

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

In the Matter of)
SCHOOL BOARD OF PALM BEACH)
COUNTY, FLORIDA)
Application for Renewal of Educational Broadband) File No. 0002443484
Service Station KZB30 (Boynton Beach, FL))
Request for Waiver of Section 74.932(a) With)
Respect to Educational Broadband Service Stations) DA 06-1782
KZB28 and KZB30 (Boynton Beach, FL))

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 October 10, 2006, WBSWP Licensing Corp. (WBSWP), a wholly owned subsidiary of Sprint Nextel Corporation, filed a petition for reconsideration. WBSWP seeks reconsideration of the grant of the application by the School Board Palm Beach County (School Board) for renewal of its license for Educational Broadband Service (EBS) Station KZB30 (Boynton Beach, FL). WBSWP also seeks reconsideration of the grant of School Board's related requests for waiver of former Section 74.932(d) of the Commission's Rules relating to KZB28, another EBS station licensed to School Board in the same market area, as well as KZB30. For the reasons set forth below, we dismiss the Petition.

1 WBSWP Petition for Reconsideration (filed October 10, 2006) (WBSWP Petition).

2 File No. 0002443484 (Renewal Application).

3 See Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of BRS and EBS Discontinuance of Service Rules, Public Notice, 21 FCC Rcd 10079 (WTB BD 2006) (Waiver Grant PN).

4 Renewal Application, Request for Waiver (filed Jan. 11, 2006) (KZB30 Waiver Request); Letter from Blair R. LittleJohn, Sr. Counsel, Legal Services, The School District of Palm Beach County, Florida to Federal Communications Commission (filed May 3, 2006) (KZB28 Waiver Request).

5 47 C.F.R. 74.932(d) (2004). Former Section 74.932(d) of the Commission's Rules states in relevant part that "[i]n case of permanent discontinuance of operation of a station licensed under this subpart, authority to operate is forfeited and the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, a station which is not operated for a period of one year is considered to have been permanently discontinued." On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that transformed 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 (continued...)

II. BACKGROUND

2. School Board has been the licensee of EBS Stations KZB30 (H1-H3 channels) and KZB28 (A1-A4 channels) in the West Palm Beach-Boca Raton, FL area since 1974.⁶ In 1998, Station KZB30 was taken off the air after modifications were made to permit the receive sites to receive signals from other facilities licensed to School Board.⁷ Similarly, in 2003, Station KZB28 was taken off the air after modifications were made to permit the receive sites to receive signals from other facilities licensed to School Board.⁸ In late 2005, Hurricane Wilma destroyed the facilities of nearly all of School Board's EBS stations, including KZB28 and KZB30.⁹

3. On January 11, 2006, the School Board filed an application to renew the license for KZB30.¹⁰ In connection with its renewal application for KZB30, School Board filed a request for waiver¹¹ of former Section 74.932(d) of the Commission's Rules.¹² A public notice announcing that the application had been accepted for filing was issued on January 18, 2006.¹³ No party objected to the Renewal Application or the KZB30 Waiver Request. School Board filed the KZB28 Waiver Request on May 3, 2006.¹⁴ The KZB28 Waiver Request was unopposed.

4. On September 8, 2006, the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) granted the KZB28 Waiver Request and the KZB30 Waiver Request.¹⁵ The Division granted School Board's waiver requests, as well as other waiver requests, to facilitate the transition to the new BRS/EBS rules.¹⁶ On September 11, 2006, the Bureau granted the Renewal Application.¹⁷

(...continued from previous page)

educational entities. 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*). Among other actions, the *BRS/EBS R&O & FNPRM* eliminated the discontinuance of service rules for the new BRS and EBS. See *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14255-57 ¶¶ 231-239. Because Stations KZB28 and KZB30 were off the air for more than one year prior to January 10, 2005, however, School Board requires a waiver of the rule.

⁶ File Nos. BPIF-278 (granted Apr. 3, 1974), BPIF-276 (granted Jul. 26, 1974).

⁷ KZB30 Waiver Request at 1.

⁸ KZB28 Waiver Request at 1.

⁹ KZB30 Waiver Request at 1; KZB28 Waiver Request at 1.

¹⁰ Renewal Application.

¹¹ KZB30 Waiver Request.

¹² 47 C.F.R. § 74.932(d) (2004).

¹³ See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 2387, *Public Notice* (released Jan. 18, 2006) at 2.

¹⁴ KZB28 Waiver Request.

¹⁵ Waiver Grant PN.

¹⁶ *Id.*

¹⁷ Public notice of grant of the Renewal Application was given on September 20, 2006. See Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 2652, *Public Notice*, (released Sep. 20, 2006) at 2.

5. WBSWP argues that the Broadband Division's decisions effectively reinstate licenses that were forfeited before School Board sought waivers of former Section 74.932(d) of the Commission's Rules.¹⁸ Specifically, WBSWP argues that School Board never sought waivers of former Section 74.932(d) prior to the automatic forfeiture of its licenses for both KZB30 and KZB28, nor did School Board even petition the Commission to reinstate those licenses after they were forfeited. WBSWP avers that School Board chose to bury its untimely request for waiver of former Section 74.932(d) in its January 11, 2006, application for renewal of Station KZB30.¹⁹ WBSWP argues that School Board's request for waiver of former Section 74.932(d) was seven years too late because School Board admits that Station KZB30 was taken off the air in 1998.²⁰ With respect to Station KZB28, WBSWP argues that Station KZB28's license automatically forfeited some time in 2004.²¹ Thus, WBSWP argues that School Board request for waiver of former Section 74.932(d) of the Commission's Rules was defective because Station KZB28 was off the air for over 12 months before the waiver was requested.²²

6. On October 20, 2006, the School Board filed its Opposition to the WBSWP Petition.²³ School Board contends that WBSWP's Petition must be dismissed because it is procedurally defective on three counts.²⁴ First, School Board argues that the Petition is defective because WBSWP failed to file a petition to deny or other objection against the Waiver Requests or Renewal Application prior to action on those filings.²⁵ Second, SPBC contends that WBSWP lacks standing to file a petition for reconsideration because WBSWP fails to demonstrate how it is adversely affected by the Commission's actions.²⁶ Third, School Board argues that WBSWP's Petition must be dismissed for failure to rely on new facts that were not previously known, or to show that the Commission committed a material error.²⁷ School Board also alleges that WBSWP filed the Petition to improperly force School Board to enter into a lease with WBSWP.²⁸ School Board also claims that the waiver grants are also consistent with at least 25 other grants of the discontinuance of service rule issued by the Division.²⁹ Additionally, School Board states that WBSWP raises new claims that are not properly considered in the context of the KZB30 renewal.³⁰ School Board notes that WBSWP claims that the H2 and H3 channels are "grandfathered", and the H1 channel is secondary to commercial H1 operations by WBSWP.³¹ School Board argues these allegations are misplaced in the context of this proceeding and that these are not new facts, nor were they facts that

¹⁸ Petition at 2-3.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 4.

²¹ *Id.* at 4.

²² *Id.* at 4.

²³ The School Board of Palm Beach County Opposition to Petition for Reconsideration (filed Oct. 20, 2006) (School Board Opposition). On November 3, 2006, WBSWP filed its Reply to Opposition to Petition for Reconsideration. WBSWP Reply to Opposition to Petition for Reconsideration (filed Nov. 3, 2006) (WBSWP Reply).

²⁴ School Board Opposition at 6.

²⁵ *Id.* at 6.

²⁶ *Id.* at 8.

²⁷ *Id.* at 9.

²⁸ *Id.* at 2-5.

²⁹ *Id.* at 10-11.

³⁰ *Id.* at 9 n.19.

³¹ *Id.*

WBSWP could not have known or raised earlier in the proceeding had it timely participated.³² Accordingly, School Board argues that the Commission must dismiss WBSWP's Petition pursuant to Section 1.106(b)(2) and (c) of the Commission's Rules.³³

III. DISCUSSION

7. We conclude that the Petition must be dismissed. With respect to the KZB30 Waiver Request and the Renewal Application, we conclude that WBSWP fails to meet the Commission's requirements for entering the proceeding for the first time at reconsideration stage. With respect to KZB28, we conclude that WBSWP lacks standing to file a Petition. As a result, we need not make a determination on the merits of WBSWP's Petition.

8. 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.³⁴ A petitioner must also show good reason why it was not possible for it to participate in the earlier stages of the proceeding.³⁵ With respect to Station KZB30, WBSWP's Petition did not rely on facts unknown to it until after WBSWP's last opportunity to present such matters that could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. WBSWP did not file a petition to deny or other objection when the KZB30 Renewal Application and associated Waiver Request were filed.³⁶ On January 18, 2006, the Commission issued a Public Notice of the filing of the KZB30 renewal application.³⁷ Section 1.939 of the Commission's Rules provides that any interested party who wants to object must file a petition to deny within thirty days of the public notice.³⁸ WBSWP did not do so. While WBSWP accuses School Board of "hiding" the Waiver Request in the Renewal Application, we find School Board's filing method to be appropriate. Waiver Requests are commonly filed with renewal applications, all of which are publicly available and accessible on the Internet through the Commission's Universal Licensing System (ULS) website. In fact, FCC Form 601 specifically asks at Item 11a whether the application includes a request for waiver of the Commission's Rule(s).³⁹ We conclude that WBSWP could have filed a timely petition or objection by reviewing School Board's Renewal Application in due course.

9. In the absence of a showing that WBSWP acted diligently, we find that it is not in the public interest to consider its late-filed Petition. While WBSWP claims that granting School Board's

³² *Id.*

³³ *Id.* (citing 47 C.F.R. § 1.106(b)(2)(c)).

³⁴ 47 C.F.R. §§ 1.106(b)(2), (c).

³⁵ 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."

³⁶ School Board Opposition at 6.

³⁷ See Waiver Grant PN.

³⁸ School Board Opposition at 6; 47 C.F.R. § 1.939.

³⁹ See Form 601, Item 11(a).

waiver requests “will only complicate” the transition of the BRS/EBS band to the new band plan,⁴⁰ WBSWP provides no specifics to justify this broad claim. Furthermore, since School Board has been licensee of these stations since 1974, grant of the waiver requests preserves the *status quo* and should not present WBSWP with any circumstance it could not have anticipated. Accordingly, we conclude the Petition must be dismissed with respect to Station KZB30 because the Petition does not meet the requirements of Section 1.106(c) of the Commission’s Rules.

10. With respect to Station KZB28, we recognize that WBSWP could have a colorable claim that it could not have learned of the KZB28 Waiver Request because it was not filed as part of an application. Even if we concluded that WBSWP complied with Section 1.106 of the Commission’s Rules, however, we conclude that WBSWP lacks standing to challenge the grant of the KZB28 Waiver Request. 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.⁴¹ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.⁴² Although WBSWP holds the BRS BTA authorization for the area in question, WBSWP does not hold a cognizable interest in the frequencies licensed under Station KZB28 because WBSWP is not eligible to be licensed on these EBS channels.⁴³

11. With respect to WBSWP’s potential to become a transition proponent for the territory covered by Station KZB28, we conclude that WBSWP’s status as a potential proponent does not give it standing to challenge the KZB28 Waiver Request. It is uncertain whether WBSWP will in fact be the proponent for BTA469 because it has not yet filed a transition plan for the BTA authorization for the West Palm Beach-Boca Raton, FL area (B469).⁴⁴ Under the Commission’s Rules, the first entity to file a transition initiation plan for a BTA will be the proponent.⁴⁵ The mere fact that WBSWP may in the future decide to serve as the proponent for the transition of BTA B469 does not give it standing to challenge KZB30’s waiver request. Indeed, its status is analogous to a potential assignee of a television station that would compete with another station in the market, and the Commission has held that such potential assignees lack standing to file petitions to deny against other stations in a market.⁴⁶ Furthermore, even if WBSWP had established itself as the proponent in the market, it has not demonstrated that it would suffer a “direct injury” from the grant of the KZB28 Waiver Request.⁴⁷

⁴⁰ Petition at 7.

⁴¹ 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).

⁴² *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)).

⁴³ Section 27.1201 of the Commission’s rules provides, in relevant part, that a license for an Educational Broadband Service 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.

⁴⁴ Petition at 7.

⁴⁵ 47 C.F.R. § 27.1231(c)(1)(iii).

⁴⁶ See *Syracuse Channel 62, Inc., Memorandum Opinion and Order*, 60 Rad. Reg. 2d 1161, 1164 ¶ 10 (1986).

⁴⁷ See *AT&T Wireless, supra*.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons discussed above, we conclude that with respect to Station KZB30, WBSWP's Petition does not comply with Section 1.106(c) of the Commission's Rules. With respect to Station KZB28, WBSWP lacks standing to file the Petition. Accordingly, we dismiss WBSWP's Petition.

13. Accordingly, IT IS ORDERED, pursuant to Section 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 C.F.R. § 1.106, that the petition for reconsideration filed by WBSWP Licensing Corp. on October 10, 2006 IS DISMISSED.

14. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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