

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

In the matter of
CHIPPEWA VALLEY TECHNICAL COLLEGE
Request for Reinstatement of Authorizations for
EBS Stations WLX260, WLX268, and WLX310

ORDER ON FURTHER RECONSIDERATION

Adopted: October 29, 2009

Released: October 30, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 16, 2007, Chippewa Valley Technical College ("Chippewa") filed a petition asking the Wireless Telecommunications Bureau, Broadband Division ("Division") to reconsider its decision terminating Chippewa's authorization to operate Educational Broadband Service ("EBS") Stations WLX260, WLX268, and WLX310 (the "Stations") and an associated waiver request seeking waiver of Section 1.949(a) of the Commission's Rules to permit it to file untimely applications to renew the Stations. On June 16, 2009, the Division denied Chippewa's petition and waiver request. We now have before us a petition for further reconsideration filed by Chippewa. For the reasons stated below, we grant the Petition, reinstate the licenses for the Stations, and direct Chippewa to file renewal applications with associated requests for waiver of Section 1.949(a) of the Commission's Rules within 30 days of the release of this Order on Further Reconsideration.

II. BACKGROUND

2. On October 19, 2007, the Division terminated Chippewa's licenses to operate Stations WLX260, WLX268, and WLX310, because Chippewa had not constructed the Stations by the deadline required by former Section 73.3534(a) of the Commission's Rules, did not have on file extensions of time to construct the Stations, did not have on file waivers to allow consideration of a late-filed extension applications, and did not timely file applications to renew the Stations. On November 16, 2007,

1 Petition for Reconsideration and Reinstatement and Waiver Request, Chippewa Valley Technical College (filed Nov. 16, 2007) (First Petition).

2 Hampshire Fannett High School et al., Order on Reconsideration, 24 FCC Rcd 8068 (WTB BD 2009) (Order on Reconsideration).

3 Petition for Further Reconsideration and Reinstatement, Chippewa Valley Technical College (filed Jul. 17, 2009) (Petition).

4 Letter from Joel D. Taubenblatt, Federal Communications Commission to Chippewa Valley Technical College Regarding Station WLX260 at 1-2 (dated Oct. 19, 2007) ("WLX260 Termination Letter"); Letter from Joel D. Taubenblatt, Federal Communications Commission to Chippewa Valley Technical College Regarding Station WLX268 at 1-2 (dated Oct. 19, 2007) ("WLX268 Termination Letter"); Letter from Joel D. Taubenblatt, Federal Communications Commission to Chippewa Valley Technical College Regarding Station WLX310 at 1-2 (dated Oct. 19, 2007) ("WLX310 Termination Letter") (collectively, "Termination Letters"). Former Section 73.3534(a) of the Commission's Rules required licensees to construct within eighteen months of the original authorization. 47 C.F.R. § 73.3534(a) (2003).

Chippewa filed a petition for reconsideration of the Division's decision and a request for waiver of Section 1.949 of the Commission's Rules to permit it to late-file an application to renew the Stations.⁵ Chippewa argued that it was unable to timely file its renewal applications because it lost its FCC counsel, its commercial lessee, and its internal knowledge of Commission processes through the loss of key personnel.⁶ In addition, Chippewa argued that the Division's decision was based, in part, on erroneous information and that Chippewa had in fact constructed the Stations, although it could find the Notice of Completion of Construction for only one station, WLX310.⁷ Chippewa then asked for a waiver of Section 1.949(a) of the Commission's Rules arguing that the changing regulatory environment had made it difficult for Chippewa to comply with the rules and that a waiver was in the public interest because Chippewa would be able to provide advanced telecommunication services to its student body and to rural communities in Wisconsin.⁸ Sprint Nextel opposed the Chippewa's petition and waiver request.⁹ Shekinah Network filed a Request for a Declaratory Ruling asking that the Geographic Service Area (GSA) of its Station WNC868, which overlaps the geographic service area of Chippewa's Station WLX260, not be required to "split-the football" if Chippewa's license to operate WLX260 should be reinstated.¹⁰

3. On June 16, 2009, the Division denied Chippewa's Petition for Reconsideration.¹¹ The Division rejected Chippewa's claim that "changed circumstances" excused its failure to construct the stations or to timely file renewal applications.¹² The Division found that the "changed circumstances" cited by Chippewa, an ongoing rulemaking proceeding and existing bankruptcy filing by a previous operator, do not constitute "changed circumstances" under Section 1.106(c) of the Commission's Rules.¹³ The Division noted that Chippewa had alleged that Station WLX310 was constructed, but concluded that Chippewa had failed to establish that a certification of construction was filed with the Commission.¹⁴ Moreover, the Division held that even if Station WLX310 had been properly constructed, the license was

⁵ First Petition.

⁶ *Id.* at 3.

⁷ *Id.* at 3-4 and n.3.

⁸ *Id.* at 4-6.

⁹ Opposition of Sprint Nextel Corporation (filed Nov. 21, 2007) (Sprint Nextel Opposition).

¹⁰ Request for a Declaratory Ruling, Shekinah Network (filed Nov. 27, 2007) at 1. 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. 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). The Commission stated 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. *Id.* at 6060 ¶ 179.

¹¹ *Order on Reconsideration*, 24 FCC Rcd at 8068, 8073 ¶¶ 1, 11.

¹² *Id.* at 80771-8072 ¶¶ 6-7.

¹³ *Id.* at 8072-8073 ¶¶ 7-8. *See also* 47 C.F.R. § 1.106(c).

¹⁴ *Order on Reconsideration*, 24 FCC Rcd at 8071-8072 n.23.

subject to termination for failure to properly renew the license.¹⁵

4. On July 17, 2009, Chippewa filed the instant Petition.¹⁶ Chippewa asks the Division to further reconsider its decision because it has discovered evidence in the Commission's files that Station WLX310 had been timely constructed and therefore, the Division's decision in the Termination Letters and the *Order on Reconsideration* was issued based, in part, on erroneous information.¹⁷ Chippewa asserted that it strongly believed that Stations WLX260 and WLX268 were also timely constructed.¹⁸ Based on this new information, Chippewa argues that reinstating the licenses for the Stations would be consistent with the Division's recent decision to grant waivers to 116 late-filed EBS renewal applications.¹⁹ Chippewa also asserts that permitting Chippewa to file a renewal application is in the public interest because Pierce County, Wisconsin is interested in using the spectrum to serve its underserved and unserved residents.²⁰ The current Petition is unopposed.

III. DISCUSSION

5. Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three scenarios: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;²¹ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;²² or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.²³ We find that reconsideration of our decision in the Termination Letters and the *Order on Reconsideration* as it relates to Chippewa's licenses to operate the Stations is in the public interest because Chippewa has shown that our prior decisions were based, in part, on erroneous information that concerned one of the central issues in this case: whether Chippewa had timely constructed the Stations. In the *Order on Reconsideration*, the Division held that Chippewa's letter, dated January 12, 1993, purporting to show that Station WLX310 was constructed was insufficient to show that the Notice of Completion of Construction was filed with the Commission.²⁴ Now, Chippewa supports its claim with an affidavit that states that a copy of a letter, dated January 12, 1993, informing the Commission that Station WLX310 had been constructed was found in the Commission's files for Station WLX310.²⁵ We find that this affidavit, together with the letter previously submitted, show that Station WLX310 was indeed timely constructed. Thus, we conclude that Chippewa

¹⁵ *Id.*

¹⁶ *See* Petition.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 4-5, *citing* 116 Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108 (WTB BD 2009).

²⁰ Petition at 5-6.

²¹ 47 C.F.R. § 1.106(c)(1)(i).

²² 47 C.F.R. § 1.106(c)(1)(ii).

²³ 47 C.F.R. § 1.106(c)(2).

²⁴ *Order on Reconsideration*, 24 FCC Rcd at 8071-8072 n.23.

²⁵ Petition at Attachment A (Affidavit of Christopher K. Horn).

has shown that it constructed Station WLX310 and properly filed a Notice of Completion of Construction before February 5, 1993, the deadline required by former Section 73.3534(a) of the Commission's Rules.²⁶

6. We further find that it is in the public interest to reconsider our decision in the Termination Letters and the *Order on Reconsideration* as it relates to Stations WLX260 and WLX268. Taken together, the facts support a conclusion that Chippewa did construct both stations before the deadline required by Section 73.3534(a) of the Commission's Rules. First, the authorizations for all three stations were granted within the period of one year: Chippewa was granted authorizations to operate Stations WLX260, WLX268, and WLX310 on September 4, 1990,²⁷ January 17, 1991,²⁸ and August 5, 1991, respectively.²⁹ The construction deadlines for each station were also within one year: the deadlines for constructing Stations WLX260, WLX268, and WLX310 were March 4, 1992,³⁰ July 17, 1992,³¹ and February 5, 1993, respectively.³² In addition, the Geographic Service Areas for Stations WLX260, WLX268, and WLX310 overlap.³³ Chippewa leased all three stations to Todd Communications, Inc. ("Todd"), which assisted Chippewa in complying with Commission regulations.³⁴ In view of these facts, we conclude that all three of the stations were part of the same system. Given the respective construction deadlines, Notices of Completion of Construction for Stations WLX260 and WLX268 were required to be filed months before the Notice of Completion of Construction for Station WLX310. Although Chippewa has not presented the filed Notices of Completion of Construction for WLX260 and WLX268,³⁵ we find that the facts support a reasonable inference that Chippewa constructed Stations WLX260 and WLX268 by the deadline required under former Section 73.3534(a) of the Commission's Rules.

7. Therefore, we reconsider our earlier decision to terminate Chippewa's authorization to operate the Stations based on failure to construct. We note, however, that the Termination Letters and *Order on Reconsideration* also stated that failure to timely file renewal applications for the Stations constituted another basis for terminating Chippewa's licenses to operate the Stations.³⁶ Under the Commission's former rules applicable to the Instructional Television Fixed Service ("ITFS"), the predecessor-in-interest to EBS, renewal applications were due the first day of the fourth full calendar month prior to license expiration.³⁷ Chippewa's licenses to operate Stations WLX260, WLX268, and WLX310 expired on September 4, 2000,³⁸ January 17, 2001,³⁹ and August 5, 2001, respectively.⁴⁰ In response to the

²⁶ WLX310 Termination Letter at 1.

²⁷ WLX260 Termination Letter at 1.

²⁸ WLX268 Termination Letter at 1.

²⁹ WLX310 Termination Letter at 1.

³⁰ WLX260 Termination Letter at 1.

³¹ WLX268 Termination Letter at 1.

³² WLX310 Termination Letter at 1.

³³ Sprint Nextel Opposition at Appendix C.

³⁴ Petition at 3.

³⁵ Petition at 4.

³⁶ WLX260 Termination Letter at 2; WLX268 Termination Letter at 2; WLX310 Termination Letter at 2; *Order on Reconsideration*, 24 FCC Rcd at 8071-8072 n.23.

³⁷ 47 C.F.R. § 74.15(e).

³⁸ WLX260 Termination Letter at 2.

³⁹ See First Petition at 4 n.7.

⁴⁰ *Id.*

Termination Letters, Chippewa also sought a waiver of Section 1.949(a) of the Commission's Rules to permit it to file untimely renewal applications.⁴¹ While we held in the *Order on Reconsideration* that the failure to file a renewal application constituted an independent basis for terminating the license and dismissed Chippewa's waiver request,⁴² on further reflection, we believe the clear intent of the Termination Letters was to terminate the licenses for failure to comply with both the construction requirement and the renewal requirement. In light of our conclusion that Chippewa complied with the construction requirement, we believe that the licenses should be reinstated and Chippewa should be given the opportunity to file late-filed renewal applications with requests for waiver.⁴³

8. Chippewa recognizes that the Commission's Rules require that renewal applications must be filed electronically using Form 601,⁴⁴ and it promises to "move rapidly" to file renewal applications once the licenses are reinstated.⁴⁵ Consistent with our treatment of other reinstated licenses,⁴⁶ we direct Chippewa to file renewal applications for the Stations with appropriate requests for waiver within 30 days of the release of this *Order on Further Reconsideration*. Failure to file such applications within the designated time period will result in a new determination that Chippewa is no longer interested in the licenses and that the licenses are terminated. While it appears that good cause may exist for waiver of the rules to allow consideration of late-filed renewal applications, a decision on any waiver requests filed with those applications will be made in connection with those applications, including any petitions to deny that may be filed against the renewal applications. Furthermore, any decision on whether Chippewa will be allowed to "split-the-football" with neighboring co-channel licensees will be made in connection with action on the renewal applications. If Chippewa believes it should be allowed to "split-the-football," it should make a showing in its renewal applications explaining why it believes it is entitled to "split-the-football."

IV. CONCLUSION AND ORDERING CLAUSES

9. We reverse our prior decision denying Chippewa's previous request for reconsideration of our decision terminating its licenses to operate the Stations and find that Chippewa has shown that it has constructed the Stations within the deadline required under former Section 73.3534(a) of the Commission's Rules. We therefore reinstate the licenses and direct Chippewa to electronically file renewal applications, with associated waiver requests, within 30 days of the release of the *Order on Further Reconsideration*.

10. ACCORDINGLY, IT IS ORDERED THAT pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Further Reconsideration filed on July 17, 2009 by Chippewa Valley Technical College IS GRANTED.

⁴¹ 47 C.F.R. § 1.949(a).

⁴² *Order on Reconsideration* at n.23.

⁴³ We note that the *Order on Reconsideration* affirmed the termination of several other EBS licenses. Because the other former licensees did not request reconsideration or Commission review of the *Order on Reconsideration*, the termination of those licenses is now final, and we will not consider further pleadings regarding those terminated licenses.

⁴⁴ See 47 C.F.R. § 1.913(b).

⁴⁵ Petition at 6.

⁴⁶ See Brantley County Board of Education, *et al.*, *Order on Reconsideration*, 24 FCC Rcd 8102, 8106 ¶ 12 (WTB BD 2009).

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106, that the licenses for Educational Broadband Service Stations WLX260, WLX268, and WLX310 ARE REINSTATED, subject to compliance with the requirement in Paragraph 13, *infra*.

12. 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 Section 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that within thirty days of the release of this *Order on Further Reconsideration*, Chippewa Valley Technical College SHALL FILE applications for renewal of license, along with appropriate waiver requests.

13. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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