

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

In the Matter of)
UNIVERSITY OF MONTEVALLO) File No. 0004934021
Application for Waiver and Extension of Time to)
Meet Substantial Service Requirement for)
Educational Broadband Radio Service Station)
WND520)

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2012

Released: April 2, 2012

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the University of Montevallo ("Montevallo") request for extension of time to demonstrate substantial service for Educational Broadband Service ("EBS") Station WND520, located in the Montevallo, Alabama area, and its associated request for waiver of the November 1, 2011 substantial service deadline. We also declare Montevallo's license to operate Station WND520 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.1 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.2

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.3 Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011.4 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

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

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, 2011.⁹

5. On July 24, 2009, Montevallo filed an application to renew Station WND520.¹⁰ The Wireless Telecommunications Bureau granted that application on September 1, 2009.¹¹

6. On October 31, 2011, Montevallo filed a timely request for an extension of time to demonstrate substantial service to September 28, 2012 and a request for a waiver of the November 1, 2011 substantial service deadline.¹² Montevallo states that it has experienced unforeseen reductions in support from the State of Alabama and from other sources due to the unforeseen downturn in the economy.¹³ Montevallo asks for an extension of time to construct Station WND520 until September 28, 2012.¹⁴ In the alternative, Montevallo requests a waiver of the November 1, 2011 deadline.¹⁵

(...continued from previous page)

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*).

⁵ 47 C.F.R. § 27.14(o).

⁶ 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).

⁷ 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).

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

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

¹⁰ File No. 0003912753.

¹¹ File No. 0003912753.

¹² University of Montevallo Extension and Waiver Request (filed Oct. 31, 2011) ("*Extension and Waiver Request*").

¹³ Extension and Waiver Request at 1.

¹⁴ Extension and Waiver Request at 1.

¹⁵ Extension and Waiver Request at 1.

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.”¹⁶ The Commission’s rules specifically prohibit granting an extension due to delays caused by a failure to obtain financing . . .¹⁷ Viewed under these standards, we conclude that Montevallo has not justified an extension of time to construct.

8. We find that Montevallo’s inability to obtain financing is the cause of its inability to meet the November 1, 2011 deadline, and, thus, we conclude that Montevallo has not shown that its failure to construct is because of circumstances beyond its control. Montevallo admits that it has not constructed Station WND520 because of reductions in funding from the State of Alabama and from other sources due to the current economic climate.¹⁸ As indicated above, inability to obtain financing is not a circumstance beyond a licensee’s control under the Commission’s Rules and cannot justify a construction extension. Thus, we deny Montevallo’s request for an extension of time to construct.

9. In the alternative, Montevallo requests a waiver. To be granted a waiver of the November 1, 2011 construction deadline, Montevallo 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.¹⁹

10. We conclude that Montevallo has not shown that a waiver of the substantial service deadline is warranted in this case. First, Montevallo 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.”²⁰ Montevallo admits that it cannot construct Station WND520 because of reductions in funding caused by general economic conditions.²¹ We find that Montevallo’s argument that a grant of a waiver and an extension of time to construct will ensure that the Station WND520 will be constructed by September 28, 2012, is speculative. While the spectrum associated with Station WND520 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 Montevallo will be able to put the spectrum to use. We do not know whether the State of Alabama will restore Montevallo’s funding to the level that Montevallo had previously anticipated, nor do we know whether improved economic conditions will result in increased funding for Montevallo from other sources. Because of this uncertainty, we find that Montevallo has not shown that a grant of its waiver request furthers the underlying purpose of the substantial service rules.

11. Second, Montevallo has not shown that cancelling its license to operate Station WND520 is inequitable, unduly burdensome or contrary to the public interest. The only “unique circumstance”

¹⁶ 47 C.F.R. § 1.946(e)(1).

¹⁷ See 47 C.F.R. § 1.946(e)(2).

¹⁸ Extension and Waiver Request at 1.

¹⁹ 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.

²⁰ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

²¹ Extension and Waiver Request at 1.

Montevallo demonstrates its inability to obtain financing, which cannot serve as an excuse for failure to construct. Montevallo currently lacks the ability to construct and operate Station WND520, and we do not know if or when Montevallo will acquire that ability. We therefore find that Montevallo has not shown that it is in the public interest to grant its waiver request. Thus, we find that Montevallo 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.²² In light of our conclusion that grant of an extension to Montevallo is not in the public interest, we find that Montevallo's license to operate Station WND520 automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service. We will therefore deny the Extension Application and Waiver Request.

IV. CONCLUSION AND ORDERING CLAUSES

13. Montevallo has failed to justify an extension of time to meet the substantial service deadline for Station WND520 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 Montevallo's license to operate Station WND520 automatically terminated as of November 1, 2011.

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 the University of Montevallo on October 31, 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 University of Montevallo for Station WND520 IS DECLARED TERMINATED as of November 1, 2011.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

²² See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).