

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

In the Matter of Application of)
)
THE BOARD OF TRUSTEES OF NORTHERN) File No. 0003250992
MICHIGAN UNIVERSITY)
)
For a New Educational Broadband Service Station)
)

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 2008

Released: August 6, 2008

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On December 4, 2007, The Board of Trustees of Northern Michigan University (NMU or Northern Michigan University) filed an application¹ and waiver request in support of its application for four Educational Broadband Service (EBS) channels in the area of Marquette, Michigan.² In its Application, NMU seeks a waiver of the filing freeze that the Commission imposed on new EBS applications in the April 2003 *NPRM and MO&O* regarding services in the 2500-2690 MHz band,³ and of Section 1.1913(b) of the Commission's rules to permit manual filing of the Application.⁴ For the reasons stated below, we grant the Waiver Request with certain conditions and direct the Broadband Division to process the Application.

II. BACKGROUND

2. *2500-2690 MHz Band Generally.* In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's potential to host a variety of services. In 1963, the Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band,⁵ 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

¹ File No. 0003250992 (filed Dec. 4, 2007) (Application).

² Application, Exhibit A - Request for Waiver (filed Dec. 4, 2007) (Waiver Request).

³ See Waiver Request at 1. See also 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*).

⁴ See Waiver Request at 1. Section 1.913(b) of the Commission's Rules states in relevant part that "all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS." 47 C.F.R. § 1.913(b).

⁵ See Educational Television, Docket No. 14744, *Report and Order*, 39 FCC 846 (1963) (*MDS R&O*), recon. denied 39 FCC 873 (1964) (*ETV Decision*).

students.⁶ In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted eight ITFS channels (the E and F channel blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁷ In conjunction with this re-allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.⁸

3. In April 2003, the Commission proposed new technical rules and a new band plan for ITFS and MDS spectrum (changing the service names to EBS and Broadband Radio Service (BRS), respectively). At the same time, it 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.⁹ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.¹⁰ 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.¹¹ On June 10, 2004, the Commission adopted new rules that initiated a fundamental restructuring of the 2500-2690 MHz band in order to provide both existing EBS and BRS licensees and potential new entrants greater flexibility in order to encourage the highest and best use of spectrum domestically and internationally.¹² Earlier this year, the Commission sought comment on how to license unassigned EBS spectrum.¹³

4. *Northern Michigan University License Application.* NMU states that it is an accredited university located in Marquette, Michigan that serves approximately 9,700 students with over 1,000 faculty and staff.¹⁴ The University currently offers 1,600 hybrid and Web-based courses in its curriculum

⁶ 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.).

⁷ 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*).

⁸ *Id.* at 1206-07 ¶ 4.

⁹ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

¹⁰ 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 Bands, *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

¹¹ *Id.*

¹² 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*).

¹³ 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, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6060-6068 ¶¶ 180-204 (2008) (*Second FNPRM*).

¹⁴ Waiver Request at 1.

targeted at the over 6,000 students who live off campus and are not always able to attend classes in person during the winter months.¹⁵

5. On December 4, 2007, NMU filed an application seeking an EBS authorization with a Geographic Service Area (GSA) with a 35 mile radius around the following coordinates 46-30-48.8 N, 087-23-58.5 (NAD83) on the following post-transition EBS channels: A4 (2572.00-2578.00 MHz), B4 (2578-2584 MHz), C4 (2584-2590 MHz), and D4 (2590-2596 MHz).¹⁶ A review of Commission records indicates that there is no EBS license that covers Marquette, Michigan. However, there is a very slight overlap between that proposed GSA and the GSA of EBS Stations WNC755, WNC756, WNC753, and WNC762, licensed to the Regional Educational Media Center in Houghton, Michigan.¹⁷ NMU asks that any area currently licensed to another EBS entity not be included in its GSA.¹⁸

6. NMU explains that its efforts to expand learning opportunities for its students are limited by poor infrastructure and broadband availability.¹⁹ Specifically, NMU asserts that there are currently no other available broadband service options in the areas surrounding Marquette, Michigan, as these areas are extremely rural and have limited communications infrastructure.²⁰ Supporting letters state that the areas surrounding Marquette have no broadband access in residences or schools because cable and telephone providers have not deployed service in those areas.²¹

7. NMU further states that it has explored other possible wireless broadband solutions.²² While NMU has deployed an 802.11 wireless network throughout its campus, it asserts that this WiFi network is subject to limitations, including low power, lack of adequate backhaul capacity, and difficulties in access point maintenance.²³ NMU explains that it has evaluated solutions to combat the difficulties presented by the rural nature of its community and has determined that a WiMAX network is the best opportunity for providing bandwidth-intensive hybrid and web-based online courses remotely, and that EBS spectrum is its best option for creating a WiMAX network.²⁴ NMU indicates that it intends to use its EBS license "solely for educational purposes."²⁵ Specifically, NMU states that it does not

¹⁵ *Id.* at 2.

¹⁶ Application. On October 2, 2007, NMU filed an application for Special Temporary Authority (STA) to operate on EBS spectrum pending action on an application for regular authority to operate on the spectrum. Request for Special Temporary Authority, File No. 0003187729 (filed Oct. 2, 2007) (STA Application). The STA Application proposed the same GSA as the instant Application. *Id.* The STA Application was granted on October 3, 2007. See License for Station WQHQ337 (STA). On January 17, 2008, the Bureau granted an application for renewal of the STA. See File No. 0003245253.

¹⁷ Application, Appendix 2, Engineering Statement of John F.X. Browne at 2.

¹⁸ Waiver Request at 11.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 1-3.

²¹ See Letter from Darlene M. Walch, Dean of Academic Information Services, Northern Michigan University to the Federal Communications Commission (dated Nov. 24, 2007) (Walch Letter); Letter from June M. Schaefer, Superintendent – Marquette-Alger Regional Educational Service Agency to the Federal Communications Commission (dated Nov. 15, 2007) (RESA Letter).

²² Waiver Request at 3.

²³ *Id.* at 4.

²⁴ *Id.* at 3-4.

²⁵ *Id.* at 6.

intend to use this license for any commercial purpose and that it does not intend to lease any spectrum associated with this Application to another entity.²⁶

8. NMU's application was listed on public notice as accepted for filing on December 12, 2007.²⁷ No petitions to deny or other oppositions were filed. Comments in support of the application were filed by the Honorable Carl Levin, United States Senator,²⁸ the Honorable Debbie Stabenow, United States Senator,²⁹ and the Honorable Bart Stupak, United States Representative.³⁰ Comments in support of the application also were filed by the Superintendent of the Marquette-Alger Regional Educational Service Agency,³¹ the Dean of Academic Services at NMU,³² the Chairman of Starbucks Coffee Company (an alumnus of NMU with an interest in Northern Michigan's local business community),³³ and a local teacher interested in taking courses online from NMU.³⁴ The supporting commenters argue that granting NMU relief will enable the university to deliver high-speed data to large sections of the remote, rural communities the university serves,³⁵ as well as providing better educational opportunities to the Upper Peninsula (UP) citizens who live in and around Marquette County, Michigan.³⁶

III. DISCUSSION

9. As noted, NMU seeks both a waiver of the filing freeze on new EBS applications, and a waiver of the electronic filing requirement for such applications, to permit it to use available EBS channels to operate a WiMAX network for the provision of educational and instructional material.³⁷ 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.³⁸ As discussed below, we conclude that NMU has met the waiver standard with respect to both of its requests, and accordingly we grant its waiver request, subject to the conditions outlined in the following discussion.

²⁶ *Id.*

²⁷ See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 3694, *Public Notice* (rel. Dec. 27, 2007) at 3.

²⁸ Letter from Carl Levin, United States Senator, to the Marlene H. Dortch, Secretary, Federal Communications Commission (dated Nov. 26, 2007) (Levin Letter).

²⁹ Letter from Debbie Stabenow, United States Senator, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission (dated Nov. 30, 2007) (Stabenow Letter).

³⁰ Letter from Bart Stupak, Member of Congress to the Marlene H. Dortch, Secretary, Federal Communications Commission (dated Nov. 20, 2007) (Stupak Letter).

³¹ RESA Letter.

³² Walch Letter.

³³ Letter from Howard Schultz, Chairman, Starbucks Coffee Company to the Federal Communications Commission (dated Nov. 30, 2007) (Schultz Letter).

³⁴ Letter from Susan S. Syria to the Federal Communications Commission (dated Dec. 2, 2007) (Syria Letter).

³⁵ Stupak Letter; Stabenow Letter; RESA Letter; Schultz Letter, Syria Letter.

³⁶ Stupak Letter; Stabenow Letter; RESA Letter; Schultz Letter; Walch Letter; Levin Letter.

³⁷ See Waiver Request at 1.

³⁸ 47 C.F.R. § 1.925(b)(3).

10. We conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by NMU's situation. Specifically, we find that, absent access to EBS spectrum, NMU would face substantial challenges in providing educational content to its students, who may not be able to attend classes in person during the winter months, and members of the Marquette community, a relatively remote rural location. As described by local officials, the areas surrounding Marquette have no broadband access in residences or schools because cable and telephone providers have not deployed service in those areas.³⁹ Moreover, given that no EBS licensee covers the Marquette area, NMU does not have the option of leasing spectrum from an existing EBS licensee. In addition, NMU has also shown that it has explored other alternatives and has determined that EBS spectrum represents the best means of serving its students and the Marquette, Michigan community.

11. We note that NMU's proposed use of the EBS channels is consistent with the Commission's policy for EBS. Section 27.1201(a) of the Commission's Rules states that a "license for an Educational Broadband Service stations will be issued only to an accredited institution...engaged in the formal education of enrolled students."⁴⁰ NMU is such an institution and has indicated that it will use the proposed EBS system solely to meet the educational needs of the University and its surrounding community.⁴¹ The provision of broadband services via a new EBS license would be consistent with the Commission's view that, "the public interest favors preserving [EBS] spectrum for licensing to [educators] and that doing so will further the educational objectives that led to the establishment of [EBS]."⁴²

12. We also find that granting a waiver to NMU is consistent with Commission precedent. In the *StratusWave MO&O*, the Commission granted a limited waiver of the filing freeze to allow StratusWave, a commercial operator, to access EBS spectrum to provide broadband services to areas in West Virginia and Ohio that had no broadband service or very limited broadband options where there were no BRS or EBS licensees in the area.⁴³ The Commission issued ten-year, non-renewable conditional authorizations with conditions to ensure that the anticipated public interest benefits materialize, that the spectrum ultimately is used for educational purposes, and that StratusWave does not receive a windfall without delivering the promised service.⁴⁴ Specifically, the Commission required StratusWave to reduce or terminate service as needed to protect EBS operations when a new adjacent-channel or co-channel EBS licensee notifies StratusWave that it is ready to commence providing service within any portion of the GSAs covered by StratusWave's licenses. In addition, StratusWave also must make a substantial service

³⁹ See Letter from Darlene M. Walch, Dean of Academic Information Services, Northern Michigan University to the Federal Communications Commission (dated Nov. 24, 2007) (Walch Letter); Letter from June M. Schaefer, Superintendent – Marquette-Alger Regional Educational Service Agency to the Federal Communications Commission (dated Nov. 15, 2007) (RESA Letter).

⁴⁰ 47 C.F.R. § 27.1201(a).

⁴¹ See Waiver Request at 7.

⁴² See Gateway Telecom LLC d/b/a StratusWave Communications; Applications For New Educational Broadband Service Stations on the A and B Group Channels in Centerville, Ohio; and the A and B Group Channels in Arden, West Virginia, *Memorandum Opinion and Order*, 22 FCC Rcd 15789, 15796 ¶ 15 (2007) (*StratusWave MO&O*).

⁴³ *StratusWave MO&O*, 22 FCC Rcd at 15798 ¶ 20. See also Choice Communications, LLC, *Memorandum Opinion and Order*, 20 FCC Rcd 10906 (WTB 2005) (Bureau waiver of filing freeze to permit an existing BRS operator to obtain vacant EBS channels in the Virgin Islands to expand its service offerings).

⁴⁴ *Id.*, 22 FCC Rcd at 15799 ¶ 21.

showing by December 31, 2009, a date earlier than the EBS buildout deadlines under the Commission's rules, and may not assign or transfer its authorizations until it has satisfied its buildout obligation.⁴⁵

13. Consistent with the Commission's decision in *StratusWave*, we also impose a condition in the instant case to ensure that the spectrum is used for educational purposes. Specifically, we adopt as a license condition NMU's commitment not to lease its spectrum.⁴⁶ We note that additional conditions similar to those adopted in *StratusWave* – setting a more limited term for the license and prohibiting transfer and assignment of the license until buildout obligations are satisfied – are not necessary in the instant case. Unlike *StratusWave*, NMU is an educational institution eligible to hold an EBS license, and the license could only be assigned to another EBS-eligible licensee.⁴⁷ Therefore, we do not see a significant risk that NMU will receive a windfall from the issuance of the license. Similarly, while the Commission accelerated *StratusWave*'s buildout requirements as a condition of issuing the license, we do not see reason to do so here for NMU, given NMU's efforts to take steps towards expeditiously providing service under its STA, and the relatively near term approach of the existing buildout requirement for EBS licensees generally.⁴⁸

14. We also place two additional conditions on NMU's license, consistent with its request and representations in its Application. First, as NMU requests,⁴⁹ its GSA shall not include any area within the GSA of any previously licensed co-channel EBS station.⁵⁰ Second, although the discrete operations proposed in NMU's Application⁵¹ are not within the Canadian coordination zone, to the extent that NMU subsequently wishes to expand operations into the portion of its GSA that is within the coordination zone, it must comply with the coordination requirements of the relevant agreement between the United States and Canada.⁵² Specifically, prior to operating within 120 kilometers of the Canadian border, NMU must either file an application for an individual transmitter with the Commission, which will be coordinated with Canada,⁵³ or directly coordinate with affected licensees across the border, as permitted under the agreement with Canada.

15. With respect to the electronic filing requirement contained in Section 1.1913(b) of the Commission's Rules,⁵⁴ we observe that the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the one submitted by NMU. We therefore conclude that, in light of these circumstances, application of the rule would be inequitable and contrary to the public interest because it would be unfair to reject an application for failure to file electronically when

⁴⁵ *Id.*, 22 FCC Rcd at 15801 ¶ 27.

⁴⁶ Waiver Request at 6.

⁴⁷ See 47 C.F.R. § 27.1201.

⁴⁸ See 47 C.F.R. § 27.14(o) (all EBS licensees must demonstrate substantial service by May 1, 2011).

⁴⁹ Waiver Request at 11.

⁵⁰ As noted above, there is a very slight overlap between that proposed GSA and the GSA of EBS Stations WNC755, WNC756, WNC753, and WNC762, licensed to the Regional Educational Media Center in Houghton, Michigan.

⁵¹ See Waiver Request at 5.

⁵² Interim Arrangement Concerning the Use of the Frequency Bands 2150 – 2162 MHz and 2500 – 2690 MHz by MCS and MDS Stations Near the Canada/United States of America Border (Dec. 5, 1997). A similar condition was placed on NMU's STA. See STA.

⁵³ See 47 C.F.R. § 27.1209(b)(1)(i).

⁵⁴ See 47 C.F.R. § 1.913(b).

electronic filing capability is not available. We therefore grant NMU a waiver to permit manual filing of its Application.

16. Based upon the evaluation of the record before us, we conclude that NMU has demonstrated that continued application of the filing freeze and electronic filing requirement would be inequitable, unduly burdensome and contrary to the public interest, given the unique circumstances of this case. We also find that waiving the filing freeze and the electronic filing requirement will facilitate the provision of educational material through a broadband network in Northern Michigan and will further the Commission's goals of ultimately providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.⁵⁵ We note that the waivers granted in the instant Order are based on the unique circumstances of this case, and do not prejudice the Commission's consideration of the appropriate mechanism generally for licensing unassigned EBS spectrum.⁵⁶

IV. CONCLUSION AND ORDERING CLAUSES

17. For the reasons discussed above, we grant NMU's requests for waiver of (1) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*, and, (2) the electronic filing requirement in Section 1.1913(b) of the Commission's Rules. We also direct the Broadband Division to process NMU's Application in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

18. 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 Northern Michigan University on December 3, 2007 in connection with File No. 0003250992 ARE GRANTED, subject to the conditions noted below.

19. 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 that the licensing staff of the Broadband Division, Wireless Telecommunications Bureau SHALL PROCESS File No. 0003250992 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

20. 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 that the following conditions SHALL BE IMPOSED on any authorizations issued to Northern Michigan University as a result of the application it has filed:

The Geographic Service Area of this station shall not include any area within the GSA of any previously licensed co-channel EBS station.

Operation within 120 kilometers of the Canadian border is prohibited without prior compliance with the coordination requirements of the Interim Arrangement Concerning the Use of the Frequency Bands 2150 – 2162 MHz and 2500 – 2690 MHz by MCS and MDS Stations Near the Canada/United States of America Border or any subsequent agreement with Canada.

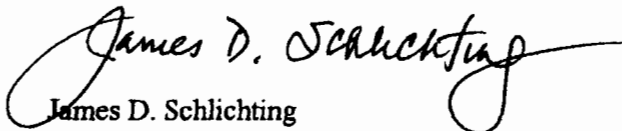
⁵⁵ FCC Strategic Plan 2006-2011 at 5. In turn, this goal is based upon the statutory requirement that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Telecommunications Act of 1996, P.L. 104-104, Section 706(a).

⁵⁶ See *Second FNPRM*, *supra*.

The Board of Trustees of Northern Michigan University shall not lease any spectrum associated with this license to another entity.

21. 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


James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau