



PUBLIC NOTICE

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WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON REQUEST BY OKLAHOMAWESTERN TELEPHONE COMPANY, INC. FOR WAIVER OF THE REQUIREMENT TO TRANSITION TO THE NEW BRS/EBS BAND PLAN

Comment Date: June 2, 2009

Reply Date: June 12, 2009

On May 5, 2008,¹ Oklahoma Western Telephone Company, Inc. (Oklahoma Western), a provider of multichannel video service over the E-group channels (under Call Sign WLK382) and the H-group channels (under Call Signs WNTC500, WNTC764, and WNTD797) in Pushmataha County, Oklahoma filed a request for permanent waiver of the requirement that all Broadband Radio Service (BRS) and Educational Broadband Service (EBS) licensees transition to the new BRS/EBS band plan adopted in the Commission's *Report and Order* in WT Docket No. 03-66.² This band plan is set forth in Section 27.5(i)(2) of the Commission's Rules.³ Oklahoma Western requests waiver of Sections 27.1230 *et. seq.* of the Commission's Rules.⁴

In the *BRS/EBS R&O* and *FNPRM*, the Commission adopted a new band plan for the Educational Broadband Service (EBS) and the Broadband Radio Service (BRS) in the 2495-2690 MHz band.⁵ The Commission established a market-oriented, transition mechanism that enabled incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. The Commission also 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 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 GSAs, as

¹ Oklahoma Western filed a supplement on May 19, 2008.

² 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). The deadline for filing opt-out waiver requests was within 60 days after a proponent filed an initiation plan, or April 30, 2007, whichever came first. 47 C.F.R. § 27.1231(g). On March 20, 2008, the Commission, *inter alia*, granted Oklahoma Western an extension until May 5, 2008 to file a request for waiver to opt out of the new band plan. See *Oklahoma Western Telephone Company, Memorandum Opinion and Order*, 23 FCC Rcd 5606, 5613 ¶ 20 (2008). Oklahoma Western's request is timely pursuant to the extension granted by the Commission.

³ 47 C.F.R. § 27.5(i)(2).

⁴ 47 C.F.R. § 27.1230 *et. seq.*

⁵ *BRS/EBS R&O* and *FNPRM*.

calculated in accordance with the requirements of Section 76.905(c) of the Commission's Rules. The Commission further found 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.⁶ 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 will 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 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 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.⁷

On May 5, 2008, Oklahoma Western filed a request for waiver to allow it to opt-out of transitioning to the new band plan. Oklahoma Western requests waiver of Sections 27.1230 *et. seq.* of the Commission's Rules,⁸ and also requests that the Commission issue certain clarifications. Specifically, Oklahoma Western requests that grant of its requested waiver specifically state that:

- (1) Oklahoma Western 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) Oklahoma Western shall participate in good faith in any transition planning process relating to any geographic area that overlaps its GSAs. In conjunction with any transition, Oklahoma Western will subsequently make such modifications to their facilities at the proponent's expense and 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 *de minimis* reduction in Oklahoma Western's ability to serve its then-existing subscribers;
- (3) Every main, booster, and base station currently used in conjunction with Oklahoma Western's wireless cable 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 channel used for the transmission of analog video programming on Oklahoma Western's system shall be permitted to continue operating under the "pre-transition" emission limits for analog video programming channels set forth in Section 27.53(l)(1). Any channel used for the transmission of digital video programming on Oklahoma Western'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(l)(3). In addition, per Section 27.53(l)(5), Oklahoma Western 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;

⁶ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

⁷ 47 C.F.R. § 1.925(b)(3).

⁸ 47 C.F.R. §§ 27.1230 *et. seq.*

(5) Consistent with Section 27.55(a)(4)(i), all of the channels in Oklahoma Western'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 5.5 MHz wide channels in the LBS and UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to Oklahoma Western; and

(7) Oklahoma Western 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 2, 2009**. Parties interested in submitting reply comments must do so on or before **June 12, 2009**.

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 United 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 United States 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@bcpiwed.com, 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 John Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau at (202) 418-0797, or by e-mail at John.Schauble@fcc.gov.

By the Chief, Broadband Division, Wireless Telecommunications Bureau.

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