

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

In the matter of)	
)	
BRANTLEY COUNTY BOARD OF EDUCATION)	File Nos. 0003897820, 0003897825
)	
Application for Renewal of License for Educational Broadband Service Station WLX683)	
)	
EARLE SCHOOL DISTRICT)	File Nos. 0003901236, 0003901235
)	
Application for Renewal of License for Educational Broadband Service Station WLX730)	
)	
EVANS COUNTY SCHOOL SYSTEM)	File Nos. 0003902734, 0003902652
)	
Application for Renewal of License for Educational Broadband Service Station WLX698)	
)	
TROUP COUNTY SCHOOLS)	File Nos. 0003899140, 0003899154
)	
Application for Renewal of License for Educational Broadband Service Station WNC417)	
)	

MEMORADUM OPINION AND ORDER

Adopted: August 28, 2009

Released: August 31, 2009

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us the above-captioned applications to renew Educational Broadband Service (“EBS”) Stations WLX683, WLX730, WLX698, and WNC417 (collectively the “Stations”),¹ and related applications for extension of time to meet the construction deadline for the Stations,² as well as

¹ File Nos. 0003897820 (Brantley County Board of Education) (filed Jul. 13, 2009); 0003901236 (Earle School District) (filed Jul. 15, 2009); 0003902734 (Evans County School System) (filed Jul. 16, 2009); 0003899140 (Troup County Schools) (filed Jul. 14, 2009).

² File Nos. 0003897825 (Brantley County Board of Education) (filed Jul. 13, 2009); 0003901235 (Earle School District) (filed Jul. 15, 2009); 0003902652 (Evans County School System) (filed Jul. 16, 2009); 0003899154 (Troup County Schools) (filed Jul. 14, 2009).

associated requests for waiver³ of Sections 1.949(a) and Section 1.946(e) of the Commission's Rules.⁴ For the reasons discussed below, we grant the waiver requests and direct processing of the applications.

II. BACKGROUND

2. 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.⁵ 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.⁶ Applications for extension of time to construct were ordinarily required to have been filed at least 30 days prior to the construction deadline.⁷ In those cases where a station is not constructed by the deadline specified in the permit or as extended by the Commission, the Commission shall declare the permit forfeited and make a notation of such forfeiture.⁸

3. 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.⁹ 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."¹⁰

4. Prior to March 25, 2002, the Instructional Television Fixed Service (ITFS), the predecessor-in-interest to EBS, was administered by the former Mass Media Bureau. That Bureau had a

³ Requests for Waiver, Brantley County Board of Education (filed Jul. 13, 2009) (Brantley Waiver Request); Requests for Waiver, Earle School District (filed Jul. 15, 2009) (Earle Waiver Request); Requests for Waiver, Evans County School System (filed Jul. 16, 2009) (Evans Waiver Request); Requests for Waiver, Troup County Schools (filed Jul. 14, 2009) (Troup Waiver Request) (collectively, "waiver requests").

⁴ 47 C.F.R. § 1.949(a). 47 C.F.R. § 1.946(e).

⁵ 47 C.F.R. § 73.3534(a) (2002).

⁶ 47 C.F.R. § 73.3534(c) (2002).

⁷ 47 C.F.R. § 73.3534(b) (2002).

⁸ 47 C.F.R. § 73.3599 (2002).

⁹ 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*).

¹⁰ *BRS/EBS NPRM*, 18 FCC Rcd at 6805 ¶ 201.

policy under which it would not accept renewal applications for ITFS stations that were not constructed.¹¹ None of the stations referenced in this *Memorandum Opinion and Order* were ever constructed.

5. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS.¹² 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.

6. In 2002, each of the Applicants captioned above filed an application for extension of time to construct their ITFS stations.¹³ Pursuant to its policy, WTB attempted to return each of the extension applications, directing the licensees to file renewal applications.¹⁴ In these cases, however, the Return Letters that were generated did not include return addresses. The Applicants did not respond to the Return Letters. Because there were no responses, the applications were dismissed, and Dismissal Letters were generated.¹⁵ As with the Return Letters, the Dismissal Letters did not include addresses.¹⁶ None of the Petitioners sought reconsideration or Commission review of the dismissals of their Extension Applications at that time. As a result, in 2007, WTB issued letters terminating all of the above-captioned licenses.¹⁷

7. Once the licensees received notice of termination of the licenses, each of the licensees filed Petitions for Reconsiderations along with requests for waiver of Section 1.949(a)¹⁸ of the Commission's rules, which requires licensees to file their renewal applications no later than the expiration

¹¹ 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).

¹² Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, DA 02-638 (WTB Mar. 18, 2002).

¹³ See Brantley Board of Education Extension Application, File No. 20020613AAD (filed Jun. 13, 2002) (Brantley Extension); Earle School District Extension Application, File No. 20020211AAH (filed Feb. 11, 2002) (Earle Extension); Evans County School System Extension Application, File No. 20020805AAG (filed Aug. 5, 2002) (Evans Extension); Troup County Schools Dismissal Letter, File No. 20020911AAD (filed Sep. 11, 2002) (Troup Extension).

¹⁴ See Notice of Return, Brantley County Board of Education, Ref. No. 3213302 (Dec. 22, 2004); Notice of Return, Earle School District, Ref. No. 3211568 (Dec. 21, 2004); Notice of Return, Evans County School System, Ref. No. 3189268 (Dec. 9, 2004); Notice of Return, Troup County Schools Ref. No. 3181825 (Dec. 6, 2004) (collectively, Return Letters).

¹⁵ See Notice of Dismissal, Brantley County Board of Education, Ref. No. 3368334 (Mar. 14, 2005); Notice of Dismissal, Earle School District, Ref. No. 3368335 (Mar. 14, 2005); Notice of Dismissal, Evans County School System, Ref. No. 3342677 (Feb. 28, 2005); Notice of Dismissal, Troup County Schools, Ref. No. 3342682 (Feb. 28, 2005) (collectively, Dismissal Letters).

¹⁶ *Id.*

¹⁷ See Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Brantley County Board of Education (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Earle School District (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Evans County School System (Oct. 19, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Troup County Schools (Oct. 19, 2007) (Termination Letters).

¹⁸ 47 C.F.R. § 1.949(a).

date of the license.¹⁹ On June 16, 2009, the Wireless Telecommunications Bureau's Broadband Division (Division) released an *Order on Reconsideration* in which it granted petitions for reconsideration filed by the Applicants in response to letters terminating their authorizations to operate the Stations.²⁰ The Division concluded that it was in the public interest to grant the petitions because neither the return letters nor the dismissal letters sent by the Division included return addresses, and consequently, the Applicants never received notice that the Division had requested additional information from the Applicants or that their renewal application must be on file before the Division would act on the extension applications.²¹ They also never received notice that their applications for extension of time to construct had been dismissed.²² The Division directed the Applicants to electronically file renewal applications on Form 601 and appropriate requests for waivers of the Commission's Rules within 30 days of the release date of the *Order on Reconsideration*.²³ The Applicants timely filed electronic applications to renew the Stations and requests for waivers 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 and for waiver of Section 1.946(e), which requires that extension applications be filed prior to the construction deadline.²⁴ Public notice of the filing of the renewal applications was given on July 22, 2009.²⁵ No petitions to deny or other oppositions were filed.

III. DISCUSSION

A. Waiver Requests – Renewal Applications

8. 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.²⁶ 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

¹⁹ See Letter from D. Cary Mitchell, Esq. and John A. Prendergast, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 16, 2007); Petition for Reconsideration and Reinstatement and Waiver Request, Earle School District (filed Nov. 17, 2007); Petition for Reconsideration of License Termination, Evans County School System (filed Nov. 19, 2007); Petition for Reconsideration and Reinstatement and Waiver Request, Troup County Schools (filed Nov. 13, 2007).

²⁰ Bradley County Board of Education et al., *Order on Reconsideration*, 24 FCC Rcd 8102 (WTB BD 2009) (*Order on Reconsideration*).

²¹ *Id.* at 8106 ¶ 10.

²² *Id.*

²³ *Id.* at 8106 ¶ 12.

²⁴ See *supra* nn.1-3.

²⁵ See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 5114, *Public Notice* (WTB Jul. 22, 2009) at 1-2.

²⁶ 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).

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.²⁷

9. 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.²⁸ 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.²⁹ 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.

10. Nonetheless, we conclude, based on the circumstances surrounding the return and dismissal of the Applications, that it would be inequitable and contrary to the public interest to deny the waiver requests. The Applicants had filed extensions of time to construct without filing renewal applications.³⁰ They did this in response to the former Mass Media Bureau's policy of not permitting applicants to file renewal applications for unconstructed stations.³¹ Unfortunately, when WTB attempted to notify the applicants of the need to file a renewal application, the notice was defective because it did not contain any address. Similarly, when the prior extension applications were dismissed, the notices were not addressed. 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."³² We therefore conclude that it would be inequitable to fault the Applicants for failing to file renewal applications prior to license expiration because they 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.³³ Accordingly, we waive Section 1.949(a) of the Commission's Rules to allow consideration of their renewal applications.

11. In order to facilitate the transition to the new BRS/EBS band plan, we require the applicants to take such steps as are necessary to reflect the transition to the new band plan. According to filings made to the Commission, Stations WLX683 and WNC417 have already been transitioned to the new band plan.³⁴ A self-transition notification³⁵ has been filed for Station WLX698.³⁶ We will, on our

²⁷ 47 C.F.R. § 1.925(b)(3).

²⁸ See Brantley Waiver Request at 2-3; Evans Waiver Request at 1-2.

²⁹ 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")

³⁰ *Order on Reconsideration* at 8106 ¶ 10.

³¹ *Id* at 8103 ¶ 4.

³² *Salzer v. FCC*, 778 F.2d 869, 874 (D.C. Cir. 1985), citing *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d at 404.

³³ See *Aquinas High School, et al., Memorandum Opinion and Order*, 24 FCC Rcd 8049 (WTB BD 2009).

³⁴ See Letters from Nadja Sodos-Wallace, Regulatory Counsel and Assistant Secretary, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jul. 17, 2008 and May 29, 2009).

³⁵ See 47 C.F.R. § 27.1236(c).

own motion, extend the deadline for Earle School District to file a self-transition notification to thirty days after their renewal application is granted. We expect the applicants, once their renewal applications are granted, to promptly file applications to move to their default location under the new band plan.

B. Declaratory Ruling

12. On March 18, 2008, the Commission has adopted 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.”³⁷ 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.”³⁸

13. As described above, although the Division attempted to notify the Applicants that they needed to file a renewal application and other information before the Division would act on the extension applications, the Notice of Return Letters and the Dismissal Letters were sent without addresses and, consequently the Applicants never received them and never had the opportunity to properly follow WTB procedures. Therefore, we conclude the Applicants have shown that manifest Commission error exists in the instant case and that the Applicants may “split-the-football” with other active co-channel licensees.³⁹

C. Waiver Requests – Extension Applications

14. 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.⁴⁰ 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.⁴¹ Applications for extension of time to construct were ordinarily required to have been filed at least 30 days prior to the construction deadline.⁴² 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.⁴³

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³⁶ Letter from Joy Collins, Superintendent, Evans County School System to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Apr. 8, 2009).

³⁷ *Declaratory Ruling, supra.*

³⁸ *Id.*

³⁹ *See Aquinas High School, supra.*

⁴⁰ 47 C.F.R. § 73.3534(a) (2002).

⁴¹ 47 C.F.R. § 73.3534(c) (2002).

⁴² 47 C.F.R. § 73.3534(b) (2002).

⁴³ 47 C.F.R. § 73.3599 (1998).

15. On April 2, 2003, the Commission released the *BRS/EBS NPRM*, seeking comment on an industry proposal as well as other potential alternatives for restructuring the 2500-2690 MHz band.⁴⁴ 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."⁴⁵

16. We conclude that the underlying purpose of Section 1.946(e) and former Section 73.3534 of the Commission's Rules would not be served by applying it to the instant case. The underlying purpose of the Commission's 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."⁴⁶ The buildout requirements at issue have been replaced with a new requirement that all licensees demonstrate substantial service by May 1, 2011.⁴⁷ Given the impending deadline, and that the former deadline was suspended over six years ago, we believe the best way of meeting the underlying purposes of performance requirements is to allow the Applicants to make their licenses current and strictly enforce the new substantial service requirements.⁴⁸ This will allow the Applicants to begin providing service and provide licensees with the maximum incentive to begin providing service as soon as possible.

17. We also conclude that granting the waiver requests for the late-filed extensions would be in the public interest because the waiver could facilitate the provision of broadband services and allow spectrum to be put to use. Brantley County has partnered with a company and has committed to providing wireless broadband service to a largely rural area within 180 days after the license renewal is granted.⁴⁹ Evans County has partnered with Clearwire Corporation, which intends to use Station WLX698 in connection with its nationwide WiMAX-ready broadband network.⁵⁰ Earle states its intention to meet the May 1, 2011 substantial service deadline.⁵¹ While the Commission has sought comment on how to license vacant EBS spectrum in the future,⁵² educators do not currently have the

⁴⁴ See *BRS/EBS NPRM*.

⁴⁵ *Id.* at 6805 ¶ 201.

⁴⁶ 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).

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

⁴⁸ See In the Matter of 116 Late-Filed Applications For Renewal of Educational Broadband Service Stations and In the Matter of Fifty-Four Late-Filed Applications For Extension of Time to Construct Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108, 8118-8119 ¶ 31 (WTB BD 2009).

⁴⁹ Brantley Waiver Request at 1-2.

⁵⁰ Evans Waiver Request at 2.

⁵¹ Earle Waiver Request at 1.

⁵² *BRS/EBS 2nd FNPRM*.

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.

IV. CONCLUSION AND ORDERING CLAUSES

18. For the reasons discussed above, we grant the waiver requests. The licensing staff of the Broadband Division shall process the instant renewal applications and extension applications in accordance with this *Memorandum Opinion and Order*.

19. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925, 1.949(a), and 1.946(e), and former Section 73.3534 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), 1.946(e), 73.3534, that the Requests for Waiver filed by Brantley County Board of Education on July 13, 2009, Earle School District on July 15, 2009, Evans County School System on July 16, 2009, and Troup County Schools on July 14, 2009 ARE GRANTED.

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 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that the licensing staff of the Broadband Division SHALL PROCESS the applications for renewal of license (File Nos. 0003897820, 0003901236, 0003902734, and 0003899140) and for extension of time to construct (File Nos. 0003899154, 0003901235, 0003902652, and 0003897825) filed by Brantley County Board of Education, Earle School District, Evans County School System, and Troup County Schools, respectively, in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

21. 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