

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

In the Matter of
SWEET BRIAR INSTITUTE
Application for Renewal of License for
Educational Broadband Service Station WNC586
File No. 0002923574

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2009

Released: June 16, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On February 23, 2007, Sweet Briar Institute (SBI) filed the above-captioned application to renew Educational Broadband Service (EBS) Station WNC586 with an associated request to waive Section 1.949(a) of the Commission's Rules to permit untimely filing of its renewal application. We also have before us a petition to deny the Application filed by Sprint Nextel Corporation (Sprint Nextel), an opposition filed by SBI, a reply filed by Sprint Nextel, a request to designate this proceeding as "permit but disclose" for purposes of the Commission's ex parte rules filed by Sprint Nextel, and an informal objection filed against the Application by Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc. For the reasons discussed below, we dismiss the Petition and the Informal Objection, deny the Ex Parte Motion, and grant the Waiver Request.

II. BACKGROUND

2. SBI took assignment of the authorization for Station WNC586 from Seven Hills School. On September 14, 1995, SBI filed a modification application (supplemented on December 14, 1995) to change the coordinates and site location of the station tower. By this filing, SBI intended to colocate

1 File No. 0002923574 (filed Feb. 23, 2007) (Application).

2 47 C.F.R. § 1.949(a).

3 Waiver Request, File No. 0002923574 (Waiver Request).

4 Consolidated Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Mar. 30, 2007) (Petition to Deny).

5 Opposition to Petition to Dismiss or Deny of the Sprint Nextel Corporation (filed Apr. 12, 2007) (Opposition).

6 Consolidated Reply of Sprint Nextel Corporation (filed Apr. 19, 2007) (Reply).

7 Request to Designate Proceedings as "Permit but Disclose," Sprint Nextel Corporation (filed Mar. 22, 2007) (Ex Parte Motion).

8 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).

9 File No. 19950914GS.

10 File No. 19951014GR (Modification Application).

and conform the technical parameters of the station to other Lynchburg area stations whose excess capacity was being leased by NTELOS Licenses, Inc. (NTELOS).¹¹

3. Action on the Modification Application was denied because of an objection filed by the National Radio Astronomy Observatory (NRAO) and the need to coordinate interference issues with the NRAO.¹² On September 24, 1999, SBI let the authorization for its original transmitter site lapse because it believed that construction at the originally authorized site was not in the public interest.¹³ SBI represented that “it was the practice of the [former] Mass Media Bureau to permit licensees to maintain authority to operate if they had a pending modification application as SBI did at that time.”¹⁴

4. The former Mass Media Bureau granted the Modification Application on September 6, 2001.¹⁵ SBI represents that it was unaware that the Modification Application had been granted.¹⁶ SBI notes that NTELOS expected all of the Lynchburg applications to be treated similarly, and inadvertently missed the grant of the modification application in September 2001.¹⁷ Therefore, it did not file a request for extension of time to construct the Modification Application. On July 20, 2004, the Wireless Telecommunications Bureau declared the authorization for Station WNC586 forfeited, pursuant to Section 73.3534(e)¹⁸ of the Commission’s Rules, for failure to construct and for failure to request an extension of time to construct.¹⁹

5. SBI filed the Reinstatement Petition on August 27, 2004.²⁰ SBI contended that, pursuant to Section 1.925(b)(3)(ii) of the Commission’s Rules,²¹ the Bureau should waive Section 73.3534 of the Commission’s Rules and reinstate the authorization for Station WNC586.²²

6. On January 25, 2007, the Broadband Division of the Wireless Telecommunications Bureau granted the Reinstatement Petition, reinstated the authorization for Station WNC586, and waived Section 73.3534 of the Commission’s Rules to allow SBI to file a late-filed extension application.²³ No party sought reconsideration or review of the *Reinstatement Order*.

¹¹ Sweet Briar Institute, Petition for Reconsideration, Reinstatement and Waiver (filed Aug. 27, 2004) (Reinstatement Petition) at 2.

¹² *Id.* at 3.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 4.

¹⁵ Mass Media Bureau Instructional TV Fixed Service Multipoint Distribution Service Actions, Report No. 505, *Public Notice* (rel. Sep. 11, 2001).

¹⁶ Reinstatement Petition at 4.

¹⁷ *Id.* at 4.

¹⁸ 47 C.F.R. § 73.3534(e) (2004).

¹⁹ See Wireless Telecommunications Bureau Site-by-Site Action, Report No. 1890, *Public Notice* (rel. Jul. 28, 2004). See also Letter from Mary M. Shultz, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Sweet Briar Institute (dated Jul. 21, 2004).

²⁰ Reinstatement Petition.

²¹ 47 C.F.R. § 1.925(b)(3)(ii) (2004).

²² Reinstatement Petition.

²³ Sweet Briar Institute, *Order on Reconsideration*, 22 FCC Rcd 887 (WTB BD 2007) (*Reinstatement Order*).

7. The former authorization for Station WNC586 expired on April 25, 2005.²⁴ Because the Bureau had cancelled the authorization for Station WNC586 in 2004, SBI could not have filed a renewal application for Station WNC586 within the 90 days prior to license expiration, as required by Section 1.949(a) of the Commission's Rules.²⁵ Staff of the Broadband Division advised SBI's counsel to file a late-filed renewal application with request for waiver of Section 1.949(a) of the Commission's Rules.²⁶ SBI filed the Application on February 23, 2007, within thirty days after release of the *Reinstatement Order*.²⁷ The Application was accepted for filing on February 28, 2007.²⁸

8. On March 30, 2007, Sprint Nextel filed the Petition to Deny against the Application, as well as twelve other EBS renewal applications.²⁹ The Petition to Deny fails to acknowledge the history of SBI's authorization, the fact that SBI could not have filed during the time period provided for in the rules, or the *Reinstatement Order*. Sprint Nextel claims that SBI "has no authorization to renew" because the authorization automatically terminated when the expiration date passed.³⁰ Sprint Nextel claims that SBI and other applicants advocate a "rubber stamp" waiver standard that is contrary to the Commission's rules and policies.³¹ Sprint Nextel claims that granting the Application would violate the "plan" to award new EBS authorizations through competitive bidding and would violate the freeze on applications for new EBS authorizations.³² It also argues that granting the Application would harm EBS licensees that followed the Commission's Rules.³³

9. SBI accuses Sprint Nextel of ignoring SBI's specific circumstances.³⁴ SBI states that it was impossible for it to file a renewal application until its authorization was reinstated on January 25, 2007.³⁵ SBI argues that the Reinstatement Order directly contradicts Sprint Nextel's claim that SBI has no authorization to renew.³⁶ Sprint Nextel responds as follows:

Although the Opposition filed by Sweet Briar Institute (SBI) attempts to argue that its particular circumstances warrant a waiver of the Commission's renewal requirements, SBI seeks to take advantage of the same rubber-stamp waiver standard the other Applicants advocate. Earlier this year, the Commission staff applied this rubber-stamp approach when it reinstated SBI's authorization and reversed the July 2004 forfeiture resulting from SBI's failure to meet its construction requirements. [Cite to *Reinstatement Order*.] SBI's late-filed renewal application now urges the Division to perpetuate this

²⁴ Authorization, File No. 19951014GR.

²⁵ 47 C.F.R. § 1.949(a).

²⁶ Opposition at 3.

²⁷ Application.

²⁸ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 2956, *Public Notice* (rel. Feb. 28, 2007) at 4.

²⁹ Petition to Deny.

³⁰ Petition to Deny at 4-9.

³¹ Petition to Deny at 9-10.

³² Petition to Deny at 11-14.

³³ Petition to Deny at 14-17.

³⁴ Opposition at 1-2.

³⁵ Opposition at 2-3.

³⁶ Opposition at 4.

arbitrary and capricious decision making. The Commission should uphold the Commission's strict waiver policy and dismiss SBI's application.³⁷

10. 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.³⁸ 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.³⁹

III. DISCUSSION

A. Petition to Deny and Informal Objection

11. The issue raised by SBI's Application is whether a waiver of Section 1.949 of the Commission's Rules is warranted when a cancelled license is reinstated after the expiration date of the license and the licensee files a renewal application within thirty days after the license is reinstated. Sprint Nextel's Petition to Deny does not address that issue. Instead, it makes a series of arguments that have no applicability to SBI's situation involving applicants that could have filed timely renewal applications but failed to do so. In its Reply, Sprint Nextel makes clear that its argument is not with SBI's filing of its renewal application in March 2007 but with the decision made in the January 2007 *Reinstatement Order* to reinstate the license for Station WNC586. Specifically, Sprint Nextel criticizes the decision to reinstate SBI's authorization as a "rubber-stamp approach" and "arbitrary and capricious decision making."⁴⁰

12. When viewed as a petition for reconsideration of the *Reinstatement Order*, the Petition to Deny must be dismissed as an untimely collateral attack on the *Reinstatement Order*. Section 405 of the Communications Act of 1934, as amended,⁴¹ provides that petitions for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of."⁴² For the purposes of Section 405, the terminal date of the thirty-day time period for

³⁷ Reply at 2 n.2.

³⁸ 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) (*Declaratory Ruling*).

³⁹ *Id.* at ¶ 179.

⁴⁰ Reply at 2 n.2.

⁴¹ 47 U.S.C. § 405 (1996).

⁴² See also 47 C.F.R. § 1.106(f).

filing petitions for reconsideration is determined in accordance with Section 1.4 of the Commission's Rules.⁴³ In this case, the date of public notice is January 25, 2007, the release date of the *Reinstatement Order*.⁴⁴ The deadline for petitions for reconsideration of the *Reinstatement Order* was February 26, 2007.⁴⁵ Because the time period for filing petitions for reconsideration is prescribed by statute, the Commission may not, with one extremely narrow exception not applicable here, waive or extend the filing period.⁴⁶ If Sprint Nextel had wanted to challenge the decision to reinstate SBI's license, it was required to have filed a timely petition for reconsideration of the *Reinstatement Order*. Even if a petition is only one day late, it must be dismissed.⁴⁷ We therefore dismiss the Petition to Deny with respect to Station WNC586 and decline to consider that pleading further.

13. 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 . . ."⁴⁸ 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 pleading, Nokia fails to explain its failure to participate in a timely fashion in the proceeding and makes no serious attempt to 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 Objection.

B. Ex Parte Motion

14. 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.⁴⁹ 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.⁵⁰

15. 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

⁴³ 47 C.F.R. § 1.4.

⁴⁴ 47 C.F.R. § 1.4(b)(2).

⁴⁵ The thirtieth day after January 25, 2007 was February 24, 2007, a Saturday. Accordingly, petitions were due on Monday, February 26, 2007, the next business day. 47 C.F.R. § 1.4(j).

⁴⁶ See *Reuters Ltd. v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986) ("[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."); see also *Metromedia Inc., Memorandum Opinion and Order*, 56 FCC 2d 909 (1975) (Commission may not waive 30-day filing period to accept a petition for reconsideration filed one day late); *Fortuna Systems Corp., Order on Reconsideration*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Specifically, the courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances. See, e.g., *Virginia Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

⁴⁷ *Metromedia, Inc., Memorandum Opinion and Order*, 56 FCC 2d 509 (1975).

⁴⁸ See *D.H. Overmyer Communications Co.*, Docket No. 16388, *Memorandum Opinion and Order*, 4 FCC 2d 496, 505 ¶ 28 (Rev. Bd. 1966).

⁴⁹ *Ex Parte Motion* at 2.

⁵⁰ *Ex Parte Motion* at 2-3.

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 other EBS parties that, as educational institutions and organizations without a regular presence in Washington, it would be difficult for them to monitor these proceedings.

C. Waiver Request

16. Under the Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services, renewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc*⁵¹ if the application is otherwise sufficient under our rules. In those cases, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.⁵² Applicants who file renewal applications more than thirty days after the license expiration date also may request that the license be renewed *nunc pro tunc*. Such requests will be subject to stricter review, will not be routinely granted, and may be accompanied by enforcement action, including more significant fines or forfeitures.⁵³

17. 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.⁵⁴ 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.⁵⁵

18. In this case, we conclude that a waiver is warranted under the second prong of the waiver standard. The strict application of the renewal filing requirement would be inequitable in this case because it was impossible for SBI to file a renewal application during the period prescribed in the rule. Only after the Broadband Division reinstated SBI's license could it file a renewal application. It would be absurd to reinstate a license whose term had expired and then deprive the licensee of the reinstatement by refusing to renew the license on timeliness grounds. We therefore grant SBI a waiver of Section 1.949(a) of the Commission's Rules.

D. Declaratory Ruling

19. 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

⁵¹ *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.

⁵² 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, 11486 ¶ 22 (1999) (*ULS MO&O*).

⁵³ See *id.*, 14 FCC Rcd at 11486 ¶ 22.

⁵⁴ See *id.*, 14 FCC Rcd at 11485 ¶ 22.

⁵⁵ 47 C.F.R. § 1.925(b)(3).

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."⁵⁶ 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."⁵⁷

20. In this case, we conclude that Sweet Briar has shown unique circumstances manifest such that it should be allowed to split the football with other licensees. The only reason Sweet Briar was required to file an untimely renewal application was because of the erroneous decision to declare the license forfeited. Sweet Briar could not have filed a renewal application prior to the expiration date because its license was forfeited. Only after the *Reinstatement Order* was issued was it possible for Sweet Briar to renew its license. Under those circumstances, we conclude that Sweet Briar has shown unique circumstances and that Sweet Briar should be allowed to split the football.

IV. CONCLUSION AND ORDERING CLAUSES

21. For the reasons discussed above, we dismiss the petition to deny. We deny Sprint Nextel's request to change the *ex parte* status of this proceeding. We grant Seventh Day's request for waiver of Section 1.949(a) of the Commission's Rules and direct processing of its renewal application.

22. 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 Petition to Deny filed by Sprint Nextel Corporation on March 30, 2007 IS DISMISSED with respect to File No. 0002923574.

23. 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. 0002923574.

24. 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. 0002923574.

25. 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 and 1.949(a) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), that the request for waiver filed by Sweet Briar Institute on February 23, 2007 IS GRANTED.

26. 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 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL PROCESS the application for renewal of license of EBS Station WNC586 filed by Sweet Briar Institute on February 23, 2007 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules and policies.

27. 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) and 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the Broadband Division SHALL PROCESS the application for extension of time to

⁵⁶ *Declaratory Ruling, supra*.

⁵⁷ *Id.*

construct filed by Sweet Briar Institute on February 26, 2007 (File No. 0002926268) in accordance with the *Reinstatement Order* and the Commission's rules and policies.

28. 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

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