</sup> Sprint Nextel filed an opposition to the Havens Objection on October 23, 2006.<sup>18</sup> On November 6, 2006, Havens filed a reply to the oppositions filed by both WPV and Sprint Nextel.<sup>19</sup>

## III. DISCUSSION

4. NTELOS claims that WPV failed to keep its corporate status in the state of Delaware in good standing from 1999 until 2004.<sup>20</sup> NTELOS states that WPV also failed to report this change in status to the Commission during the same time.<sup>21</sup> NTELOS argues that this failure should result in the

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<sup>6</sup> File Nos. BLMD-9950135, BLMD-9950136 (granted Feb. 10, 1999).

<sup>7</sup> File No. 920938 (granted Apr. 27, 2005).

<sup>8</sup> Martinsburg Application.

<sup>9</sup> Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, Report No. 2607, *Public Notice* (Aug. 9, 2006).

<sup>10</sup> Strasburg Application.

<sup>11</sup> Request for Waiver of Section 27.1201, Nextel Spectrum Acquisition Corp. (filed Sep. 19, 2006) (Waiver).

<sup>12</sup> Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, Report No. 2884, *Public Notice* (Sep. 27, 2006) at 2.

<sup>13</sup> NTELOS Martinsburg Petition.

<sup>14</sup> Opposition, Wireless Properties of Virginia, Inc. (filed Sep. 5, 2006) (WPV Opposition).

<sup>15</sup> NTELOS Strasburg Petition.

<sup>16</sup> Havens Objection.

<sup>17</sup> Opposition, Wireless Properties of Virginia, Inc. (filed Oct. 23, 2006) (WPV Opposition II).

<sup>18</sup> Opposition to Petition to Deny (filed Oct. 23, 2006) (Sprint Nextel Opposition).

<sup>19</sup> Reply to Oppositions to Petition to Deny and in the Alternative Informal Request to Dismiss or Deny, Warren Havens (filed Nov. 6, 2006) (Havens Opposition).

<sup>20</sup> NTELOS Martinsburg Petition at 2-3, NTELOS Strasburg Petition at 2-3.

<sup>21</sup> NTELOS Martinsburg Petition at 2, NTELOS Strasburg Petition at 2.

denial of the Applications and the forfeiture of WPV's licenses.<sup>22</sup> NTELOS also chronicles an alleged contractual dispute pertaining to the assignment of WPV's licenses but does not request any action on that basis.<sup>23</sup> In response, WPV argues that NTELOS lacks standing to file a petition to deny.<sup>24</sup> WPV also contends that their corporate status and the alleged contractual dispute with NTELOS are irrelevant to the Commission because those issues are typically in the purview of the state court system.<sup>25</sup> With respect to the Strasburg Application, NTELOS also argues that WPV's ownership reports filed with the Commission do not list all of WPV's disclosable interest holders.<sup>26</sup> More specifically, NTELOS claims that WPV should list Sandra DePriest, the wife of Donald DePriest (DePriest), the controlling interest holder of WPV, in its Form 602.<sup>27</sup> WPV responds that the rule NTELOS relies on<sup>28</sup> is not applicable because WPV did not acquire its licenses through competitive bidding.<sup>29</sup>

5. In his Objection, Havens argues that Sprint Nextel's Waiver does not meet the requirements of Section 1.925 of the Commission's Rules.<sup>30</sup> Havens also argues that WPV's controlling interest holder, DePriest, does not have the necessary character and fitness to be a Commission licensee.<sup>31</sup> Havens cites pending petitions for reconsideration of orders denying his petitions challenging DePriest's character qualifications.<sup>32</sup> In particular, Havens claims that DePriest and his wife Sandra DePriest concealed pertinent information for the purpose of improperly claiming a bidding credit in Auction No. 61.<sup>33</sup> Havens also claims that a company DePriest controls "is fraudulently maintaining bogus and/or defective AMTS incumbent stations, laundering them, and has used them to reduce competition at FCC auction."<sup>34</sup> Finally, Havens argues that WPV has not abided by the Commission's rules for Commercial Mobile Radio Service (CMRS) stations and is warehousing spectrum.<sup>35</sup> In response, WPV argues that Havens' Petition is untimely with respect to the Martinsburg Application and that Havens lacks the standing to challenge the Applications.<sup>36</sup> WPV also vehemently denies Havens' argument that DePriest lacks the character and fitness necessary to be a Commission licensee and notes that the stations at issue are not CMRS stations.<sup>37</sup> Both Sprint Nextel and WPV argue that they have justified a waiver of the eligibility requirements of Section 27.1201 of the Commission's Rules.<sup>38</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> NTELOS Petition to Deny Application One at 2.

<sup>24</sup> WPV Opposition at 2.

<sup>25</sup> WPV Opposition at 3.

<sup>26</sup> NTELOS Strasburg Petition at 3.

<sup>27</sup> *Id.*

<sup>28</sup> 47 C.F.R. § 1.2110(c)(5)(iii)(A).

<sup>29</sup> WPV Opposition II at 8.

<sup>30</sup> Havens Objection at 3.

<sup>31</sup> Havens Objection at 4-6.

<sup>32</sup> Maritime Communication/Land Mobile, LLC and Paging Systems, Inc., *Order*, 21 FCC Rcd 8794 (WTB PS&CID 2006), Mobex Network Services, Inc., *Order*, 20 FCC Rcd 17957 (WTB PS&CID 2005).

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

<sup>34</sup> Havens Objection at 6.

<sup>35</sup> Havens Objection at 7.

<sup>36</sup> WPV Opposition II at 2.

<sup>37</sup> WPV Opposition II at 3-5.

<sup>38</sup> WPV Opposition II at 5, Sprint Nextel Opposition at 2-3.

6. Initially, we note that Sprint Nextel does not need a waiver of the EBS eligibility rules contained in Section 27.1201 of the Commission's Rules for the Strasburg Application. The Commission has clarified that existing commercial EBS stations such as Station WQCP982 may be freely assigned.<sup>39</sup> Accordingly, no waiver is required, and there is no need for us to consider the arguments made by the parties concerning this matter.

7. WPV contends that NTELOS and Havens lack standing to file a petition to deny. To establish a party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject applications would cause it to suffer a direct injury.<sup>40</sup> In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.<sup>41</sup> With respect to the Martinsburg Application, we conclude that NTELOS does have standing because the geographic service areas of Stations WMY290 and WMY291 extend into a Basic Trading Area (BTA) where NTELOS is the BRS BTA licensee.<sup>42</sup> If NTELOS is correct and the licenses for Stations WMY290 and WMY291 are forfeited, it would acquire the right to operate in the portion of those service areas within its BTA.<sup>43</sup> Accordingly, approval of the Martinsburg Assignment would cause NTELOS a direct and concrete injury because that would constitute a finding that the licenses were not forfeited and NTELOS could not operate those channels within that area.

8. With respect to the Strasburg Application, we agree with WPV that NTELOS lacks standing to file a petition. NTELOS bases its standing on the claim that the geographic service area of Station WQCP982 overlaps its BRS BTA authorization and its claim that its BTA authorization "includes[s] any commercial spectrum within the BTA provided that it is not encumbered by an overlapping incumbent co-channel BRS licensee."<sup>44</sup> NTELOS' statement is incorrect. It does not have any right or interest in EBS spectrum within its BTA. The Commission Rules state, "If the license for an incumbent BRS station cancels or is forfeited, the GSA area of the incumbent station shall dissolve and the right to operate in that area automatically reverts to the GSA licensee that held the corresponding BTA."<sup>45</sup> Although NTELOS holds the BRS BTA authorization for the area in question, NTELOS does not hold a cognizable interest in the frequencies licensed under Station WQCP982 because NTELOS is not eligible to be licensed on these EBS channels.<sup>46</sup> Accordingly, we dismiss the NTELOS Strasburg Petition.

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<sup>39</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, WT Docket No. 03-66 *et al.*, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606, 5756 ¶ 366 (2006).

<sup>40</sup> See *AT&T Wireless PCS, Inc.*, *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (*AT&T Wireless*) (citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988).

<sup>41</sup> *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 72, 78 (1978)).

<sup>42</sup> NTELOS Martinsburg Petition, Attachment A.

<sup>43</sup> See 47 C.F.R. § 27.1206(b).

<sup>44</sup> NTELOS Strasburg Petition at 2 n.1.

<sup>45</sup> See 47 C.F.R. § 27.1206(b) (emphasis added).

<sup>46</sup> Section 27.1201 of the Commission's rules provides in relevant part a license for an EBS station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended. 47 C.F.R. § 27.1201.

9. Moreover, Havens' Objection must be dismissed because it suffers from several procedural defects. First, as Havens admits,<sup>47</sup> it was filed after the deadline for filing petitions to deny against the Martinsburg Application. A Petition to deny an assignment application must be filed within fourteen days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing.<sup>48</sup> Havens claims that he is presenting evidence that was not available to him until after the deadline for filing.<sup>49</sup> That claim is contradicted by the fact that his allegations are based on pleadings dated prior to the filing of the Martinsburg Application.<sup>50</sup> We conclude that Havens has failed to justify his failure to file a timely petition against the Martinsburg Application and dismiss his pleading with respect to the Martinsburg Application.

10. Havens has also failed to establish standing with respect to either the Martinsburg Application or the Strasburg Application. Havens contends that he holds licenses in the same area as WPV and that they may offer competitive service to the Licenses.<sup>51</sup> However, Havens does not establish how his referenced Location and Monitoring Service<sup>52</sup> (LMS), Automated Maritime Telecommunications System (AMTS)<sup>53</sup> or 220-222 MHz Band<sup>54</sup> (QA) licenses are competitive with the BRS<sup>55</sup> and EBS<sup>56</sup>

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<sup>47</sup> Havens Objection at 1 n.1.

<sup>48</sup> 47 C.F.R. § 1.948(j)(1)(iii).

<sup>49</sup> Havens Objection at 1 n.1.

<sup>50</sup> See Havens Objection at 2. One of the petitions he attempts to incorporate by reference was filed on December 9, 2005. *Id.*

<sup>51</sup> See Havens Objection at 2 nn. 3-4.

<sup>52</sup> See Havens Objection at 2 nn. 3-4. LMS provides the use of non-voice signaling methods to locate or monitor mobile radio units. LMS systems may transmit and receive voice and non-voice status and instructional information related to such units. 47 C.F.R. § 90.7.

<sup>53</sup> See Havens Petition to Deny, nn. 3-4. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges and other maritime vessels. Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

<sup>54</sup> See Havens Objection at 2 nn. 3-4. The 220-222 MHz band provides federal government and private land mobile service. In *The Matter Of Amendment Of Part 90 Of The Commission's Rules To Provide For The Use Of The 220-222 MHz Band By The Private Land Mobile Radio Services*, *Report and Order*, PR Docket No. 89-552, 6 FCC Rcd. 2356, 2356 ¶ 1 (1991).

<sup>55</sup> See Havens Objection at 2 nn. 3-4. BRS provides integrated access to broadband technologies, including high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services. In *The Matter Of 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*, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, ¶ 9 (2004).

<sup>56</sup> See Havens Objection at 2 nn. 3-4. EBS originally provided for the transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students. The Commission also permits EBS licensees to use the channels to transmit cultural and entertainment material to educational institutions, and to transmit instructional material to non-educational institutions such as hospitals, nursing homes, training centers, clinics, rehabilitation centers, commercial and industrial establishments, and professional groups. System operators in this band typically provide these types of offerings: (1) downstream analog video; (2) downstream digital video; (3) downstream digital data; and (4) downstream/upstream digital data. In *The Matter Of 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*, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, ¶¶ 9-16 (2004).

licenses in question. Havens also cites, with no explanation, *Mobex Network Services, LLC*<sup>57</sup> as a basis for standing. Havens reliance on *Mobex* is misplaced. *Mobex* speaks to whether in certain instances, the need to locate and monitor mobile radio units could be equally met by AMTS or LMS.<sup>58</sup> *Mobex* does not support Havens contention that he has standing in the instant case by virtue of holding licenses in various services in the Washington, D.C. area.

11. Additionally, we reject NTELOS' argument that the Applications should be denied based on WPV's failure to remain in good standing with the state of Delaware. The Commission has held that it will not consider an argument concerning a licensee's legal disability based on loss of corporate status "where no challenge has been made in state court and the determination is one that is more appropriately resolved by a local court of competent jurisdiction."<sup>59</sup> Whether WPV is in good standing with the state of Delaware is a matter of state law and should be dealt with by a state court. Furthermore, according to NTELOS, WPV is currently in good standing with the state of Delaware.<sup>60</sup> Thus, NTELOS' argument provides no basis for denying the Applications.

12. While the remaining arguments made by NTELOS and Havens are contained in pleadings that have been dismissed, it is in our discretion to informally consider them.<sup>61</sup> We have determined that the remaining arguments made by the parties provide no basis for denying the Applications. None of the parties contends that WPV has engaged in any misconduct with respect to the stations at issue. We also note that Havens' allegations concerning Auction 61 and the AMTS stations have been rejected in other contexts and that his arguments will be considered when his pending petitions challenging those orders are resolved.<sup>62</sup> We also note that NTELOS and Havens accuse WPV and/or DePriest of failing to make required ownership disclosures and/or misrepresenting facts or lacking candor. A necessary element of misrepresentation and lack of candor is an intent to deceive the Commission.<sup>63</sup> Furthermore, they have not made a showing that any violation of reporting obligations that did take place were of such a magnitude as to call WPV's character qualifications into question. Finally, Havens claims that WPV is warehousing spectrum for trafficking purposes.<sup>64</sup> The Commission's Rules define trafficking as, "Obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services..."<sup>65</sup> Havens has offered no credible evidence that WPV is in fact warehousing spectrum for resale purposes. As a result, we conclude that there is no basis for denying the Applications.

#### IV. CONCLUSION AND ORDERING CLAUSES

13. We dismiss the NTELOS Strasburg Petition and the Havens Objection for lack of standing and because the Havens Objection is untimely with respect to the Martinsburg Application. We deny the NTELOS Martinsburg Petition. We have reviewed all of the filed pleadings and conclude that

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<sup>57</sup> *Mobex Network Services, LLC, Order*, 18 FCC Rcd 12305 (WTB PSPWD 2003) (*Mobex*).

<sup>58</sup> *Mobex*, 18 FCC Rcd at 12307 ¶ 5.

<sup>59</sup> Aspen FM, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 17852, 17855 (1997), citing North American Broadcasting Co., Inc., *Memorandum Opinion and Order*, 15 FCC 2d 979 (Rev. Bd. 1969).

<sup>60</sup> See NTELOS Martinsburg Petition at 1 n.4.

<sup>61</sup> See 47 C.F.R. § 1.41.

<sup>62</sup> Maritime Communication/Land Mobile, LLC and Paging Systems, Inc., *Order*, 21 FCC Rcd 8794 (WTB PS&CID 2006), *Mobex Network Services, Inc., Order*, 20 FCC Rcd 17957 (WTB PS&CID 2005).

<sup>63</sup> Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 ¶ 6 (1983).

<sup>64</sup> Havens Petition to Deny at 7-8; Havens Reply at 1-2.

<sup>65</sup> 47 C.F.R. 1.948(i)(1).

neither NTELOS nor Havens has established a valid argument as to why the assignment of licenses for Stations WMY290, WMY291 and WQCP982 from WPV to Sprint Nextel is not in the public interest.

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the Petition to Deny filed by NTELOS Licenses, Inc. on August 23, 2006 IS DENIED.

15. 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 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the Petition to Deny filed by NTELOS Licenses, Inc. on October 10, 2006 and the Petition to Deny, and in the alternative, Section 1.41 Informal Request to Dismiss or Deny filed Warren C. Havens, *et al.* on October 1, 2006 ARE DISMISSED.

16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.948 of the Commission's Rules, 47 C.F.R. § 1.948, that the licensing staff of the Broadband Division SHALL PROCESS the applications filed by Wireless Properties of Virginia, Inc. (File Nos. 0002695270 and 0002755676) in accordance with this *Memorandum Opinion and Order* and the applicable Commission's Rules.

17. 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.

FEDERAL COMMUNICATIONS COMMISSION

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