

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

In the Matter of)
WBCSB LICENSING CORPORATION) File Nos. 19961105UO, 19961105UP
Applications for a New Educational Broadband)
Service Station on the A and B Group Channels at)
Coos Bay, Oregon;)
WBSH LICENSING CORPORATION) File Nos. 19961105UU, 19961105UV
Applications for a New Educational Broadband)
Service Station on the A and B Group Channels at)
Helena, Montana;) File Nos. 19961115UQ, 19961115UR
WBSK LICENSING CORPORATION)
Applications For a New Educational Broadband)
Service Station on the A and C Group Channels at)
Klamath Falls, Oregon;)
And)
WBSR LICENSING CORPORATION) File Nos. 19961216US, 19961216UT
Applications for a New Educational Broadband)
Service Station on the A and B Group Channels at)
Roseburg, Oregon)

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2007

Released: January 31, 2007

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In November of 1996, WBCSB Licensing Corporation (WBCSB), WBSH Licensing Corporation (WBSH), WBSK Licensing Corporation (WBSK), and WBSR Licensing Corporation (WBSR) (collectively, 'Petitioners'), all wholly owned subsidiaries of Sprint Nextel, filed applications¹

¹ File Nos. 19961105UO & 19961105UP, filed by WBCSB (Nov. 5, 1996); 19961105UU & 19961105UV, filed by WBSH (Nov. 5, 1996); 19961115UQ & 19961115UR, filed by WBSK (Nov. 15, 1996); and 19961216US & 19961216UT, filed by WBSR (December 16, 1996) (Applications).

(continued....)

and associated waiver requests for various vacant A, B, and C group, Instructional Television Fixed Service (ITFS) channels in Coos Bay, Oregon; Helena, Montana; Klamath Falls, Oregon; and Roseburg, Oregon.² Petitioners filed these Waiver Requests in support of their pending Applications pursuant to Section 27.1201(c)(1) of the Commission's Rules,³ and pursuant to the rights granted in the *BTA Auction Order*.⁴ Specifically, Petitioners seek a waiver of the frequency availability restrictions in Section 27.5 of the Commission's rules, and of the filing freeze imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O* that proposed new technical rules and a new band plan for Educational Broadband Service (EBS) and Broadband Radio Service (BRS) spectrum.⁵ On or about August 4, 2006, Petitioners updated their Waiver Requests pursuant to the Broadband Division's request, and sought a waiver of the frequency availability restrictions in Section 27.5 of the Commission rules.⁶ For the reasons set forth below, we deny the Waiver Requests and dismiss Petitioners' Applications.

II. BACKGROUND

2. In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's vast potential to host a variety of services. In 1963, the Commission established the ITFS service in the 2500-2690 MHz band,⁷ envisioning that it would be used for transmission of instructional material to accredited public and private schools, colleges, and universities for the formal education of students.⁸ In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted

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² WBSCB Requests for Waiver (filed Nov. 5, 1996); WBSH Requests for Waiver (filed Nov. 5, 1996); WBSK Requests for Waiver (filed Nov. 15, 1996); and WBSR Requests for Waiver (filed Dec. 16, 1996) (Waiver Requests). Petitioners later updated their Waiver Requests on or about August 4, 1996.

³ Section 27.1201(c)(1) of the Commission's Rules states in relevant part that "a wireless cable entity may be licensed on EBS frequencies in areas where at least eight other EBS channels remain available in the community for future EBS use. Channels will be considered available for future EBS use if there are no co-channel operators or applicants within 80.5 km (50 miles) of the transmitter site of the proposed wireless cable operation and if the transmitter site remains available for use at reasonable terms by new EBS applicants on those channels within three years of commencing operation." 47 C.F.R. § 27.1201(c)(1).

⁴ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589, 9612 ¶ 41 (1995) (*BTA Auction Order*).

⁵ 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. *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6811 ¶ 226, 6825 ¶ 260 (2003) (*NPRM and MO&O*) (stating in relevant part that "[i]t is . . . ordered that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control WILL NOT BE ACCEPTED until further notice.")

⁶ Petitioners' Updated Waiver Requests (filed Aug. 4, 2006).

⁷ See Educational Television, Docket No. 14744, *Report and Order*, 39 FCC 846 (1963) (*MDS R&O*), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

⁸ See Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, *Report and Order*, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (*1983 R&O*) (citing *ETV Decision*, 39 FCC 846, 853 ¶ 25).

eight ITFS channels (the E and F channel blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁹ The Commission determined that there were a substantial number of unused ITFS channels in many areas of the country.¹⁰ At the same time, in an effort to encourage more intensive use of the spectrum and to help ITFS licensees generate needed revenue, the Commission began to relax use restrictions to permit ITFS licensees to lease excess capacity on their facilities to commercial entities.¹¹

3. On October 25, 1991, the Commission adopted the “wireless cable exception,” which permitted use of available ITFS channels by wireless cable entities.¹² To ensure that wireless cable use did not have a negative impact upon ITFS, the Commission established a series of requirements that were to be met before ITFS channels could be used for wireless cable use.¹³ Commercial operators seeking to take advantage of ITFS frequencies had to show that at least 8 ITFS channels remained available in the community.¹⁴ Also, there could be no co-channel ITFS station within 50 miles of the proposed system.¹⁵

4. In March 1996, the Commission completed an auction of MDS licenses for unused spectrum in each of 493 BTAs and BTA-like areas.¹⁶ The Commission granted the BTA auction winner the exclusive right to apply for available ITFS frequencies on a commercial basis within the BTA.¹⁷ The Commission’s rules at that time, however, limited applications for new ITFS channel authorizations to certain prescribed filing windows.¹⁸ Petitioners were successful bidders for the BTA authorizations for Coos Bay, Oregon (BTA B097); Klamath, Oregon (BTA B231); Helena, Montana (BTA B188); and Roseburg, Oregon (BTA B385).¹⁹ Thus, as the BTA authorization holders for these geographic areas, Petitioners had the exclusive right to apply for the vacant ITFS channels.²⁰

5. In November and December of 1996, Petitioners filed a series of applications for the vacant ITFS channels in their BTA license areas. Because Petitioners’ applications were filed outside of

⁹ See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen Docket No. 80-112 and CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*First Leasing Decision*).

¹⁰ *Id.* at 1206-07 ¶ 4.

¹¹ *Id.*

¹² See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792, 6793, 6801-06 ¶¶ 4, 42-58 (1991) (*Second Report and Order*); see also *Second Report and Order* at Appendix C; 47 C.F.R. § 74.990 (1991).

¹³ See former 47 C.F.R. § 74.990.

¹⁴ See former 47 C.F.R. § 74.990(a).

¹⁵ *Id.*

¹⁶ See *Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas*, *Public Notice* (rel. Mar. 29, 1996).

¹⁷ See *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

¹⁸ See former 47 C.F.R. § 74.911(c)(2).

¹⁹ FCC Announces Grant of MDS Authorizations, *Public Notice*, Report No. D-889-A (rel. Oct. 28, 1996).

²⁰ 47 C.F.R. § 27.1201(c)(1); see also *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

an open filing window for ITFS applications, Petitioners sought a waiver of former Section 74.911(c)(2). In their Waiver Requests, Petitioners argued that they had assumed that they would also be granted authorizations to operate on the vacant ITFS frequencies in the markets they acquired at auction when they placed their winning bids.²¹ Petitioners further argued that any delay in the development of those markets would deny service to the public while also forcing them to endure delay and expense while they waited to use the spectrum.²²

6. In April 2003, the Commission proposed new technical rules and a new band plan for ITFS and MDS spectrum and at the same time imposed a filing freeze on new ITFS applications.²³ On June 10, 2004, the Commission adopted new rules that initiated a fundamental restructuring of the 2500-2690 MHz band²⁴ to provide both existing ITFS and MDS licensees and potential new entrants greater flexibility, encouraging the highest and best use of spectrum domestically and internationally. At that time, the ITFS and MDS services were renamed the Educational Broadband Service (EBS) and Broadband Radio Service (BRS), respectively. Among other things, the Commission eliminated the “wireless cable exception” to the EBS eligibility rules for those markets that had transitioned to the new band plan.²⁵ The Commission also sought comment on whether to eliminate the wireless cable exception to the EBS eligibility rules pre-transition.²⁶ The Commission stated that if it did eliminate the exception, it would grandfather existing licenses granted pursuant to the exception.²⁷ Furthermore, because the Commission instituted geographic area licensing for BRS/EBS facilities wherein licensees could modify or add to their facilities without prior approval, the Commission, in the *BRS/EBS R&O & FNPRM*, directed WTB to “dismiss all pending applications to modify MDS or ITFS stations, except for modifications that could change an applicant’s protected service area (PSA) or applications for facilities that would have to be separately applied for” under the adopted rules.²⁸

7. Petitioners’ Applications and associated Waiver Requests were dismissed by the Wireless Telecommunications Bureau (WTB) on July 29, 2004, when it determined that Petitioners application fell within the Commission’s directive in the *BRS/EBS R&O & FNPRM*. On October 29, 2004, the Commission released a modification to the *BRS/EBS R&O & FNPRM* clarifying that it did not intend to have the Bureau dismiss applications to add or modify frequency assignments.²⁹ On October 29, 2004, Petitioners filed Petitions for Reconsideration of the dismissal of their applications asserting that because their applications sought to add frequency assignments, such applications were improperly dismissed. On May 3, 2005, the Bureau granted these Petitions and reinstated Petitioners’ applications and associated

²¹ See Waiver Requests at 1-2.

²² *Id.*

²³ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

²⁴ 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*).

²⁵ See *id.* at 14293 ¶ 349.

²⁶ See *id.* at 14293 ¶ 350.

²⁷ *Id.*

²⁸ *Id.* at 14191 ¶ 58.

²⁹ 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, *Order*, WT Docket No. 03-66, 19 FCC Rcd 22284 (2004) (*BRS/EBS Modification Order*).

Waiver Requests.³⁰ On April 27, 2006, the Commission adopted the *BRS/EBS 3rd MO&O and 2nd R&O*, which eliminated the “wireless cable exception” in those markets that have not transitioned.³¹ The Commission had grandfathered existing applications filed pursuant to the “wireless cable exception.”³²

8. On June 9, 2006, the Division notified Petitioners that their Waiver Requests appeared to be outdated, and requested that Petitioners update such Waiver Requests to reflect current facts and circumstances. On or about August 4, 2006, Petitioners updated their Waiver Requests pursuant to the Division’s request, and sought a waiver of the frequency availability restrictions in Section 27.5 of the Commission rules.³³ Petitioners argue that a grant of their requests would support Sprint Nextel’s ability to deploy broadband infrastructure more efficiently and develop wireless, interactive multimedia communications solutions.³⁴ Petitioners further argue that grant of their applications would potentially facilitate the transitions of the BTAs involved to the new BRS/EBS band plan.³⁵ Petitioners also note that the spectrum at issue continues to be unlicensed and lies fallow more than forty years after the allocation of spectrum for EBS Services.³⁶

III. DISCUSSION

9. As the BTA authorization holders for Coos Bay, Helena, Klamath Falls, and Roseburg BTAs, Petitioners had the exclusive right to apply for the vacant EBS channels in those geographic areas pursuant to Section 27.1201(c)(1) of the Commission’s Rules³⁷ and the *BTA Auction Order*.³⁸ Petitioners seek a waiver of the frequency availability restrictions contained in Section 27.5 of the Commission’s Rules. To be licensed on these frequencies, Petitioners also require a waiver of the filing freeze that was imposed by the Commission on new EBS applications in the Commission’s April 2003 *NPRM and MO&O*.³⁹ The Commission may grant a request for a waiver if it is shown that: (i) 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 (ii) in 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.⁴⁰ In this case, we conclude that Petitioners have not met the waiver standard.

³⁰ See Wireless Telecommunications Bureau’s Broadband Division Grants Requests for Reconsideration of Dismissal of BRS/EBS Applications, DA 05-1279, *Public Notice* (WTB rel. May 3, 2005).

³¹ 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. *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5755 ¶ 364 (2006) (*BRS/EBS 3rd MO&O and 2nd R&O*).

³² *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14292-93 ¶¶ 347-350.

³³ See 47 C.F.R. §§ 27.5.

³⁴ See Petitioners’ Updated Waiver Requests (filed Aug. 4, 2006) at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 47 C.F.R. § 27.1201(c)(1).

³⁸ *BTA Auction Order*, 10 FCC Rcd at 9612 ¶ 41.

³⁹ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

⁴⁰ 47 C.F.R. § 1.925(b)(3).

10. In support of its Applications and associated Waiver Requests, Petitioners argue that grant of their requests would support Sprint Nextel's ability to deploy broadband infrastructure more efficiently and develop wireless, interactive multimedia communications solutions in the 2.5 GHz band for consumers in the areas in which they hold BTA licenses.⁴¹ However, a review of the Commission's records reveals that Petitioners are not themselves using their BTA authorizations, and have actually leased their BTA authorizations to other entities.⁴² Because Petitioners are not currently using their available spectrum in these geographic areas, and their lease commitments prevent them from deploying broadband systems on such spectrum, Petitioners have failed to corroborate their claims that the assignment of the additional frequencies requested would facilitate their ability to deploy broadband on these frequencies.

11. Petitioners further argue that the requested channel assignments would potentially facilitate the timely transition to the new BRS/EBS band plan for the geographic areas at issue.⁴³ To date, Transition Initiation Plans for the BRS/EBS band have been filed for over 100 BTAs, and transitions have been completed in 23 BTAs.⁴⁴ This demonstrates that the transition to the new band plan is progressing rapidly despite any difficulties the transitioning parties may have encountered.

12. In this connection, we note that the Commission implemented a filing freeze with respect to all applications for new BRS and EBS licenses, as well as for major modifications of those licenses, in order to permit the orderly and effective resolution of issues in the BRS/EBS proceeding.⁴⁵ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.⁴⁶ The Commission also permitted the filing of applications for major modifications of EBS licenses, but still maintained the filing freeze with respect to applications for new EBS licenses.⁴⁷ The Commission stated that the "purpose [of the freeze] was to prevent further construction that might be inconsistent with rules and policies that [it] may later adopt for the band [and therefore was] concerned that unconstrained investment in interim technology and systems could generate resistance to the adoption of advanced-system rules, if after subsequent analysis [it] were to conclude that the interim technologies involved are not consistent with necessary rule changes."⁴⁸ In altering the freeze, the Commission explained that "several MDS/ITFS operators were well underway with serious efforts to deploy two-way, if not fully mobile, Internet access services when the MO&O was adopted [and that the] freeze action may have disrupted those plans and brought those efforts to a halt."⁴⁹ The Commission, however, reasoned "that continuing the freeze on applications for new ITFS stations should not disrupt existing business plans."⁵⁰ In the instant case, Petitioners have not demonstrated that at that time, they

⁴¹ See Updated Waiver Requests at 3.

⁴² See, e.g., BTA B097, Lease ID L000000104, WSCSB, licensee, and Fixed Wireless Holdings, LLC, lessee, (May 5, 2005 to Mar. 28, 2016).

⁴³ See Updated Waiver Requests at 3.

⁴⁴ See WT Docket No. 06-136.

⁴⁵ 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 Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

⁴⁶ *Id.* at 16848 ¶ 1.

⁴⁷ *Id.*

⁴⁸ See *id.* at 16851 ¶ 6.

⁴⁹ See *id.* at 16851 ¶ 8.

⁵⁰ See *id.* at 16851-52 ¶ 10.

had efforts underway to deploy broadband services in the geographic areas at issue, and that the freeze has disrupted such plans or halted their efforts. Therefore, Petitioners do not fall into the category of licensees whom the freeze modification was meant to assist.

13. Finally, Petitioners note that a search of Commission records indicates that there are no EBS licensees within fifty miles of the geographic areas at issue herein, and point out that the spectrum continues to lie fallow.⁵¹ However, even prior to Petitioners' 1996 Applications, EBS-eligible entities have not been able to apply for these channels due to the filing window restrictions and filing freezes discussed above. Indeed, in eliminating the "wireless cable exception" to the EBS eligibility rule post-transition, the Commission noted, "[g]iven that EBS-eligible licensees have not been able to apply for new stations in this band since 1995, we believe the better action is to restrict access to ITFS frequencies after the transition to educational institutions and non-profit educational organizations."⁵² In this case, Petitioners have not proffered any compelling arguments to demonstrate that waiving the filing freeze would not harm educational entities that wished to access EBS spectrum in these areas. Nor have Petitioners, who are not utilizing their available spectrum in these geographic areas, demonstrated any compelling reasons why they should be able to acquire such spectrum before EBS-eligible entities have been given the opportunity to seek licenses for these EBS channels. Therefore, we conclude that Petitioners have not demonstrated that they merit a waiver of Section 27.5 or a waiver of the current filing freeze on EBS channels imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*.⁵³

IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons discussed above, we deny Petitioners' request for a waiver of Section 27.5 of the Commission's rules, and further deny them a waiver of the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O*. We also dismiss Petitioners' above-captioned Applications.

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3), that the waiver requests filed by WBSCB Licensing Corporation, WBSH Licensing Corporation, WBSK Licensing Corporation and WBSR Licensing Corporation on or about August 4, 2006, in connection with File Nos. 19961105UO, 19961105UP, 19961105UU, 19961105UV, 19961115UQ, 19961115UR, 19961216US and 19961216UT ARE DENIED.

⁵¹ See Updated Waiver Requests at 3.

⁵² *Id.*, 19 FCC Rcd at 14293 ¶ 349.

⁵³ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

16. 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 27.5 of the Commission's Rules, 47 C.F.R. § 27.5, that the licensing staff of the Broadband Division SHALL DISMISS File Nos. 19961105UO, 19961105UP, 19961105UU, 19961105UV, 19961115UQ, 19961115UR, 19961216US and 19961216UT.

17. 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, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Joel D. Taubenblatt
Chief, Broadband Division
Wireless Telecommunications Bureau