

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

In the Matter of)
LIBERTY COUNTY DISTRICT SCHOOL) File No. 0003945615
BOARD)
Late-Filed Application For Renewal of)
Educational Broadband Service Station WNC895)
Request for Waiver of Section 1.949(a) of the)
Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 2010

Released: March 5, 2010

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

I. INTRODUCTION

1. On August 24, 2009, Liberty County District School Board (Liberty County) filed an application to renew Educational Broadband Service (EBS) station WNC895 with associated requests for waiver to permit the untimely filing of the renewal application. For the reasons discussed below, we grant Liberty a waiver of 1.949(a) of the Commission's Rules, and direct processing of the Renewal Application.

II. BACKGROUND

2. 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. 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.

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS. WTB began requiring unconstructed ITFS stations to submit

1 File No. 0003945615 (filed Aug. 24, 2009) (Renewal Application).
2 Liberty County District School Board EBS Station WNC895 Reinstatement, Waiver & Renewal Applications Waiver Request Exhibit Liberty County District School Board (filed August 24, 2009) (Waiver Request).
3 47 C.F.R. § 74.15(e).
4 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).
5 Radio Services Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, Public Notice, DA 02-638 (WTB Mar. 18, 2002).

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

4. On September 6, 2002, Liberty County filed an application for an extension of time to construct.⁷ On November 12, 2002, WTB granted the extension application and extended the construction deadline for Station WNC685 to May 12, 2003.⁸ 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

5. On April 12, 2006, the Commission adopted the *BRS/EBS Second Report and Order* in which it established substantial service as the performance requirement for EBS licensees.¹¹ In addition, the Commission adopted May 1, 2011 as the date for EBS licensees to demonstrate substantial service.¹²

6. On August 24, 2009, Liberty County filed a late-filed renewal application, 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.¹³ Liberty County also filed a new application 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 and for waiver of former Section 74.15(e), which applied to EBS licenses that expired before January 10, 2005. Liberty County indicates that it failed to timely file its renewal application because it did not receive the February 4, 2008 reminder letter sent by the Bureau reminding Liberty County to renew its license to operate WNC895 before it expired on May 1, 2008 and therefore had no notice that the policy regarding renewal applications for unconstructed licenses had changed.¹⁴

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

⁷ File No. 20020906AAY (filed Sep. 6, 2002).

⁸ *Id.* (granted Nov. 12, 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).

¹⁰ *Id.* at 6805 ¶ 201.

¹¹ 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, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5718-5762 ¶¶ 277-279 (2006).

¹² *Id.*, 21 FCC Rcd 5718-5762 ¶ 304. 47 C.F.R. § 27.14(o).

¹³ 47 C.F.R. § 1.949(a).

¹⁴ Waiver Request at 4.

7. On September 2, 2009, Liberty County's Renewal Application was accepted for filing.¹⁵ No petitions to deny or other oppositions were filed.

III. DISCUSSION

8. As a preliminary matter, we dismiss, as moot, Liberty County's request for waiver of former Section 74.15(e) of the Commission's Rules. Former Section 74.15(e) applied to ITFS licenses that expired before January 10, 2005. Because Liberty County's license expired on May 1, 2008, the applicable rule is Section 1.949(a) of the Commission's Rules.

9. We also dismiss, as moot, Liberty County's request for an extension of time to construct and for a waiver of Section 1.946(e) and former Section 73.3534 of the Commission's Rules. As explained above, five months after Liberty County was granted an extension of time to construct, the Commission suspended the build out requirements applicable to EBS licensees that had construction permits that were unexpired as of April 2, 2003. Because Liberty County had an unexpired construction permit as of April 2, 2003, its construction deadline was suspended. Then, in the *BRS/EBS Second Report and Order*, the Commission adopted 27.14(o) of the Commission's Rules, which established substantial service as the performance requirement for EBS licensees and May 1, 2011 as the deadline for establishing substantial service.¹⁶ Thus, Liberty County is not required to demonstrate substantial service until May 1, 2011, and an extension request is not necessary for Liberty County to renew its license to operate Station WNC895.

10. As mentioned above, Liberty County seeks a waiver of Section 1.949(a) of the Commission's Rules to permit it to file an untimely renewal application. 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.¹⁷ 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.¹⁸

11. Liberty County has shown that in view of the unique factual circumstances of this case, applying Section 1.949(a) of the Commission's Rules, which requires licensees to renew their licenses "no later than the expiration date," is inequitable and contrary to the public interest.¹⁹ Initially, we note that the record does not support Liberty County's assertions that it was not sent a renewal reminder.²⁰ The Universal Licensing System (ULS) shows that on February 4, 2008, a renewal reminder was sent to

¹⁵ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 5227, *Public Notice* (rel. Sep. 2, 2009) at 1.

¹⁶ 47 C.F.R. § 27.14(o).

¹⁷ 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).

¹⁸ 47 C.F.R. § 1.925(b)(3).

¹⁹ 47 C.F.R. § 1.949(a).

²⁰ See Waiver Request, Declaration of David Summers.

Liberty County at the following address: Highway 12 North, Bristol, FL 32321.²¹ When there is an allegation that Commission correspondence was not received, “the question of receipt should be resolved on the basis of all the record evidence, including the regularity of mailing and delivery procedures and the inferences naturally drawn from those facts.”²² In any event, a renewal reminder is merely a courtesy, and whether or not it receives the reminder, the licensee is responsible for filing a timely renewal application with the Commission.²³

12. Nonetheless, considering the facts and circumstances as a whole, we conclude that a waiver of Section 1.949(a) of the Commission’s Rules is appropriate. Recently, the Division granted waivers to allow consideration of a series of late-filed EBS renewal applications.²⁴ The Division noted that with respect to unconstructed EBS stations, it would have been impossible for those applicants to have filed renewal applications prior to the deadline because the former Mass Media Bureau had a staff policy of not accepting renewal applications from unconstructed stations.²⁵ With respect to constructed stations, the Division noted that while those stations had notice of the need to file a renewal application, the Division concluded that “[i]t 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.”²⁶ In this case, while Liberty County did not construct its station, unlike many of the licensees granted waivers, Liberty County complied with the then-existing construction requirements by requesting and receiving an extension of time to construct. Furthermore, Liberty County did not need a further extension of time to construct and is not required to demonstrate service until May 1, 2011. Under those circumstances, we believe Liberty County is similarly situated to those licensees who had complied with the construction requirement by building their stations. We therefore conclude it would be inequitable to deny Liberty County a waiver and terminate its license.²⁷

IV. CONCLUSION AND ORDERING CLAUSES

13. For the reasons discussed above, we conclude that the unique circumstances surrounding Liberty County’s renewal application justify a waiver of Section 1.949(a) of the Commission’s Rules to allow consideration of its late-filed renewal. We further conclude that Liberty County’s remaining waiver requests are unnecessary and therefore are dismissed as moot. We direct processing of the Renewal Application.

²¹ Renewal Reminder, Ref. No. 4705166 (Feb. 4, 2008).

²² See Juan Galiano *et al.*, *Memorandum Opinion and Order*, 5 FCC Rcd 6442 ¶ 7 (1990).

²³ See Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21071 ¶ 96 (1998).

²⁴ See *In the Matter of 116 Late-Filed Applications For Renewal of Educational Broadband Service Stations, et al.*, *Memorandum Opinion and Order*, 24 FCC Rcd 8108 (WTB BD 2009).

²⁵ *Id.* at 8116-8117 ¶ 24.

²⁶ *Id.* at 8117 ¶ 25.

²⁷ On March 19, 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). Because Liberty County’s license was active on January 10, 2005, when division of overlapping GSAs took place, we need not address that question in this case.

14. 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 Sections 1.925, and 1.949(a) of the Commission's Rules, 47 C.F.R. §§ 1.925, and 1.949(a) that the request for waiver of Section 1.949(a) of the Commission's Rules filed by Liberty County District School Board on August 24, 2009 IS GRANTED.

15. 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), 73.3534, and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946(e), 73.3534, 74.15(e) that the requests for waiver of Section 1.946(e), 73.3534, and 74.15(e) of the Commission's Rules filed by Liberty County District School Board on August 24, 2009 ARE DISMISSED AS MOOT.

16. 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 application for renewal of Educational Broadband Service Station WNC895 filed by Liberty County District School Board on August 24, 2009 (File No. 0003945615) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

17. 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

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