

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

In the Matter of)
XANADOO, LLC, DEBTOR-IN-POSSESSION) File Nos. 0004941957, 000470165
Applications for Waiver and Extension of Time to)
Meet Substantial Service Requirement for)
Commercial Educational Broadband Radio)
Service Stations WMX703 and WMX704)

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2012

Released: April 4, 2012

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny Xanadoo, LLC, Debtor-in-Possession's ("Xanadoo") request for extension of time to demonstrate substantial service for Commercial Educational Broadband Service ("C-EBS") Stations WMX703 and WMX704, located in the Parkersburg, West Virginia area, and its associated request for waivers of the November 1, 2011 substantial service deadline. We also declare Xanadoo's licenses to operate Stations WMX703 and WMX704 terminated as of November 1, 2011.

II. BACKGROUND

2. The Educational Broadband Service ("EBS") is 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 and is generally restricted to entities that meet the educational criteria in the Commission's Rules; the remaining 73.5 megahertz of spectrum in the band is allocated to the Broadband Radio Service ("BRS"), a commercial service, and to two four-megahertz guard bands. In 2004, the Commission transformed 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 and required BRS and EBS licensees to transition from their old channel locations to their new channel locations. In addition, in 2006, the Commission "grandfathered" commercial licensees that had been authorized under the old rules to operate on educational channels. These licensees are now known as Commercial EBS licensees.

1 47 C.F.R. § 27.5(i)(2).

2 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).

3 Id.

4 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, (continued...)

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.⁶ Under Section 27.14(o), all BRS, EBS, and Commercial EBS licensees were required to demonstrate substantial service on or before May 1, 2011.⁷ 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.⁸ A BRS or Commercial 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.⁹

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, 2011.¹⁰

5. On April 4, 2011, Xanadoo filed applications to renew Stations WMX703 and WMX704.¹¹ The Wireless Telecommunications Bureau granted both renewal applications on June 1, 2011.¹²

6. On November 7, 2011, Xanadoo filed a request for an extension of time to demonstrate substantial service to May 1, 2012 or six months after Xanadoo emerges from bankruptcy and a request for a waiver of the November 1, 2011 substantial service deadline.¹³ Xanadoo, a BRS and C-EBS licensee and an EBS lessee, has constructed and is operating commercial grade wireless broadband facilities providing high speed mobile wireless broadband services to the public utilizing spectrum from 13 leased EBS stations in six markets within the United States.¹⁴ Xanadoo filed for Chapter 11

(...continued from previous page)

Second Report and Order, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5762 ¶ 366 (2006) (*BRS/EBS Second Report and Order*).

⁵ See 47 C.F.R. § 27.4.

⁶ 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*).

⁷ 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*).

⁸ 47 C.F.R. § 27.14(o).

⁹ 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).

¹⁰ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB/2011) ("*EBS Extension Order*").

¹¹ File Nos. 0004941957, 000470165.

¹² File Nos. 0004941957, 000470165.

¹³ Xanadoo, LLC, Debtor-in-Possession, Extension and Waiver Request (filed Nov. 7, 2011) ("*Extension and Waiver Request*").

¹⁴ Extension and Waiver Request at 1.

bankruptcy protection in June 2011.¹⁵ Xanadoo asks for an extension of time to construct Stations WMX703 and WMX704 until May 1, 2012 or until six months after it emerges from bankruptcy.¹⁶ Xanadoo claims that it was not able to meet the November 1, 2011 deadline because of current market conditions and because it is financially constrained by the bankruptcy proceeding.¹⁷ In the alternative, Xanadoo requests a waiver of the November 1, 2011 deadline.¹⁸

III. DISCUSSION

7. Commercial EBS licensees may engage in terrestrial point-to-point and point-to-multipoint fixed and mobile operations.¹⁹ Under Section 27.14(o) of the Commission's Rules, Commercial EBS licensees were originally required to demonstrate substantial service on or before May 1, 2011.²⁰ The Wireless Telecommunications Bureau ("Bureau"), however, extended the substantial service deadline to November 1, 2011 for EBS licensees, including Commercial EBS licensees.²¹

A. Extension Request

8. Xanadoo requests an extension of time to demonstrate substantial service until May 1, 2012 or until six months after it emerges from bankruptcy.²² To be granted an extension of time to construct, Xanadoo must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."²³ A request for extension cannot be granted for failure to obtain financing.²⁴

9. We find that Xanadoo's inability to obtain financing is the cause of its inability to meet the November 1, 2011 deadline, and thus, we conclude that Xanadoo has not shown that its failure to construct is because of circumstances beyond its control. Xanadoo admits that it has not constructed Stations WMX703 and WMX704 because of the current economic climate and because of the massive amount of capital it has taken to construct and operate 13 other stations, which Xanadoo leases from EBS licensees.²⁵ Constructing and operating these 13 stations took a significant toll on Xanadoo's financial health, which, in turn, caused Xanadoo to file for Chapter 11 bankruptcy protection in June 2011.²⁶ Since Xanadoo entered into bankruptcy protection, it has been severely restricted in how it may allocate its financial resources and, consequently, it is not able to build out in the Parkersburg, West Virginia market.²⁷ As indicated above, the inability to obtain financing is not a circumstance beyond a licensee's

¹⁵ *Id.* See Pegasus Rural Broadband, LLC, *et al.*, Case No. 11-11772 (DE June 10, 2011).

¹⁶ Extension and Waiver Request at 1.

¹⁷ *Id.* at 1-2.

¹⁸ *Id.*

¹⁹ 47 C.F.R. § 27.4.

²⁰ 47 C.F.R. § 27.14(o).

²¹ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Red 4021 ¶ 1 (WTB/2011) ("*EBS Extension Order*"). See also 47 C.F.R. § 27.1201(d).

²² Extension and Waiver Request at 1.

²³ 47 C.F.R. § 1.946(e)(1).

²⁴ 47 C.F.R. § 1.946(e)(2).

²⁵ Extension and Waiver Request at 1.

²⁶ *Id.*

²⁷ *Id.*

control under the Commission's Rules and cannot justify a construction extension. Thus, we deny Xanadoo's request for an extension of time to construct.

B. Waiver Request

10. In the alternative, Xanadoo requests a waiver. To be granted a waiver of the November 1, 2011 construction deadline, Xanadoo 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.²⁸

11. We conclude that Xanadoo has not shown that a waiver of the substantial service deadline is warranted in this case. First, Xanadoo 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."²⁹ Although Xanadoo has shown that it has been able to construct and operate 13 EBS stations in six markets, it admits that it cannot construct Stations WMX703 and WMX704 because of the current market conditions and because it is financially constrained by the bankruptcy proceeding.³⁰ We find Xanadoo's argument that a grant of a waiver and an extension of time to construct will ensure that the Stations WMX703 and WMX704 will be constructed when Xanadoo emerges from bankruptcy is speculative. While the spectrum associated with Stations WMX703 and WMX704 will be returned to the Commission if the licenses are cancelled, which may result in a delay in placing the spectrum in use, it is equally true that we do not know if or when Xanadoo will be able to put the spectrum to use. We do not know whether Xanadoo will emerge from bankruptcy as a going concern, or when Xanadoo will emerge from bankruptcy – ten months or ten years from now. Because of this uncertainty, we find that Xanadoo has not shown that a grant of its waiver request furthers the underlying purpose of the substantial service rules.

12. Second, Xanadoo has not shown that cancelling its license to operate Stations WMX703 and WMX704 is inequitable, unduly burdensome or contrary to the public interest. The only "unique circumstance" Xanadoo demonstrates is its inability to obtain financing, which cannot serve as an excuse for failure to construct. Although we agree with Xanadoo that it has demonstrated an ability to construct and operate 13 EBS stations in six markets, Xanadoo currently lacks that ability for Stations WMX703 and WMX704, and we do not know if or when Xanadoo will acquire that ability. We therefore find that Xanadoo has not shown that it is in the public interest to grant its waiver request. Thus, we find that Xanadoo has not shown that a waiver is justified in this case.

13. An authorization for a Commercial EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.³¹ In light of our conclusion that grant of an extension to Xanadoo is not in the public interest, we find that Xanadoo's licenses to operate Stations WMX703 and WMX704 automatically terminated on November 1, 2011, the date that Commercial EBS licensees were required to demonstrate substantial service. We will therefore deny the Extension Application and Waiver Request.

²⁸ 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.

²⁹ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

³⁰ Extension and Waiver Request at 1.

³¹ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

IV. CONCLUSION AND ORDERING CLAUSES

14. Xanadoo has failed to justify an extension of time to meet the substantial service deadline for Stations WMX703 and WMX704 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 Xanadoo's licenses to operate Stations WMX703 and WMX704 automatically terminated as of November 1, 2011.

15. 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 wavier and the applications for extension of time to demonstrate substantial service (File Nos. 0004941957, 000470165) filed by Xanadoo, LLC, Debtor-In-Possession on November 7, 2011 ARE DENIED.

16. 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 licenses issued to Xanadoo, LLC, Debtor-In-Possession for Stations WMX703 and WMX704 ARE DECLARED TERMINATED as of November 1, 2011.

FEDERAL COMMUNICATIONS COMMISSION

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