

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

In the Matter of Applications of)
EASTERN NEW MEXICO UNIVERSITY) File No. 20020822AAC
For Renewal of License for)
Instructional Television Fixed Service Station)
WLX261, Elida, New Mexico)
323 Late-Filed Applications for Renewal of ITFS)
Licenses)

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: October 5, 2004

Released: October 5, 2004

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 20, 2003, Eastern New Mexico University (ENU) filed a Petition for Reconsideration (Petition) of an Order¹ of the former Public Safety and Private Wireless Division (PSPWD), Wireless Telecommunications Bureau, denying its application to renew Instructional Television Fixed Service (ITFS) Station WLX261, Elida, New Mexico, and its request for a waiver of Section 74.15(e) of the Commission's Rules to permit the untimely filing of the renewal application.² We also have before us 323 other late-filed applications for renewal of licenses from other ITFS licensees as well as associated requests for waiver to allow untimely filing of the renewal applications.³ For the reasons discussed below, we grant ENU's Petition and waiver request, grant the other waiver requests, and direct processing of the associated renewal applications.

II. BACKGROUND

2. On May 14, 1990, ENU filed an application to construct and operate a new ITFS station on the C group channels in Elida, New Mexico.⁴ The application was granted under call sign WLX261 on October 26, 1990 for a ten year license term,⁵ subject to the condition that construction of the facilities be completed by April 26, 1992. ENU timely constructed the facilities. However, on October 26, 2000, the license for Station WLX261 expired. On August 23, 2002, ENU filed an application to renew Station WLX261.⁶ Because ENU's license to operate Station WLX261 expired on October 26, 2000, ENU

¹ Eastern New Mexico University, Order, 18 FCC Rcd 2448 (WTB PSPWD 2003) (Order).

² See File No. 20020822AAC (filed Aug. 23, 2002) (Renewal Application).

³ A chart listing the pending late-filed ITFS renewal applications with waiver requests is attached as an appendix to this Memorandum Opinion and Order and Order on Reconsideration.

⁴ See File No. BPIF-19000514DA (filed May 14, 1990).

⁵ See 47 C.F.R. § 74.15(e) (stating that ITFS licenses are issued for a period of ten years beginning with the date of grant).

⁶ See Renewal Application.

requested a waiver of Section 74.15(e) of the Commission's Rules to permit the untimely filing of the renewal application.⁷ ENU concurrently filed a request for Special Temporary Authority (STA) to continue operating Station WLX261.⁸ ENU's explanation for not timely filing an application to renew its license to operate Station WLX261 was that it had not receive a renewal reminder from the Commission "through normal channels."⁹ According to ENU, it realized that Station WLX261's authorization expired during a review of its licenses.¹⁰ ENU argued that a waiver was warranted because it provides instructional and educational programming on a daily and continuous basis to Elida Public Schools and other educational and instructional institutions.¹¹

3. By *Order* dated February 18, 2003, the Division found that ENU had not met its burden of demonstrating that grant of a waiver was warranted under the circumstances presented.¹² The Division stated that it was the responsibility of each licensee to renew its license prior to expiration, and that such obligation was not dependent upon the Commission sending a renewal reminder to the licensee.¹³ Rather, even if ENU failed to receive a renewal reminder, it was expected to know the term of its license and to file a timely renewal application.¹⁴ Consequently, the Division denied ENU's waiver request, holding that ENU's failure to file a timely renewal application for Station WLX261 for the proffered reason did not provide a sufficient basis for granting a waiver of Section 74.15(e) of the Commission's Rules.¹⁵ Furthermore, finding that Section 74.15(e) of the Commission's Rules precludes ENU's untimely filing of an application to renew Station WLX261, it dismissed the renewal application as defective.¹⁶ Nonetheless, finding that the immediate termination of the educational and instructional programming provided by Station WLX261 to students in the area would not be in the public interest, the Division granted ENU a limited STA to continue operating the facilities licensed under Station WLX261 through June 30, 2003, to allow ENU to continue to operate its facilities while it made alternative arrangements for delivering its educational and instructional programming in the future.¹⁷ On March 20, 2003 ENU filed the instant Petition.¹⁸ The Division then granted ENU an extension of its STA on June 17, 2003, and then again on May 5, 2004. The current STA authorizes ENU to operate Station WLX261 until November 5, 2004.

⁷ See 47 C.F.R. § 74.15(e).

⁸ See Letter from Jeff Burmeister, Director of Engineering, Eastern New Mexico University, to Albert Knerr, Chief, Technical Analysis Section, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, FCC (dated Aug. 22, 2002; filed Aug. 23, 2002) (STA Request).

⁹ See Waiver Request; STA Request.

¹⁰ See Waiver Request; STA Request.

¹¹ *Id.*

¹² *Order.*

¹³ *Id.*, 18 FCC Rcd at 2449 ¶ 4.

¹⁴ *Id.* Pursuant to Section 74.15(e) of the Commission's Rules, an ITFS licensee must file a renewal application "not later than the first day of the fourth calendar month prior to the expiration date of the license sought to be renewed." 47 C.F.R. § 74.15(e). Section 74.15(e) also specifies that an ITFS license is issued for a period of ten years beginning with the date of grant. *Id.* ENU's license for Station WLX261 expired on October 26, 2000. ENU was therefore required to have filed its renewal application by June 1, 2000.

¹⁵ *Order*, 18 FCC Rcd at 2449-50 ¶ 4.

¹⁶ *Id.* at 2450 ¶ 5.

¹⁷ *Id.* at 2450 ¶ 6. This STA has subsequently been extended.

¹⁸ Petition at 1.

4. As previously indicated, we also have before us 323 late-filed applications for renewal of license along with associated requests for waiver of Section 74.15(e) of the Commission's Rules.¹⁹ These applications all involve ITFS licensees who have inadvertently failed to file timely renewal applications. Like ENU, these licensees assert that their educational programming operations serve very important public interest goals. For example, PACE Telecommunications Consortium, an ITFS licensee who claims that it inadvertently missed the deadline for filing a renewal application, reports that its channels are part of a system that serves approximately 18,000 students in two school districts and 30,000 homes in five counties.²⁰ Additionally, many of the referenced licensees assure us that in the future, they will exercise the appropriate diligence to ensure that their licenses do not lapse.

III. DISCUSSION

5. ENU argues that the Division applied the "wireless services" renewal policy instead of the Commission's lenient Part 74 standard.²¹ It further argued that the Commission's past practice of granting late-filed renewal applications under similar circumstances mandated a grant in the instant case. In its Petition, ENU provides examples of cases where the Commission exercised the "lenient" standard in adjudicating late-filed ITFS renewal applications.²² Furthermore, ENU argues that the *Order* reflects an unjustified punitive attitude towards an educational institution serving poor, rural students.²³

6. Section 74.15(e) of the Commission's Rules requires that applications for renewal of ITFS licenses be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed."²⁴ At issue is whether the Division erred in denying ENU's request, and whether the Bureau should exercise its discretion to waive Section 74.15(e) of the Commission's Rules and accept the pending late-filed applications for renewal of ITFS station licenses. At the outset, we conclude that the Division's decision denying ENU's request for waiver was well reasoned and used the correct standard for evaluating waiver requests. ENU is incorrect that the Division used the "wireless standard" to evaluate its waiver request. The Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services is as follows: Renewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc*²⁵ if the application is otherwise sufficient under our rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.²⁶ Applicants who file renewal applications more than thirty days after the license expiration date may also request that the license be renewed *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be

¹⁹ See Appendix A.

²⁰ Application of PACE Telecommunications Consortium for Renewal of License of Station WLX374, File No. 20030129AAE, Request for Late Acceptance.

²¹ Petition at 5.

²² *Id.* at 5-6.

²³ *Id.* at 9.

²⁴ 47 C.F.R. § 74.15(e).

²⁵ *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.

²⁶ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11486 ¶ 22 (1999) (*ULS MO&O*).

accompanied by enforcement action, including more significant fines or forfeitures.²⁷ In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.²⁸ In contrast, the Division evaluated ENU's waiver request pursuant to the waiver standard generally applicable to Part 73 and 74 licensees. Specifically, the Division used the following standard to evaluate ENU's waiver request: "An applicant for waiver faces a high hurdle even at the starting gate. 'When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.'"²⁹

7. We also agree with the Division that, under the *WAIT Radio* waiver standard, ENU did not meet its burden of demonstrating that grant of a waiver was warranted under the circumstances presented. We find that the Division correctly held that ENU's reason for failing to timely renew its license—the fact that it did not receive a renewal notice—did not provide a sufficient basis for granting a waiver of Section 74.15, and that it is the responsibility of each licensee to renew its license prior to expiration.³⁰ Therefore, in instances where Commission licensees have failed to receive renewal reminders, the Commission has expected the licensee to know the term of its license and to file a timely renewal application.

8. We are nonetheless granting ENU's Petition and reversing the Division's denial of ENU's request for waiver of Section 74.15 of the Commission's Rules because of special circumstances that warrant a departure from the Commission's usual waiver standard. Section 1.106(c)(2) of the Commission's Rules allows us to grant reconsideration based on facts not previously presented if consideration of such facts is in the public interest.³¹ In this case, we conclude that reconsideration is appropriate based on our determination that, at the time ENU's application was due to be filed, it was the staff's practice to routinely grant late filed renewal applications filed by ITFS licensees, even if the renewal application was extremely late and the licensee did not provide an acceptable explanation for the untimely filing. Commission licensing records indicate that former staff accepted virtually all explanations for untimely filing from ITFS licensees, including explanations that the licensee had not been reminded by the Commission to renew its license or that the licensee had overlooked the filing deadline. For example, in 1998, staff granted a late filed renewal and associated waiver request to Daytona Beach Community College (DBCC) for its Station WHR779 in Daytona Beach, Florida. In that case, DBCC argued that it had inadvertently allowed its license to expire in 1996, and only discovered the mishap during a routine check of station records by new counsel almost two years later.³² Furthermore, in 2001, staff granted a waiver and a late filed renewal request to Richardson Independent School District, for its Station WHR881 in Fort Worth, Texas, the license of which had expired in 1997. Richardson's waiver request indicated that it had become confused about the expiration date of the license and had discovered the expired license during a routine check of records by counsel almost four years after the license expired.³³ These explanations did not provide a sufficient basis upon which to grant a waiver, yet

²⁷ See *id.* at 11486 ¶ 22.

²⁸ See *id.* at 11485 ¶ 22.

²⁹ *Order*, 18 FCC Rcd at 2449 ¶ 4, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*).

³⁰ See, e.g., Daniel R. Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944 (1998); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693 (WTB PSPWD 2000).

³¹ 47 C.F.R. § 1.106(c)(2).

³² See Application for Renewal of ITFS Station WHR779, File No. BRIF-19980109DH.

³³ See Application for Renewal of ITFS Station WHR881, File No. BRIF-20010622AAA.

in these, and many other cases, staff continued to exhibit exceptional leniency in adjudicating ITFS late-filed renewal cases instead of applying well-established Commission waiver standards.

9. We note that the staff's practice of renewing late-filed ITFS licenses notwithstanding the merit of the reason provided was not prescribed by Commission rules nor sanctioned by the Commission. Upon reviewing the past practices with regard to the handling of late-filed ITFS renewal applications, we conclude that the correct standard for granting a waiver of Section 74.15(e) of the Commission's Rules would have precluded the granting of late-filed ITFS renewal applications such as ENU's where the licensee simply forgot to renew or did not receive a renewal reminder from the Commission.

10. This conclusion notwithstanding, factors exist in this situation which lead us to conclude that ITFS licensees such as ENU were not "on notice" of the Commission's actual policy. The record indicates that the routine granting of late-filed ITFS renewal applications was a practice that was widely-known by the public. Although the Commission's well-established waiver provisions normally have been sufficient to put applicants on notice of the possible consequences of failing to timely renew their licenses, we conclude that the staff practice of routinely granting late-filed renewal applications caused the Commission's actual policy to be unclear to applicants. Indeed, the sheer number of pending ITFS late-filed renewal applications demonstrates that ITFS licensees have come to rely on the exceptional leniency exercised by staff in processing such applications and associated waivers. We believe this situation is analogous to the situation recently addressed by the Commission in the *East River* case.³⁴ In *East River*, the Commission reinstated Specialized Mobile Radio (SMR) applications despite the fact that the applications were properly dismissed under the Commission's Rules. Although the applicable rule required that an SMR application be placed on a wait list if the specific frequencies an applicant had requested were unavailable, the staff had developed a practice of searching for alternative frequencies and granting the application if alternative frequencies were unavailable. In *East River*, the Commission concluded that *East River* was not on notice of the Commission's policy because the informal staff practice was widely known. The Commission concluded that it would be in the public interest to reinstate *East River*'s applications and grant those applications where alternative frequencies were available.³⁵ Similarly, we conclude that ITFS renewal applicants were aware of the staff's lenient policy and may have relied on this leniency. We therefore conclude that it is in the public interest to reinstate the Renewal Application and grant ENU's waiver request. For the same reasons, based upon the unique circumstances present in this situation, we grant the other 323 pending waiver requests that are the subject of this order. We direct the Bureau's Broadband Division to process the late-filed renewal applications.

11. We note that in 2003, the Commission undertook a comprehensive examination of our rules and policies governing ITFS and other services in the 2500-2690 MHz band, in recognition of the spectrum's vast potential for broadband offering. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rule Making* which fundamentally restructured the band to provide ITFS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.³⁶ Among other actions, the *MDS/ITFS R&O & FNPRM* applied the Wireless Radio Services late-filed renewal policy to the Educational Broadband Service (EBS, the new name for ITFS).³⁷ The *MDS/ITFS R&O & FNPRM*

³⁴ See *East River Electric Power Cooperative, Memorandum Opinion and Order*, 18 FCC Rcd 15977 (2003) (*East River*).

³⁵ *Id.*, 18 FCC Rcd at 15980-81 ¶ 9.

³⁶ 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) (*MDS/ITFS R&O & FNPRM*).

³⁷ *Id.*, 19 FCC Rcd at 14247-48 ¶¶ 216-220.

made great strides towards ending the uncertainty and confusion that have plagued the ITFS band for years. This factor, coupled with the great potential for broadband service that exists within the band highlights the Commission's responsibility to ensure that the band is properly utilized. In this connection, we strongly remind EBS licensees to exercise due diligence in complying with all our rules as such rules will be strictly enforced henceforth. While we have concluded that ITFS licensees did not have sufficient notice prior to this order of our strict waiver and renewal policies, we now provide notice that leniency will no longer be exercised, and EBS licensees will be required to meet the same standards for renewal and waiver as other wireless licensees.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons discussed above, we grant ENU's Petition. Additionally, we grant ENU's and the other 323 requests for waiver of Section 74.15(e) of the Commission's Rules, and direct processing of the associated renewal applications.

13. 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 and 74.15(e) of the Commission's Rules, 47 C.F.R. §§ 1.106, 74.15(e), the Petition for Reconsideration for Waiver of Section 74.15(e) of the Commission's Rules filed by Eastern New Mexico University on March 20, 2003 IS GRANTED.

14. IT IS FURTHER 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 74.15(e) of the Commission's Rules, 47 C.F.R. § 74.15(e), that the requests for waiver of Section 74.15(e) filed by Eastern New Mexico University and in connection with the applications listed in Attachment A of this *Memorandum Opinion and Order and Order on Reconsideration* ARE GRANTED.

15. 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), 309, and Section 74.15(e) of the Commission's Rules, 47 C.F.R. § 74.15(e), that the Broadband Division SHALL PROCESS ENU's Renewal Application and the applications listed in the attached appendix in accordance with this *Memorandum Opinion and Order and Order on Reconsideration* and the Commission's rules and policies.

16. 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

Scott D. Delacourt
Deputy Chief, Wireless Telecommunications Bureau