

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

In the Matter of	)	
	)	
SWEET BRIAR INSTITUTE	)	File No. 19950914GR
	)	
Request for Reconsideration, Reinstatement and	)	
Waiver of the Commission’s Rules to Allow	)	
Reinstatement of the Construction Permit for	)	
Educational Broadband Service Station WNC586,	)	
Lynchburg, Virginia	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: January 24 2007**

**Released: January 25, 2007**

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

**I. INTRODUCTION**

1. On August 27, 2004, Sweet Briar Institute (SBI) filed a petition seeking reconsideration<sup>1</sup> of the action taken by the Broadband Division (Division) of the Wireless Telecommunications Bureau on July 20, 2004, terminating the construction permit for Educational Broadband Service (EBS)<sup>2</sup> Station WNC586, Lynchburg, Virginia.<sup>3</sup> For the reasons discussed below, we grant SBI’s petition, reinstate its license, and waive former Section 73.3534 of the Commission’s Rules.

**II. BACKGROUND**

2. SBI took assignment of the authorization for Station WNC586 from Seven Hills School.<sup>4</sup> On September 14, 1995, SBI filed a modification application (supplemented on December 14, 1995) to change the coordinates and site location of the station tower.<sup>5</sup> By this filing, SBI intended to colocate and

<sup>1</sup> Sweet Briar Institute, Petition for Reconsideration, Reinstatement and Waiver (filed Aug. 27, 2004) (Petition).

<sup>2</sup> On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. 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, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O & FNPRM*). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Unless otherwise noted, the citations to rules will be to those rules in effect during the operative time period.

<sup>3</sup> See *Public Notice*, Wireless Telecommunications Bureau Site-by-Site Action Report No. 1890 (rel. Jul. 28, 2004). See also Letter from Mary M. Shultz, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Sweet Briar Institute (dated Jul. 21, 2004).

<sup>4</sup> File No. 19950914GS.

<sup>5</sup> File No. 19951014GR (Modification Application).

conform the technical parameters of the station to other Lynchburg area stations whose excess capacity was being leased by NTELOS Licenses, Inc. (NTELOS).<sup>6</sup>

3. Action on the Modification Application was denied because of an objection filed by the National Radio Astronomy Observatory (NRAO) and the need to coordinate interference issues with the NRAO.<sup>7</sup> On September 24, 1999, SBI let the authorization for its original transmitter site lapse because it believed that construction at the originally authorized site was not in the public interest.<sup>8</sup> SBI represents that “it was the practice of the [former] Mass Media Bureau to permit licensees to maintain authority to operate if they had a pending modification application as SBI did at that time.”<sup>9</sup>

4. The former Mass Media Bureau granted the modification application on September 6, 2001.<sup>10</sup> SBI represents that it was unaware that the Modification Application had been granted.<sup>11</sup> SBI notes that NTELOS expected all of the Lynchburg applications to be treated similarly, and inadvertently missed the grant of the modification application in September 2001.<sup>12</sup> Therefore, it did not file a request for extension of time to construct the Modification Application. On July 20, 2004, the Wireless Telecommunications Bureau declared the authorization for Station WNC586 forfeited, pursuant to Section 73.3534(e)<sup>13</sup> of the Commission’s Rules, for failure to construct and for failure to request an extension of time to construct.<sup>14</sup>

5. SBI filed the Petition on August 27, 2004.<sup>15</sup> SBI contends that, pursuant to Section 1.925(b)(3)(ii) of the Commission’s Rules,<sup>16</sup> we should waive Section 73.3534 of the Commission’s Rules and reinstate the construction permit for Station WNC586.<sup>17</sup> First, SBI argues that a waiver is necessary due to the unique circumstances that resulted in SBI failing to file the necessary extension applications.<sup>18</sup> SBI states that it and NTELOS recognize that a timely application should have been filed, and are confident that such a problem will not recur as proper procedures have been put in place to ensure identification of all application grants.<sup>19</sup> SBI further notes that the departure of the two individuals who were best positioned to identify the error at the time makes such a lapse unlikely to repeat itself.<sup>20</sup> SBI

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<sup>6</sup> Petition at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Mass Media Bureau Instructional TV Fixed Service Multipoint Distribution Service Actions, Report No. 505, *Public Notice* (rel. Sep. 11, 2001).

<sup>11</sup> Petition at 4.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> 47 C.F.R. § 73.3534(e) (2004).

<sup>14</sup> *See* Wireless Telecommunications Bureau Site-by-Site Action, Report No. 1890, *Public Notice* (rel. Jul. 28, 2004). *See also* Letter from Mary M. Shultz, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Sweet Briar Institute (dated Jul. 21, 2004).

<sup>15</sup> Petition.

<sup>16</sup> 47 C.F.R. § 1.925(b)(3)(ii) (2004).

<sup>17</sup> Petition at 1.

<sup>18</sup> Petition at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

states that further evidence of its desire to maintain the license for WNC586 is the database correction filing SBI submitted during the Broadband Licensing System conversion process in 2003.<sup>21</sup>

6. SBI also maintains that application of the rule would be contrary to the public interest because benefits achieved from reinstatement will allow for the future build-out of a licensed system to underserved areas of Lynchburg, Virginia.<sup>22</sup> SBI states that grant of its request will allow NTELOS, as SBI's lessee, to further develop and operate its wireless cable system to provide ubiquitous coverage to the Lynchburg, Virginia area.<sup>23</sup> SBI requests that the Commission reconsider its termination of the construction permit for Station WNC586, reinstate the permit, and grant SBI additional time to construct the station.<sup>24</sup>

### III. DISCUSSION

7. At the pertinent time period, former Section 73.3534(b) of the Commission's Rules<sup>25</sup> provided:

Requests for extension of time within which to construct an Instructional TV Fixed station shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such request for extension are known to the applicant in time to permit such filing. In other cases, a request will be accepted upon a showing satisfactory to the FCC of sufficient reasons for filing within less than 30 days prior to the expiration date.

Section 73.3534(e) of the Commission's Rules<sup>26</sup> provided:

A construction permit for an Instructional TV Fixed station shall be declared forfeited if the station is not ready for operation within the time specified therein or within such further time as the FCC may have allowed for completion, and a notation of the forfeiture of any construction permit under this provision will be placed in the records of the FCC as of the expiration date.

Because SBI failed to timely construct its modified facilities or seek an extension of time to construct, its authorization was subject to Section 73.3534(e) of the Commission's Rules.

8. SBI now seeks a waiver of those rules. Pursuant to Section 1.925(b)(3) of the Commission's Rules,<sup>27</sup> a request for waiver may be granted upon a showing that "[i]n view of 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>28</sup> We find that strict application of Section 73.3534 of the Commission's Rules would be inequitable, unduly burdensome, and contrary to the public interest because denying a waiver could hinder the substantial

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<sup>21</sup> Letter from Paul Sinderbrand, Esq. on behalf of Sweet Briar Institute to Federal Communications Commission, MDS/ITFS Database Corrections (dated Jan. 27, 2003).

<sup>22</sup> Petition at 2.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.*

<sup>25</sup> 47 C.F.R. § 73.3534(b) (2002).

<sup>26</sup> 47 C.F.R. § 73.3534(e) (2002).

<sup>27</sup> 47 C.F.R. § 1.925(b)(3) (2004).

<sup>28</sup> 47 C.F.R. § 1.925(b)(3)(ii) (2004).

efforts to transition the 2500-2690 MHz band. The Commission is seeking to promote the delivery of wireless broadband and educational services through a major restructuring of the 2500-2690 MHz band, arguably the most significant change to the band plan since ITFS was first established in 1963. Through the *BRS/EBS R&O* and *BRS/EBS 3rd MO&O*, the Commission has established a process for transitioning to the new band plan that will require an extraordinary degree of coordination and negotiation among all affected licensees in the transition area over a finite time period.<sup>29</sup> Though the rules for this process were established over a several year period, the transition of the 2500-2690 MHz band only recently began on July 19, 2006, when Clearwire and Sprint/Nextel filed Initiation Plans to transition ten BTAs.<sup>30</sup> Given the inchoate nature of the band transition, and the challenges inherent in a multi-party, time-limited process, the Commission has sought to minimize burdens on the transition proponents and other affected parties in order to spur transformation of the band.<sup>31</sup> Consistent with these Commission policies, we believe that granting the waiver request at issue and reinstating SBI's license will create greater certainty for existing and future transition proponents regarding which EBS licenses will be part of the transition, and thus facilitate a more rapid restructuring of the band.

9. Furthermore, if we were to deny SBI's Petition, the spectrum covered by its license would be unassigned until the Commission reassigns the spectrum. Because the Commission recently concluded "that it is premature to make available unassigned spectrum until the transition period is completed,"<sup>32</sup> it could be years before reclaimed spectrum is relicensed. The unavailability of such

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<sup>29</sup> This process requires a proponent, which can be a BRS or EBS licensee or lessee, to relocate licensees from their current interleaved channel locations to their new channel locations in the new band plan, according to the following three-stage process: the 30-month Initiation Phase, the 90-day Transition Planning Phase, and the 18-month Transition Completion Phase. *BRS/EBS R&O*, 19 FCC Rcd at 14194-14207 ¶¶ 68-102; *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5639-5686 ¶¶ 59-178. During the transition process, the proponent must contact and negotiate with every licensee in the Basic Trading Area (BTA) being transitioned. For instance, during the Initiation Phase, a proponent must send the Pre-Transition Data Request and transition notice to all BRS and EBS licensees in the BTA and file the Initiation Plan with the Commission. *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5654-5659 ¶¶ 96-106. During the 90-day Transition Planning Phase, the proponent must develop the Transition Plan and negotiate with all of the BRS and EBS licensees. *Id.*, 21 FCC Rcd at 5659-5667 ¶¶ 107-126. During the Transition Completion Phase, the proponent must replace downconverters at all eligible EBS receive sites, migrate eligible video and data transmission program tracks to the MBS, and file the Post-Transition Notification with the Commission. *Id.*, 21 FCC Rcd at 5674-5677 ¶¶ 144-152. After the transition is completed, the proponent must seek reimbursement for the costs of the transition. *Id.*, 21 FCC Rcd at 5677-5684 ¶¶ 153-172. In many instances, the proponent will have to arrange channel swaps with various BRS and EBS licensees to effectuate a particular business plan or to permit channel pairing, which makes the transition process even more difficult. *Id.*, 21 FCC Rcd at 5665 ¶¶ 120-122.

<sup>30</sup> On July 19, 2006, Sprint Nextel filed Initiation Plans in the following BTAs: BTA 461 (Washington, DC) and BTA 029 (Baltimore, MD). Also on July 19, 2006, Clearwire filed Initiation Plans through Fixed Wireless Holdings LLC for the following BTAs: BTA 100 (Cumberland, MD); BTA 207 (Ironwood, MI); BTA 282 (Marquette, MI); BTA 295 (Middlesboro-Harlan, KY); BTA 330 (Olean, NY-Bradford, PA); BTA 360 (Pottsville, PA); BTA 382 (Rocky Mount-Wilson, NC); and BTA 475 (WilliamSPORT, PA). See WT Docket No. 06-136.

<sup>31</sup> For example, in the *BRS/EBS 3rd MO&O*, the Commission reduced the size of the area to be transitioned from Major Economic Area to BTA. *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5641-5642 ¶¶ 64-65. The Commission also required Multichannel Video Programming Distributors (MVPD) to inform proponents, in the Initiation Phase of the transition, that they intended to opt-out of the transition. *Id.*, 21 FCC Rcd at 5646 ¶ 74. In addition, the Commission adopted a "first-in-time" rule that assures a BRS or EBS licensee or lessee that it will be the proponent if it is the first to file an Initiation Plan for a BTA. *Id.*, 21 FCC Rcd at 5652-5654 ¶¶ 91-95. Also, the Commission reduced the requirements for filing the Initiation Plan and the Post-transition Notification. *Id.*, 21 FCC Rcd at 5658, 5677 ¶¶ 106, 152. Moreover, The Commission adopted two more safe harbors to assure proponents that a Transition Plan is reasonable if it offers certain safe harbors to EBS licensees. *Id.*, 21 FCC Rcd at 5661-5664 ¶¶ 112, 119.

<sup>32</sup> *Id.*, 21 FCC Rcd at 5739 ¶ 320. We note that NextWave Broadband, Inc. has filed a petition for reconsideration of that determination. Petition for Reconsideration, WT Docket No. 03-66, NextWave Broadband, Inc. (filed Jul. 19, 2006).

spectrum may discourage operators from providing service to the Lynchburg, Virginia market and may discourage potential proponents from transitioning those markets. We find that such a result would be inconsistent with the Commission's decisions in the *BRS/EBS* proceeding to promote a rapid transition to efficient use of the 2500-2690 MHz band.

10. We will therefore grant the Petition and reinstate the authorization for Station WNC586. Furthermore, subject to the filing of an application for extension of time to construct within thirty (30) days after the date of this letter order,<sup>33</sup> we will waive Section 1.946 of the Commission's Rules, the rule currently applicable to applications for extension of time to construct. The waiver will allow us to process SBI's extension application. If such application is granted, SBI, like all EBS licensees, will be required to demonstrate substantial service by May 1, 2011.<sup>34</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we grant SBI's Petition for reconsideration and reinstate SBI's authorization for EBS Station WNC586. We direct SBI to file an application for extension of time to construct and accompanying waiver request<sup>35</sup> within 30 days after the date of this letter order.

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration, Reinstatement and Waiver filed by Sweet Briar Institute on August 27, 2004 IS GRANTED and Sweet Briar Institute's authorization for Educational Broadband Service Station WNC586 IS REINSTATED.

13. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the Broadband Division SHALL PROCESS the application to be filed by SBI in accordance with this *Order on Reconsideration* and the Commission's rules and policies.

14. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>33</sup> The notice of consummation must be accompanied by request for waiver of Section 1.948(d). Such waiver request may refer to the waiver grant contained in this letter order without restating the arguments set forth in the Petition.

<sup>34</sup> 47 C.F.R. § 27.14(e).

<sup>35</sup> The extension application must be accompanied by request for waiver of 47 C.F.R. § 1.946. Such waiver request may refer to the waiver grant contained in this *Memorandum Opinion and Order* without restating SBI's arguments.