



Federal Communications Commission  
Washington, D.C. 20554

January 4, 2012

DA 12-7

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Dear Ms. Repp:

On October 26, 2011, Saint Michael's College ("Saint Michael's") filed substantial service showings for each of its Educational Broadband Service ("EBS") stations: WLX631, WLX640, WLX705, WLX706, WLX729, WLX933, and WLX936 (referred to collectively as the "Stations") located in the Burlington, Vermont area.<sup>1</sup> On November 14, 2011, Saint Michael's amended the Substantial Service Showings to request a waiver of section 27.14(o)(4) of the Commission's Rules to make one combined showing for all seven Stations.<sup>2</sup> For the reasons stated below, we grant the Waiver Request, find that Saint Michael's has demonstrated substantial service for the Stations, and dismiss as moot requests for extension of time to demonstrate substantial service.

*Background.* Each of the Stations is authorized to operate on Channels D1-D4. On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM*, which fundamentally transformed the rules for the 2500-2690 MHz band.<sup>3</sup> In the *BRS/EBS R&O*, the Commission adopted a band plan that restructured the 2500-2690 MHz band into upper and lower-band segments for low-power operations, and a mid-band segment for high-power operations, in order to reduce the likelihood of interference caused by incompatible uses. Also, the Commission replaced the existing scheme of requiring a licensee to file a separate application for each station with a scheme under which each licensee received an exclusive geographic service area (GSA) within which it could place transmitters without prior Commission approval, subject to compliance with the Commission's technical rules.<sup>4</sup> The Commission also established a process, known as "splitting-the-football," for dividing overlapping GSAs between incumbent BRS and EBS licensees.<sup>5</sup>

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<sup>1</sup> File nos.: 0004929279 (Station WLX631); 0004929280 (Station WLX640); 0004929281 (Station WLX705); 0004929282 (Station WLX706); 0004929283 (Station WLX729); 0004929284 (Station WLX933); and 0004929285 (Station WLX936) (filed Oct. 26, 2011) ("collectively, "Substantial Service Showings").

<sup>2</sup> Demonstration of Substantial Service or, in the Alternative, Request for Waiver and/or Extension of Time at 1 (filed Nov. 14, 2011) ("Waiver Request") at 2.

<sup>3</sup> 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).

<sup>4</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14189-14190 ¶ 54.

<sup>5</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14192 ¶ 60.

Marissa G. Repp, Esq.

Between July 15, 2002 and August 10, 2003, Saint Michael's let the licenses for the Stations expire.<sup>6</sup> On January 12, 2007, Saint Michael's filed late-filed renewal applications for the Stations, along with a request for waiver.<sup>7</sup> On June 16, 2009, the Broadband Division ("Division") of the Wireless Telecommunications Bureau ("Bureau") granted Saint Michael's waiver request (among others), but with a condition stating that it could not split the football with another co-channel licensee whose license was in active status on January 10, 2005 and the date Saint Michael's late-filed renewal applications were granted.<sup>8</sup> The Division specifically rejected an argument made by Saint Michael's and others that not allowing them to split the football would be inequitable because its GSAs would not cover its campus.<sup>9</sup> As a result, the GSAs of the Stations had the following area and population:<sup>10</sup>

Call Signs	Area (sq mi)	Population
WLX631	74.73946	0
WLX640	1259.575	19001
WLX705	325.1313	6196
WLX706	546.8809	8799
WLX729	145.1506	3756
WLX933	1161.12	48981
WLX936	2260.723	60306

All EBS licensees were required to demonstrate substantial service by November 1, 2011.<sup>11</sup> On October 26, 2011, Saint Michael's filed its Substantial Service Showings. In the Substantial Service Showings, as originally filed, Saint Michael's attached to each of its applications a map showing that the Geographic Service Areas ("GSAs") of five stations WLX631, WLX640, WLX936, WLX933, and WLX729 (collectively referred to as the "Adjacent Stations") overlap such that Station WLX640 splits the football<sup>12</sup> with Stations WLX631 and WLX936, while Station WLX936 splits the football with Stations WLX640, WLX933, and WLX729.<sup>13</sup> Stations WLX705 and WLX706 (collectively referred to as the "Non-adjacent Stations") are not adjacent to the other five stations, but are adjacent to each other and overlap; consequently, Station WLX705 splits the football with Station WLX706.<sup>14</sup> Saint Michael's asks the Wireless Telecommunications Bureau ("Bureau") to permit it to make one substantial service showing under Section 27.14(o)(4) based on the combined license area for the five Adjacent Stations.<sup>15</sup> In addition, Saint Michael's asks for a waiver of Section 27.14(o)(4) of the Commission's Rules to allow

<sup>6</sup> See 116 Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108, 8121 (2009) ("*116 Late-Filed Applications MO&O*").

<sup>7</sup> File Nos. 0002880358-0002880364.

<sup>8</sup> *116 Late-Filed Applications MO&O, supra*, 24 FCC Rcd at 8118 ¶ 29.

<sup>9</sup> *Id.* at 8117-8118 ¶ 28.

<sup>10</sup> Waiver Request at 2.

<sup>11</sup> See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 (WTB 2011).

<sup>12</sup> "Split-the-football" refers to the process described in Section 27.1206 of the Commission's Rules in which Protected Service Areas ("PSAs"), including overlapping co-channel adjacent PSAs, were converted to Geographic Service Areas ("GSAs") on January 10, 2005. The boundaries of the GSAs of adjacent co-channel licensees with overlapping PSAs was determined by drawing a chord between the intersection points of their respective PSAs.

<sup>13</sup> See Substantial Service Showings, Map.

<sup>14</sup> File nos. 0004929281 (Station WLX705) and 0004929282 (Station WLX706).

<sup>15</sup> Waiver Request at 1-2.

Marissa G. Repp, Esq.

it to make a combined showing for the Adjacent Stations and the Non-adjacent Stations.<sup>16</sup> In the alternative, Saint Michael's asks the Bureau for a six-month extension of time to permit it to establish substantial service for each of its seven licenses.<sup>17</sup>

*Waiver Request.* Although, generally, licensees are required to demonstrate substantial service on an individual license basis,<sup>18</sup> Section 27.14(o)(4) of the Commission's Rules permits licensees to make a combination showing if the GSA of the station is less than 1,924 square miles in size and there is an overlapping co-channel station licensed or leased by the licensee of its affiliate.<sup>19</sup> With respect to the Adjacent Stations, we find that those stations are eligible for a combined showing because each of the Adjacent Stations, except for Station WLX936, has a GSA smaller than 1,924 square miles, and each of the other stations overlaps with Station WLX936 or with stations that overlap with Station WLX936.<sup>20</sup>

With respect to the Non-adjacent Stations, Saint Michaels would require a waiver to make a combined showing with the Adjacent Stations. We reject Saint Michael's argument that because both Saint Michael's and the National Conference on Citizenship ("NCOC"), the licensee of Station WLX828, lease excess capacity to Clearwire they are affiliates and thus Saint Michael's can combine the GSAs of the Non-adjacent Stations with the GSAs of the Adjacent Stations under Section 27.14(o)(4).<sup>21</sup> We conclude that Saint Michael's and NCOC are not affiliates just because they lease excess capacity to the same lessee.

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 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>22</sup> In this case, we conclude that Saint Michael's has justified a waiver request under the second prong of the waiver standard. The GSAs of Saint Michael's Stations are severely reduced in size, oddly shaped, and contain very few people and very few schools.<sup>23</sup> Together, the seven GSAs contain less area than two regular licenses that would not have to split the football.<sup>24</sup> Also as a consequence of converting PSAs to GSAs, Saint Michael's own campus is no longer located in the GSA of any of the Stations.<sup>25</sup> Thus, it must rely on other educational entities to meet the educational use requirements of Section 27.1203 and Section 27.1214 of the Commission's Rules.<sup>26</sup> Saint Michael's reports that it and its lessee, Clearwire Corporation, contacted every educational entity in the GSAs of the Stations to offer them access to devices for educational use, but there are very

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<sup>16</sup> *Id.* at 2.

<sup>17</sup> File Nos. 0004929268- 0004929274 (filed Oct. 26, 2011) ("Extension Applications").

<sup>18</sup> See 47 C.F.R. § 27.14(o).

<sup>19</sup> 47 C.F.R. § 27.14(o)(4).

<sup>20</sup> See 47 C.F.R. § 27.14(o)(4).

<sup>21</sup> See Waiver Request at 2.

<sup>22</sup> 47 C.F.R. § 1.925(b)(3).

<sup>23</sup> Waiver Request at 2, 4, Map.

<sup>24</sup> Together, the seven GSAs total approximately 5,773 square miles. An EBS GSA that does not have to split the football covers approximately 3,848 square miles ( $\pi \times 35 \text{ miles}^2$ ).

<sup>25</sup> See *116 Late-Filed Applications MO&O*, *supra*, 24 FCC Red at 8117-8118 ¶ 28.

<sup>26</sup> 47 C.F.R. §§ 27.1203, 27.1214.

Marissa G. Repp, Esq.

few schools located within any of the GSAs of the Stations.<sup>27</sup> In addition, because the State of Vermont highly regulates the siting of cell towers, it has been very difficult for Saint Michael's to find tower locations and to otherwise locate antennas within the GSAs.<sup>28</sup> Thus, Saint Michael's reports it has only been able to establish educational use at three schools all located within the GSA of Station WLX936.<sup>29</sup> Finally, as explained further below, Saint Michael's has considerably exceeded the minimum requirements to demonstrate substantial service using the EBS-specific safe harbor contained in Section 27.14(o)(2) of the Commission's Rules.<sup>30</sup> Under those circumstances, we conclude that it would be inequitable and contrary to the public interest to require Saint Michaels to demonstrate educational use within the GSAs of the Non-adjacent Stations. We therefore waive Section 27.14(o)(4) of the Commission's Rules to allow Saint Michaels' to make a combined substantial service showing for all seven of its Stations.

*Substantial Service Showing.* Saint Michaels reports that it operates devices and has granted access to those devices to three schools within the GSA of Station WLX936: North Country Union High School's North Country Career Center, Lyndon Institute, and St. Johnsbury Academy.<sup>31</sup> The three schools are accredited institutions, accessing broadband mobile devices that operate on Clearwire's wireless broadband network operating within Saint Michael's combined GSA.<sup>32</sup> Specifically, the Educational Entities utilize Clearwire's broadband network operating on BRS/EBS channels that includes spectrum licensed under the Stations within the combined GSA of the License.<sup>33</sup> Each of the Educational Entities access the four devices that are available to and used by the schools' administration, faculty, staff and students for school-related purposes at least 80 hours a week, for at least 320 hours a week.<sup>34</sup> Regular use includes school-related educational reference and research, data transmissions, and uploading and downloading of educational content that furthers the educational mission of the school system.<sup>35</sup> Saint Michael's also reports that it has installed two weather stations and security cameras at a Clearwire transmission tower in Barnett, Vermont that the schools noted above use in their science classrooms and to assess weather conditions.<sup>36</sup>

The Commission established a series of "safe harbors" that EBS licensees could use to demonstrate substantial service.<sup>37</sup> The Commission established a specific safe harbor based on educational use.<sup>38</sup> Specifically:

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<sup>27</sup> Waiver Request at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See 47 C.F.R. § 27.14(o)(2).

<sup>31</sup> Waiver Request at 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, *et al.*, 21 FCC Rcd 5606, 5722-5728 ¶¶ 281-292 (2006).

<sup>38</sup> *Id.* at 5727-5728 ¶ 292.

Marissa G. Repp, Esq.

An EBS licensee has provided “substantial service” when:

- (i) The EBS licensee is using its spectrum (or spectrum to which the EBS licensee's educational services are shifted) to provide educational services within the EBS licensee's GSA;
- (ii) the EBS licensee's license is 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; or
- (iii) the level of service provided by the EBS licensee meets or exceeds the minimum usage requirements specified in §27.1214.<sup>39</sup>

Saint Michael’s has met each element of the EBS educational use safe harbor. Its spectrum is being used to provide educational services to accredited schools providing formal education located within the GSA of its combined licenses. Furthermore, the 320 hours of weekly use of the Stations’ four channels by the local schools well exceeds the 20 hours per channel per week standard established in Section 27.1214 of the Commission’s Rules.<sup>40</sup> Since Saint Michaels has demonstrated substantial service for its Stations, we will direct the licensing staff of the Broadband Division to dismiss its Extension Applications as moot.

*Conclusion.* We grant Saint Michaels a waiver to allow it to make a combined substantial service showing for each of its Stations. We then conclude that Saint Michaels has demonstrated substantial service for its Stations pursuant to the EBS educational use safe harbor. Finally, we dismiss the Extension Applications filed by Saint Michaels as moot.

Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.946(d) and 27.14(o) of the Commission’s Rules, 47 C.F.R. §§ 1.946(d), 27.14(o), that the WLX631, WLX640, WLX705, WLX706, WLX729, WLX933, WLX936 Demonstration of Substantial Service or, in the Alternative, Request for Waiver and/or Extension of Time filed by Saint Michael’s College on November 14, 2011 IS GRANTED to the extent indicated.

IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.946(d) and 27.14(o) of the Commission’s Rules, 47 C.F.R. §§ 1.946(d), 27.14(o), that the licensing staff of the Broadband Division SHALL ACCEPT the notifications of completion of construction filed by Saint Michael’s College on October 26, 2011, as amended on November 14, 2011 (File Nos. 0004929279-0004929285).

IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.946(e) of the Commission’s Rules, 47 C.F.R. §§ 1.946(e), 27.14(o), that the licensing staff of the Broadband Division SHALL DISMISS AS MOOT the requests for

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<sup>39</sup> 47 C.F.R. § 27.14(o)(2).

<sup>40</sup> 47 C.F.R. § 27.1214.

Marissa G. Repp, Esq.

extension of time to complete construction filed by Saint Michael's College on October 26, 2011 (File Nos. 0004929268-0004929274).

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

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