

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

In the Matter of)
LOIS HUBBARD) File No. 20031128AAA
Application for Renewal of Broadband Radio)
Service Station WMI307, South Bend, Indiana)

ORDER ON RECONSIDERATION

Adopted: June 15, 2009

Released: June 16, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On January 3, 2007, Sprint Nextel Corporation (Sprint Nextel) filed a petition for reconsideration.1 Sprint Nextel seeks reconsideration of the December 1, 2006 Order on Reconsideration2 granting a petition for reconsideration filed by Lois Hubbard (Hubbard) and reinstating her license for Broadband Radio Service (BRS) Station WMI307, South Bend, Indiana and associated application for renewal of license for Station WMI307.3 We also have before us an opposition filed by Hubbard,4 a reply filed by Sprint Nextel,5 a request to designate this proceeding as "permit but disclose" for purposes of the Commission's ex parte rules filed by Sprint Nextel,6 and an informal objection filed against the Application by Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc.7 For the reasons discussed below, we dismiss the Petition and Informal Objection and deny the Ex Parte Motion.

II. BACKGROUND

2. On March 25, 2002, the Wireless Telecommunications Bureau (Bureau) assumed responsibility from the Mass Media Bureau for the administration of the Instructional Television Fixed Service (ITFS), Multipoint Distribution Service (MDS), and Multichannel Multipoint Distribution

1 Petition for Reconsideration of Sprint Nextel Corporation (filed Jan. 3, 2007) (Sprint Nextel Petition).
2 Lois Hubbard, Order on Reconsideration, 21 FCC Rcd 14088 (WTB BD 2006) (Reconsideration Order).
3 See File No. 20031128AAA (Waiver Request).
4 Lois Hubbard Opposition to Petition for Reconsideration (filed Jan. 17, 2007) (Hubbard Opposition).
5 Reply to Opposition to Petition for Reconsideration of Sprint Nextel Corporation (filed Jan. 30, 2007) (Sprint Nextel Reply).
6 Request to Designate Proceedings as "Permit but Disclose," Sprint Nextel Corporation (filed Mar. 22, 2007) (Ex Parte Motion).
7 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 (Jul. 10, 2007) (Informal Objection).

Service (MMDS) (collectively the “Services”).⁸ As the WTB began migrating data from the Broadband Licensing System (BLS) to the Universal Licensing System (ULS),⁹ it sought to ensure that it had a complete and accurate listing of all licenses, pending applications, and other pertinent legal matters. To that end, WTB released a public notice on October 18, 2002, requiring all licensees, applicants, and petitioners to review and verify the information contained in the six different tables that were attached to it.¹⁰ The *October Public Notice* warned all interested parties of the consequences of the failure to comply with the instructions contained in the *October Public Notice*.¹¹ In addition, the WTB required that all applicants respond in writing by December 18, 2002 if they desired the Commission to continue processing pending applications that were filed prior to March 25, 2002.¹² Although the WTB originally provided a sixty-day window (ending December 18, 2002) in which to comply with its request,¹³ it later extended the filing deadline to February 21, 2003.¹⁴

3. On April 2, 2001, Hubbard submitted a timely application for renewal of license for BRS Station WMI307.¹⁵ She did not respond, however, to the *October Public Notice*, nor did she file a

⁸ 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 Nos. 03-66, *et al.*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS and ITFS as the Broadband Radio Service and the Educational Broadband Service, respectively. Because the new rules are currently in effect, we will refer to the services by their new names. Because the rules adopted in the *BRS/EBS R&O and FNPRM* were not in effect when Hubbard filed her renewal application, however, we will cite to the rules in effect at the time of filing, unless otherwise required.

⁹ See Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 17 FCC Rcd 18365 (WTB 2002); see also Wireless Telecommunications Bureau to Complete Conversion of MDS, MMDS, and ITFS Services to the Universal Licensing System, *Public Notice*, 19 FCC Rcd 2716 (WTB 2004).

¹⁰ Wireless Telecommunications Bureau Seeks To Verify ITFS, MDS, and MMDS License Status and Pending Applications, *Public Notice*, 17 FCC Rcd 20543 (WTB 2002) (*October Public Notice*). Specifically, the *October Public Notice* referenced six different tables of licensing information. Table A listed all ITFS licenses including main station and two-way stations shown in BLS. Table B listed all MDS and MMDS licenses, including Basic Trading Area (BTA) authorizations, main stations and two-way stations contained in BLS. Table C listed all granted modifications and construction permits for ITFS for which certifications of construction have not yet been filed. Table D listed all granted MDS/MMDS modifications and conditional licenses for which certifications of construction have not yet been filed. Table E listed all pending applications for ITFS, and Table F listed all pending applications for MDS and MMDS.

¹¹ *Id.* Specifically, the *October Public Notice* stated: “**IT IS VERY IMPORTANT THAT ALL ITFS, MDS, AND MMDS LICENSEES AND APPLICANTS CAREFULLY REVIEW THIS PUBLIC NOTICE AND THE TABLES OF LICENSING INFORMATION DESCRIBED BELOW. FAILURE TO FOLLOW THE INSTRUCTIONS IN THIS PUBLIC NOTICE MAY RESULT IN THE CANCELLATION OF LICENSES AND/OR DISMISSAL OF PENDING APPLICATIONS.**” (Emphasis in original).

¹² See *id.*

¹³ See *id.*

¹⁴ Wireless Telecommunications Bureau Seeks To Verify ITFS, MDS, and MMDS License Status and Pending Applications – Request for Extension of Response Date, *Order*, 17 FCC Rcd 24620 (WTB PSPWD 2002) (extending the deadline to February 3, 2003); Letter from D’wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC, to Paul J. Sinderbrand, Esq., Wilkinson, Barker, and Knauer LLP (dated Feb. 20, 2003) (extending the deadline to February 21, 2003).

¹⁵ File No. 20010402ABD.

timely petition for reconsideration of the decision in the *June Public Notice* dismissing her license.¹⁶ On November 28, 2003, Hubbard filed a late-filed renewal application with a waiver request.¹⁷ No party objected to the Renewal Application or the Waiver Request. In her Waiver Request, Hubbard asserted that she was not represented by Washington, D.C. counsel, was unfamiliar with Commission practice and procedure and, therefore, was unaware of the *October Public Notice*.¹⁸ She also maintains that she filed the Waiver Request as soon as she realized that the application was dismissed.¹⁹ Hubbard indicated that her brother-in-law put her on notice that the application was dismissed but does not provide specifics on how he learned about the dismissal.²⁰

4. On October 24, 2004, the Bureau's Broadband Division (Division) released an order denying Hubbard's Waiver Request and dismissing her resubmitted application.²¹ In the *Hubbard Order*, the Division said that granting the Waiver Request and reinstating the forfeited license under the circumstances presented by Hubbard would frustrate the goal of providing a date certain upon which one may file an application for an area covered by an expired license and would frustrate the goal of ensuring uninterrupted, authorized service to the public.²² The Division determined that Hubbard had not shown how granting a waiver due to unfamiliarity with Commission practice and procedures would ensure that parties would have a date certain after which they may file applications for an area covered by an expired license and ensure service to the public.²³

5. Hubbard filed a Petition for Reconsideration on November 12, 2004.²⁴ Hubbard's Petition was unopposed. In her Petition, Hubbard claimed that the Bureau failed to process her application and Waiver Request under the correct standard and that a more lenient standard should have been applied in her case.²⁵ Hubbard asked the Commission to take into account her age and inexperience, the fact that she had timely filed the original renewal, the absence of any negative impact on any other potential filer, and that she notified the Commission of her continued interest in the application although outside of the deadline for petitions for reconsideration.²⁶ Hubbard also claimed that the Commission failed to provide proper notice of the potential dismissal of her license because the tables that listed the

¹⁶ On June 20, 2003, the WTB released another public notice in which it announced the action it had taken on the responses to the *October Public Notice*. Wireless Telecommunications Bureau Announces Action On Responses To Public Notice Regarding ITFS, MDS, And MMDS Pending Applications, *Public Notice*, 18 FCC Rcd 12,277 (WTB 2003) (*June Public Notice*). The dismissed applications were clearly listed in Appendix B of the *June Public Notice* by licensee name, file number, call sign, facility ID, and transmitter city and state.

¹⁷ Waiver Request.

¹⁸ *Id.*

¹⁹ Petition for Reconsideration, Lois Hubbard (filed Nov. 12 2004) (Hubbard Petition) at 2.

²⁰ Waiver Request at 3.

²¹ See Lois Hubbard, *Memorandum Opinion and Order*, 19 FCC Rcd 21113 (WTB BD 2004) (Hubbard Order).

²² *Id.* at 21115 ¶ 9.

²³ *Id.*

²⁴ See Hubbard Petition.

²⁵ Hubbard Petition at 2-4, citing *BRS/EBS R&O and FNPRM*; Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004).

²⁶ Hubbard Petition at 5.

applications subject to dismissal were not published in the Federal Register, FCC Reports, FCC Record or Pike and Fischer.²⁷

6. On December 1, 2006, the Division granted Hubbard's Petition and Waiver Request and reinstated the license for Station WMI307 and the Renewal Application.²⁸ In the *Reconsideration Order*, the Division held that while the *Hubbard Order* had applied the correct legal standard to the Waiver Request,²⁹ the Division reconsidered its application of the standard and concluded that Hubbard had made the requisite showing that a waiver was warranted.³⁰ It determined that Hubbard met the underlying purposes of the rule by originally filing a timely renewal application and by promptly acting to file her waiver request after she learned of the dismissal of her original application.³¹ The Division concluded that it would be inequitable to terminate Hubbard's license because she had generally acted with sufficient diligence.³²

7. Sprint Nextel filed its Petition on January 3, 2007.³³ American Telecasting of Michiana, Inc. a subsidiary of Sprint Nextel, holds the BRS authorization for Basic Trading Area (BTA) 424, in which Station WMI307 is located.³⁴ It argues that the Commission's decision to reinstate Hubbard's license creates regulatory uncertainty and takes properly-obtained spectrum away from Sprint Nextel.³⁵ It requests that Hubbard's Waiver Request be denied, that her renewal application be dismissed, and that the license be declared forfeited.³⁶

8. Sprint Nextel argues that Hubbard's reasons for failing to respond to the *October Public Notice* and for failing to timely file her reconsideration of the decision in the *June Public Notice* dismissing her license did not support the Division's waiver grant.³⁷ Sprint Nextel contends that Hubbard did not make the requisite showing pursuant to Section 1.925(b)(3)³⁸ of the Commission's Rules and that the Division determination conflicts with Commission precedent.³⁹ It also contends that the reinstatement of Hubbard's license undermines the Commission's goal of promoting the public interest by introducing

²⁷ *Id.*

²⁸ *Reconsideration Order*.

²⁹ *Id.*, 21 FCC Rcd at 14090 ¶ 6.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Sprint Nextel Petition.

³⁴ *Id.* at 2.

³⁵ *Id.* at 2-3.

³⁶ *Id.* at 10.

³⁷ *Id.* at 3-9.

³⁸ 47 C.F.R. § 1.925(b)(3).

³⁹ Petition at 6, 8-9, citing Byron Independent School District, *Order on Reconsideration*, 21 FCC Rcd 13777 (WTB BD 2006); BCW Systems, Inc., *Order on Reconsideration*, 19 FCC Rcd 18905 (WTB BD 2004).

uncertainty to the validity of 2.5 GHz licenses.⁴⁰ It argues the Division decision may delay the deployment of wireless broadband services to the public and discourage investment by licensees.⁴¹

9. Hubbard contends that the Petition must be dismissed because Sprint Nextel failed to satisfy Section 1.106(b)(1)⁴² of the Commission's rules.⁴³ Hubbard argues that Sprint Nextel, while acknowledging that it decided not to participate in earlier stages of the proceeding, offers no good reason for failing to participate at an earlier stage in the proceeding.⁴⁴ Additionally, Hubbard contends that Sprint fails to satisfy the requirement under Section 1.106(b)(1) that it show how its interests have been adversely affected by the Division decision.⁴⁵ She argues that reinstatement of her license is *sui generis* and unlikely to have a precedential effect.⁴⁶ Regardless, Hubbard contends, the potential adverse impact on Sprint Nextel in an unrelated matter (*i.e.*, late-filed EBS renewal applications) does not suffice as an adversely affected interest for the purpose of standing.⁴⁷ Sprint Nextel responds that there was no adverse action for it to contest prior to the *Reconsideration Order* and that the precedential effect of the *Reconsideration Order* "is a justifiable source of concern, triggering Sprint Nextel's participation at this time."⁴⁸ Sprint Nextel also claims that the merits could be reached by considering the petition as an informal complaint.⁴⁹

10. On the merits, Hubbard argues that the Commission rescinded the dismissal of other applications dismissed in the June 20, 2003 Order in response to petitions for reconsideration requested within the normal 30 day period,⁵⁰ and that the Commission has consistently held reasonable diligence as a reason for applications to be reinstated in lieu of forfeiting a license.⁵¹ In reply, Sprint Nextel argues that the *Reconsideration Order* contradicts the record evidence and is arbitrary and capricious.⁵²

III. DISCUSSION

A. Petition for Reconsideration and Informal Objection

11. We dismiss the Petition because Sprint Nextel fails to meet the Commission's requirements for entering the proceeding for the first time at reconsideration stage. As a result, we need not make a determination on the merits of Sprint Nextel's Petition.

⁴⁰ Petition at 9.

⁴¹ *Id.*

⁴² Hubbard Opposition at 2.

⁴³ Hubbard Opposition at 2-4.

⁴⁴ Hubbard Opposition at 3.

⁴⁵ Hubbard Opposition at 4.

⁴⁶ Hubbard Opposition at 5.

⁴⁷ Hubbard Opposition at 4.

⁴⁸ Sprint Nextel Reply at 8-9.

⁴⁹ *Id.* at 9, *citing* 47 C.F.R. § 1.41, Nassau County Police Department, *Memorandum Opinion and Order*, 19 FCC Rcd 10088, 10092 ¶ 11 (WTB 2004), New York Telephone Co., *et al.*, *Memorandum Opinion and Order*, 6 FCC Rcd 3303, 3304 ¶ 10 (1991).

⁵⁰ Hubbard Opposition at 5.

⁵¹ Hubbard Opposition at 5 n.1.

⁵² Sprint Nextel Reply at 3-6.

12. 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.⁵³

13. Sprint Nextel's Petition did not rely on facts unknown to it until after Sprint Nextel's last opportunity to present such matters that could not, through the exercise of ordinary diligence, have been learned prior to such opportunity. In 2003, American Telecasting of Michiana, Inc. was controlled by Sprint Corporation, which merged with Nextel to become Sprint Nextel. Sprint did not file a petition to deny or other objection when the Waiver Request was filed.⁵⁴ On December 17, 2003, the Commission issued a Public Notice of the filing of the WMI307 Renewal Application and Waiver Request.⁵⁵ 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.⁵⁶ Sprint did not do so. Furthermore, after Hubbard filed her petition for reconsideration, Sprint Nextel did not file an opposition, even though it would have acquired the rights to operate on the spectrum covered by Hubbard's license if the Division had affirmed the termination of her license. Accordingly, the Sprint Nextel Petition does not comply with Section 1.106(c) of the Commission's Rules.

14. Additionally, pursuant to Section 1.106(b)(1) of the Commission's Rules, a petitioner must show good reason why it was not possible for it to participate in the earlier stages of the proceeding.⁵⁷ Sprint Nextel claims it failed to participate earlier in Hubbard's Renewal proceeding "because Hubbard's circumstances did not appear to present unique circumstances that might warrant the extraordinary grant of waiver relief."⁵⁸ It calls the Division decision "surprising" and claims the decision, along with "Sprint Nextel's strong interest in [the WMI307] license in particular and in the development of uniform, consistent regulations and precedent for the 2.5GHz band in general," as the reason for its initial participation in the proceeding.⁵⁹ Regardless of Sprint Nextel's surprise with the decision, it does not show a good reason for failing to participate earlier in the proceeding. Parties cannot be allowed "to sit back and hope that a decision will be in its favor and then, 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."⁶⁰ Accordingly, the Petition does not meet the requirements of Section 1.106(b)(1) of the Commission's Rules.

⁵³ 47 C.F.R. §§ 1.106(b)(2), (c).

⁵⁴ Hubbard Opposition at 3; Sprint Nextel Petition at 3 n.5.

⁵⁵ Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, Report No. 1689, *Public Notice* (Dec. 17, 2003) at 37.

⁵⁶ 47 C.F.R. § 1.939.

⁵⁷ 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."

⁵⁸ Sprint Nextel Petition at 3 n.5.

⁵⁹ *Id.*

⁶⁰ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

15. In the absence of a showing that Sprint Nextel acted diligently, we find that it is not in the public interest to consider its late-filed Petition. The only cognizable injuries Sprint has shown from the reinstatement of Hubbard's license is the fact that it will not acquire the right to operate on the channels in question and that it will have to protect Hubbard's geographic service area consistent with the Commission's Rules. While Sprint Nextel argues that the precedential effect of the decision will harm it, the Commission has stated that "the mere precedential effect of the agency's rationale in later adjudications does not give rise to a legally cognizable injury. . ."⁶¹ In that regard, we note that our decision does not set any precedent on the merits of Sprint Nextel's Petition because we are dismissing the Petition on procedural grounds. Nor does our dismissal of a BRS-related petition prejudice what action we may take on Sprint Nextel's series of petitions to deny against late-filed Educational Broadband Service (EBS) renewal applications. Furthermore, Sprint's claim that the reinstatement could affect the deployment of wireless broadband⁶² is speculative and unsupported. We find that the public interest in requiring parties to timely participate in licensing proceedings outweighs Sprint Nextel's private interests in being able to operate without consideration of Hubbard's license. Accordingly, we conclude that the Sprint Nextel Petition must be dismissed as it does not meet the requirements of Section 1.106(b)(1) and (c) of the Commission's Rules.

16. We also dismiss the Informal Objection. Sprint Nextel's Petition cannot be considered because it failed to timely participate in the proceeding. The Commission's procedural rules regarding petitions for reconsideration would have no meaning if a party could circumvent those rules by filing an informal objection months after the deadline for petitions for reconsideration. While Nokia also signed the pleading, Nokia also fails to explain its failure to participate in a timely fashion in the proceeding and makes no serious attempt to demonstrate standing. We therefore dismiss the Informal Objection.⁶³

B. *Ex Parte* Motion

17. Sprint Nextel argues that the "broad, important public policy issues" raised by these and similar applications justifies "permit-but-disclose" treatment of the Application under the Commission's *ex parte* rules.⁶⁴ 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.⁶⁵

18. We deny Sprint Nextel's request because we do not believe that changing the *ex parte* status

⁶¹ See *Texas Cable and Telecommunications Association v. GTE Southwest, Inc.*, *Order*, 17 FCC Rcd 6261, 6265 ¶ 10 (2002) (citations omitted).

⁶² Sprint Nextel Reply at 6.

⁶³ 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. 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, FCC 08-83 ¶¶ 161-179 (Mar. 20, 2008). The Commission held that late-filed renewal applications granted prior to the adoption of that new policy would be entitled to "split the football" with overlapping co-channel licensees. *Id.* at ¶ 174. Because Hubbard's application was granted prior to the adoption of the new policy, she will be entitled to "split the football."

⁶⁴ *Ex Parte* Motion at 2.

⁶⁵ *Ex Parte* Motion at 2-3.

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.

IV. CONCLUSION AND ORDERING CLAUSES

19. For the reasons discussed above, we conclude that the Sprint Nextel Petition does not comply with Sections 1.106(b)(1) and 1.106(c) of the Commission's Rules and that the public interest does not support consideration of the pleading. Accordingly, we dismiss the Sprint Nextel Petition. We also dismiss the Informal Objection and deny Sprint Nextel's *Ex Parte* Motion.

20. 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 Sprint Nextel on January 3, 2007 IS DISMISSED.

21. 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 No. 20031128AAA.

22. 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 No. 20031128AAA.

FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto
Chief, Broadband Division
Wireless Telecommunications Bureau