

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

In the matter of)
)
 WALTONVILLE COMMUNITY UNIT #1) File No. 0004944835
)
 Application For Extension of Time to Construct)
 Educational Broadband Service Station WLX711)
)

ORDER ON RECONSIDERATION

Adopted: November 13, 2012

Released: November 14, 2012

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

I. INTRODUCTION

1. In this *Order on Reconsideration*, we deny Waltonville Community Unit #1’s (“Waltonville”) request to reconsider our decision denying it an extension of time to construct Educational Broadband Service (“EBS”) Station WLX711 and denying it a waiver of the November 1, 2011 substantial service deadline. Thus, we affirm our decision in the *Memorandum Opinion and Order* and hold that Waltonville’s license to operate Station WLX711 terminated on November 1, 2011.

II. BACKGROUND

2. Waltonville, a local K-12 public school district, was licensed to operate Station WLX711 on the D-group channels in Waltonville, Illinois.¹ Waltonville’s Geographic Service Area (“GSA”) covers small towns and farms in rural southern Illinois.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 which the Wireless Telecommunications Bureau (“Bureau”) subsequently extended

¹ Waltonville Community Unit #1, Petition for Reconsideration and Reinstatement (filed Apr. 30, 2012) (“Petition”) at 2.

² *Id.* at 2.

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 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*).

for all EBS licensees to November 1, 2011.⁵ 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.⁶ A BRS or EBS licensee could 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.⁷ In addition, an EBS licensee could 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.⁸ Many EBS licensees have demonstrated substantial service by meeting this safe harbor.⁹ Regardless of how they establish substantial service, however, all EBS licensees are also required to show that they are using the spectrum for educational purposes by showing that they use each EBS channel twenty hours per week for educational purposes.¹⁰

4. On November 8, 2011, seven days after the deadline for filing extension requests, Waltonville filed a request for waiver of the November 1, 2011 substantial service deadline applicable to Station WLX711 and a request to extend WLX711's substantial service deadline for six months until May 1, 2012.¹¹ Waltonville maintained that it failed to meet the November 1, 2011 substantial service deadline because its commercial lessee did not construct the system and Waltonville did not have sufficient time to construct the system on its own.¹² Waltonville then argued that granting it an extension of time was in the public interest because Waltonville had found another commercial operator that was willing and able to construct the system on its behalf, which would enable Waltonville to place the system into educational use.¹³ Waltonville also argued that returning the spectrum to the Commission would result in the spectrum going unused for years, contrary to the Commission's overarching policy goal announced in the National Broadband Plan, of providing mobile broadband service to every part of the country or as quickly as possible.¹⁴

⁵ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB 2011).

⁶ 47 C.F.R. § 27.14(o).

⁷ 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).

⁸ 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).

⁹ The Wireless Telecommunications Bureau has accepted over 2,100 substantial service notifications from EBS licensees who complied with the November 1, 2011 deadline.

¹⁰ See 47 C.F.R. §§ 27.1203, 27.1214.

¹¹ File No. 0004944835, Waltonville Community Unit #1, Extension and Waiver Request (filed Nov. 8, 2011) ("Extension Request") at 1. See Petition at 5 n.9.

¹² Extension Request at 1.

¹³ Extension Request at 2.

¹⁴ Extension Request at 2.

5. On January 27, 2012, Waltonville amended its Extension Request indicating that the potential for denial of its pending Extension Request has created significant uncertainty.¹⁵ Thus, Waltonville promised that if its pending Extension Request is granted, it, with its commercial partner, would immediately put into motion the pre-existing plan for building an educationally focused wireless broadband system utilizing Waltonville's channels.¹⁶

6. On March 29, 2012, the Broadband Division of the Wireless Telecommunications Bureau ("Division") found that, in the absence of evidence that Waltonville acted diligently prior to the November 1, 2011 deadline, Waltonville's promise to promptly order and build a wireless system was an insufficient reason to grant its Extension Request.¹⁷ The Division also rejected Waltonville's argument that it was in the public interest to grant the waiver and permit it to construct Station WLX711 rather than allow the spectrum to remain fallow until the Commission developed rules to license available EBS spectrum.¹⁸ The Division held that granting Waltonville's extension request would send the wrong signal to licensees that have acted diligently to provide service and would hinder our ability to strictly enforce construction requirements and meet our statutory duties.¹⁹ Finally, the Division also rejected Waltonville's argument that it was entitled to a waiver because it took reasonable steps necessary to ensure that it would be able to demonstrate substantial service before the November 1, 2011 deadline.²⁰ Instead, the Division held that Waltonville passively relied on a third party in the hope that a third party would construct facilities for it.²¹ The third party did not do so.

7. On April 30, 2012, Waltonville asked the Division to reconsider the *MO&O*.²² Waltonville argues that the Division erred by relying on cases where it had denied extension requests to commercial entities and by not considering cases where the Division had granted extension requests to governmental entities.²³ And, Waltonville argued, the Division also erred by not considering Waltonville's firm commitment to meet the substantial service requirement by May 1, 2012.²⁴ Waltonville then notified the Division that Wisper ISP, Inc. ("Wisper"), a local wireless Internet service provider, had constructed a point-to-point link connecting two schools within Waltonville's GSA that Waltonville intended to use to replace a link that does not have the capacity or reliability to provide the service the schools need.²⁵ Waltonville indicated that it and Wisper would agree to the following conditions on its reinstated license:

¹⁵ File No. 0004944835, Waltonville Community Unit #1, Amendment to Extension and Waiver Request (filed Jan. 27, 2012) ("Extension Request Amendment") at 1.

¹⁶ Extension Request Amendment at 1.

¹⁷ Mumford Independent School District, *et al.*, *Memorandum Opinion and Order*, 27 FCC Rcd 3034, 3039 ¶ 8 (WTB BD 2012) (*MO&O*). In addition to the Waltonville Extension Request, the *MO&O* denied 18 other extension applications filed by EBS licensees. None of those other licensees sought reconsideration or Commission review of the *MO&O*.

¹⁸ *MO&O*, 27 FCC Rcd at 3039 ¶ 9.

¹⁹ *MO&O*, 27 FCC Rcd at 3039 ¶ 9.

²⁰ *MO&O*, 27 FCC Rcd at 3039 ¶ 10.

²¹ *MO&O*, 27 FCC Rcd at 3039 ¶ 10.

²² Petition.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 3-4.

- Waltonville will begin transmitting on the constructed facilities within two (2) business days of License reinstatement, and will promptly file its ‘substantial service’ notification within five (5) business days thereafter;
- Waltonville and Wisper will file an application for approval of their leasing arrangement within ten (10) business days following License reinstatement; and
- Wisper will begin constructing commercial operations within thirty (30) days of License reinstatement.²⁶

Waltonville further argued that the Division by granting Waltonville’s petition for reconsideration would not be relying just on Waltonville’s promises, but also on an accomplished fact of completed construction.²⁷ Thus, Waltonville argues, it is appropriate for the Division to consider Waltonville’s having already honored its commitments to the Commission as sufficient basis for grant of its waiver request.²⁸

8. On June 5, 2012, Waltonville requested leave to supplement its Petition for Reconsideration and Reinstatement.²⁹ Waltonville argues that the information in the Supplement should be considered because it contains facts that can be derived from the Commission’s own files and materials distributed to Commission staff at a meeting and that this information bears on the outcome of this proceeding.³⁰ Specifically, the Supplement states that Waltonville’s geographic service area (GSA) is the only EBS GSA covering that area and is important to demonstrate the presence of EBS “white space” if Waltonville’s license is not reinstated.³¹ The Supplement also contains copies of letters from members of the public who are interested in providing broadband service and other documents that were shared with the Commission staff at a recent meeting.³²

III. DISCUSSION

9. As an initial matter, we grant Waltonville’s Petition for Leave to File Supplement in part and deny it in part. To the extent the Supplement provides factual information concerning the absence of other EBS licenses in Waltonville’s GSA, background on Wisper, and letters from members of the public, we will consider that information in the interest of having a complete record. To the extent the Supplement provides additional legal argumentation, we deny the Petition for Leave to File Supplement because such argumentation could have been presented in the original Petition.³³

10. We deny Waltonville’s Petition. Waltonville’s Petition is based on the construction of a point-to-point link connecting two schools and its promise to promptly place that link into operation if its license is reinstated. In fact, the Commission has rejected the argument that after-the-fact construction,

²⁶ *Id.* at 4.

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ Waltonville Community Unit #1, Petition for Leave to File Supplement to Petition for Reconsideration and Reinstatement (filed Jun. 5, 2012) (“Petition for Leave to File Supplement”).

³⁰ *Id.* at 1-2.

³¹ Supplement to Petition for Reconsideration and Reinstatement (filed June 5, 2012) (“Supplement”) at 1.

³² *Id.* at Exhibits A and B.

³³ *See* 47 C.F.R. § 1.106(c).

by itself, is sufficient to justify a waiver of buildout requirements.³⁴ While Waltonville's construction is not as untimely as the construction in the *Anderson* and *Holst* cases, we agree with the Commission's observation in *Anderson* that if we credit untimely construction, enforcement of the underlying construction requirement "becomes a meaningless or arbitrary exercise."³⁵

11. Waltonville argues that a Division decision in 2009 granting a series of applications for extension of time to construct demonstrates that it will credit after-the-fact promises to construct.³⁶ In fact, Waltonville fails to take that decision in context, and the *116 Late-Filed Renewal Applications MO&O* supports our action denying Waltonville's extension. In the *116 Late-Filed Renewal Applications MO&O*, the Division was addressing a situation caused, in part, by the radical transformation of the licensing and technical rules for the 2500-2690 MHz band plan the Commission started in 2003, which included radically changing the construction requirement.³⁷ To ease the burden of uncertainty on EBS licensees as the Commission changed the licensing rules, the Commission, in 2003, suspended the construction rules applicable to EBS licensees and did not adopt new rules construction rules until 2006.³⁸ The construction requirements that the Division waived were the old, pre-2003 construction requirements.³⁹ In waiving the old requirements, the Division held that "the best way of meeting the performance requirements is to allow the licensees to make their licenses current and strictly enforce the new substantial service requirements."⁴⁰ The statement about providing "licensees with the maximum incentive to begin providing service as soon as possible"⁴¹ was made in the context of explaining why it was appropriate to focus on and strictly enforce the new substantial service requirement. In this case, the denial of Waltonville's extension is consistent with the Division's warning in the *116 Late-Filed Renewal Applications MO&O* that it would strictly enforce the substantial service requirement. Our decision on

³⁴ See Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order and Order on Remand*, 18 FCC Rcd 4819, 4193-4194 ¶ 11 (2003) (*Anderson*) (denying request for waiver of construction deadline where facilities were built more than four years after deadline); Mr. Tom Holst, City of Springfield, *Letter*, 27 FCC Rcd 2184, 2185 (WTB MD 2012) (*Holst*) (request to waive construction deadline denied where facilities were built well after the construction deadline).

³⁵ *Anderson*, 18 FCC Rcd at 4194 ¶ 11.

³⁶ Petition at 8, *citing* 116 Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108 (WTB BD 2009) ("*116 late-Filed Renewal Applications MO&O*").

³⁷ See *id.* at 8109-8113 ¶¶ 4-9.

³⁸ 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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; WT Docket Nos. 03-66, 03-67, 02-68, MM Docket No. 97-217, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6805 ¶ 201 (2003).

³⁹ See *116 Late-Filed Renewal Applications MO&O*, 24 FCC Rcd at 8118 ¶ 31.

⁴⁰ *Id.* at 8119 ¶ 31.

⁴¹ *Id.*

Waltonville is also consistent with the Division's rejection of after-the-fact promises of construction made by other EBS licensees.⁴²

12. We also disagree with Waltonville that its actions at the time it filed its extension and waiver requests demonstrate that it would promptly deliver wireless service.⁴³ While Waltonville duly filed its modification application and its extension and waiver requests, we find that these activities have little bearing on the issue at hand.⁴⁴ The issue is whether Waltonville constructed or attempted to construct Station WLX711 on or before November 1, 2011. Waltonville passively relied on a third party to build its station, and once abandoned by that third party was unable to construct Station WLX711 on its own.⁴⁵

13. The District of Columbia case cited by Waltonville, which involved two 800 MHz licenses that were intended to be used for critical public safety communications and new information that showed that the District of Columbia's position had materially changed since its waiver and extension requests were denied is inapplicable to Waltonville.⁴⁶ Waltonville does not intend to use Station WLX711 for critical public safety communications and Waltonville's position has not materially changed since it filed its extension and waiver requests.

14. In the Supplement, Waltonville states that Station WLX711's GSA is the only EBS GSA covering that area.⁴⁷ Waltonville also provides letters from prospective customers interested in receiving broadband service.⁴⁸ While there is a general public interest in facilitating broadband service, in this case, such interest is insufficient to support grant of Waltonville's Extension Request. As we stated in the *MO&O*, "In the absence of evidence that the applicants acted diligently prior to the November 1, 2011 deadline, we find that these future promises to act [by providing service] are insufficient."⁴⁹ Furthermore, Waltonville can obtain alternative spectrum for the point-to-point link by applying for a license in the Private Operational Fixed Service.⁵⁰ We note that the only additional commitment Waltonville and Wisper have made is to "begin constructing commercial operations within thirty (30) days of License reinstatement."⁵¹ Most EBS licensees were able to meet the November 1, 2011 substantial service deadline. In the absence of any meaningful justification for Waltonville's failure to meet that deadline,

⁴² See West Blocton High School, *Memorandum Opinion and Order*, 27 FCC Rcd 3234 (WTB BD 2012); Rockton School District, *Order of Reconsideration and Memorandum Opinion and Order*, 27 FCC Rcd 3219 (WTB BD 2012); Archdiocese of Hartford Diocesan School Office, *Order on Reconsideration and Memorandum Opinion and Order*, 27 FCC Rcd 3027 (WTB BD 2012) ("*Archdiocese MO&O*"). Waltonville argues that its case is distinct from the Archdiocese of Hartford's case because Waltonville has, through a third party, constructed a link that will connect two schools within its GSA. Petition at 6. As noted above, after-the-fact construction is insufficient to justify a waiver or extension.

⁴³ Petition at 5-7.

⁴⁴ *Id.* at 6.

⁴⁵ Extension Request at 1.

⁴⁶ District of Columbia, *Second Memorandum Opinion and Order*, 12 FCC Rcd 19419, 19421-19422 ¶¶ 7-8 (WTB 1997). See Petition at 8.

⁴⁷ Supplement at 1.

⁴⁸ Supplement at Exhibit A.

⁴⁹ *MO&O*, 27 FCC Rcd at 3039 ¶ 8.

⁵⁰ See 47 C.F.R. Part 101.

⁵¹ Petition at 4.

we find that the public interest in strictly enforcing its buildout requirements outweighs any potential benefit of accepting Waltonville's after-the-fact promises of service.

IV. CONCLUSION AND ORDERING CLAUSES

15. The Division's decision terminating Waltonville's license to operate Station WLX711 for failure to construct by November 1, 2011 was correct. We therefore deny the Petition.

16. 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 Sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Waltonville Community Unit #1, Waltonville, Illinois on April 30, 2012 IS DENIED.

17. IT IS FURTHER 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 Sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Leave to Supplement Petition for Reconsideration and Reinstatement filed by Waltonville Community Unit #1, Waltonville, Illinois on June 5, 2012 IS GRANTED IN PART AND DENIED IN PART.

18. These actions are taken under designated 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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