

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

In the Matter of)
)
ROCKTON SCHOOL DISTRICT)
)
Petition for Reconsideration, Waiver Request, and)
Request for Extension of Time to Construct)
Educational Broadband Service Station WNC464)
)

ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: April 2, 2012

Released: April 3, 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 Rockton School District (“Rockton”) 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 WNC464 in “Termination Pending” status. We also deny Rockton’s request for extension of time to demonstrate substantial service for incumbent Educational Broadband Service (“EBS”) Station WNC464 and request for a waiver of the November 1, 2011 substantial service deadline.

II. BACKGROUND

2. Rockton is licensed to operate EBS station, WNC464, on the C1 and C2 channels in Rockford, Illinois.¹ On June 16, 2004, Rockton’s license to operate Station WNC464 was renewed.² On August 11, 2004, Rockton submitted a “Certificate of Completion of Construction for an Instructional Television Fixed Service.”³

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.⁴ 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.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

¹ Rockton School District #140, Petition for Reconsideration, Extension and Waiver Request (filed Jan. 6, 2012) at 1 (“Petition” or “Waiver and Extension Request,” as appropriate).

² File No. 0001792517 (granted Jun. 16, 2004)..

³ Petition at Exhibit 2.

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, *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.*

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 Also in 2004, the Commission sought comment on construction requirements for the newly created BRS and EBS services.⁷

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.⁸ Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011.⁹ 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.¹⁰ 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.¹¹ 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.¹² Many EBS licensees have demonstrated substantial service by meeting this safe harbor.

5. On February 2, 2007, Sprint-Nextel Corporation ("Sprint") filed an Initiation Plan to transition the Rockford, Illinois Basic Trading Area (BTA380), where Station WNC464 is located, to transition all of the licensees in BTA380 from the old band plan to the new band plan.¹³ Station WNC464 was included in the list of stations to be transitioned in BTA380.¹⁴ Then on October 25, 2007, Sprint filed a Post-Transition Notification, in which Sprint informed the Commission that it had completed the

⁶ See 47 C.F.R. § 27.5(i)(2).

⁷ *BRS/EBS FNPRM*, 19 FCC Rcd 14165, 14265-14301 ¶¶ 320-332.

⁸ 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). 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*).

¹⁰ 47 C.F.R. § 27.14(o).

¹¹ 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).

¹² 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).

¹³ 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 ("Rockford BTA Initiation Letter").

¹⁴ *Id.* at Exhibit A.

transition for BTA380.¹⁵ Sprint's Rockford BTA Completion Letter shows that Station WNC464 was not operating at the time the transition was completed on October 25, 2007.¹⁶ Although Station WNC464 was included in the list of stations that were transitioned, the Commission's Universal Licensing System shows that Rockton has not modified its license to show that it is authorized to operate on the new C1 and C2 channels.¹⁷

6. On February 1, 2011, the Bureau sent a Reminder Notice to Rockton reminding it of the upcoming deadline for demonstrating substantial service.¹⁸ The Reminder Notice notified Rockton 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 WNC464 would be terminated automatically.¹⁹

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, 2011.²⁰ Rockton, however, did not file a construction notification or seek an extension of the deadline.

8. On December 7, 2011, the Bureau sent Rockton an auto-termination letter²¹ and Station WNC464 entered auto-termination status.²² 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

¹⁵ 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 Sept. 28, 2007) ("Rockford BTA Completion Letter").

¹⁶ *Id.* at Schedules A and B.

¹⁷ Under the old band plan, channels C1 and C2 were six-megahertz non-contiguous channels located at 2548-2554 MHz and at 2560-2566 MHz, respectively. Under the new channel plan, C1 and C2 are 5.5-megahertz contiguous channels located at 2535-2540.5 MHz and 2540.5-2546 MHz, respectively.

¹⁸ Construct/Coverage Reminders, Ref. Nos. 5103290, 5103291 (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 Rockton School District (dated Feb. 1, 2011); Construction/Coverage Deadline Reminder Notice to James A. Stenger Thelen Reid & Priest LLP (dated Feb. 1, 2011).

¹⁹ *Id.* at 1.

²⁰ *See* National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB 2011).

²¹ 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").

²² 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 Rockton School District, Ref. No. 5269086 (dated Dec. 7, 2011). Construction/Coverage Deadline Notice of Termination Pending Status to James A. Stenger, Thelen Reid & Priest, Ref. No. 5269086 (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.

Petition for Reconsideration . . . showing that it met the construction or coverage deadline.²³ 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.”²⁴

9. Rockton filed the instant Petition on January 6, 2012.²⁵ Rockton asks us to reconsider our decision to place the license for Station WNC464 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 WNC464 or to at least April 29, 2012 if such grant is on public notice at least 45 days before that date so Rockton can implement its facilities in a timely manner.²⁶ Rockton states that it intends to work with Utopian Wireless Corporation to deploy a point-to-point link within the Geographic Service Area (“GSA”) of Station WNC464.²⁷ Rockton points to other instances where the Bureau has granted extensions of the November 1, 2011 substantial service deadline.²⁸

III. DISCUSSION

10. First, we deny Rockton’s request to reconsider our decision to place the license for Station WNC464 on the “Termination Pending” list because Rockton did not comply with the requirement specified by the Bureau in the Auto-Termination Public Notice. Rockton was required to include the actual date when construction was completed in its petition for reconsideration.²⁹ Rockton, however, has not constructed and thus, cannot comply with this requirement.

11. Moreover, we conclude that Rockton has not shown that a waiver of the November 1, 2011 deadline for providing substantial service or for requesting an extension of time to construct is warranted. To be granted a waiver, Rockton 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.³⁰

12. We find that Rockton 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.”³¹ On the contrary, the actions of Rockton show that it will not put this spectrum to use.

²³ *Id.* at 1.

²⁴ *Id.*

²⁵ Petition.

²⁶ Petition at 2.

²⁷ Waiver and Extension Request at 2.

²⁸ Petition at 2.

²⁹ 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).

³⁰ 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.

³¹ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

Rockton did not meet the November 1, 2011 deadline and has failed to present any information to persuade us not to strictly enforce the deadline. Rockton argues that it missed the construction deadline because it had not leased Station WNC464's excess capacity to a commercial operator who would have been responsible for not only for constructing Station WNC464, but also for knowing the regulatory requirements applicable to Station WNC464.³² 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.³³ In this case, it appears that Rockton's failure to meet the deadline was caused by its failure to become familiar with our regulatory requirements or to act promptly to provide service, which is considered to be a matter within its control.

13. We also deny Rockton's request for an extension of time to construct because we conclude that Rockton 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.³⁴ We reject Rockton'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.³⁵ 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.³⁶ Rockton fails to show that it tried to lease Station WNC464 or construct Station WNC464 on its own. Thus, we find that Rockton's own inaction, and not circumstances beyond its control, prevented it from constructing a system and offering service to its students. We therefore deny Rockton's request for an extension of time to construct.³⁷ Despite Rockton'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 Rockford, Illinois, we find that a grant of Rockton's petition and waiver and extension requests are not in the public interest.³⁸

14. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.³⁹ In light of our conclusion that grant of Rockton's extension request is not in the public interest, we find that Rockton's license to operate Station WNC464

³² See Petition at 1.

³³ 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).

³⁴ 47 C.F.R. § 1.946(e)(1).

³⁵ Waiver and Extension Request at 2.

³⁶ 47 C.F.R. § 1.946(e)(2).

³⁷ Rockton is readily distinguishable from those applicants who received extensions of the November 1, 2011. Unlike Rockton 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).

³⁸ Petition at 2; Waiver and Extension Request at 1.

³⁹ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service. We will therefore deny the Petition for Reconsideration, Extension and Waiver Request.

IV. CONCLUSION AND ORDERING CLAUSES

15. Rockton has failed to justify an extension of time to meet the substantial service deadline for Station WNC464 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 Rockton's license to operate Station WNC464 automatically terminated as of November 1, 2011.

16. 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 Rockton School District on January 6, 2012 ARE DENIED.

17. 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 Rockton School District for Station WNC464 IS DECLARED TERMINATED as of November 1, 2011.

18. 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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