

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

In the Matter of)
ARCHDIOCESE OF HARTFORD DIOCESAN)
SCHOOL OFFICE)
Petition for Reconsideration, Waiver Request, and)
Request for Extension of Time to Construct)
Educational Broadband Service Station WHR893)

ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: Month 28, 2012

Released: Month 29, 2012

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a petition for reconsideration filed by the Archdiocese of Hartford Diocesan School Office ("Archdiocese") seeking reconsideration of the December 7, 2011 decision by the Broadband Division of the Wireless Telecommunications Bureau ("Division") to place the license to operate Station WHR893 in "Termination Pending" status. We also deny the Archdiocese's request for extension of time to demonstrate substantial service for incumbent Educational Broadband Service ("EBS") Station WHR893 and a waiver of the November 1, 2011 substantial service deadline.

II. BACKGROUND

2. The Archdiocese is licensed to operate two EBS stations, WHR893, in the New Haven, Connecticut area, and WLX569 in the Hartford, Connecticut area. On February 1, 1998, the Archdiocese's license to operate unconstructed Station WHR893 on the B-group channels in New Haven, Connecticut expired. In 2002, the Archdiocese timely renewed its license to operate Station WLX569, which operates on the B-group channels in Hartford.

3. In 2004, the Commission undertook the radical transformation of the 2496-2690 MHz band to facilitate the development and deployment of advanced wireless services, including wireless broadband. The Commission changed the band plan and technical and licensing rules applicable to EBS

1 The Archdiocese of Hartford Diocesan School Office, Petition for Reconsideration, Extension and Waiver Request (filed Jan. 6, 2012) at 1 ("Petition" or Waiver and Extension Request," as appropriate).

2 116 Late-Filed Application for Renewal of Educational Broadband Service Stations and Fifty-Four Late-Filed Applications for Extension of Time to Construct Educational Broadband Service Stations, Memorandum Opinion and Order, 24 FCC Rcd 8108, 8125 at Appendix (WTB BD 2009) ("116 Late-Filed Renewal Applications MO&O").

3 File No. BRIF-20020116AAF (granted Jun. 4, 2002).

4 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, (continued...)

licenses and required EBS licensees to transition from their old channel locations to their new channel locations.⁵ As a consequence of these changes, EBS is now a radio communications service that consists of 112.5 megahertz of spectrum in the 2496-2690 MHz band and is licensed under Part 27 of the Commission's rules; the remaining 73.5 megahertz of spectrum in the band is allocated to the Broadband Radio Service ("BRS") and to two four-megahertz guard bands.⁶

4. Two years later, on April 27, 2006, the Commission adopted new construction requirements applicable to all BRS and EBS licensees, which were codified at Section 27.14(o) of the Commission's Rules.⁷ Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011.⁸ The Commission defines substantial service as a level of service, which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.⁹ A BRS or EBS licensee may make a showing based on meeting the definition of substantial service or based on meeting one of the general safe harbors provided by the Commission in Section 27.14(o)(1) of the Commission's Rules.¹⁰ In addition, an EBS licensee may make a showing under the educational "safe harbor" the Commission specifically adopted for EBS licensees in Section 27.14(o)(2) of the Commission's Rules.¹¹ Many EBS licensees have demonstrated substantial service by meeting this safe harbor. On March 22, 2011, the Wireless Telecommunications Bureau ("Bureau") extended the deadline for EBS licensees to demonstrate substantial service from May 1, 2011 to November 1, 2011.¹²

(...continued from previous page)

Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*, as appropriate).

⁵ *Id.*

⁶ See 47 C.F.R. § 27.5(i)(2).

⁷ 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 5606, 5718-5736 274-310 (2006) (*BRS/EBS Second R&O*).

⁸ 47 C.F.R. § 27.14(o). 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, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 ¶¶ 274-310 (2006) (*BRS/EBS Second R&O*).

⁹ 47 C.F.R. § 27.14(o).

¹⁰ An EBS or a BRS licensee could meet the substantial service requirement by showing that it meets one or more of the following five general safe harbors: that it constructed six permanent links per one million people for licensees providing fixed point-to-point services; that it provided coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; that it provided service to "rural areas" or areas with limited access to telecommunications services; that it provided specialized or technologically sophisticated service; or that it provided service to niche markets. 47 C.F.R. § 27.14(o)(1).

¹¹ Under the educational "safe harbor," an EBS licensee is deemed to be providing substantial service with respect to all channels it holds if: it is using its spectrum (or spectrum to which its educational services are shifted) to provide educational services within its GSA; the services it provides are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and the level of service it provides meets or exceeds the minimum usage requirements specified in the Commission's rules. 47 C.F.R. § 27.14(o)(2).

¹² See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB/2011) ("*EBS Extension Order*").

5. On January 8, 2007, Sprint-Nextel Corporation (“Sprint”) filed an Initiation Plan to transition the New Haven-Waterbury-Meriden, Connecticut Basic Trading Area (BTA318), where Station WHR893 is located, from the old band plan to the new band plan.¹³ Station WHR893 was not included in the list of stations to be transitioned in BTA318, although the Archdiocese’s other EBS station, WLX569, was included in the Initiation Plan for the Hartford, Connecticut BTA184, which Sprint also transitioned.¹⁴ Sprint initiated the transition for BTA184 just one month after it initiated the transition for BTA318.¹⁵

6. On July 16, 2007, the Archdiocese filed an application to renew its license to operate Station WHR893, along with a request for a waiver of Section 1.949(a) to permit it to file a late-filed renewal application.¹⁶ On September 28, 2007, while the Archdiocese’s application to renew Station WHR893 was still pending, Sprint filed a Post-Transition Notification, in which Sprint informed the Commission that it had completed the transition for BTA318.¹⁷ Station WHR893 was not included in the list of stations that were transitioned. On November 16, 2007, the Archdiocese filed an application for extension of time to construct Station WHR893.¹⁸ On June 16, 2009, the Division granted the Archdiocese’s request to waive Section 1.949(a) and request for extension of time to construct and permitted the Archdiocese to file an application to renew Station WHR893.¹⁹ In granting waivers, the Division stated that it expected applicants who received a waiver but who were not included in transition plans “to fully cooperate with neighboring licensees and to file the necessary application to modify their license to move to the new band plan.”²⁰ The Division also stated that it would strictly enforce the substantial service deadline, that it would fully expect applicants to meet that deadline, and that licensees would face license termination if they failed to meet the November 1, 2011 deadline.²¹

7. On February 1, 2011, the Bureau sent a Reminder Notice to the Archdiocese reminding it of the upcoming deadline for demonstrating substantial service.²² The Reminder Notice notified the

¹³ Letter from Robert H. McNamara, Sprint Nextel to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jan. 8, 2007) (“New Haven BTA Initiation Letter”).

¹⁴ WLX569 was included in Sprint Nextel’s Initiation Plan for BTA 184 and was transitioned by Sprint Nextel to the new band plan and technical rules on September 28, 2007. *See* Letter from Robert H. McNamara, Sprint Nextel to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Feb. 7, 2007) (“Hartford BTA Initiation Letter”); Letter from Robert H. McNamara, Sprint Nextel to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Sep. 28, 2007) (“Hartford BTA Completion Letter”). WLX569 was assigned to Hartford Educational Broadband, Inc. on February 27, 2008. *See* File No. 0003232565. Hartford Educational Broadband, Inc. is wholly controlled by the Hartford Roman Catholic Diocesan Corporation (the Archdiocese). *See id.* at Exhibit A. On June 14, 2011, the Archdiocese timely filed a Notification of Construction for Station WLX569, which was accepted by the Bureau on June 22, 2011. *See* File No. 0004764795.

¹⁵ *See* Hartford BTA Initiation Letter.

¹⁶ File No. 0003119706.

¹⁷ Letter from Robert H. McNamara, Sprint Nextel to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Sept. 28, 2007) (“New Haven BTA Completion Letter”).

¹⁸ File No. 0003233594.

¹⁹ *116 Late-Filed Renewal Applications MO&O*, 24 FCC Rcd at 8125 at Appendix.

²⁰ *Id.* at 8115 ¶ 17.

²¹ *Id.* at 8119 ¶ 32.

²² Construct/Coverage Reminders, Ref. Nos. 5103131, 5103132 (Feb. 1, 2011). The Bureau sent two letters, one to the licensee and one to the licensee’s contact. *See* Construction/Coverage Deadline Reminder Notice to Rev. John P. Gatzak, Archdiocese Hartford Diocesan School Office (dated Feb. 1, 2011). *See* Construction/Coverage Deadline Reminder Notice to John M. Pelkey, Garvey Schubert Barer (dated Feb. 1, 2011) (Collectively “Reminder Notice”).

Archdiocese that it had 15 days from the construction deadline to file the construction notification; that, if needed, it could seek an extension of time to construct but that the request must be filed on or before the construction deadline; and that if it failed to meet its construction requirement by its deadline, and it did not file a request for an extension of time on or before the construction coverage deadline, the license to operate Station WHR893 would be terminated automatically.²³

8. On March 22, 2011, the Wireless Telecommunications Bureau (“Bureau”) extended the deadline for EBS licensees to demonstrate substantial service from May 1, 2011 to November 1, 2011.²⁴ The Archdiocese did not file a construction notification or an application to transition the license for Station WHR893 to the new band plan.

9. On December 7, 2011, the Bureau sent the Archdiocese an auto-termination letter²⁵ and Station WHR893 entered auto-termination status.²⁶ The Auto-Termination Letter stated that “if the licensee met its construction or coverage requirement, it has 30 days from the date of the Public Notice to file a Petition for Reconsideration . . . showing that it met the construction or coverage deadline.”²⁷ The Termination Pending Notice continued that in “filing its petition for reconsideration, the licensee must include the actual date when construction was completed or the coverage requirement was met.”²⁸

10. The Archdiocese filed the instant Petition on January 6, 2012.²⁹ The Archdiocese asks us to reconsider our decision to place the license for Station WHR893 on the “Termination Pending” list, to waive the November 1, 2011 deadline for providing substantial service, to waive the November 1, 2011 deadline for requesting an extension of time to construct, and to grant it an additional six months to construct Station WHR893 or to at least April 29, 2012 if such grant is on public notice at least 45 days before that date so the Archdiocese can implement its facilities in a timely manner.³⁰ The Archdiocese states that it intends to work with Utopian Wireless Corporation to deploy a point-to-point link within the

²³ *Id.* at 1.

²⁴ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB/2011) (“*EBS Extension Order*”).

²⁵ When a licensee fails to file a notification that it has completed construction by an applicable buildout deadline, the license, location, or frequency is placed in “termination pending” status. For a license, location, or frequency in that status, the Bureau presumes that the licensee did not meet buildout requirement. If the licensee does not file a petition for reconsideration within 30 days after public notice of the termination pending status demonstrating that it met that buildout requirement, the status of the license, location, or frequency is changed to “terminated” as of the buildout deadline. See Wireless Telecommunications Bureau Announces Deployment Of “Auto-Term,” the Automated Feature in its Universal Licensing System That Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses, *Public Notice*, 21 FCC Rcd 163 (WTB 2006) (“Auto-Termination Public Notice”).

²⁶ The Bureau sent two letters, one to the licensee and one to the licensee’s contact. Construction/Coverage Deadline Notice of Termination Pending Status to Rev. John P. Gatzak, Archdiocese Hartford Diocesan School Office, Ref. No. 5269002 (dated Dec. 7, 2011). Construction/Coverage Deadline Notice of Termination Pending Status to John M. Pelkey, Garvey Schubert Barer, Ref. No. 5269002 (dated Dec. 7, 2011) (Collectively “Auto-Termination Letter”). See also Wireless Telecommunications Bureau Market Based Licenses Termination Pending Public Notice, Report No. 7360 (WTB Dec. 7, 2011) at 1.

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ Petition.

³⁰ Petition at 2.

Geographic Service Area (“GSA”) of Station WHR893.³¹ The Archdiocese points to other instances where the Bureau has granted extensions of the November 1, 2011 substantial service deadline.³²

III. DISCUSSION

11. First, we deny the Archdiocese’s request to reconsider our decision to place the license for Station WHR893 on the “Termination Pending” list because the Archdiocese did not comply with the requirement specified by the Bureau in the Auto-Termination Public Notice. The Archdiocese was required to include the actual date when construction was completed in its petition for reconsideration.³³ The Archdiocese, however, has not constructed and thus, cannot comply with this requirement.

12. Moreover, we conclude that the Archdiocese has not shown that a waiver of the November 1, 2011 deadline for providing substantial service or requesting an extension of time to construct deadline is warranted. To be granted a waiver, the Archdiocese must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual 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.³⁴

13. We find that the Archdiocese has not shown how granting its waiver request would further the underlying purpose of the EBS substantial service requirement, which is to fulfill our statutory duty 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.”³⁵ On the contrary, the actions of the Archdiocese show that it will not put this spectrum to use. At the time the Division permitted the Archdiocese to renew its license to operate Station WHR893 in 2009, it was sympathetic to EBS licensees with expired and unconstructed licenses because of the change to the construction requirements applicable to EBS licensees adopted by the Commission in 2006.³⁶ The Archdiocese did not meet the November 1, 2011 deadline and has failed to present any information to persuade us not to strictly enforce the deadline. Indeed, the Archdiocese took no action regarding Station WHR893 from the time its license was renewed in 2009 until January 6, 2012. It did not even attempt to self-transition to the new band plan as required by the *116 Late-Filed Renewal Applications MO&O*, which could have easily been accomplished by filing a minor modification application. The Archdiocese’s argument that it was not only prevented from constructing Station WHR893, but also from knowing the regulatory requirements applicable to Station WHR893 because it did not have a commercial lessee for Station WHR893 is not an excuse.³⁷ Moreover, the Archdiocese is required to know the terms of its license regardless of whether it leases the excess capacity of Station WHR893.

³¹ Waiver and Extension Request at 1.

³² Petition at 2.

³³ See Wireless Telecommunications Bureau Announces Deployment of “Auto-Term,” The Automated Feature in its Universal Licensing System that Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses, Public Notice, 21 FCC Rcd 163 (WTB 2006).

³⁴ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

³⁵ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, citing 47 U.S.C. § 309(j)(4)(B).

³⁶ *116 Late-Filed Renewal Applications MO&O*, 24 FCC Rcd at 8118-8119 ¶ 31.

³⁷ See Petition at 1.

14. We also find that the Archdiocese in fact knew about the deadlines and did not meet them because of its own inaction. As described above, the Archdiocese is authorized to operate two EBS stations, WHR893 and WLX569. The Archdiocese timely complied with the regulatory requirements with regard to Station WLX569, but not with regard to Station WHR893, even though both stations are subject to the same regulatory requirements. On June 14, 2011, five months before the substantial service deadline, the Archdiocese filed a Required Notification of Construction for Station WLX569.³⁸ Yet with regard to Station WHR893, the Archdiocese did not even ask for an extension until January 6, 2012, two months after the deadline for filing an extension request. Moreover, the Archdiocese was notified of its requirement to construct Station WHR893 on or before November 1, 2011.³⁹ The Archdiocese met the deadlines for Station WLX569 and not for Station WHR893. Thus, we waive neither the November 1, 2011 substantial service deadline nor the November 1, 2011 deadline for seeking an extension of time to construct.

15. We also deny the Archdiocese's request for an extension of time to construct because we conclude that the Archdiocese has not shown that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control," as required by Section 1.946(e)(1) of the Commission's Rules.⁴⁰ We reject the Archdiocese's argument that negative economic conditions, which were beyond its control, prevented it from entering into a lease agreement with a commercial operator who would, in turn, construct and operate the system.⁴¹ Section 1.946(e)(2) of the Commission's Rules specifically precludes us from granting a construction extension request based on a licensee's failure to obtain financing.⁴² Furthermore, negative economic conditions did not prevent the Archdiocese from leasing Station WLX569 to Clearwire. Nor did these negative economic conditions prevent the vast majority of EBS licensees from complying with the substantial service requirement, either through leasing or through their own actions.⁴³ The Archdiocese fails to show that it tried to lease Station WHR893 or construct Station WHR893 on its own. Thus, we find that the Archdiocese's own inaction, and not circumstances beyond its control, prevented it from constructing a system and offering service to its students. We therefore deny the Archdiocese's request for an extension of time to construct.⁴⁴ Despite the Archdiocese's assurances that it has now entered into a lease agreement with a commercial provider (who will install a point-to-point link) and that it can now facilitate the introduction of new wireless broadband service in New Haven, Connecticut, we find that a grant of the Archdiocese's petition and waiver and extension requests are not in the public interest.⁴⁵

16. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.⁴⁶ In light of our conclusion that grant of an extension to the Archdiocese is not in the public interest, we find that Archdiocese's license to operate Station WHR893 automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate

³⁸ File No. 0004764795 (filed Jun. 21, 2011).

³⁹ See Reminder Notice.

⁴⁰ 47 C.F.R. § 1.946(e)(1).

⁴¹ Waiver and Extension Request at 2.

⁴² 47 C.F.R. § 1.946(e)(2).

⁴³ The Bureau has accepted over 2,100 construction notifications from EBS licensees demonstrating compliance with the November 1, 2011 deadline.

⁴⁴ The Archdiocese is readily distinguishable from those applicants who received extensions of the November 1, 2011. Unlike the Archdiocese, the applicants who received extensions had acted diligently but were unable to complete construction for reasons beyond their control. See 47 C.F.R. § 1.946(e)(1).

⁴⁵ Petition at 2; Waiver and Extension Request at 1.

⁴⁶ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

substantial service. We will therefore deny the Petition for Reconsideration, Extension and Waiver Request.

IV. CONCLUSION AND ORDERING CLAUSES

17. The Archdiocese has failed to justify an extension of time to meet the substantial service deadline for Station WHR893 or to justify a waiver of the November 1, 2011 deadline for establishing substantial service. We therefore deny the Petition for Reconsideration, Extension and Waiver Request and declare that the Archdiocese's license to operate Station WHR893 automatically terminated as of November 1, 2011.

18. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 309 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and Sections 1.106 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.946, that the Petition for Reconsideration, Extension and Waiver Request filed by the Archdiocese of Hartford Diocesan School Office on January 6, 2012 ARE DENIED.

19. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the license issued to the Archdiocese of Hartford Diocesan School Office for Station WHR893 IS DECLARED TERMINATED as of November 1, 2011.

20. 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
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