

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

In the Matter of
LITTLE ROCK SCHOOL DISTRICT
Petition for Reconsideration for Educational
Broadband Service Station WLX953

ORDER ON RECONSIDERATION

Adopted: March 29, 2012

Released: March 30, 2012

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

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a petition filed by the Little Rock School District ("Little Rock") 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 WLX953 in "Termination Pending" status.

II. BACKGROUND

2. Little Rock is licensed to operate Educational Broadband Service ("EBS") station, WLX953, on the G-group channels in Little Rock, Arkansas. On September 1, 2004, Little Rock's license to operate Station WLX953 was renewed.

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 licenses and required EBS licensees to transition from their old channel locations to their new channel locations. 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. Also in 2004, the Commission sought comment on construction requirements for the newly created BRS and EBS services.

1 Little Rock School District, Petition for Reconsideration (filed Jan. 6, 2012) ("Petition").

2 File No. 20030429AAA (granted Sep. 1, 2004).

3 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).

4 Id.

5 See 47 C.F.R. § 27.5(i)(2).

6 BRS/EBS FNPRM, 19 FCC Rcd at 14265-14301 ¶¶ 320-332.

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.

5. On January 9, 2008, Nextel Spectrum Acquisition Corporation, a wholly-owned subsidiary of Sprint Nextel Corporation ("Sprint") filed an Initiation Plan to transition the Little Rock, Arkansas Basic Trading Area (BTA257), where Station WLX953 is located, from the old band plan to the new band plan.¹² Station WLX953 was included in the list of stations to be transitioned in BTA257.¹³ Then on June 10, 2008, Sprint filed a Post-Transition Notification, in which Sprint informed the Commission that it had completed the transition for BTA257.¹⁴ Sprint's Little Rock BTA Completion Letter shows that Station WLX953 was not operating at the time the transition was completed on June 10, 2008.¹⁵ Although Station WLX953 was included in the list of stations that were transitioned, the

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 Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jan. 9, 2008).

¹³ *Id.* at Exhibit A.

¹⁴ Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed June 10, 2008).

¹⁵ *Id.* at Schedules A and B.

Commission's Universal Licensing System shows that Little Rock has not modified its license to show that it is authorized to operate on the new G-group channels.¹⁶

6. On February 1, 2011, the Bureau sent a Reminder Notice to Little Rock reminding it of the upcoming deadline for demonstrating substantial service.¹⁷ The Reminder Notice notified Little Rock 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 WLX953 would be terminated automatically.¹⁸

7. 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, 2011.¹⁹ Little Rock, however, did not file a construction notification or request for extension of the deadline.

8. On December 7, 2011, the Bureau sent Little Rock an auto-termination letter²⁰ and Station WLX953 entered auto-termination status.²¹ 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."²² 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."²³

¹⁶ Under the old band plan, the G-group consisted of four six-megahertz wide non-contiguous channels located at 2644-2650 MHz (G1), 2656-2662 MHz (G2), 2668-2674 MHz (G3), and 2680-2686 MHz (C4). Under the new channel plan, G1, G2, and G3 are each 5.5-megahertz wide contiguous channels located in the Upper Band Segment at 2673.5-2679 MHz, 2679-2684.5 MHz, and 2684.5-2690 MHz, respectively. Channel G4 is six-megahertz wide and is located in the Middle Band Segment at 2596-2602 MHz.

¹⁷ Construct/Coverage Reminders, Ref. Nos. 5104211, 5104212 (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 Suellen Vann, Little Rock School District (dated Feb. 1, 2011). See Construction/Coverage Deadline Reminder Notice to Deanna Larson, Sprint (dated Feb. 1, 2011) (Collectively "Reminder Notice").

¹⁸ *Id.* at 1.

¹⁹ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB 2011).

²⁰ 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").

²¹ 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 Suellen Van, Little Rock School District, Ref. No. 529061 (dated Dec. 7, 2011). Construction/Coverage Deadline Notice of Termination Pending Status to Deanna Larsen, Sprint Ref. No. 529061 (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 3.

²² Auto-Termination Letter at 1.

²³ *Id.*

9. Little Rock filed the instant Petition on January 6, 2012.²⁴ Little Rock asks us to reconsider our decision to place the license for Station WLX953 on the “Termination Pending” list because their excess capacity commercial leases have expired and they are currently negotiating with commercial carriers for leasing rights to its excess capacity.²⁵

III. DISCUSSION

10. We conclude that it is not in the public interest to grant Little Rock’s petition for reconsideration. We deny Little Rock’s request to reconsider our decision to place the license for Station WLX953 on the “Termination Pending” list because Little Rock did not comply with the requirement specified by the Bureau in the Auto-Termination Public Notice. Little Rock was required to include the actual date when construction was completed in its petition for reconsideration.²⁶ Little Rock, however, has not constructed and thus, cannot comply with this requirement. We will therefore deny Little Rock’s Petition for Reconsideration.

11. We note that while Little Rock has not formally requested an extension of the November 1, 2011 substantial service deadline, the facts it has offered would not support an extension. 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.”²⁷ The Commission has consistently found that licensee business decisions are not circumstances beyond the licensee’s control and are not the basis for regulatory relief.²⁸ Moreover, the Commission has held that a licensee cannot rely on a third party’s failure to perform as justification for a construction extension.²⁹ In this case, it appears that Little Rock’s failure to meet the deadline was caused by its passive reliance on third parties, which is considered to be a matter within its control.

12. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.³⁰ In light of our conclusion that grant of Little Rock’s petition for

²⁴ Petition.

²⁵ Petition.

²⁶ 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).

²⁷ 47 C.F.R. § 1.946(e)(1).

²⁸ See, e.g., Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff’d sub nom.*, *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

²⁹ See e.g., Daniel R. Goodman, Receiver, *Memorandum Opinion and Order*, 10 FCC Rcd 8537, 8548 ¶ 24 (1995) (investor reliance on fraudulent company does not excuse compliance with Commission rules); Kansas City Wireless Partners LLP, *Letter*, 24 FCC Rcd 8625, 8627 (WTB MD 2009); Stephen E. Coran, Esquire, *Letter*, 22 FCC Rcd 1921, 1923 (WTB MD 2007) (reliance on third party for financing does not justify extension).

³⁰ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

reconsideration is not in the public interest, we find that Little Rock's license to operate Station WLX953 automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service.

IV. CONCLUSION AND ORDERING CLAUSES

13. Little Rock has failed to demonstrate that it has complied with the substantial service and educational use requirements associated with its license to operate Station WLX953. We therefore deny the Petition for Reconsideration and declare that Little Rock's license to operate Station WLX953 automatically terminated as of November 1, 2011.

14. 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 that the Petition for Reconsideration filed by the Little Rock School District on January 6, 2012 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 Little Rock School District for Station WLX953 IS DECLARED TERMINATED as of November 1, 2011.

16. 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