

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

In the Matter of 116 Late-Filed Applications For
Renewal of Educational Broadband Service
Stations
In the Matter of Fifty-Four Late-Filed
Applications For Extension of Time to Construct
Educational Broadband Service Stations

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 to waive Section 1.949(a) of the Commission's Rules to permit untimely filing of the renewal applications. 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 most of the renewal applications filed by Sprint Nextel Corporation (Sprint Nextel) (Sprint Nextel Petitions), petitions to deny against certain renewal applications filed by other EBS licensees (EBS Petitions), an informal objection filed against certain renewal applications by Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc., responsive pleadings, and a request to designate these proceedings as "permit but disclose" for purposes of the Commission's ex parte rules with respect to certain applications filed by Sprint Nextel. For the

1 47 C.F.R. § 1.949(a).

2 See the Appendix to this Memorandum Opinion and Order for complete information concerning the applications and waiver requests under consideration.

3 Sprint Nextel filed petitions to deny against most renewal applications under consideration in this Memorandum Opinion and Order. 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.

4 The Appendix lists the EBS petitioners in question and the date the petition was filed.

5 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).

6 The responsive pleadings are too numerous to list in this Memorandum Opinion and Order. All filed pleadings have been read and considered.

7 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: 0002841453, 0002871886, 0002872230, 0002880049, 0002880358, 0002880359, 0002880360, 0002880361, 0002880362, 0002880363, 0002880364, 0002880397, 0002880398,

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reasons discussed below, we dismiss the Petitions, 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 license expiration dates indicated. Under former Section 74.15(e) of the Commission's Rules, which was in effect until January 10, 2005, renewal applications for the Instructional Television Fixed Service (ITFS), the predecessor-in-interest to EBS, were due the first day of the fourth full calendar month prior to license expiration.⁸ Prior to March 25, 2002, ITFS 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.⁹ 65 of the 116 stations with pending renewal applications under consideration in this *Memorandum Opinion and Order* were never constructed.

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS.¹⁰ 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.¹¹

4. On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM*, which fundamentally transformed the rules for the 2500-2690 MHz band.¹² In the *BRS/EBS R&O*, the Commission adopted a band plan that restructured the 2500-2690 MHz band into upper and lower-band segments for low-power operations (UBS and LBS, respectively), and a mid-band segment (MBS) for high-power operations, in order to reduce the likelihood of interference caused by incompatible uses. Also, the Commission replaced the existing scheme of requiring a licensee to file a separate application for each station with a scheme under which each licensee received an exclusive geographic service area (GSA) within which it could place transmitters without prior Commission approval, subject to

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0002880399, 0002880400, 0002880401, 0002880402, 0002880403, 0002881245, 0002881246, 0002881247, 0002881248, 0002881249, 0002881250, 0002882798, 0002884194, 0002884328, 0002887478, 0002887517, 0002887610, 0002887707, 0002898733, 0002911844, 0002915945, 0002916208, 0002916209, 0002916210, 0002916211, 0002916221, 0002916222, 0002916225, 0002916226, 0002916231, 0002916232, 0002922383, and 0002923574.

⁸ 47 C.F.R. § 74.15(e).

⁹ 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).

¹⁰ Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, DA 02-638 (WTB Mar. 18, 2002).

¹¹ See, e.g., Notice of Return, File No. 20020802AAB, Ref. No. 3181820 (Dec. 6, 2004).

¹² 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, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O* and *FNPRM* as appropriate).

compliance with the Commission's technical rules.¹³ The Commission also established a process, known as "splitting-the-football," for dividing overlapping GSAs between incumbent BRS and EBS licensees.¹⁴

5. On the dates indicated, 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.¹⁵ 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. Most applicants indicated that they failed to file timely renewal applications because of changes in personnel,¹⁶ failure to monitor the renewal deadline,¹⁷ reliance upon lessees that filed for bankruptcy and went out of business,¹⁸ failure to make someone responsible for ensuring that deadlines were met,¹⁹ and/or failure to receive a renewal notice.²⁰ The Foreign Language and Cultural Foundation has indicated that it did not file a renewal application prior to the license expiration date because of the former Mass Media Bureau policy of not accepting renewal applications from unconstructed stations.²¹ The applications were accepted for filing on the dates indicated in the Appendix. Petitions to deny were due thirty days after release of the public notice accepting the applications for filing.²²

6. As indicated in the Appendix, Sprint Nextel filed petitions to deny against most of these applications on the dates indicated. 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.²³ Sprint Nextel makes a number of claims to be a party in

¹³ *BRS/EBS R&O*, 19 FCC Rcd at 14189-14190 ¶ 54.

¹⁴ *BRS/EBS R&O*, 19 FCC Rcd at 14192 ¶ 60.

¹⁵ 47 C.F.R. § 1.949(a).

¹⁶ *See, e.g.*, Petition for Waiver and Reinstatement, Bowling Green State University at 1 (Bowling Green Waiver Request), Petition for Waiver and Reinstatement, BOCES District of St. Lawrence and Lewis Counties at 1, Petition for Waiver and Reinstatement, George C. Wallace State Community College at 2; Petition for Waiver and Reinstatement, Robert C. Hatch High School at 1 (Hatch Waiver Request).

¹⁷ *See, e.g.*, Bowling Green Waiver Request at 1, Statement in Support of Request to Accept Late-filed Renewal Application, Liberty University at 1, Waiver Request for Greene County Hospital at 1 Eagle Valley Waiver Request at 1.

¹⁸ *See, e.g.*, Request for Waiver of Late-filing Texas State Technical College-Sweetwater at 1, Waiver Request, Withdrawal of Cancellation of Authorization Request, and Programming Statement, West Georgia RESA at 1, Waiver Request and Programming Statement, Houston Academy at 1 (Houston Academy Waiver Request), Waiver Request and Programming Statement, Dothan City Board of Education at 1 (Dothan City Waiver Request), Petition for Waiver and Reinstatement, Marion-Florence USD #408 at 1, Petition for Waiver and Reinstatement, Peabody-Burns Unified School District #398 at 1; Hatch Waiver Request at 1.

¹⁹ *See, e.g.*, Petition for Waiver and Reinstatement, Landmark Baptist Receiver for Bethel Christian School at 1.

²⁰ *See, e.g.*, Houston Academy Waiver Request at 1, Dothan City Waiver Request at 1.

²¹ Foreign Language and Cultural Foundation, Request for Waiver of Late-Filing at 1.

²² 47 C.F.R. § 1.939(a)(2).

²³ *See, e.g.*, Petition to Dismiss or Deny of Sprint Nextel Corporation directed against West Georgia RESA (filed Mar. 2, 2007) (West Georgia RESA Petition) at 4-11; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Houston Academy (filed Mar. 2, 2007) (Houston Academy Petition) at 3-11; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Liberty University (filed Mar. 2, 2007) (Liberty University Petition) at 3-11; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Dothan City Board of

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interest with respect to these applications. First, it claims that applicants are seeking “to overturn the rules and renewal policies” adopted by the Commission in 2004 in a rulemaking proceeding to which Sprint Nextel is a party.²⁴ Second, Sprint Nextel claims that granting a late-filed renewal application may complicate network deployment and will delay deployment of service by forcing Sprint Nextel to redesign its network.²⁵ Third, Sprint Nextel claims that granting the applications “is likely” to delay the transition process.²⁶ 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.²⁷ Finally, Sprint Nextel asserts that grant of the applications would cause interference to and/or a reduction in the geographic service area of co-channel and adjacent-channel licenses that it either holds, or from which it leases spectrum capacity.²⁸

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.²⁹ 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

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Education (filed Mar. 2, 2007) (Dothan City Petition) at 3-11; Consolidated Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Mar. 15, 2007) (Bowling Green and Texas – Sweetwater Petition) at 4-12; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Greene County Hospital (filed Mar. 23, 2007) (Greene County Petition) at 4-14; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against George C. Wallace State Community College (filed May 11, 2007) (Wallace Petition) at 3-17; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Peabody-Burns Unified School District #398 (filed May 18, 2007) (Peabody-Burns Petition) at 3-17; Petition to Dismiss or Deny of Sprint Nextel Corporation directed against Robert C. Hatch High School (filed May 25, 2007) (Hatch Petition) at 3-16; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Jun. 8, 2007) (Eagle Valley Petition) at 3-16; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Jun. 6, 2008) (Washington-Berry Petition) at 4-20; Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Jun. 13, 2008) (Meharry Petition) at 4-20.

²⁴ Wallace Petition at 20, Peabody-Burns Petition at 20, Hatch Petition at 20-21, Eagle Valley Petition at 20-21, Washington-Berry Petition at 22, Meharry Petition at 22.

²⁵ See, e.g., West Georgia RESA Petition at 18; Wallace Petition at 21, Peabody-Burns Petition at 21-22, Hatch Petition at 21-22, Eagle Valley Petition at 21, Washington-Berry Petition at 23-24, Meharry Petition at 23-24.

²⁶ See, e.g., West Georgia RESA Petition at 18-19; Wallace Petition at 21-22, Peabody-Burns Petition at 22, Hatch Petition at 22, Eagle Valley Petition at 22, Washington-Berry Petition at 25-26, Meharry Petition at 25-26.

²⁷ See, e.g., Petition to Dismiss or Deny of Sprint Nextel Corporation (filed Aug. 24, 2007) (Sprint August 24 Petition) at 27-28, Washington-Berry Petition at 24-25, Meharry Petition at 24.

²⁸ See, e.g., Peabody-Burns Petition at 21, Hatch Petition at 21, Wallace Petition at 20, Meharry Petition at 23.

²⁹ 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*).

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.³⁰

B. Extension Applications

8. Under the rules in effect prior to 2003, EBS permittees had eighteen months from the date of the issuance of the original authorization to construct their facilities.³¹ 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.³² Applications for extension of time to construct were ordinarily required to have been filed at least 30 days prior to the construction deadline.³³ In those cases where a station had not been constructed by the deadline specified in the permit or as extended by the Commission, the rules indicated that the Commission shall declare the permit forfeited and make a notation of such forfeiture.³⁴

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.³⁵ 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."³⁶

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.

³⁰ *Id.* at ¶ 179.

³¹ 47 C.F.R. § 73.3534(a) (2002).

³² 47 C.F.R. § 73.3534(c) (2002).

³³ 47 C.F.R. § 73.3534(b) (2002).

³⁴ 47 C.F.R. § 73.3599 (1998).

³⁵ 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*).

³⁶ *BRS/EBS NPRM*, 18 FCC Rcd at 6805 ¶ 201.

III. DISCUSSION

A. Renewal Applications - Procedural Matters

1. Untimely Petitions to Deny

11. Under Section 1.939(a) of the Commission's Rules,³⁷ petitions to deny are due thirty days after public notice that an application has been accepted for filing. As is indicated in the Appendix, several of the petitions to deny before us are untimely, as they were filed weeks or months after the deadline. Accordingly, we dismiss those petitions.

12. We note that under Section 1.41 of the Commission's Rules, we have discretion to consider these untimely petitions as informal objections.³⁸ We decline to do so in this instance because, as described in greater detail below, we conclude that the parties have failed to show any cognizable interest in denial of any of the pending applications.

2. *Ex Parte* Motion

13. 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.³⁹ 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.⁴⁰ In a joint filing, a group of EBS licensees argues that they are small entities and that it would be extremely burdensome to monitor Sprint Nextel's filings and activities.⁴¹ 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.⁴²

14. 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 against which Sprint Nextel has filed, 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 at stake. 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 Petitions to Deny and Informal Objection

15. 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

³⁷ 47 C.F.R. § 1.939(a).

³⁸ 47 C.F.R. § 1.41.

³⁹ *Ex Parte* Motion at 2.

⁴⁰ *Ex Parte* Motion at 2-3.

⁴¹ Joint Opposition to Request to Designate Proceedings as "Permit but Disclose" (filed Mar. 30, 2007) at 4.

⁴² *Id.* at 2.

that grant of the subject application would cause it to suffer a direct injury.⁴³ In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.⁴⁴ 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.⁴⁵ We reject 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*. 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.

16. 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 areas at issue, whether it intends to use frequencies adjacent to the frequencies covered by the licenses in question, 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 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.

17. 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.⁴⁶ 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.⁴⁷ 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

⁴³ 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).

⁴⁴ *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)).

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ See WT Docket No. 06-136.

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 notifications⁴⁸ 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.

18. 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.⁴⁹

19. 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, that concern does not apply in these cases. As will be explained in further detail below, we conclude that the applicants at issue here will not be entitled to "split-the-football" with active overlapping co-channel licenses. Accordingly, that concern is not applicable here.

20. 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 Objections. 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 . . ."⁵⁰ 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 Objections repeat arguments made by Sprint Nextel in its other pleadings. We therefore exercise our discretion and decline to consider the Informal Objections.

C. Petitions to Deny Filed By EBS Licensees

21. We also dismiss the petitions to deny filed by other EBS licensees. As noted above, we dismiss the petitions that were untimely filed. Some timely-filed petitioners claim standing based on potential loss of their GSAs if they are required to "split-the-football" with reinstated licensees.⁵¹ As will

⁴⁸ See 47 C.F.R. § 27.1236(c).

⁴⁹ 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.

⁵⁰ See D.H. Overmyer Communications Co., Docket No. 16388, *Memorandum Opinion and Order*, 4 FCC 2d 496, 505 ¶ 28 (Rev. Bd. 1966).

⁵¹ See, e.g., Petition to Deny of Vermont ETV, Inc. (filed Sep. 14, 2007) at 2-3; Petition to Deny, The Roman Catholic Diocese of Rockville Centre, File No. 0003119706 (filed Aug. 27, 2007) at 1 n.1; Petition to Dismiss or Deny, Instructional Telecommunications Foundation, Inc., File No. 0003023901 (filed Aug. 27, 2007) at 2-3; Petition to Deny, Boston Catholic Television Center, Inc., File Nos. 0003025633, 0003025641, 0003028734,

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be explained in further detail below, however, we conclude that the applicants at issue here will not be entitled to “split-the-football” with active overlapping co-channel licenses. Other petitions to deny cite generalized interference concerns.⁵² We find those arguments insufficient to establish standing for the same reasons as noted with respect to Sprint Nextel. Accordingly, the EBS petitioners have failed to establish standing, and we dismiss their petitions.

D. Waiver Requests – Renewals

22. 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.⁵³ 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.⁵⁴

23. 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.⁵⁵ 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.

24. 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. With respect to those applicants whose stations were not constructed, we find that failing to renew applicants’ license would be inequitable and contrary to the public interest. In many cases, the licenses expired when the former Mass Media Bureau regulated these services. The Mass Media Bureau had a staff policy of not accepting renewal applications from unconstructed stations. Accordingly, it would have been impossible for those applicants to have filed renewal applications prior to the deadline. Furthermore, while WTB changed the policy to require unconstructed stations to file renewal applications, it did not notify licensees of that change in policy unless they filed an extension application. Accordingly, for unconstructed stations whose licenses expired after WTB assumed responsibility for the

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0003028735 (filed Jun. 15, 2007) at 2 (BCTC Petition); Petition to Deny, National Conference on Citizenship (filed Feb. 23, 2007) at 4.

⁵² See, e.g., Petition to Deny of Malcolm School District 148 (filed Aug. 24, 2007) at 2; BCTC Petition at 2.

⁵³ 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).

⁵⁴ 47 C.F.R. § 1.925(b)(3).

⁵⁵ 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 (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”)

services, unless a station needed to file an application for extension of time to construct, the licensee would never have been notified of the change in policy and the need to file a renewal application. The United States Court of Appeals for the District of Columbia has stated, “[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.”⁵⁶ We therefore conclude that it would be inequitable to fault licensees of unconstructed stations for failure to file prior to license expiration because these licensees could not have filed renewal applications with the former Mass Media Bureau and did not receive notice of WTB’s change in policy in connection with an extension application. Accordingly, we waive Section 1.949(a) of the Commission’s Rules to allow consideration of their renewal applications.

25. We acknowledge that constructed stations did have clear notice of the need to file renewal applications. It would be inequitable, however, to allow unconstructed stations to renew their licenses while terminating licenses of stations that constructed their facilities and attempted to serve students and provide service. While we admonish these licensees for failure to file timely renewal applications, we conclude that enforcing Section 1.949(a) of the Commission’s Rules would be inequitable and contrary to the public interest. We therefore waive Section 1.949(a) of the Commission’s Rules and direct the Broadband Division to process these renewal applications.

E. Declaratory Ruling

26. 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.”⁵⁷ 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.”⁵⁸

27. In this case, we conclude that the Commission’s general policy should apply and that the licensees whose licenses expired before January 10, 2005 should not be allowed to “split-the-football” with active, co-channel EBS licensees.⁵⁹ While, as a legal matter, we have concluded that it would be inequitable to enforce the construction deadline against unconstructed licensees, the licensees could have acted with greater diligence and attempted to renew their licenses sooner. Our records indicate that many unconstructed EBS licensees did manage to file timely renewals or filed prior to January 10, 2005, when the new rules took effect. Accordingly, we conclude that these licensees have not shown the existence of unique circumstances that would justify allowing them to “split-the-football.”

28. Burlington College, Champlain College, Norwich University, and Saint Michael’s College (collectively, the Vermont Licensees) assert that not allowing them to split the football would redraw the GSAs of their licenses in a manner that would generally exclude each Vermont Licensee’s campus from the resulting license coverage areas on certain channels.⁶⁰ Assuming the Vermont Licensees

⁵⁶ *Salzer v. FCC*, 778 F.2d 869, 874 (D.C. Cir. 1985), citing *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d at 404.

⁵⁷ *Declaratory Ruling, supra*.

⁵⁸ *Id.*

⁵⁹ For licenses that expired after January 10, 2005, the GSAs were split on that date, and granting waivers to these licensees will not change the GSA of any adjacent licensee. See 47 C.F.R. § 27.1206.

⁶⁰ Letter from Dr. Jane O’Meara Sanders, President, Burlington College, Dr. David F. Finney, President, Champlain College, Dr. Richard W. Schneider, President, Norwich University, Dr. John J. Neuhauser, President, Saint

are correct, we conclude that this circumstance is not unique enough to justify allowing them to split the football. When the Commission established the splitting the football rule, it contemplated that licensees might lose licensed areas with existing operations, but declined to establish an exception to the splitting the football rule for existing operations.⁶¹ It would be inconsistent to provide special relief for possible future operations when the Commission declined to provide special relief to pre-existing operations.

29. We therefore conclude that none of the licensees have shown unique circumstances or agency error that would justify allowing them to split the football. Accordingly, any grant of renewal applications under consideration in this *Memorandum Opinion and Order* shall contain the following condition:

The 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.

F. Waiver Requests - Extensions

30. 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 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.⁶²

31. 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."⁶³ The buildout requirements at issue have been replaced with a new requirement that all licensees demonstrate substantial service by May 1, 2011.⁶⁴ Given the impending deadline, and that the former deadline was

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Michael's College, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 15, 2008) (Vermont Licensees' Opposition).

⁶¹ *BRS/EBS R&O*, 19 FCC Rcd at 14192-14193 ¶¶ 60-62.

⁶² 47 C.F.R. § 1.925(b)(3).

⁶³ 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606, 5720 ¶ 278 (2006) (*BRS/EBS 3rd MO&O*), quoting 47 U.S.C. § 309(j)(4)(B).

⁶⁴ *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5733 ¶ 303; 47 C.F.R. § 27.14(e).

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.

32. We also conclude that granting the waiver requests would be in the public interest. Applicants provide many instances in which they have plans to provide service, either through their own development or in conjunction with commercial lessees.⁶⁵ While the Commission has sought comment on how to license vacant EBS spectrum in the future,⁶⁶ 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.

33. 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

34. For the reasons discussed above, we dismiss the petitions to deny as untimely or for lack of standing. We also dismiss the Informal Objection. We conclude that the circumstances surrounding these applications justify waivers to allow consideration of their late-filed renewal and construction extension applications. We therefore grant the waiver requests and direct processing of the applications.

35. 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 deny filed listed in the Appendix to this *Memorandum Opinion and Order* ARE DISMISSED.

36. 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 the applications at issue in this *Memorandum Opinion and Order*.

37. 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

⁶⁵ See, e.g., Request for Determination of Necessity for, and Waiver of the Commission's Rules to Allow Reinstatement of the Construction Permits for Educational Broadband Service Stations WNC975 (Minford) and WNC976 (New Boston) Prior to License Renewal, File Nos. 0003065283 and 0003065287 (filed Jul. 18, 2007) (explaining how licenses would be used to serve a depressed region of Ohio); Request for Waiver, Clark County School District, File No. 0003204355 (filed Oct. 22, 2007) (describing plans to deploy wireless broadband to rural southeastern Nevada).

⁶⁶ *BRS/EBS 2nd FNPRM*.

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.

38. 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.

39. 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 the applications listed in footnote 7.

40. 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. § 1.949, 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.

41. 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