

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

In the matter of)	
)	
CHIPPEWA VALLEY TECHNICAL COLLEGE)	File Nos. 0004040058, 0004040031,
)	0004040014
Applications for Renewal of Educational)	
Broadband Service Stations WLX260, WLX268,)	
and WLX310)	
)	

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 November 20, 2009, Chippewa Valley Technical College (“Chippewa”) filed applications¹ to renew Educational Broadband Service (EBS) Station WLX260, WLX268, and WLX310 with associated requests to waive former Section 74.15(e)² and current Section 1.949(a)³ of the Commission’s Rules to permit the untimely filing of the applications.⁴ For the reasons discussed below, we grant the Waiver Requests with a condition and direct processing of the Renewal Applications.

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.⁵ 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.⁶

3. On March 25, 2002, the Wireless Telecommunications Bureau (WTB) became responsible for administering ITFS.⁷ WTB began requiring unconstructed ITFS stations to submit

¹ File Nos.0004040058, 0004040031, 0004040014 (filed Nov. 20, 2009) (Renewal Applications).

² 47 C.F.R. § 74.15(e) (2000).

³ 47 C.F.R. § 1.949(a).

⁴ Renewal Applications, Waiver Request (Waiver Requests).

⁵ 47 C.F.R. § 74.15(e) (2000). In contrast, current Section 1.949(a) of the Commission’s Rules requires that applications for renewal of license be filed prior to the license expiration date. *See* 47 C.F.R. § 1.949(a).

⁶ *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).

⁷ 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.⁸

4. On October 19, 2007, the Broadband Division of the Wireless Telecommunications Bureau (“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.⁹ On November 16, 2007, 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.¹⁰ On June 16, 2009, the Division denied Chippewa’s Petition for Reconsideration.¹¹ On July 17, 2009, Chippewa filed a petition for further reconsideration.¹² On October 30, 2009, the Division granted the Second Petition and ordered the reinstatement of the licenses for Stations WLX260, WLX268, and WLX310.¹³ The Division concluded that Chippewa had adequately demonstrated that the stations had been constructed.¹⁴ The Division then concluded that Chippewa should be given the opportunity to file late-filed renewal applications with requests for waiver.¹⁵ The Division ordered Chippewa to file late-filed renewal applications with requests for waiver within 30 days after release of the *Reinstatement Order*.¹⁶ In the *Reinstatement Order*, we directed Chippewa to make a showing explaining why it should be allowed to “split-the-football” if it believed it was entitled to such relief.¹⁷

⁸ See, e.g., Notice of Return, File No. 20020802AAB, Ref. No. 3181820 (Dec. 6, 2004).

⁹ 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).

¹⁰ Petition for Reconsideration and Reinstatement and Waiver Request, Chippewa Valley Technical College (filed Nov. 16, 2007).

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

¹² Petition for Further Reconsideration and Reinstatement, Chippewa Valley Technical College (filed Jul. 17, 2009) (Second Petition).

¹³ Chippewa Valley Technical College, *Order on Further Reconsideration*, 24 FCC Rcd 13470 (WTB BD 2009) (*Reinstatement Order*).

¹⁴ *Id.* at 13472-13473 ¶¶ 5-6.

¹⁵ *Id.* at 13474 ¶ 7.

¹⁶ *Id.* at 13474 ¶ 8.

¹⁷ *Id.* 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*

(continued....)

5. Chippewa filed the instant Renewal Applications on November 20, 2009, within the period established by the *Reinstatement Order*.¹⁸ Chippewa contends, “The combination of a changing regulatory environment and an unfamiliarity with the changes and requirements, made the filing of the renewal application impossible . . .”¹⁹ Chippewa also argues that waiving Section 1.949(a) of the Commission’s Rules would be consistent with prior orders granting waivers for late-filed EBS renewal applications.²⁰ Chippewa also contends that granting the Renewal Applications “will facilitate the restructuring of the 2.5 GHz band and ultimately provide service to schools in Wisconsin.”²¹ The Waiver Requests did not address the “splitting-the-football” issue.²²

6. The Renewal Applications were accepted for filing on November 25, 2009.²³ No petitions to deny or other oppositions were filed.

III. DISCUSSION

7. 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.²⁴ We may grant a request for a waiver when: (i) the underlying purpose of the rules(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

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Proposed Rulemaking and Declaratory Ruling, WT Docket No. 03-66, 23 FCC Rcd 5992, 6053-6060 ¶¶ 161-179 (2008) (*Declaratory Ruling*). In pertinent part, 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.

¹⁸ Renewal Applications.

¹⁹ Waiver Request at 2.

²⁰ *Id.*, citing 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) (*116 Late-Filed Renewals Order*); Central Catholic High School Foundation, *Order on Reconsideration*, 21 FCC Rcd 13807 (WTB 2006); Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB 2007); Eastern New Mexico University, *Memorandum Opinion and Order and Order on Reconsideration*, 19 FCC Rcd 19540 (WTB 2004).

²¹ Waiver Requests at 2.

²² Waiver Requests.

²³ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 5436, *Public Notice* (rel. Nov. 25, 2009) at 1.

²⁴ 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.²⁵

8. Initially, we reject Chippewa's argument that the late-filed Renewal Applications should be excused because of changes in regulatory environment and unfamiliarity with the Commission's rules. 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.²⁶ Accordingly, we find that the various arguments presented by the applicants do not justify a waiver of former Section 74.15(e) and current Section 1.949(a) to excuse the late filings.

9. Nonetheless, based on the circumstances surrounding Chippewa's late-filed Renewal Applications, we conclude that a waiver is justified under the second prong of the waiver standard. Chippewa 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.²⁷ Recently, we held that it would be inequitable to strictly apply the renewal deadline against unconstructed EBS stations because, under the former Mass Media Bureau's policy, renewal applications would not have been accepted.²⁸ With respect to constructed EBS stations, we concluded, "It 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."²⁹ We believe the same logic applies to Chippewa's Renewal Applications. We also note that the Renewal Applications are not opposed. Accordingly, we will waive former Section 74.15(e) and current Section 1.949(a) of the Commission's Rules and direct processing of the Renewal Applications.

10. We conclude, however, that Chippewa has not shown unique circumstances justifying allowing it to "split-the football." Indeed, despite our specific directive in the *Reinstatement Order*, in its Waiver Request, Chippewa did not address this issue. Therefore, in this case, we conclude that the Commission's general policy should apply and that Chippewa should not be allowed to "split-the-football" with active, co-channel EBS licensees. Accordingly, any grant of the Renewal Applications shall contain the following condition:

The 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.

²⁵ 47 C.F.R. § 1.925(b)(3).

²⁶ 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")

²⁷ 47 C.F.R. § 1.949(a).

²⁸ See *116 Late-Filed Renewals Order*, 24 FCC Rcd at 8116-8117 ¶ 24.

²⁹ *Id.* at 8117 ¶ 25.

IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we conclude that the unique circumstances surrounding Chippewa's Renewal Applications justify a waiver of former Section 74.15(e) and current Section 1.949(a) of the Commission's Rules to allow consideration of their late-filed renewals. We also conclude that Chippewa has not shown unique circumstances that would justify allowing it to "split-the-football." We direct processing of the Renewal Applications.

12. 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, 1.949(a), and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a), and 74.15(e) that the requests for waiver filed by Chippewa Valley Technical College on November 20, 2009 in connection with File Nos. 0004040014, 0004040031, 0004040058 ARE GRANTED.

13. 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 the licensing staff of the Broadband Division SHALL PROCESS the applications for renewal of Educational Broadband Service Stations WLX260, WLX268, and WLX310 filed by Chippewa Valley Technical College on November 20, 2009 (File Nos. 0004040058, 0004040031, and 0004040014) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

14. 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
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Wireless Telecommunications Bureau