

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

In the Matter of )
KSMQ PUBLIC SERVICE MEDIA, INC. ) File No. 0004935711
Application for Waiver and Extension of Time to )
Meet Substantial Service Requirement for )
Educational Broadband Radio Service Station )
WNC589 )

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 2012

Released: March 30, 2012

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny KSMQ Public Service Media, Inc.'s ("KSMQ") request for extension of time to demonstrate substantial service for Educational Broadband Service ("EBS") Station WNC589, located in the Austin, Minnesota area, and its associated request for waiver of the November 1, 2011 substantial service deadline. We also declare KSMQ's license to operate Station WNC589 terminated as of November 1, 2011.

II. BACKGROUND

2. 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 radically changed the band plan and technical and licensing rules applicable to EBS licenses and required EBS licensees to transition from their old channel locations to their new channel locations.

3. 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. Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011. The Commission defines substantial service as a level of service, which is sound,

1 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, 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).

2 Id.

3 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).

4 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 (continued...)

favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> Many EBS licensees have demonstrated substantial service by meeting this safe harbor.<sup>8</sup>

4. 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.<sup>9</sup>

5. The Wireless Telecommunications Bureau renewed the license for WNC589 on September 11, 2006.<sup>10</sup> The licensee at that time was Independent School District #492, which had constructed and begun operating an Instructional Television Fixed Service station under the license in 1995 but later shut the station down and informed the Bureau that it was exploring ways to revive the operation under the new regulatory framework that the Commission adopted in 2004.<sup>11</sup> On November 13, 2006, the licensee filed an application to transfer its license for WNC589 to Southern Minnesota Quality Broadcasting, Inc., and the transfer was consummated on March 26, 2007.<sup>12</sup> The assignee notified the Bureau on May 1, 2007 that it had changed its name to KSMQ Public Service Media, Inc.<sup>13</sup>

6. On November 1, 2011, KSMQ filed a timely request for an extension of time for WNC589 to demonstrate substantial service to May 1, 2012, along with a request for a waiver of the

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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*).

<sup>5</sup> 47 C.F.R. § 27.14(o).

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> The Wireless Telecommunications Bureau has accepted over 2,100 substantial service notifications from EBS licensees who complied with the November 1, 2011 deadline.

<sup>9</sup> See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB 2011).

<sup>10</sup> See File No. 0001955104 (granted Sep. 11, 2006).

<sup>11</sup> File No. 0001955104, Letter from Steven C. Schaffer, counsel for Independent School District #492, to Marlene H. Dortch, Secretary, Federal Communications Commission, April 28, 2005, regarding Request for Waiver of Former Section 74.932(d) of the Commission's Rules and Grant of Renewal File No. 0001955104. See *BRS/EBS R&O*, *supra* n.1.

<sup>12</sup> File No. 0002809139 (consented Nov. 14, 2006, consummated Mar. 26, 2007).

<sup>13</sup> File No. 0003013244 (filed May 1, 2007).

November 1, 2011 substantial service deadline.<sup>14</sup> KSMQ states that it is the licensee of noncommercial educational television station KSMQ in Austin, Minnesota, and that, since acquiring WNC589, it has attempted diligently either to find the resources to develop an EBS facility on its own or to engage a commercial lessee that would finance construction and provide a revenue stream sufficient to implement educational services.<sup>15</sup> Specifically, KSMQ says that it has spoken a number of times with the commercial lessee of an EBS station in Rochester, Minnesota, and has presented the argument that leasing WNC589 and extending its operation to Austin would be a logical move because the respective licenses share a community of interest.<sup>16</sup> KSMQ also reports that it has met with representatives of a local company that holds a BRS license and provides broadband connectivity in the area.<sup>17</sup> Finally, KSMQ states that Rochester Catholic Schools has recently completed construction of a new high school, has expressed an interest in partnering with KSMQ, and has just hired a new network administrator who will soon begin strategic planning.<sup>18</sup> However, KSMQ acknowledges that none of those discussions have yet borne fruit in the form of a commercial lease or other funding.<sup>19</sup> Meanwhile, KSMQ states that its public television station has experienced a decline in public support in the midst of difficult economic conditions, and has been forced to lay off some of its staff.<sup>20</sup> As a consequence, KSMQ has not been able to devote resources to constructing EBS facilities.<sup>21</sup> It asks for an extension of time to construct Station WNC589 until May 1, 2012.<sup>22</sup> In the alternative, KSMQ requests a waiver of the November 1, 2011 deadline.<sup>23</sup>

### III. DISCUSSION

7. An extension request for a coverage requirement may be granted “if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”<sup>24</sup> The Commission’s rules specifically prohibit granting an extension “due to delays caused by a failure to obtain financing . . .”<sup>25</sup> Viewed under these standards, we conclude that KSMQ has not justified an extension of time to construct.

8. We find that KSMQ’s inability to obtain financing is the cause of its inability to meet the November 1, 2011 deadline, and, thus, we conclude that KSMQ has not shown that its failure to construct is because of circumstances beyond its control. KSMQ has obviously made an earnest attempt to secure the necessary funding, but, as indicated above, the Commission’s Rules provide that inability to obtain financing is not a circumstance that is beyond a licensee’s control sufficient to justify a construction extension. Thus, we deny KSMQ’s request for an extension of time to construct.

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<sup>14</sup> File No. 0004935711, KSMQ Extension and Waiver Request (filed Nov. 1, 2011) (“Extension and Waiver Request”).

<sup>15</sup> Extension and Waiver Request at 1.

<sup>16</sup> Extension and Waiver Request at 1.

<sup>17</sup> Extension and Waiver Request at 1.

<sup>18</sup> Extension and Waiver Request at 2.

<sup>19</sup> Extension and Waiver Request at 1-2.

<sup>20</sup> Extension and Waiver Request at 1.

<sup>21</sup> Extension and Waiver Request at 1.

<sup>22</sup> Extension and Waiver Request at 1.

<sup>23</sup> Extension and Waiver Request at 1.

<sup>24</sup> 47 C.F.R. § 1.946(e)(1).

<sup>25</sup> See 47 C.F.R. § 1.946(e)(2).

9. In the alternative, KSMQ requests a waiver. To be granted a waiver of the November 1, 2011 substantial service deadline, KSMQ 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.<sup>26</sup>

10. We conclude that KSMQ has not shown that a waiver of the substantial service deadline is warranted in this case. First, KSMQ has not shown how granting a waiver furthers the underlying purpose of the substantial service requirement 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.”<sup>27</sup> KSMQ admits that it cannot construct Station WNC589 because it has been unable to secure a commercial lease or educational partnership and because of reductions in funding caused by general economic conditions.<sup>28</sup> We find that KSMQ’s argument that a grant of a waiver and an extension of time to construct will ensure that the Station WNC589 will be constructed by May 1, 2012, is speculative. While the spectrum associated with Station WNC589 will be returned to the Commission if the license is cancelled, which may result in a delay in placing the spectrum into use, it is equally true that we do not know if or when KSMQ will be able to put the spectrum to use. We do not know whether KSMQ will be able to secure a commercial lease or educational partnership, nor do we know whether improved economic conditions will result in increased funding for KSMQ from other sources. Because of this uncertainty, we find that KSMQ has not shown that a grant of its waiver request furthers the underlying purpose of the substantial service rules.

11. Second, KSMQ has not shown that cancelling its license to operate Station WNC589 is inequitable, unduly burdensome or contrary to the public interest. The only “unique circumstance” KSMQ demonstrates is its inability to obtain financing, which cannot serve as an excuse for failure to construct. KSMQ currently lacks the ability to construct and operate Station WNC589, and we do not know if or when KSMQ will acquire that ability. We therefore find that KSMQ has not shown that it is in the public interest to grant its waiver request. Thus, we find that KSMQ has not shown that a waiver is justified in this case.

12. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.<sup>29</sup> In light of our conclusion that grant of an extension to KSMQ is not in the public interest, we find that KSMQ’s license to operate Station WNC589 automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service. We therefore deny the Extension Application and Waiver Request.

#### IV. CONCLUSION AND ORDERING CLAUSES

13. KSMQ has failed to justify an extension of time to meet the substantial service deadline for Station WNC589 or to justify a waiver of the November 1, 2011 deadline for establishing substantial service. We therefore deny the Extension Application and the Waiver Request, and declare that KSMQ’s license to operate Station WNC589 automatically terminated as of November 1, 2011.

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<sup>26</sup> 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.

<sup>27</sup> *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, citing 47 U.S.C. § 309(j)(4)(B).

<sup>28</sup> Extension and Waiver Request at 1.

<sup>29</sup> See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

14. Accordingly, IT IS ORDERED that, 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 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the request for waiver and the application for extension of time to demonstrate substantial service (File No. 0004934021) filed by KSMQ Public Service Media, Inc., on November 1, 2011 IS DENIED.

15. 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 KSMQ Service Public Media, Inc. for Station WNC589 IS DECLARED TERMINATED as of November 1, 2011.

FEDERAL COMMUNICATIONS COMMISSION

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