

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

In the matter of
UTOPIA INDEPENDENT SCHOOL DISTRICT
Application For Renewal of License of
Educational Broadband Service Station WLX968
File No. 0002972895

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 an application<sup>1</sup> by Utopia Independent School District (Utopia), filed March 29, 2007, to renew Educational Broadband Service (EBS) Station WLX968 with an associated request for waiver of Section 1.949(a) of the Commission's Rules<sup>2</sup> to permit an untimely filing of the renewal application,<sup>3</sup> a petition to dismiss or deny that application filed by Sprint Nextel Corporation (Sprint Nextel),<sup>4</sup> and an informal objection filed against these applications by Sprint Nextel, Nokia, Inc. and Nokia Siemens Networks, Inc.<sup>5</sup> For the reasons discussed below, we dismiss the Petition and the Informal Objection, grant the Waiver Request (although not on the grounds urged by Utopia), and direct the Broadband Division to process the 2007 Application.

II. BACKGROUND

2. On October 8, 1993, Utopia was issued an authorization for Station WLX968, for a term of ten years.<sup>6</sup> Commission records demonstrate that Utopia filed an application for renewal for Station WLX968 on September 30, 2003 (2003 Application),<sup>7</sup> and the application was accepted for filing on October 8, 2003.<sup>8</sup> Although Utopia's renewal application was submitted prior to the expiration of its

1 File No. 0002972895 (filed Mar. 29, 2007) (2007 Application).
2 47 C.F.R. § 1.949(a).
3 Utopia Independent School District Request for Waiver, File No. 0002972895 (filed Mar. 29, 2007) (Waiver Request).
4 Petition to Dismiss or Deny of Sprint Nextel Corporation (filed May 4, 2007) (Petition).
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 File No. BPIF-19920302DH (granted Oct. 8, 1993).
7 See File No. 20030930AAA (filed Sep. 30, 2003) (2003 Application).
8 Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, Report No. 1626A, Public Notice (Oct. 8, 2003) at 10.

license, the application was nonetheless untimely because, at that time, the Commission's rules required that EBS license renewal applications be filed four months prior to expiration.<sup>9</sup>

3. On October 5, 2004, the Wireless Telecommunications Bureau (WTB or Bureau) released a Memorandum Opinion and Order (*MO&O*) granting a Petition for Reconsideration of a denial of Eastern New Mexico University's (ENU) request for a waiver to allow the late filing of its EBS renewal application.<sup>10</sup> In the *MO&O*, the Bureau chose to simultaneously adjudicate 323 other late-filed, pending EBS renewal applications, including Utopia's 2003 Application to renew Station WLX968.<sup>11</sup> In the *MO&O*, the Bureau found that while the 323 applications did not strictly meet the standard necessary to grant a waiver request, it was in the public interest to grant the renewal applications.<sup>12</sup> The Bureau determined that staff of the former Mass Media Bureau had previously accepted almost every late-filed renewal application and did not apply the Commission's waiver standards.<sup>13</sup> The staff's failure to apply the Commission's waiver standards caused EBS licensees to be unaware of the actual standards.<sup>14</sup> Accordingly, the Bureau directed processing of ENU's and the 323 other pending, untimely renewal applications, including Utopia's 2003 Application for WLX968.<sup>15</sup>

4. On December 16, 2004, WTB's Broadband Division (Division) attempted to return Utopia's 2003 Application via an automatically generated Universal Licensing System (ULS) letter, due to missing or inadequate information in the renewal application.<sup>16</sup> However, the return letter was defective as it did not contain a mailing address.<sup>17</sup> On March 7, 2005, ULS generated another automatic letter dismissing Utopia's renewal application because no response to the December 16<sup>th</sup> letter had been received.<sup>18</sup> This letter was also defective as it likewise did not contain any address for Utopia. The automatic dismissal of Utopia's renewal application also generated an automatic expiration of Utopia's license as of October 8, 2003.

5. On March 29, 2007, Utopia filed another renewal application (2007 Application)<sup>19</sup> and associated Waiver Request. The Waiver Request makes no mention of the 2003 Application and the errors involved in the disposition of the 2003 Application as described above. Utopia seeks a waiver of Section 1.949(a) of the Commission's rules, which requires licensees to file their renewal applications no later than the expiration date of the license.<sup>20</sup> Utopia explains that it had a lease agreement with Heartland Wireless Communications, Inc. (Heartland) for WLX968, in which Heartland handled the license

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<sup>9</sup> 47 C.F.R. § 74.15(e) (2003) (a renewal application "shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed").

<sup>10</sup> See Eastern New Mexico University, *Memorandum Opinion and Order*, 19 FCC Rcd 19540 (WTB 2004).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 19543-44 ¶¶ 8-10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 19545 ¶ 15.

<sup>16</sup> See File No. 20030930AAA, Ref. No. 3202895 to Utopia Independent School District (Dec. 16, 2004).

<sup>17</sup> See *id.*

<sup>18</sup> See File No. 20030930AAA, Ref. No. 3354544 to Utopia Independent School District (Mar. 7, 2005). Public notice of the dismissal was given on March 9, 2005. Wireless Telecommunications Bureau Site-by-Site Action, Report No. 2089, *Public Notice* (Mar. 9, 2005) at 14.

<sup>19</sup> File No. 0002972895.

<sup>20</sup> 47 C.F.R. § 1.949(a).

paperwork and Utopia's involvement was "minimal."<sup>21</sup> Nucentrix later purchased Heartland, and although Utopia negotiated a ten-year contract with Nucentrix, Utopia asserts that Nucentrix never informed it that its license would expire in 2003.<sup>22</sup> Utopia further explains that the U.S. Postal Service changed its postal box number in 2001, and it never received any letters from the Commission regarding the expiration of its license.<sup>23</sup>

6. On May 4, 2007, Sprint Nextel filed a Petition seeking dismissal or denial of Utopia's Application (Petition). Sprint Nextel alleges that it has a direct interest in the outcome of this proceeding because, as an "interested person", it has the "right" to submit its views in proceedings that threaten to overthrow settled rules and policies.<sup>24</sup> Sprint Nextel claims that, as a licensee in an overlapping BTA, it could experience harmful interference from the "new" authorization Utopia seeks, which in turn would diminish the value of its license.<sup>25</sup> Sprint Nextel further claims that granting a late-filed renewal application "may" delay deployment of service by forcing it to "redesign" its planned operations to accommodate a reinstated EBS licensee.<sup>26</sup> Sprint Nextel also claims that granting the Application "is likely" to delay the transition process.<sup>27</sup> Utopia is located within the San Antonio, Texas Basic Trading Area (BTA401). On December 8, 2006, Fixed Wireless Holdings (FWH), LLC, a subsidiary of Clearwire Corporation (Clearwire), filed a transition initiation plan for the San Antonio BTA.<sup>28</sup> Station WLX968 was among the stations to be transitioned as part of the transition plan.<sup>29</sup> On May 2, 2007, FWH filed a post-transition notification indicating that it had completed the transition for BTA401.<sup>30</sup>

7. On March 18, 2008, the Commission adopted a declaratory ruling clarifying its policy concerning the division of overlapping geographic service areas (GSAs) between active EBS licensees and EBS licensees whose licenses expired prior to January 10, 2005 but are later reinstated.<sup>31</sup> The Commission stated:

- An active BRS or EBS licensee whose former protected service area overlapped with a co-channel license that was expired on January 10, 2005 need not split the football with such expired license if the licensee has not had its license reinstated.

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<sup>21</sup> Waiver Request at 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Petition at 20.

<sup>25</sup> Petition at 21.

<sup>26</sup> Petition at 21.

<sup>27</sup> Petition at 22.

<sup>28</sup> See Letter from Terri B. Natoli to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (Dec. 8, 2006).

<sup>29</sup> *Id.*, Exhibit 1 at 2.

<sup>30</sup> See Letter from Terri B. Natoli to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (May 2, 2007).

<sup>31</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6053-6060 ¶¶ 161-179 (2008) (*Declaratory Ruling*).

- If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances.<sup>32</sup>

### III. DISCUSSION

#### A. Sprint Nextel Petition to Deny and Informal Objection

8. We dismiss the Petition because Sprint Nextel has failed to demonstrate standing. To establish party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury.<sup>33</sup> In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.<sup>34</sup> Although a subsidiary of Sprint Nextel holds the BRS BTA authorization for the area in question,<sup>35</sup> Sprint Nextel does not hold a cognizable interest in the frequencies licensed under Station WLX968 because Sprint Nextel is not eligible to be licensed on these EBS channels.<sup>36</sup> Sprint Nextel's general allegations concerning network deployment are insufficient to establish that it has any cognizable interest in Utopia's Application. Sprint Nextel provides no information concerning when it may offer service in the area, whether it intends to use frequencies adjacent to Utopia's frequencies, and what difficulties it would face as a result of a grant of the Application. Furthermore, we note that Sprint Nextel has filed a transition plan for BTA242, in Laredo, Texas, which is adjacent to BTA401 where Utopia's authorization is located. In its plan, Sprint Nextel asserts that no adjacent operations will cause interference to BTA242.<sup>37</sup> 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 Utopia's Application would cause such complications. Accordingly, Sprint Nextel's vague and general claims are insufficient to establish standing.

9. Furthermore, Sprint Nextel's argument concerning transition does not apply to Sprint Nextel in this case because Clearwire, not Sprint Nextel, was the proponent for the San Antonio BTA. Sprint Nextel lacks standing to complain about any difficulty that granting a waiver to Utopia may cause or may have caused to Clearwire, and we note that Clearwire has not taken a position on the Waiver

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<sup>32</sup> *Id.* at ¶ 179.

<sup>33</sup> See AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (*AT&T Wireless*) (citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988)).

<sup>34</sup> *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978)).

<sup>35</sup> Nextel Spectrum Acquisition Corporation holds the BRS BTA Authorization for the San Antonio, Texas BTA.

<sup>36</sup> Section 27.1201 of the Commission's rules provides, in relevant part, that a license for an Educational Broadband Service station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended. 47 C.F.R. § 27.1201.

<sup>37</sup> BTA242 Initiation Plan at 1-2.

Request. Moreover, Clearwire has already completed the transition and included Utopia's station into its transition plan. Since Sprint Nextel has not shown how it would be injured by a grant of Utopia's Application, we dismiss the Petition for lack of standing.

10. We also dismiss the Informal Objection. Sprint Nextel has already had a full opportunity to present its arguments by filing a petition to deny and a reply pleading. As noted by the former Review Board, additional pleadings should be authorized "only in the most compelling and unusual circumstances where it is felt that basic fairness to a party requires such action . . ."<sup>38</sup> Since Sprint Nextel has already had a full and fair opportunity to present its arguments, we see no purpose in allowing it to buttress its defective pleadings by filing yet another pleading. While Nokia also signed the 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. Waiver Request**

11. In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.<sup>39</sup> We may grant a request for a waiver when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>40</sup>

12. As an initial matter, we reject Utopia's argument that its late-filed 2007 renewal application should be excused by its reliance on its lessee, Heartland, to file its renewal application. The Commission has repeatedly held that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.<sup>41</sup> Accordingly, we find that Utopia's reliance on its lessee to file its renewal application does not justify a waiver of Section 1.949(a) to excuse the instant late filing.

13. We further reject Utopia's argument that its postal box number change, which resulted from the construction of a new post office in Utopia, amounts to a mitigating circumstance. Utopia explains that it would not have received any reminders about renewing its license that the Commission may have sent because the postal service stopped forwarding its mail to its new postal box after one

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<sup>38</sup> See D.H. Overmyer Communications Co., Docket No. 16388, *Memorandum Opinion and Order*, 4 FCC 2d 496, 505 ¶ 28 (Rev. Bd. 1966).

<sup>39</sup> See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999).

<sup>40</sup> 47 C.F.R. § 1.925(b)(3).

<sup>41</sup> See *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14248 ¶ 217 ("As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application."); Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-21973 ¶ 53 (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")

year.<sup>42</sup> We note that it is the licensee's obligation to keep the Commission apprised of any changes in its mailing address,<sup>43</sup> and we conclude that Utopia's argument does not justify a waiver.

14. Nonetheless, we conclude, based on the circumstances surrounding the return and dismissal of the 2003 Application, that a waiver is justified under the second prong of the waiver standard. Specifically, we find that failing to renew Utopia's license would be inequitable and contrary to the public interest. As mentioned above, after Utopia was granted a waiver for the untimely filing of its 2003 Application, ULS generated letters seeking clarification and ultimately dismissing Utopia's application, yet these letters were not properly addressed. We note that the ULS letters address issue was not due to any failure on Utopia's part—the ULS letters that were sent to Utopia failed to print out any address whatsoever. Therefore, Utopia did not have adequate notice that the Division sought additional information, nor did it have adequate notice that its application was ultimately dismissed. If the letters had been properly addressed, Utopia would have had the opportunity to provide the requested information, and it would not have been required to file the 2007 Application. We therefore grant a waiver of the filing deadline and direct the processing of the 2007 Application.

### C. Declaratory Ruling

15. As noted above, the Commission has issued a declaratory ruling stating, "If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances."<sup>44</sup> The Commission directed WTB to make a determination in each case whether unique circumstances exist that would justify allowing those licensees to "split-the-football."<sup>45</sup>

16. In this case, we conclude that manifest Commission error exists and Utopia should be allowed to split the football with its neighboring licensees. Specifically, the failure to place Utopia's address on the return and dismissal letters failed to provide Utopia with proper notice. If Utopia had been properly notified, it could have responded and had its pre-2005 application processed in a timely manner. Accordingly, we conclude that Utopia should be allowed to "split-the-football."

## IV. CONCLUSION AND ORDERING CLAUSES

17. For the reasons discussed above, we dismiss Sprint Nextel's petition to deny for lack of standing. While we conclude that the arguments made by Utopia do not justify a waiver, we conclude that the circumstances surrounding the 2003 Application justify a waiver of Section 1.949(a) of the Commission's Rules. We therefore grant a waiver and direct processing of Utopia's March 29, 2007 renewal application.

18. 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 Dismiss or Deny filed by Sprint Nextel Corporation on May 4, 2007 IS DISMISSED.

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<sup>42</sup> Waiver Request at 1.

<sup>43</sup> 47 C.F.R. § 1.5.

<sup>44</sup> *Declaratory Ruling, supra*.

<sup>45</sup> *Id.*

19. 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. 0002972895.

20. 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 Utopia Independent School District on March 29, 2007 in connection with application File No. 0002972895 IS GRANTED.

21. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.949 of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL PROCESS the application for renewal of license filed by Utopia Independent School District on March 29, 2007 (File No. 0002972895) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

22. 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