



PUBLIC NOTICE

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WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON REQUEST BY CHOICE COMMUNICATIONS, LLC, FOR WAIVER OF THE REQUIREMENT TO TRANSITION TO THE NEW BRS/EBS BAND PLAN

Comment Date: June 25, 2007

Reply Date: July 10, 2007

Choice Communications, LLC (Choice), a provider of multichannel digital video and audio programming, as well as wireless broadband Internet access service, over licensed and leased Broadband Radio Service (BRS) and leased Educational Broadband Service (EBS) spectrum in the U.S. Virgin Islands Basic Trading Area (BTA), has filed, on its own behalf and on behalf of all the EBS licensees from which Choice leases excess capacity, a request for permanent waiver of the requirement that all BRS and EBS licensees transition to the new BRS/EBS band plan adopted in the Commission's *Report and Order* in WT Docket No. 03-66.¹ This band plan is set forth in Section 27.5(i)(2) of the Commission's Rules.²

In the *BRS/EBS R&O* and *FNPRM*, the Commission adopted a new band plan in an effort to modernize and enhance our rules and policies governing the licensing of the Educational Broadband Service (EBS) and the Broadband Radio Service (BRS) in the 2495-2690 MHz band.³ Indeed, a critical element of the *BRS/EBS R&O* and *FNPRM* is the adoption of a market-oriented, transition mechanism that enables incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. The Commission, nevertheless, found that it is in the public interest to consider case-by-case waivers of the transition rules for a class of operators or their affiliates that: (1) meet the definition of a Multichannel Video Programming Distributor (MVPD) as defined in Section 522 of the Communications Act of 1934, as amended; and (2) provide MVPD service to five percent or more of the households within their respective Geographic Service Areas (GSAs), as calculated in accordance with the requirements of Section 76.905(c) of the Commission's rules.⁴ The Commission further found

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*), affirmed in pertinent part by *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606 (2006).

² 47 C.F.R. § 27.5(i)(2).

³ *BRS/EBS R&O* and *FNPRM*.

⁴ 47 CFR § 76.905(c). The original proposal to permit MVPDs to opt out of the transition was presented to the Commission by the Wireless Communications Association, International, the Catholic Television Network, and the National ITFS Association in October 2002. See generally A Proposal for Revising the MDS and ITFS Regulatory

that it is in the public interest to consider waivers for any BRS or EBS licensee that is collocated with any qualified MVPD licensee that seeks a waiver to opt-out.⁵ The Commission further found that it is in the public interest to consider waivers for those BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized high-powered MBS channels to deliver their service to their customers. The Commission stated that in reviewing requests to waive the rules, the Commission would consider the actions taken by MVPD or BRS licensees to minimize the effect of interference on neighboring markets, as well as the licensee's explanation as to why it cannot work within the transition rules. The Commission stated that waivers will be granted if it is shown that: (i) the underlying purpose of the rules(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 (ii) in view of the 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.⁶

On April 30, 2007, Choice filed a request for waiver to allow it to opt-out of transitioning to the new band plan. Choice requests a waiver of Sections 27.1230 *et. seq.* of the Commission's Rules,⁷ and also requests that the Commission issue certain clarifications. Specifically, Choice requests that a grant of its requested waiver specifically state that:

- (1) Choice and its Shekinah Network (Shekinah) (Choice's EBS channel lessor) will have permanent authority to operate pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1).
- (2) Choice and Shekinah must participate in good faith in any transition planning process relating to any geographic area that overlaps their GSAs. In conjunction with any transition, the BRS licensee and its BRS/EBS channel lessors will subsequently make such modifications to their facilities at the proponent's expense as the proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than a de minimis reduction in the BRS licensee's ability to serve its then-existing subscribers.
- (3) Every main, booster, and base station currently used in conjunction with Choice's system shall be permitted to continue operating under the maximum EIRP limits set forth for "pre-transition" operations in Section 27.50(h)(1)(i) and (ii).
- (4) Any channels used for the transmission of digital video programming on the BRS licensee's system shall be permitted to continue operating under the "pre-transition" emission limits for digital video programming channels set forth in Section 27.53(1)(3). Additionally, pursuant to Section 27.53(1)(5), Choice and Shekinah shall be permitted to operate fixed, temporary fixed, and mobile data stations deployed as of January 10, 2005, provided that those facilities are in compliance with the emission limits set forth in former Sections 21.908 and 74.936.

Regime, RM-10586 (filed Oct. 7, 2002). As adopted, the *BRS/EBS R&O* and *FNPRM* significantly altered that proposal.

⁵ *BRS/EBS R&O*, 19 FCC Rcd 14165, 14199 ¶ 77.

⁶ 47 C.F.R. § 1.925(b)(3).

⁷ 47 C.F.R. § 27.1230 *et. seq.*

- (5) Consistent with Section 27.55(a)(4)(i), all of the BRS and EBS channels in Choice's system will be permitted to operate at any point along their respective GSA boundaries at the greater signal strength of 47 dBu or the strength authorized in their underlying licenses as of January 10, 2005.
- (6) Sections 27.1220 (regarding the 5.5 MHz wide channels in the LBS and UBS) and 27.1222 (regarding the establishment of guardbands around the MBS) shall not be applicable to the BRS licensee and its BRS/EBS channel lessors.
- (7) Choice and Shekinah shall not be subject to the height benchmarking obligations set forth in Section 27.1221.

Interested parties may file comments on the waiver request on or before **June 25, 2007**. Parties interested in submitting reply comments must do so on or before **July 10, 2007**.

All comments should reference the subject waiver request including the DA number of this Public Notice, and should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street SW, TW-A325, Washington DC 20554. This address for FCC locations should be used only for documents filed by Choice States Postal Service first-class mail, Express Mail, and Priority Mail. Hand-delivered or messenger-delivered documents for the Commission's Secretary are accepted only by the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue NE, Suite 110, Washington DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering 236 Massachusetts Avenue NE. Other messenger-delivered documents, including documents sent by overnight mail (other than Postal Service Express Mail and Priority Mail) should be addressed for delivery to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. See FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence, *Public Notice*, 16 FCC Rcd 22165 (2001).

The full text of the waiver request, comments, and reply comments will be available for inspection and duplication during regular business hours in the FCC Reference Information Center (RIC) of the Consumer and Government Affairs Bureau, Federal Communications Commission, 445 12th Street SW, Room CY-A257, Washington DC 20554. Copies also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW, Room CY-B402, Washington DC 20554. Customers may contact BCPI through its web site, <http://www.bcpiwed.com>, by e-mail at fcc@bcpiwebcom, by phone at (202) 488-5300 or (800) 378-3160, or by facsimile at (202) 488-5563. For further information regarding the public reference file for this waiver request, contact Maria Ringold, Chief, Wireless Branch, RIC, (202) 418-1355.

Unless otherwise provided, requests for waiver of the Commission's Rules are subject to treatment by the Commission as restricted proceedings for *ex parte* purposes under Section 1.1208 of the Commission's Rules, 47 C.F.R. § 1.1208. Because of the policy implications and potential impact of this proceeding on persons not parties to the waiver request, we believe it would be in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules. See Sections 1.1200(a), 1.1206 of the Commission's Rules, 47 C.F.R. §§ 1.1200(a), 1.1206. Therefore, subsequent to the release of this Public Notice, *ex parte* presentations that are made with respect to the issues involved in the subject waiver request will be allowed but must be disclosed in accordance with the requirements of Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b).

For further information, contact Charles M. Oliver, Broadband Division, Wireless Telecommunications Bureau at (202) 418-1325, or by e-mail at Charles.Oliver@fcc.gov.

By the Chief, Broadband Division, Wireless Telecommunications Bureau.

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