

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

In the matter of )  
)  
AQUINAS HIGH SCHOOL ) File Nos. 0002926906, 0003050281  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WNC477 )  
)  
ARMOREL SCHOOL DISTRICT #9 ) File Nos. 0002882276  
)  
Application For Renewal of License of )  
Educational Broadband Service Station WLX617 )  
)  
BULLOCH COUNTY BOARD OF ) File Nos. 0003201427, 0003437078  
EDUCATION )  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WNC418 )  
)  
CANTON R-V SCHOOL DISTRICT ) File Nos. 0002998115, 0003110091  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WNC221 )  
)  
CLARK COUNTY R-I SCHOOL DISTRICT ) File No. 0002922392  
)  
Application For Renewal of License of )  
Educational Broadband Service Station WNC380 )  
)  
COOK COUNTY SCHOOLS ) File Nos. 0003139917, 0003155286  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX597 )  
)  
COOTER REORGANIZED SCHOOL DISTRICT ) File No. 0002882573  
R-IV )  
)  
Application For Renewal of License of )  
Educational Broadband Service Station WNC201 )  
)  
GLYNN COUNTY SCHOOL SYSTEM ) File Nos. 0002935983, 0003050285  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX623 )  
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GLYNN COUNTY SCHOOL SYSTEM ) File Nos. 0002935982, 0003050286  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WNC289 )  
)  
HOLTON UNIFIED SCHOOL DISTRICT ) File Nos. 0002945440, 0003050303  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX329 )  
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OAKDALE HIGH SCHOOL ) File Nos. 0003024448, 0003140584  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX675 )  
)  
SANTA FE TRAIL USD #434 ) File Nos. 0002936004, 0003050299  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX330 )  
)  
SOUTH PEMISCOT DISTRICT R-V ) File No. 0002882270  
)  
Application For Renewal of License of )  
Educational Broadband Service Station WLX618 )  
)  
STROMSBURG SCHOOL DISTRICT #10 ) File Nos. 0002998097, 0003110093  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WNC482 )  
)  
TRENTON SPECIAL SCHOOL DISTRICT ) File Nos. 0003141047, 0003155292  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX621 )  
)  
TRI COUNTY R-VII SCHOOLS ) File Nos. 0003082029, 0003188608  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )  
Broadband Service Station WLX985 )  
)  
TURNER INDEPENDENT SCHOOL DISTRICT ) File Nos. 0003160180, 0003174574  
)  
Applications For Renewal of License and For )  
Extension of Time to Construct Educational )

Broadband Service Station WLX858 )

## MEMORANDUM OPINION AND ORDER

**Adopted: June 15, 2009**

**Released: June 16, 2009**

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

### I. INTRODUCTION

1. We have before us the above-captioned late-filed applications to renew Educational Broadband Service (EBS) stations with associated requests for waiver of Section 1.949(a) of the Commission's Rules<sup>1</sup> to permit untimely filing of the renewal applications.<sup>2</sup> We also have before us the above-captioned late-filed applications for extension of time to construct the EBS stations, as well as associated requests for waiver. We also have before us petitions to deny the renewal applications filed by Sprint Nextel Corporation (Sprint Nextel),<sup>3</sup> a petition to deny filed against the application of Stromsburg School District #10 (Stromsburg) filed by Malcolm School District (Malcolm),<sup>4</sup> informal objections filed against certain renewal applications by Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc.,<sup>5</sup> responsive pleadings,<sup>6</sup> and a request to designate the adjudication of some of the applications in this proceeding as "permit but disclose" for purposes of the Commission's *ex parte* rules, filed by Sprint

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<sup>1</sup> 47 C.F.R. § 1.949(a).

<sup>2</sup> See the Appendix to this *Memorandum Opinion and Order* for complete information concerning the waiver requests under consideration.

<sup>3</sup> Sprint Nextel filed petitions to deny (Petitions) against each of the renewal applications under consideration in this *Memorandum Opinion and Order*, except for the renewal application of Tri County R-VII Schools AND Bulloch County Board of Education. The Appendix lists the date Sprint Nextel filed the petition to deny. We note that in certain instances, Sprint Nextel's petitions to deny also reference applications for extension of time to construct. See examples. Petitions to deny do not lie against applications for extension of time to construct. See 47 U.S.C. § 309(b), (c)(2)(D). Accordingly, we dismiss the pleadings to the extent they discuss the extension applications.

<sup>4</sup> Petition to Deny of Malcolm School District 148 directed against Stromsburg School District #10 (filed Aug. 24, 2007) (Malcolm Petition).

<sup>5</sup> See Letter from Trey Hanbury, Director, Government Affairs, Sprint Nextel Corporation and Cecily Cohen, Director, Government and Industry Affairs, Nokia and Nokia Siemens Networks to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission (filed Jul. 10, 2007) (Informal Objection). The Informal Objection was filed against the following renewal applications being considered in this *Memorandum Opinion and Order*: 0002882270, 0002882276, 0002882573, 0002922392, 0002926906, 0002935982, 0002935983, 0002936004, and 0002945440.

<sup>6</sup> Opposition to Consolidated Petition to Dismiss or Deny, Aquinas High School (filed Jul. 15, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Glynn County Middle School (filed Jul. 15, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Holton Unified School District (filed Jul. 15, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Stromsburg School District #10 (filed Sep. 15, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Canton R-V School District (filed Sep. 4, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Oakdale High School (filed Oct. 2, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Cook County Schools (filed Nov. 5, 2007); Opposition to Consolidated Petition to Dismiss or Deny, Turner Independent School District (filed Nov. 8, 2007) (Turner Opposition); Reply of Sprint Nextel Corporation (filed Aug. 2, 2007); Reply Comments of The Knowledge Network of Greater Omaha (filed Sep. 13, 2007); Reply of Sprint Nextel Corporation (filed Sep. 13, 2007); Reply of Sprint Nextel Corporation (filed Oct. 10, 2007).

Nextel.<sup>7</sup> For the reasons discussed below, we dismiss the Petitions and the Malcolm Petition, dismiss the Informal Objection, deny the *Ex Parte* Motion, and grant the Waiver Requests.

## II. BACKGROUND

### A. Renewal Applications

2. The Appendix to this *Memorandum Opinion and Order* lists EBS licenses that expired on the dates indicated. Prior to March 25, 2002, the Instructional Television Fixed Service (ITFS), the predecessor-in-interest to EBS, was administered by the former Mass Media Bureau. That Bureau had a policy under which it would not accept renewal applications for ITFS stations that were not constructed.<sup>8</sup> None of the stations in question in this *Memorandum Opinion and Order* were ever constructed.

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS.<sup>9</sup> WTB began requiring unconstructed ITFS stations to submit renewal applications. WTB did not issue a public notice announcing this change in policy. Instead, when licensees filed requests for extension of time to construct for licenses that had expired, WTB returned the applications and asked the licensees to file renewal applications with waiver requests.

4. In 2002, with the exception of Trenton Special School District, which had an extension application filed in 1996 which remained pending in 2002, each of the Applicants filed an application for extension of time to construct their ITFS stations.<sup>10</sup> Pursuant to its policy, WTB attempted to return each of the extension applications, directing the licensees to file renewal applications.<sup>11</sup> In these cases, because of a glitch in the licensing system, however, the return letters that were generated did not include return addresses. The Applicants did not respond to the return letters. Because there were no responses, the applications were dismissed, and dismissal letters were generated.<sup>12</sup> As with the return letters, the dismissal letters did not include addresses. None of the Applicants sought reconsideration or Commission review of the dismissals of their Extension Applications.

5. On the dates indicated in the Appendix, the licensees filed late-filed renewal applications, along with requests for waiver of Section 1.949(a) of the Commission's rules, which requires licensees to file their renewal applications no later than the expiration date of the license.<sup>13</sup> Certain applicants also filed new applications for extension of time to construct, along with requests for waiver of Section 1.946(e) of the Commission's Rules, which requires that extension applications be filed prior to the construction deadline. The Applicants generally indicated that they failed to file timely applications

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<sup>7</sup> Request to Designate Proceedings as "Permit but Disclose," Sprint Nextel Corporation (filed Mar. 22, 2007) (*Ex Parte* Motion). The motion was filed against the following renewal applications being considered in this *Memorandum Opinion and Order*: 0002882270, 0002882276, 0002882573, and 0002922392.

<sup>8</sup> See, e.g., Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division to University of Maine System, File No. BRIF-19990208AAL (MMB May 19, 2000).

<sup>9</sup> Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, DA 02-638 (WTB Mar. 18, 2002).

<sup>10</sup> The Appendix lists the file number of each of the extension applications at issue.

<sup>11</sup> The Appendix lists the date and reference number of each return letter.

<sup>12</sup> The Appendix lists the date and reference number of each dismissal letter.

<sup>13</sup> 47 C.F.R. § 1.949(a).

because of changes in personnel and lack of familiarity with the Commission's rules,<sup>14</sup> or reliance upon lessees that filed for bankruptcy and went out of business.<sup>15</sup> Five of the applicants, however, indicate that they did not file renewal applications due to reliance on the Mass Media Bureau's policy of not accepting renewal applications from unconstructed stations.<sup>16</sup> Petitions to deny were due thirty days after release of the public notice accepting the applications for filing.<sup>17</sup>

6. Sprint Nextel filed timely petitions to deny against the renewal applications (except for the application of Tri County R-VII Schools and Bulloch County Board of Education) on the dates indicated in the Appendix.<sup>18</sup> Sprint Nextel claims that the applications are in fact authorizations for new stations because the licenses automatically terminated and that granting the applications would violate the Administrative Procedure Act, Section 309(j) of the Communications Act of 1934, as amended, the standards established for late-filed renewals applicable to EBS, and the Commission's freeze on applications for new EBS stations.<sup>19</sup> Sprint Nextel claims to be a party in interest with respect to these applications in six different ways. First, it claims party in interest status based on its claim that applicants are seeking "to overturn the rules and renewal policies" adopted by the Commission in 2004 and the fact that Sprint Nextel is a party to the rulemaking proceeding.<sup>20</sup> Second, Sprint Nextel claims that granting a late-filed renewal application may complicate network deployment and will delay deployment of service

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<sup>14</sup> See Glynn County School System Petition for Waiver and Reinstatement, File Nos. 0002935982 and 0002935983 (filed Mar. 5, 2007) (Glynn County Waiver Request) at 1; Holton Unified School District, Petition for Waiver and Reinstatement, File No. 0002945440 (filed Mar. 12, 2007) (Holton Waiver Request) at 1.

<sup>15</sup> Aquinas High School Petition for Waiver and Reinstatement, File No. 0002926906 (filed Feb. 26, 2007) (Aquinas Petition) at 1; Bulloch County Board of Education, Request for Reinstatement and Associated Waivers, File No. 0003201427 (filed Oct. 17, 2007) (Bulloch County Waiver Request) at 1; Canton R-V School District Petition for Waiver and Reinstatement, File No. 0002998115 (filed Apr. 18, 2007) (Canton Waiver Request) at 1; Oakdale High School Waiver Request, File No. 0003024448 (filed May 9, 2007) at 1; Armored School District #9, Petition for Waiver and Reinstatement, File No. 0002882276 (filed Jan. 17, 2007) at 1; Clark County R-I School District, Petition for Waiver and Reinstatement, File No. 0002922392 (filed Feb. 22, 2007) at 1; Cooter Reorganized School District R-IV, Petition for Waiver and Reinstatement, File No. 0002882573 (filed Jan. 18, 2007) at 1; Santa Fe Trail USD 434, Petition for Waiver and Reinstatement, File No. 0002936004 (filed Mar. 5, 2007) at 1; South Pemiscot District R-V Petition for Waiver and Reinstatement, File No. 0002882270 (filed Jan. 17, 2007) at 1; Stromsburg School District #10 Petition for Waiver and Reinstatement, File No. 0002998097 (filed Apr. 18, 2007) (Stromsburg Waiver Request) at 1; Trenton Special School District Waiver Request, File No. 0003141047 (filed Aug. 16, 2007) (Trenton Waiver Request) at 1; Turner Independent School District Waiver Request, File No. 0003160180 (filed Aug. 31, 2007) (Turner Waiver Request) at 1.

<sup>16</sup> Cook County Schools Waiver Request, File No. 0003139917 (filed Aug. 15, 2007) (Cook County Waiver Request) at 1; Oakdale Waiver Request at 1; Trenton Waiver Request at 1; Tri-County R-VII Schools Waiver Request, File No. 0003082029 (filed Jun. 21, 2007) at 1; Turner Waiver Request at 1.

<sup>17</sup> 47 C.F.R. § 1.939(a)(2).

<sup>18</sup> See Petitions.

<sup>19</sup> See, e.g., Consolidated Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Mar. 30, 2007) (Sprint March 30 Petition) at 4-9, 11-14; Consolidated Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Jul. 13, 2007) (Sprint July 13 Petition) at 4-8, 11-18; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Aug. 24, 2007) (Sprint August 24 Petition) at 4-9, 12-19; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Sep. 21, 2007) (Sprint September 21 Petition) at 4-10, 14-22; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Oct. 26, 2007) (Sprint October 26 Petition) at 4-11, 15-23; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Nov. 2, 2007) (Sprint November 2 Petition) at 4-11, 14-22.

<sup>20</sup> See Sprint March 30 Petition at 18; Sprint July 13 Petition at 23-24; Sprint August 24 Petition at 26; Sprint September 21 Petition at 29; Sprint October 26 Petition at 32-33; Sprint November 2 Petition at 31.

by forcing Sprint Nextel to redesign its network.<sup>21</sup> Third, Sprint Nextel claims that granting the applications “is likely” to delay the transition process.<sup>22</sup> Fourth, Sprint Nextel claims that granting these renewal applications would subject it to a “level of uncertainty and regulatory disadvantage” not faced by other broadband providers.<sup>23</sup> Fifth, with respect to Santa Fe, Glynn County Middle School, Canton, Stromsburg, Turner, and Trenton, Sprint Nextel claims to be the licensee of adjacent-channel BRS stations that could suffer interference if their licenses are reinstated.<sup>24</sup> Finally, with respect to Aquinas, Santa Fe, Holton, and Turner, Sprint Nextel claims standing because it asserts that grant of the applications would cause interference and/or a reduction in the geographic service area of co-channel and adjacent-channel licenses from which Sprint Nextel leases spectrum.<sup>25</sup>

7. On March 18, 2008, the Commission adopted a declaratory ruling clarifying its policy concerning the division of overlapping geographic service areas (GSAs) between active EBS licensees and EBS licensees whose licenses expired prior to January 10, 2005 but are later reinstated.<sup>26</sup> The Commission stated:

- An active BRS or EBS licensee whose former protected service area overlapped with a co-channel license that was expired on January 10, 2005 need not split the football with such expired license if the licensee has not had its license reinstated.
- If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee’s geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee’s late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances.<sup>27</sup>

## **B. Extension Applications**

8. Under the rules in effect prior to 2003, EBS permittees had eighteen months from the

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<sup>21</sup> See Sprint March 30 Petition at 19-20; Sprint July 13 Petition at 25; Sprint August 24 Petition at 27; Sprint September 21 Petition at 30-31; Sprint October 26 Petition at 33-34; Sprint November 2 Petition at 32.

<sup>22</sup> See Sprint March 30 Petition at 20; Sprint July 13 Petition at 25-26; Sprint August 24 Petition at 28-29; Sprint September 21 Petition at 32-33; Sprint October 26 Petition at 35-36; Sprint November 2 Petition at 33-34.

<sup>23</sup> See Sprint August 24 Petition at 27-28; Sprint September 21 Petition at 31; Sprint October 26 Petition at 34-35; Sprint November 2 Petition at 32-33.

<sup>24</sup> Sprint July 13 Petition, Appendix B at 7 (Aquinas), 11 (Glynn County); Sprint August 24 Petition, Appendix A at 2 (Canton), 6 (Stromsburg); Sprint October 26 Petition, Appendix A at 3 (Turner); Sprint November 2 Petition, Appendix B at 1 (Trenton).

<sup>25</sup> Sprint July 13 Petition, Appendix B at 7 (Aquinas), 9 (Santa Fe); 15 (Holton); Sprint October 26 Petition, Appendix A at 3 (Turner).

<sup>26</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 Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6053-6060 ¶¶ 161-179 (2008) (*Declaratory Ruling*).

<sup>27</sup> *Id.*, 23 FCC Rcd at 6059-6060 ¶ 179.

date of the issuance of the original authorization to construct their facilities.<sup>28</sup> The Commission granted applications for extension of time to construct EBS stations upon a specific and detailed narrative showing that the failure to complete construction was due to causes that were beyond the permittee's control, or upon a specific and detailed showing of other sufficient justification for an extension.<sup>29</sup> Applications for extension of time to construct were ordinarily required to have been filed at least 30 days prior to the construction deadline.<sup>30</sup> In those cases where a station is not constructed by the deadline specified in the permit or as extended by the Commission, the Commission shall declare the permit forfeited and make a notation of such forfeiture.<sup>31</sup>

9. On April 2, 2003, the Commission released a *Notice of Proposed Rule Making (NPRM)* in this proceeding, seeking comment on an industry proposal as well as other potential alternatives for restructuring the 2500-2690 MHz band.<sup>32</sup> In addition to the Coalition's proposal, the Commission also sought comment on ownership and eligibility issues, transition timetables, and additional engineering issues. In light of the fundamental rule changes proposed, the Commission suspended the construction deadline for EBS licensees "that have unexpired licenses or permits that have not expired as of [April 2, 2003] and that have made a timely filed extension request."<sup>33</sup>

10. The Appendix to this *Memorandum Opinion and Order* lists EBS licensees that have filed untimely applications for extension of time to construct, the dates those applications were filed, and the applicable construction deadline. The applicants have requested waivers because their applications were filed after the construction deadline.

### III. DISCUSSION

#### A. *Ex Parte* Motion

11. Sprint Nextel has argued in certain cases that the "broad, important public policy issues" raised by these and similar applications justifies "permit-but-disclose" treatment of such Applications under the Commission's *ex parte* rules.<sup>34</sup> It also contends that changing the *ex parte* status of the proceedings would allow the Commission to develop a more complete record and provide the opportunity to meet with all parties to explore an appropriate resolution to this proceeding.<sup>35</sup> In a joint filing, a group of EBS licensees argues that they are small entities and that it would be extremely burdensome to monitor

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<sup>28</sup> 47 C.F.R. § 73.3534(a) (2002).

<sup>29</sup> 47 C.F.R. § 73.3534(c) (2002).

<sup>30</sup> 47 C.F.R. § 73.3534(b) (2002).

<sup>31</sup> 47 C.F.R. § 73.3599 (2002).

<sup>32</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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*BRS/EBS NPRM*).

<sup>33</sup> *BRS/EBS NPRM*, 18 FCC Rcd at 6805 ¶ 201.

<sup>34</sup> *Ex Parte* Motion at 2.

<sup>35</sup> *Ex Parte* Motion at 2-3.

Sprint Nextel's filings and activities.<sup>36</sup> They also argue that Sprint Nextel may not request a change in *ex parte* status because it failed to participate in a timely manner and lacks standing.<sup>37</sup>

12. We deny Sprint Nextel's request because we do not believe that changing the *ex parte* status of this proceeding will assist the Commission in the resolution of the applications. Sprint Nextel has had a full opportunity to make its arguments in its pleadings, and it fails to explain what additional information it could provide in meetings that it did not provide in its pleadings. Furthermore, given the large number of applications Sprint Nextel has filed against, changing the *ex parte* status of the proceedings could ultimately delay resolution of the proceedings by engendering a large number of repetitive presentations that would consume the resources of the parties and the Commission while not materially assisting the Commission in resolving the issues. Finally, we are sensitive to the concerns of the EBS parties that, as educational institutions and organizations without a regular presence in Washington, it would be difficult for them to monitor these proceedings.

### **B. Sprint Nextel Petitions to Deny and Informal Objections**

13. We dismiss Sprint Nextel's Petitions because Sprint Nextel has failed to demonstrate standing. To establish party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury.<sup>38</sup> In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.<sup>39</sup> Sprint Nextel does not hold a cognizable interest in the frequencies in question because Sprint Nextel is not eligible to be licensed on these EBS channels.<sup>40</sup> Sprint Nextel's claim that it has standing because it is a party to the rulemaking proceeding involving BRS and EBS (WT Docket No. 03-66) and that petitioners are seeking to change the standards established in the *BRS/EBS R&O* must be rejected. The applications will be evaluated using the waiver standard in Section 1.925 of the Commission's Rules, as applied in the *BRS/EBS R&O*. Furthermore, these applications are not rulemaking proceedings but adjudications. For the same reason, we reject Sprint Nextel's argument that it is facing a unique uncertainty or disadvantage not faced by other providers. Any difference between action on these renewal applications and actions in other services is based not on use of a different legal standard but on the different circumstances present here. Accordingly, we review Sprint Nextel's other arguments to determine whether it has demonstrated a cognizable interest in denial of these applications.

14. Sprint Nextel's general allegations concerning network deployment are insufficient to establish that it has any cognizable interest in these applications. Sprint Nextel provides no information concerning when it may offer service in the area, whether it intends to use frequencies adjacent to applicants' frequencies, and what difficulties it would face as a result of a grant of the Applications. Moreover, while Sprint Nextel could be correct in the abstract that the grant of a late-filed renewal

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<sup>36</sup> Joint Opposition to Request to Designate Proceedings as "Permit but Disclose" (filed Mar. 30, 2007) at 4.

<sup>37</sup> *Id.* at 2.

<sup>38</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>39</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>40</sup> 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.



application could complicate network planning under certain circumstances, it has not attempted to demonstrate that a grant of these applications would cause such complications. Accordingly, Sprint Nextel's vague and general claims are insufficient to establish standing.

15. Furthermore, Sprint Nextel's argument that granting these renewals would impede the transition is unsubstantiated and contrary to the available evidence. We first note that this argument could only apply in markets where Sprint had filed to be the proponent before the renewal applications.<sup>41</sup> Sprint Nextel would lack standing to complain about any difficulty that granting a waiver may cause or may have caused to Clearwire or another proponent. Additionally, Commission records show that the transition is proceeding well. According to our records, Sprint Nextel, Clearwire, and other licensees have filed transition initiation plans in 448 out of 493 Basic Trading Areas (BTAs), and the transition has been completed in 400 BTAs.<sup>42</sup> Furthermore, since these applicants have not had authority to operate, they should not have any operations that Sprint Nextel would be required to transition. We see no need to restart the transition process to accommodate those licensees who have not been operating. In many cases, applicants with pending late-filed renewal applications were included in transition plans filed by Sprint Nextel or Clearwire. We expect that such applicants, once their renewal applications are granted, will fully cooperate with the proponents in their markets and will file such applications or notices as are necessary to move to the default location under the new band plan. To the extent applicants were not included in transition initiation plans, we will, on our own motion, extend the deadline for such applicants to file self-transition notifications<sup>43</sup> to thirty days after their renewal application is granted. We expect applicants who self-transition to fully cooperate with neighboring licensees and to file the necessary application to modify their license to move to the new band plan.

16. Finally, Sprint Nextel has failed to show that it would suffer harm from interference or from its lessee's loss of geographic service area. With respect to generalized interference concerns, Sprint Nextel has not shown how the new technical rules adopted for BRS and EBS, which Sprint has mostly supported, will be insufficient to protect Sprint Nextel's operations. Furthermore, Sprint Nextel has not provided engineering analyses to support its generalized interference concerns.<sup>44</sup>

17. To the extent that Sprint Nextel's concerns are based on its lessees losing service area because they are forced to "split-the football" with licenses that have been reinstated, Sprint Nextel has failed to provide sufficient information to demonstrate that it, as opposed to its lessors, would suffer harm. Sprint Nextel's exhibits show that the areas in question where it has leases are small areas near the edge of the GSAs.<sup>45</sup> Sprint Nextel has not provided any information concerning its leases or its plans to use the leases in question to provide service. Accordingly, we cannot conclude that loss of these overlap

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<sup>41</sup> Our records indicate that Sprint Nextel filed to be the proponent in the BTA in question prior to the filing of the renewal application with respect to the following renewal applications: 0002841453, 0002936004, 0002945525, 0003022184, 0003023931, 0003025633, 0003025641, 0003025746, 0003058949, 0003065753, 0003119706, 0003141205, 0003155485, 0003160176, 0003171011, 0003188417, and 003207851. In the other cases, Clearwire was the proponent for the market in question, or there was no transition plan on file at the time the renewal application was filed.

<sup>42</sup> See WT Docket No. 06-136.

<sup>43</sup> See 47 C.F.R. § 27.1236(c).

<sup>44</sup> At the petition for reconsideration stage, the Commission requires that interference claims be supported an affidavit from an engineer. 47 C.F.R. § 1.106(e). While there is no such specific requirement at the petition to deny stage, all factual allegations in petitions to deny must be supported by an affidavit from a person with personal knowledge of the facts (unless official notice can be taken of the facts). See 47 C.F.R. § 1.939(d). Sprint Nextel's generalized interference concerns do not comply with those requirements.

<sup>45</sup> See Sprint July 13 Petition, Appendix B at 8 (Aquinas), 10 (Santa Fe); 16 (Holton); Sprint October 26 Petition, Appendix A at 4 (Turner).

areas will have any effect on current, concrete plans of Sprint Nextel to provide service. We therefore conclude that Sprint Nextel has failed to demonstrate standing.

18. Since Sprint Nextel has not shown how it would be injured by a grant of these applications, we dismiss the petitions it has filed for lack of standing. We also dismiss the Informal Objection. Sprint Nextel has already had a full opportunity to present its arguments by filing a petition to deny and a reply pleading. As noted by the former Review Board, additional pleadings should be authorized “only in the most compelling and unusual circumstances where it is felt that basic fairness to a party requires such action . . .”<sup>46</sup> Since Sprint Nextel has already had a full and fair opportunity to present its arguments, we see no purpose in allowing it to buttress its defective pleadings by filing yet another pleading. While Nokia also signed the pleadings, Nokia does not explain its failure to participate in a timely fashion in these proceedings and, accordingly, does not demonstrate standing. Furthermore, the Informal Objection repeats arguments made by Sprint Nextel in its other pleadings. We therefore exercise our discretion and decline to consider the Informal Objections.

### C. Malcolm Petition

19. We also dismiss the Malcolm Petition for lack of standing. Malcolm expresses concern about adjacent-channel interference from Stromsburg’s station.<sup>47</sup> We find those arguments insufficient to establish standing for the same reasons as noted with respect to Sprint Nextel.

### D. Waiver Request - Renewals

20. In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.<sup>48</sup> We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>49</sup>

21. As an initial matter, we reject the applicants’ arguments that their late-filed renewal applications should be excused because of changes in personnel, failure to monitor the renewal deadline, or reliance upon lessees that filed for bankruptcy and went out of business. The Commission has repeatedly held that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.<sup>50</sup> Accordingly, we find that the various arguments presented by the applicants do not justify a waiver of Section 1.949(a) to excuse the late filings.

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<sup>46</sup> See D.H. Overmyer Communications Co., Docket No. 16388, *Memorandum Opinion and Order*, 4 FCC 2d 496, 505 ¶ 28 (Rev. Bd. 1966).

<sup>47</sup> Malcolm Petition at 2-3.

<sup>48</sup> See 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, 11485 ¶ 22 (1999).

<sup>49</sup> 47 C.F.R. § 1.925(b)(3).

<sup>50</sup> See *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14248 ¶ 217 (“As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application.”); Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission’s Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-21973 ¶ 53

22. Nonetheless, we conclude, based on the circumstances surrounding the return and dismissals of the Applications, that a waiver is justified under the second prong of the waiver standard. Specifically, we find that failing to renew Applicants' licenses would be inequitable and contrary to the public interest. As mentioned above, WTB did not issue a public notice announcing that the former Mass Media Bureau's policy of not allowing licensees to file renewal applications on unconstructed stations would no longer be followed. Rather, WTB attempted to notify the licensees that a renewal application would be required after they filed their extension applications. However, as some of the Applicants have noted, ULS generated letters that were sent to the Applicants seeking clarification and ultimately dismissing their applications were not properly addressed.<sup>51</sup> We note that the ULS letters address issue was not due to any failure on Applicants' part—the ULS letters that were sent to the Applicants failed to print out any address whatsoever. Therefore, the Applicants did not have adequate notice that WTB sought additional information, nor did they have adequate notice that their applications were ultimately dismissed. If the letters had been properly addressed, Applicants would have had the opportunity to provide the requested information. We therefore grant a waiver of the filing deadline and direct the processing of the referenced applications.

### **E. Declaratory Ruling**

23. As noted above, the Commission has issued a declaratory ruling stating, "If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances."<sup>52</sup> The Commission directed WTB to make a determination in each case whether unique circumstances exist that would justify allowing those licensees to "split-the-football."<sup>53</sup>

24. In this case, we conclude that manifest agency error exists and the licensees should be allowed to split the football with other licensees. Specifically, the failure to place addresses on the return letters and dismissal letters failed to provide the applicants with proper notice. If the applicants had been properly notified, they could have responded and had their pre-2005 applications processed in a timely manner. Accordingly, we conclude that the applicants should be allowed to "split-the-football."

### **F. Waiver Requests - Extension Applications**

25. Most of the unconstructed stations at issue in this *Memorandum Opinion and Order* have either filed untimely applications for extensions of time to construct or need to file such applications in order to qualify for relief under the Commission's suspension of the former buildout deadline. In considering whether to grant a waiver to allow consideration of these late-filed extension applications, we use the same waiver standard as we did for the late-filed renewals. We may grant a request for a waiver when: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of

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(1998) (holding that "[i]t is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license," and that "failure of a licensee to receive a [renewal form] from the Commission is no excuse for failure to file a renewal application")

<sup>51</sup> See Cook County Waiver Request at 1; Trenton Waiver Request at 1.

<sup>52</sup> *Declaratory Ruling, supra*.

<sup>53</sup> *Id.*

the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>54</sup>

26. In this case, we conclude that waivers are justified under the first prong of the waiver standard. The underlying purposes of performance requirements are to “ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services.”<sup>55</sup> The buildout requirements at issue have been replaced with a new requirement that all licensees demonstrate substantial service by May 1, 2011.<sup>56</sup> Given the impending deadline, and that the former deadline was suspended almost five years ago, we believe the best way of meeting the underlying purposes of performance requirements is to allow the licensees to make their licenses current and strictly enforce the new substantial service requirements. This will allow those licensees to begin providing service and provide licensees with the maximum incentive to begin providing service as soon as possible.

27. We also conclude that granting the waiver requests would be in the public interest. While the Commission has sought comment on how to license vacant EBS spectrum in the future,<sup>57</sup> educators do not currently have the opportunity to apply for unassigned EBS spectrum. Under those circumstances, we believe the best means of having the spectrum put to use is to grant waivers as needed to allow these licensees to commence providing service and to strictly enforce the May 1, 2011 substantial service deadline against these licensees. We place the licensees on notice that we fully expect them to meet the May 1, 2011 deadline and that they face license termination if they fail to demonstrate substantial service by that date.

28. For those licensees who have filed extension applications, we waive former Section 73.3534 of the Commission’s Rules and direct the Broadband Division to process those applications. For those licensees who require an extension to become eligible for the suspension of the old buildout requirements announced in the *BRS/EBS NPRM*, we direct the Broadband Division to return their renewal applications and direct the applicants to file extension applications. The extension applications must be filed with a waiver request, which should cite this *Memorandum Opinion and Order* as justification for the waiver. Once an extension application is filed, the Broadband Division may process the renewal application and extension application in accordance with this *Memorandum Opinion and Order*.

#### IV. CONCLUSION AND ORDERING CLAUSES

29. For the reasons discussed above, we dismiss Sprint Nextel’s Petitions and the Malcolm Petition for lack of standing. While we conclude that the arguments made by Applicants do not justify a waiver, we conclude that the circumstances surrounding Applicants’ 2002 extension applications justify a waiver of Section 1.949(a) of the Commission’s Rules. We therefore grant a waiver and direct processing of Applicants’ renewal and extension applications.

30. Accordingly, IT IS 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(g) of the Commission’s Rules, 47 C.F.R. § 1.939(g), that the Petitions to Dismiss or Deny filed by Sprint Nextel Corporation on July 13, 2007, August 24, 2007, October 26, 2007, and November 2, 2007 ARE DISMISSED.

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<sup>54</sup> 47 C.F.R. § 1.925(b)(3).

<sup>55</sup> *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5720 ¶ 278, quoting 47 U.S.C. § 309(j)(4)(B).

<sup>56</sup> *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5733 ¶ 303; 47 C.F.R. § 27.14(e).

<sup>57</sup> *BRS/EBS 2<sup>nd</sup> FNPRM*.

31. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the informal objection filed by Sprint Nextel Corporation, Nokia, Inc. and Nokia Siemens Networks, Inc. on July 10, 2007 IS DISMISSED with respect to File Nos. 0002882270, 0002882276, 0002882573, 0002922392, 0002926906, 0002935982, 0002935983, 0002936004, and 0002945440.

32. 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 Sections 1.925, 1.949(a), and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), 74.15(e), that the requests for waiver of Section 1.949(a) and/or Section 74.15(e) of the Commission's Rules contained in the renewal applications listed in the Appendix ARE GRANTED.

33. 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 Sections 1.925, 1.946(e), and 73.3534 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946(e), 73.3534, that the requests for waiver of Section 1.946(e) and/or Section 73.3534 of the Commission's Rules contained in the extension applications listed in the Appendix ARE GRANTED.

34. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), that the Request to Designate Proceedings as "Permit but Disclose" filed by Sprint Nextel Corporation on March 22, 2007 IS DENIED with respect to File Nos. 0002882270, 0002882276, 0002882573, and 0002922392.

35. 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 Sections 1.949 of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL PROCESS the applications listed in the Appendix in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

36. 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

Blaise A. Scinto  
Chief, Broadband Division  
Wireless Telecommunications Bureau