

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

In the Matter of )
NOWATA PUBLIC SCHOOLS )
Petition for Reinstatement of License for )
Educational Broadband Service Call Sign )
WLX596 and Late-Filed Request for Extension of )
Substantial Service Deadline )

ORDER ON RECONSIDERATION

Adopted: September 24, 2013

Released: September 25, 2013

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

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss a late filed petition for "reinstatement" of an Educational Broadband Service (EBS) license that automatically terminated on November 1, 2011 for failure to demonstrate substantial service, and dismiss a request for extension of the now defunct license's substantial service deadline.

II. BACKGROUND

2. On July 13, 1992, the petitioner, Nowata Public Schools (Nowata), received a new license for EBS Station WLX596 (the Station).1 On April 27, 2006, the Commission adopted new construction requirements applicable to all Broadband Radio Service (BRS) and EBS licensees, which were codified at Section 27.14(o) of the Commission's Rules.2 Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011,3 which the Wireless Telecommunications Bureau ("Bureau") subsequently extended for all EBS licensees to November 1, 2011.4 On February 1, 2011, the Bureau sent Nowata a construction/coverage reminder letter.5

3. Nowata did not file a construction notification or request for extension of the substantial service deadline. On December 7, 2011, a license auto-termination letter was sent6 and the Station

1 See File No. BPIF-19911206DE (granted July 13, 1992).

2 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, WT Docket No. 03-66, Second Report and Order, 21 FCC Rcd 5606, 5718-5736 ¶¶ 274-310 (2006) (BRS/EBS Second R&O).

3 47 C.F.R. § 27.14(o). See also BRS/EBS Second R&O, 21 FCC Rcd at 5718-5736 ¶¶ 274-310.

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

5 Construct/Coverage Reminders, Ref. Nos. 5104476 and 5104477(Feb. 1, 2011).

6 Auto Termination letter, Ref. No. 5269074 (Dec. 7, 2011).

entered termination pending status.<sup>7</sup> Accordingly, on the same day, the Bureau provided public notice of the pending license termination.<sup>8</sup> On February 12, 2012, the Universal Licensing System was updated to reflect that the license for the Station terminated as of November 1, 2011.

4. On August 27, 2013, Nowata filed the instant request for reinstatement of its license and late-filed request for an extension of the construction deadline seeking and a six-month period to construct its license.<sup>9</sup> Nowata states that it originally entered into a lease agreement with Heartland Wireless (which later became Nucentrix Spectrum Networks, Inc.) for the construction of its facilities.<sup>10</sup> After Nucentrix's bankruptcy, in 2010, Nowata then entered into a new lease agreement with Xanadoo EBS Spectrum Holdings, LLC (Xanadoo), again, for the construction of its facilities.<sup>11</sup> Xanadoo also encountered financial difficulties and failed to construct Nowata's license by the required deadline of November 1, 2011.<sup>12</sup> Nowata states that Fred Bailey, its former Superintendent who was in charge of preservation of its EBS license, retired on June 8, 2012 and did not inform members of the Board of Education of Xanadoo's failure to construct or to take any action to preserve Nowata's EBS license.<sup>13</sup> Nowata also states that Mr. Bailey's failure to preserve the license was brought to its attention by Wave Wireless, LLC, with whom it has entered into a new leasing agreement for the construction of its EBS facilities within six months of the reinstatement of its license.<sup>14</sup> Nowata argues that its unique circumstances, *i.e.*, the failure of an employee to properly perform his responsibilities, justifies a waiver pursuant to section 1.925 of the Commission's Rules.<sup>15</sup> It further argues that it qualifies for an extension of the substantial service deadline pursuant to section 1.946(e)(1) of the Commission's Rules because it has experienced circumstances beyond the Board's control.<sup>16</sup>

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<sup>7</sup> 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).

<sup>8</sup> Wireless Telecommunications Bureau Site Based Licenses Termination Pending, Report No. 7360, *Public Notice* (Dec. 7, 2011) at 3.

<sup>9</sup> Request for Reinstatement of License and Late-Filed Request for Extension of Substantial Service Deadline (filed Aug. 27, 2013) (Reinstatement and Extension Request).

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 4.

### III. DISCUSSION

5. We will dismiss Nowata's Petition as untimely. The Commission has eliminated reinstatement for wireless licenses, including EBS licenses.<sup>17</sup> Therefore, we will treat Nowata's filing as a petition for reconsideration of the termination of Nowata's license due to its failure to meet the build-out requirements. Section 405(a) of the Communications Act, as implemented by Section 1.106(f) of the Commission's Rules, requires that a petition for reconsideration be filed within thirty days from the date of public notice of Commission action.<sup>18</sup> Computation of the thirty-day period is determined in accordance with Section 1.4 of the Commission's Rules.<sup>19</sup> Since public notice of the impending license termination was given on December 7, 2011, pursuant to Section 1.4(b)(4) of the Commission's Rules, the first day to be counted in computing the thirty-day period was December 8, 2011. The last day for filing a petition for reconsideration was January 6, 2012. Nowata's Request was received on August 27, 2013, over eighteen months after the deadline for seeking reconsideration.<sup>20</sup> Therefore, we find that the Petition was filed late.

6. We also conclude that the circumstances described by Nowata do not justify a waiver of the filing deadline for seeking reconsideration. The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission is without authority to extend or waive the statutory thirty-day filing period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act,<sup>21</sup> except where "extraordinary circumstances indicate that justice would thus be served."<sup>22</sup> Nowata has not demonstrated that the negligence of a former employee amounts to extraordinary circumstances that would justify a waiver.

7. Nowata is responsible for the actions of its employees, and there is nothing unique or unusual regarding employee negligence.<sup>23</sup> Moreover, the Commission has consistently denied waivers based upon claims of third party negligence.<sup>24</sup> It is the responsibility of the licensee to ensure that it is in compliance with the terms of its license, and Nowata is responsible for the consequences that flow from the management of its own business affairs. In this regard, we note that Mr. Bailey retired over a year

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<sup>17</sup> Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027, 21071 ¶ 96 (1998), *recon. denied Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476, 11485-11486 ¶¶ 21-22 (1999).

<sup>18</sup> 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

<sup>19</sup> 47 C.F.R. § 1.4.

<sup>20</sup> *See* Reinstatement and Extension Request.

<sup>21</sup> *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951-952 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

<sup>22</sup> *Gardner v. FCC, supra*, 530 F.2d at 1091.

<sup>23</sup> *See* SoFast Internet Services, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 10126, 10134 ¶ 18 (WTB ASAD 2006).

<sup>24</sup> *See* Southern Communications Systems, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 25103, 25107 ¶ 10 (2000) (holding that a failure to appropriately organize and manage business arrangements does not justify waiver of the automatic cancellation rule), *further recon. denied, Second Memorandum and Opinion*, 16 FCC Rcd 18357 (2001); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 2330, 2335 ¶ 8 (1997) (holding that a failure of a third party to perform its contractual obligation does not constitute a special circumstance justifying a waiver of the down payment default rule), *review denied sub nom. BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003); PanAmerican Interactive Corp., *Order*, 18 FCC Rcd 15314, 15318 (WTB ASAD 2003) (holding that a licensee is responsible for the consequences that flow from its business decisions).

before an outside company brought the cancelled license to Nowata's attention.<sup>25</sup> Therefore, it appears that Nowata did not even appoint a successor to attend to matters of its EBS authorization and thus was not diligent in preserving its license. Nowata's lack of effort in regards to its license is further exemplified by the fact that the license expired on July 13, 2012, after Mr. Bailey's departure, but the Board did not even take any action to renew the license. Thus, even if Mr. Bailey had secured an extension of the substantial service deadline, the license would have lapsed in any case.<sup>26</sup> Consequently, we cannot find that the requisite extraordinary circumstances exist to justify our waiving the deadline for filing a petition for reconsideration.<sup>27</sup> Additionally, because we find there is no license to construct, Nowata's request for an extension of the substantial service deadline is moot.

#### IV. CONCLUSION AND ORDERING CLAUSES

8. Nowata has failed to justify a waiver of the filing deadline for a petition for reconsideration. Furthermore, because Nowata's license has been cancelled, there is no substantial service deadline to extend. We therefore dismiss Nowata's Reinstatement and Extension Request, and dismiss its request for an extension of the substantial service deadline as moot.

9. 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, the Request for Reinstatement of License and Late-Filed Request for Extension of Substantial Service Deadline filed by Nowata Public Schools on August 28, 2012 IS DISMISSED.

10. IT IS ALSO 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 section 1.946(e) of the Commission's Rules, 47 C.F.R. § 1.946(e), the request for a six-month extension of the substantial service deadline filed by Nowata Public Schools on August 28, 2012 IS DISMISSED AS MOOT.

11. This action is 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  
Wireless Telecommunications Bureau

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<sup>25</sup> Reinstatement and Extension Request at 3.

<sup>26</sup> See 47 C.F.R. § 1.955(a)(1) ("Authorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed.")

<sup>27</sup> Moreover, even if Nowata's filing was timely, based on the facts presented, we would deny its request for additional time to demonstrate substantial service. Nowata has not met the standard for an extension of time pursuant to 47 C.F.R. § 1.946(e) or for a waiver pursuant to 47 C.F.R. § 1.925(b)(3). Nowata's citation of Unified School District #392, *Memorandum Opinion and Order*, 28 FCC Rcd 6373 (WTB BD 2013) (Reinstatement and Extension Request at 3 n.5) is inapposite. In that case, the Broadband Division granted a waiver to allow consideration of a late-filed renewal application. The bases for granting the waiver were that the licensee had overall been diligent in complying with the Commission's rules and that it was currently providing educational broadband service. *Id.* at 6374-6375 ¶¶ 7-8. Neither factor is present here.