



Federal Communications Commission
Washington, D.C. 20554

June 24, 2009

DA 09-1400

Edwin N. Lavergne, Esq.
Fish & Richardson P.C.
1425 K Street NW – 11th Floor
Washington, DC 20005

Dear Mr. Lavergne:

On March 23, 2007, the Catholic Diocese of Honolulu (CDH), licensee of Educational Broadband Service (EBS) Station WLX384, filed a “Request for Clarification and Waiver.”¹ CDH requests (1) clarification that the expiration date of the license for Station WLX384 is June 7, 2012,² (2) a request for waiver of former Section 74.932(d) of the Commission’s Rules³, and (3) a request for the waiver of the programming requirements and rules relating to spectrum leasing arrangements contained in Sections 27.1203 and 27.1214 of the Commission’s Rules.⁴ For the reasons stated below, we confirm that the expiration date of the license for Station WLX384 is June 7, 2012, grant the request for waiver of former Section 74.932(d) of the Commission’s Rules. We also deny the request for waiver of Sections 27.1203 and 27.1214 of the Commission’s Rules and admonish CDH for its violation of those rules.

CDH received an authorization for Station WLX384 on December 3, 1991.⁵ On December 4, 2001, CDH filed an application for renewal of license of Station WLX384.⁶ Although the practice at the time was to have the file number of the application reflect the year and date of filing, the renewal application was given a file number that would have indicated the application was filed on December 4, 2002.⁷ Public notice that the renewal application had been accepted for filing was given on March 14, 2002.⁸ On June 7, 2002, the Wireless Telecommunications Bureau (Bureau) granted the renewal application. In giving public notice of the grant of the renewal application, however, the Bureau incorrectly described the application as a certification of completion of construction.⁹

¹ Letter from Edwin N. Lavergne, Esq. to Federal Communications Commission, Wireless Telecommunications Bureau, Broadband Division (Mar. 23, 2007) (Request).

² Request at 1-2.

³ 47 C.F.R. § 74.932(d) (2005). *See* Request at 2-4

⁴ 47 C.F.R. §§ 27.1203, 27.1214. *See* Request at 2-4.

⁵ File No. BPIF-19910423DC.

⁶ File No. BRIF-20021204AAA.

⁷ *Id.*

⁸ Mass Media Bureau Instructional Television Fixed Service Multipoint Distribution Service Accepted for Filing, Report No. 690, *Public Notice* (MMB Mar. 14, 2002) at 3.

⁹ Wireless Telecommunications Bureau Site-By-Site Action, Report No. 1202, *Public Notice* (WTB Jun. 14, 2002) at 2.

CDH now reports that, at some point more than one year prior to January 10, 2005, Station WLX384 was off the air.¹⁰ CDH also reports that although Station WLX384 has been used by Clearwire Corporation (Clearwire) to provide commercial broadband services since August 31, 2006, CDH has not been using Station WLX384 to provide the delivery of educational services as required by Sections 27.1203 and 27.1214 of the Commission's Rules.¹¹

CDH has three separate requests for relief. First, CDH asks for "formal clarification" that the license for Station WLX384 has an expiration date of June 7, 2012.¹² Second, CDH requests a waiver of former Section 74.932(d) of the Commission's Rules to allow it to keep its license notwithstanding the fact that the station was off the air more than one year prior to January 10, 2005, the date the rule was abolished.¹³ CDH argues that grant of its waiver request would be consistent with other waivers of the same rule that have been granted.¹⁴ Third, CDH requests a waiver of Sections 27.1203 and 27.1214 of the Commission's Rules to excuse the fact that Station WLX384 has not been used to deliver educational services.¹⁵ CDH claims that this violation resulted from a "lack of communication" between CDH and Clearwire and other unspecified factors.¹⁶ In a Supplement to its Request, CDH reports that with the assistance of Clearwire, it has recently installed internet connections at four Diocese schools with an aggregate population of over 600 students, over half of which are considered high-risk.¹⁷ CDH asserts that these recent installations are the first step in its plan to use its EBS spectrum to provide superior instructional capabilities to students, teachers, clergy and staff.¹⁸

With respect to CDH's first request, the Universal Licensing System (ULS) correctly shows that CDH's renewal application was granted and that the license for Station WLX384 expires on June 7, 2012. The fact that the file number of the renewal application did not follow the usual practice of reflecting the date of filing does not affect the validity of the action.

We conclude, however, that the Bureau has not yet given proper public notice of the grant of CDH's renewal application. The standard for determining adequate notice is whether a public notice is "reasonably comprehensible to people of good faith."¹⁹ The test is whether a fair reading of the public notice put the reader on notice that the Bureau had granted an application for renewal of license for Station WLX384.²⁰ In this case, because the public notice describes the application as a certification of

¹⁰ Request at 3. CDH does not know the specific dates the station was off the air "[d]ue to changes in personnel . . . and incomplete operational records . . ." Request at 3 n.2.

¹¹ Request at 3-4.

¹² Request at 3.

¹³ Request at 3-5.

¹⁴ Request at 3-4.

¹⁵ Request at 4.

¹⁶ Request at 4.

¹⁷ Letter from Edwin N. Lavergne, Esq. to Federal Communications Commission, Wireless Telecommunications Bureau, Broadband Division (Aug. 15, 2007) at 2 (Supplement).

¹⁸ Supplement at 2.

¹⁹ *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

²⁰ *Mobilfone of Northeastern Pennsylvania, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 7414 (CCB 1990).

completion of construction, we conclude that the Bureau failed to give the public adequate notice of the action taken.²¹ Accordingly, we will issue a corrected public notice reflecting the actual action taken.

We next turn to CDH's request for waivers. An applicant seeking a waiver of the Commission's Rules must demonstrate either that: (i) the underlying purpose of the rule(s) will not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest;²² or (ii) in view of 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.²³

Under the rule that was in effect prior to January 10, 2005, former Section 74.932(d) of the Commission's Rules required that an EBS license be forwarded to the Commission for cancellation in case of permanent discontinuance of operation.²⁴ A station that had not operated for one year was considered to have permanently discontinued operation.²⁵ On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM* that fundamentally restructured the band to provide BRS and EBS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.²⁶ Among other actions, the *BRS/EBS R&O & FNPRM* eliminated the discontinuance of service rules for the new BRS and EBS.²⁷ The discontinuance of service rules no longer apply to non-common carrier BRS and EBS licensees. Because the discontinuance of service rules applied at the time for which the applicants are seeking a waiver, however, the licensees require a waiver in order to avoid forfeiting their licenses.

We will grant CDH's request for waiver of former Section 74.932(d) of the Commission's Rules. We have granted a series of waivers of that rule in order to facilitate the transition to the new rules applicable to EBS.²⁸ We agree with CDH that it is similarly situated to other EBS licensees that have received waivers.

²¹ See School Board of Dade County, *Memorandum Opinion and Order*, 18 FCC Rcd 24047, 24052 ¶ 14 (WTB PSPWD 2003) (notice of filing of application is inadequate when notice lists the wrong channel group).

²² 47 C.F.R. § 1.925(b)(3)(1).

²³ 47 C.F.R. § 1.925(b)(3)(ii).

²⁴ 47 C.F.R. § 74.932(d).

²⁵ *Id.*

²⁶ *BRS/EBS R&O & FNPRM*.

²⁷ *Id.*, 19 FCC Rcd at 14255-57 ¶¶ 231-239.

²⁸ See Wireless Telecommunications Bureau's Broadband Division Grants Request for Waiver of EBS Discontinuance of Service Rule, *Public Notice*, 21 FCC Rcd 14485 (WTB BD 2006); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of BRS and EBS Discontinuance of Service Rules, *Public Notice*, 21 FCC Rcd 10079 (WTB BD 2006); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of BRS and EBS Discontinuance of Service Rules, *Public Notice*, 20 FCC Rcd 5275 (WTB BD 2005); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 20 FCC Rcd 54 (WTB BD 2005); Wireless Telecommunications Bureau's Broadband Division Grants Requests for Waiver of MDS and ITFS Discontinuance of Service Rules, *Public Notice*, 19 FCC Rcd 18752 (WTB BD 2004).

With respect to CDH's last request, Section 27.1203 of the Commission's Rules sets forth the permissible uses of EBS stations.²⁹ Section 27.1214 of the Commission's Rules sets forth the minimum educational usage requirements for EBS stations that lease their excess capacity to commercial operators.³⁰ These rules ensure that EBS licensees use their stations to "further the educational objectives that led to the establishment of [EBS]."³¹

We deny CDH's request for waiver of these rules because granting a waiver would be inconsistent with the underlying purposes of these rules. The only justification CDH has offered is an unspecified "miscommunication" and other unspecified factors. Given the importance of the educational purposes of EBS, granting a waiver under these circumstances would be inconsistent with the underlying purposes of the rule and would be inappropriate. We therefore conclude that CDH has not justified a waiver of Sections 27.1203 and 27.1214 of the Commission's Rules, and admonish CDH for its violation of those rules.³²

Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.949, 27.1203, 27.1214, and 74.932(d) of the Commission's Rules, 47 C.F.R. §§ 1.949, 27.1203, 27.1214, and 74.932(d), that the Request for Clarification and Waiver filed by the Catholic Diocese of Honolulu on March 23, 2007 IS GRANTED to the extent indicated and is otherwise DENIED.

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 74.932(d) of the Commission's Rules, 47 C.F.R. § 74.932(d), that the request for waiver of Section 74.932(d) of the Commission's Rules filed by the Catholic Diocese of Honolulu on March 23, 2007 IS GRANTED.

²⁹ 47 C.F.R. § 27.1203.

³⁰ 47 C.F.R. § 27.1214.

³¹ *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14222 ¶ 152.

³² We will refer this matter to the Commission's Enforcement Bureau for consideration of possible enforcement action against CDH.

IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 27.1203 and 27.1214 of the Commission's Rules, 47 C.F.R. §§ 27.1203, 27.1214, that the request for waiver of Sections 27.1203 and 27.1214 of the Commission's Rules filed by the Catholic Diocese of Honolulu on March 23, 2007 IS DENIED, and the Catholic Diocese of Honolulu IS ADMONISHED for its violations of those rules.

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

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau