

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

In the matter of)
)
NORTHWEST COMMUNICATIONS)
COOPERATIVE)
)
Request for Permanent Waiver of Commission)
Rules Regarding Transition of Broadband Radio)
Service and Educational Broadband Service to)
Revised Band Plan)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2009

Released: October 23, 2009

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (WTB or Bureau) has before it a request by Northwest Communications Cooperative (NCC), seeking a waiver of Sections 27.1230-27.1239 of the Commission's Rules¹ for all of its Broadband Radio Service (BRS) and Commercial Educational Broadband Service (C-EBS) stations in the Bowbells, North Dakota Geographic Service Area (GSA).² NCC has demonstrated that a waiver is necessary for it to continue serving its customers as it has since 1990. We therefore grant NCC's Waiver Request to the extent indicated herein.³

¹ Request for Waiver (filed Apr. 25, 2007) (Waiver Request). On April 25, 2007, NCC sought a waiver to opt-out of the transition of the 2500-2690 MHz band for all of its BRS and Commercial EBS stations in the GSAs of Epping and Bowbells, North Dakota. *Id.* at 1. On April 21, 2009, however, NCC sought leave to withdraw its Waiver Request with respect to Epping, North Dakota. Notice of Conditional Amendment to Opt-Out of Northwest Communications Cooperative and Amendment to Transition Plan of Clearwire Corporation for BTA 476, Williston, North Dakota, Northwest Communications Cooperative and Clearwire Corporation at 1 (filed Apr. 21, 2009) (Withdrawal Request). NCC's Withdrawal Request was granted on October 9, 2009. *See* Letter to David L. Nace, Esq. and Nadja S. Sodos-Wallace, Esq., *Letter*, DA 09-2204 (WTB BD rel. Oct. 9, 2009).

Sections 27.1230-27.1239 of the Commission's rules concern the transition of Broadband Radio Service (BRS) and Educational Broadband Service (EBS) to the band plan adopted by the Commission in the *BRS/EBS Report and Order*. 47 C.F.R. §§ 27.1230-27.1239. *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* as appropriate).

² Stations WMX663 (Channels D2-D4), WLW987 (Channels E1-E4), WLW988 (Channels F1-F4), WMX664 (Channels G1-G4), and WNTB443 (Channels H1-H3). Waiver Request at Appendix A.

³ On May 24, 2007, the Broadband Division of the Wireless Telecommunications Bureau released a Public Notice seeking comment on the waiver request. Comments were due on June 25, 2007 and replies were due on July 10,

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II. BACKGROUND

2. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking (BRS/EBS R&O)* that transformed the rules and policies governing the licensing of services in the 2500-2690 MHz band.⁴ Prior to the *BRS/EBS R&O*, the technical rules and band plan for the 2500-2690 MHz band were designed primarily to promote wireless cable and educational television services, which resulted in licensees receiving interleaved channel groups instead of contiguous channel blocks.⁵ In most areas of the country, however, the deployment of wireless cable was not successful.

3. Consequently, in the *BRS/EBS R&O*, the Commission developed a new band plan and technical rules that permit a range of new and innovative wireless services in the 2500-2690 MHz band and give licensees contiguous channel blocks.⁶ The new band plan consists of two low-power segments, the Lower Band Segment (LBS) and the Upper Band Segment (UBS), and a high-power segment, the Middle Band Segment (MBS).⁷ The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.⁸ The MBS, in contrast, consists of seven high-power channels and is designed for the transmission of video programming, for those licensees that still wish to provide such programming.⁹ The *BRS/EBS R&O* further established a plan to transition EBS and BRS licensees from their interleaved channel locations to their new channel locations in the LBS, UBS, or MBS.¹⁰ Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted certain Multichannel Video Programming Distributors (MVPDs) to seek a waiver from the Commission to “opt-out” of the transition, thus permitting them to continue their high-power, high-site operations throughout the entire 2500-2690 MHz band.¹¹ On April 27, 2006, the

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2007. Wireless Telecommunications Bureau Seek Comment on Request by Northwest Communications Cooperative for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9378 (WTB BD 2007).

⁴ 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* as appropriate).

⁵ In the EBS and BRS services, channels are usually licensed in groups of four. When EBS was created, EBS reception equipment could not receive adjacent channels without interference. Thus, the Commission interleaved the A block channels with the B block channels, the C block channels with the D block channels, the E block channels with the F block channels and the G block channels with the H block channels. 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, 6744 ¶ 47 (2003) (*NPRM*).

⁶ See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

⁷ *Id.* at 14169 ¶ 6.

⁸ *Id.* at 14168 ¶ 4.

⁹ *Id.* at 14185-14186 ¶ 4.

¹⁰ *Id.* at 14197-14198 ¶ 72.

¹¹ *Id.* at 14199-14200 ¶ 77.

Commission released the *Third Memorandum Opinion and Order and Second Report and Order*, in which it affirmed its decision to consider these waivers on a case-by-case basis.¹²

4. NCC provides service in and around Bowbells, a thinly populated rural and remote community in northwest North Dakota.¹³ NCC, using only its own channels, has provided MVPD service to the Bowbells GSA since 1990 and high-speed broadband service since 2001.¹⁴ NCC initially established its MVPD service to provide wireless cable to rural customers who did not have access to cable television.¹⁵ Subsequently, NCC found that it was cost-efficient and cost-effective to initiate high-speed broadband services by co-locating its broadband system with its MVPD system.¹⁶ Thus, NCC initiated broadband service by converting one of its downstream channels from video to broadband, and adding BRS Channel No. 1 for the upstream path.¹⁷ NCC has 100 high-speed broadband customers.¹⁸ NCC also offers 18 channels of video for \$23.45/month and has 330 MVPD customers.¹⁹

5. NCC asks to “opt-out” of the transition of the 2500-2690 MHz band in Bowbells, North Dakota and seeks a waiver of Section 27.1230-27.1239 of the Commission’s Rules.²⁰ In addition, NCC requests that the waiver state that:

- NCC and its channel lessors will have permanent authority to operate within the Bowbells GSA pursuant to Section 27.1209 on the “pre-transition” BRS/EBS band plan set forth in Section 27.5(i)(1);
- NCC and its channel lessors must participate in good faith in any transition planning process relating to any geographic area that overlaps their GSAs. In conjunction with any transition, NCC and its channel lessors will subsequently make such modifications to their facilities at the proponent’s expense (unless otherwise agreed) 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 NCC’s ability to serve its then-existing subscribers;
- Every main, booster, and base station currently used in conjunction with NCC’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);

¹² 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 Red 5606, 5645 ¶ 72 (2006) (*BRS/EBS 3rd MO&O*). In the *3rd MO&O*, the Commission also granted WATCH TV’s request to opt-out of the transition of the 2.5 GHz band in Lima, Ohio. *Id.* at 5650 ¶ 84.

¹³ Waiver Request at 2.

¹⁴ *Id.* at ii, 2-3, 6.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 1.

- Any channel used for the transmission of digital video programming on NCC'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),²¹
- Consistent with Section 27.55(a)(4)(i), all of the BRS and EBS channels in NCC's Bowbells system will be permitted to operate at any point along its GSA boundary at the greater signal strength of 47 dBu or the strength authorized in its underlying licenses as of January 10, 2005;
- Section 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 NCC and its EBS and BRS channel lessors; and
- NCC and its BRS and EBS channel lessors shall not be subject to the height benchmarking obligations set forth in Section 27.1221.²²

6. On June 22, 2007, several NCC subscribers filed letters supporting the Waiver Request.²³ On June 25, 2007, Clearwire Corporation (Clearwire), Sprint Nextel Corporation (Sprint Nextel), Xanadoo, LLC (Xanadoo), and NextWave Wireless, Inc. (NextWave) filed comments²⁴ addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.²⁵ Also on June 25, 2007, the

²¹ In fact, because NCC is operating an analog video system, the applicable rule is 47 C.F.R. § 27.53(l)(1), which sets forth the pre-transition out-of-band emission limits for analog video systems.

²² Waiver Request at 10-11.

²³ See Letters from Representative Dorvan Solberg, Ted Hawbaker, Dave Fagerland, Denise Gustafson, Caorl Olson, and Vicki Liesner to Federal Communications Commission (filed Jun. 22, 2007).

²⁴ Letter from Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Spectrum Proceedings, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Jun. 25, 2007) (Joint Comments).

²⁵ On June 25, 2007, the Commission had pending before it opt-out waiver requests from NCC; C&W Enterprises, Inc.; Central Texas Communications, Inc.; Choice Communications LLC; CNI Wireless, Inc.; Dakota Central Telecommunications Cooperative *et al*; Evertek, Inc.; Northern Wireless Communications Inc.; RC Technologies Corporation; Starcom, Inc.; and United Telephone Mutual Aid Corporation. Wireless Telecommunications Bureau Seeks Comment on Request by Northwest Communications Cooperative for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9378 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by C&W Enterprises, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9410 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Central Texas Communications, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9414 (WTB BD 2007); 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, *Public Notice*, 22 FCC Rcd 9357 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by CNI Wireless, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9368 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Dakota Central Telecommunications Cooperative *et al* for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9371 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Evertek, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9361 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Northern Wireless Communications Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9394 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by RC Technologies Corporation for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public*

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National Telecommunications Cooperative Association (NTCA) filed comments in support of NCC's waiver request.²⁶ On July 10, 2007, the National ITFS Association (NIA) and the Catholic Television Network (CTN) filed comments addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.²⁷ Also on July 10, 2007, NCC, C&W Enterprises, Inc. (C&W), Central Texas Communications, Inc. (CTC), Choice Communications LLC (Choice), CNI Wireless, Inc. (CNI), Dakota Central Telecommunications Cooperative (Dakota Central), Evertek, Inc. (Evertek), Northern Wireless Communications Inc. (Northern), RC Technologies Corporation (RC Technologies), Starcom, Inc. (Starcom), and United Telephone Mutual Aid Corporation (United) (collectively, Waiver Proponents) filed a letter in reply to the Joint Commenters.²⁸ In addition to participating in the Joint Reply Comments, NCC filed its individual reply comments on July 10, 2007.²⁹ On July 17, 2007, NCC, C&W, CTC, Choice, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the comments filed by CTN and NIA.³⁰ On July 19, 2007, Clearwire, Sprint Nextel, Xanadoo, and NextWave, Inc. filed comments in response to the Joint Reply.³¹ On July 25, 2007, NCC, CTC, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the Second Joint Comments.³²

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Notice, 22 FCC Rcd 9364 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Starcom, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9401 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by United Telephone Mutual Aid Corporation for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9404 (WTB BD 2007).

²⁶ Comments of the National Telecommunications Cooperative Association (NTCA) (filed Jun. 25, 2007).

²⁷ Letter from Todd D. Gray, National ITFS Association and Edwin N. Lavergne, Catholic Television Network to Marlene H. Dortch, Federal Communications Commission (filed Jul. 10, 2007) (CTN/NIA Letter).

²⁸ Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Paul J. Sinderbrand, Counsel to CNI Wireless, Inc., Cheryl A. Tritt, Counsel to Choice Communications LLC, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., David L. Nace, Counsel to Evertek, Inc. and NCC, and Suzanne S. Goodwyn, Counsel to C&W Enterprises, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 10, 2007) (Joint Reply Comments).

²⁹ Reply Comments (filed Jul. 10, 2007).

³⁰ Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Cheryl A. Tritt, Counsel to Choice Communications LLC, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., David L. Nace, Counsel to Evertek, Inc. and NCC, and Suzanne S. Goodwyn, Counsel to C&W Enterprises, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 17, 2007) (Second Joint Reply Comments).

³¹ Letter from Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Spectrum Proceedings, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Jul. 19, 2007) (Second Joint Comments).

³² Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., and David L. Nace, Counsel to Evertek, Inc. and NCC to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 25, 2007) (Third Joint Reply Comments).

7. The Joint Commenters, along with CTN and NIA, oppose the grant of permanent, unconditioned opt-out waivers of the transition rules going forward.³³ The Joint Commenters argue that the permanent opt-out waiver requests granted to date have foreclosed the ability of 2.5 GHz licensees and consumers in service areas covered by opt-out grants to benefit from changes in technology that may enable transition while still accommodating MVPD operator needs. They request that any opt-out waiver requests deemed meritorious should only be granted a waiver limited in time to no later than December 31, 2008.³⁴ The Joint Commenters also argue that any waiver should be conditioned upon compliance with existing Part 27 operational and technical rules.³⁵ The National ITFS Association and the Catholic Television Network support the position of the Joint Commenters.³⁶ The Waiver Proponents argue that the Joint Commenters are attempting to contravene the Commission's repeated and consistent determinations that waivers of the BRS/EBS band plan transition rules should be considered on a case-by-case basis in light of the facts and circumstances of the particular waiver requests.³⁷ The Joint Commenters respond that applying a time limitation to any waivers granted would be entirely consistent with the Commission's prior determination that it would follow a case-by-case approach, because it could revisit and extend any waivers if subsequent conditions were to justify doing so.³⁸

III. DISCUSSION

8. In the *BRS/EBS R&O*, the Commission found that it is in the public interest to consider waivers of the rules requiring licensees to transition to the new band plan and to comply with the new technical rules.³⁹ Specifically, the Commission found that it is in the public interest to consider waivers on a case-by-case basis for those operators or their affiliates that meet the definition of a multichannel video programming distributor in Section 522 of the Communications Act of 1934, as amended, and that provide MVPD service to five percent or more of the households within their respective geographic service areas (GSAs).⁴⁰ The Commission further found that it is in the public interest to consider waivers for any BRS or EBS licensee that is co-located with any qualified MVPD licensee that elects to opt-out.⁴¹ In addition, the Commission 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.⁴²

9. The Commission stated that, in reviewing requests to waive the rules, it would consider the actions taken by MVPD or BRS licensees to minimize the affect of interference on neighboring markets, as well as the licensee's explanation as to why it cannot work within the transition rules adopted by the

³³ Joint Comments at 3.

³⁴ *Id.* at 3.

³⁵ *Id.* at 3-4.

³⁶ CTN/NIA Letter.

³⁷ Joint Reply Comments at 2-3, *citing BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 76, and *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5645-5646 ¶¶ 72-73.

³⁸ Second Joint Comments at 3.

³⁹ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

⁴⁰ *Id.* This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

⁴¹ *Id.*

⁴² *Id.*

Commission.⁴³ 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.⁴⁴ NCC has not attempted to demonstrate that it satisfies either of the specific bases for waiver established in the *BRS/EBS R&O*. We therefore consider NCC's request under the general waiver standard contained in Section 1.925 of the Commission's Rules.⁴⁵

10. At the outset, we agree with the Joint Commenters that opt-out waiver requests should be closely scrutinized to determine what effect such waivers would have on the ability of nearby operators to provide service. None of the Joint Commenters, however, has alleged that it would be harmed if NCC is granted a waiver. The Joint Commenters do not base their proposals to terminate any waivers at the end of 2008 and to require compliance with the post-transition technical rules upon an individual analysis of NCC's situation. The Joint Commenters have not established that December 31, 2008 was an appropriate date with respect to NCC, nor do they attempt to show that NCC could operate its video system under the post-transition rules. Furthermore, we agree with NCC and the other Waiver Proponents that arbitrarily establishing December 31, 2008 as the outer deadline for any waiver would be inconsistent with the Commission's decision to evaluate waiver requests on a case-by-case basis. Thus, we deny all requests to limit any waiver granted to NCC to December 31, 2008, and proceed with an individual analysis of the merits of NCC's Waiver Request.

11. NCC has shown that, in view of its unusual circumstances, requiring it to transition to the new band plan and technical rules would be inequitable, unduly burdensome, and contrary to the public interest. It would not be economically feasible for NCC to transition to the new band plan and technical rules. NCC reports that if it were forced to transition it would cease operations rather than incur the costs of rebuilding its system.⁴⁶ NCC explains that, post-transition, it would have only four high-power MBS channels (D4, E4, F4, and G4) to provide MVPD service.⁴⁷ Providing a four-channel video service, NCC submits, is neither an attractive service nor a viable business proposition compared to its current offering of 18 channels.⁴⁸ To be competitive, NCC would be forced to digitize its system to increase the number of video channels it could offer.⁴⁹ The limited number of potential customers, however, makes undertaking the task of installing expensive digital equipment economically infeasible.⁵⁰ NCC makes a similar argument with regard to its high-speed broadband service. Post-transition, NCC would be required to replace its high-powered broadband service with a low-power cellularized system.⁵¹ Not only are low-power cellularized broadband operations costly to deploy, they may not replicate the

⁴³ *Id.*

⁴⁴ *Id.*, 19 FCC Rcd at 14199-14200 ¶ 77, 47 C.F.R. § 1.925(b)(3).

⁴⁵ 47 C.F.R. § 1.925.

⁴⁶ Waiver Request at 8-9.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 6, 8.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at ii.

footprint of video operations, thus reducing NCC's ability to offer customers both high-speed internet and MVPD services.⁵²

12. NCC has shown that it is in the public interest to grant its waiver request. In most areas within the Bowbells GSA, NCC is the only terrestrial MVPD service provider and is the only competitor to Digital Broadcast Service (DBS).⁵³ Also, NCC is the only broadband service provider in many areas within the Bowbells GSA.⁵⁴ As mentioned above, NCC started its MVPD service in 1990 to provide wireless cable to customers who did not have access to cable television service. NCC reports that although coaxial cable television services are available in some towns that are within NCC's Bowbells GSA, the vast majority, if not all, of NCC's MVPD customers have no access to coaxial cable television service.⁵⁵ Thus, in these areas, NCC is the only competitor to DBS.⁵⁶ Moreover, NCC includes in its MVPD offerings network broadcast television programming that is not available off-the-air or from DBS providers.⁵⁷ NCC also transmits emergency weather information to customers and is equipped to provide Emergency Alert Services.⁵⁸ With regard to high-speed internet access, NCC reports, cable modem service is not an alternative for NCC's customers and local exchange carriers do not offer service to many households in the region.⁵⁹ Thus, NCC is the only high-speed broadband service competitor to the satellite high-speed broadband service offered by WildBlue.⁶⁰ Moreover, NCC reports that its high-speed broadband service is twice as fast as the service offered by WildBlue and costs approximately the same.⁶¹

13. NCC also has shown that neighboring licensees will not be harmed by a grant of the waiver. The Bowbells Flux Density Map shows that the 47 dB μ V/m limit is not exceeded anywhere outside its GSA boundaries.⁶² Furthermore, as explained below, we find it unnecessary to grant NCC a waiver of Section 27.1221 of the Commission's Rules. Accordingly, we find that its neighbors will not be harmed by allowing NCC to continue operations within the Bowbells GSA.

14. As described above, NCC asks that the waiver contain seven conditions, which grant NCC the right to continue to operate under the pre-transition band plan and technical rules. Although we conclude that NCC has met the Commission's waiver standard and may opt-out of the transition of the 2.5 GHz band, we find, based on the waiver request and engineering analysis presented by NCC, that it does not need all seven of these conditions to continue its current operations. For instance, because NCC uses only its own channels to operate its system, it is unnecessary for the waiver to include references to non-existent channel lessors. Also, because NCC operates an analog video system, it is unnecessary to waive Section 27.53(l)(3) of the rules, which concerns digital video programming. Moreover, NCC's 47

⁵² *Id.* at 6.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.* at 6, n.11.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 6 n.13.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 3.

⁶² *Id.*, Engineering Statement of John Dalager, PE (Dalager Statement) at 2 and Bowbells Flux Density Map.

dB μ V/m contour does not extend beyond the Bowbells GSA, so it does not need a waiver of Section 27.55(a)(4)(i) of the Commission's Rules. Finally, NCC has not demonstrated that it needs a waiver of Section 27.1221 of the Commission's Rules. Its existing system has line of sight to an extremely small area outside its authorized GSA.⁶³

15. With respect to potential aggregate harm resulting from the collective grant of pending opt-out waiver requests, we conclude that our grant of opt-out waivers will not, separately or in the aggregate, result in any meaningful harm to Sprint, Clearwire, or other entities that wish to provide advanced broadband services in the 2.5 GHz band. A total of fifteen MVPD opt-out waiver requests were filed. Those systems collectively serve fewer than 50,000 subscribers and cover only approximately 160 out of 5,289 active BRS and EBS licenses. Given the largely rural locations for which waivers have been sought, and our conclusions that each of the waivers we have granted to date⁶⁴ will have relatively minimal impact on nearby licensees, we believe our decisions will not adversely impact licensees who wish to use this band for low-power, cellularized broadband services, even if all of the waivers were ultimately granted. If the licensees requesting opt-out waivers had chosen instead to provide low-power cellularized services, nearby licensees would still have been required to protect the service areas of the opting-out licensees. Finally, since the deadline for filing opt-out waiver requests has expired,⁶⁵ licensees who wish to offer low-power, cellularized broadband services can now plan with certainty knowing that no other such requests will be entertained.

16. Therefore, we grant NCC's waiver request with the following conditions:

- NCC will have permanent authority to operate within the Bowbells GSA pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1);
- NCC must participate in good faith in any transition planning process relating to any geographic area that overlaps its GSA. In conjunction with any transition, NCC will subsequently make such modifications to its facilities at the proponent's expense (unless otherwise agreed) 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

⁶³ See Dalager Statement at 2 and Shadow Maps.

⁶⁴ See *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5650 ¶ 84 (granting WATCH TV's request to opt-out of the transition for its MVPD system in Lima, Ohio); *Antilles Wireless, LLC, Memorandum Opinion and Order*, 22 FCC Rcd 9348 (WTB 2007), *recon. denied, Order on Reconsideration*, 24 FCC Rcd 4696 (WTB 2009) (granting of opt-out request filed by Antilles Wireless, LLC d/b/a USA Digital (USA Digital) for its MVPD system in Billings, MT); *C & W Enterprises, Inc., Memorandum Opinion and Order*, 24 FCC Rcd 4705 (WTB 2009) (granting request by C & W Enterprises, Inc. (C&W) for a temporary waiver to opt out of the transition for its MVPD system in San Angelo, TX); *Central Texas Communications, Inc., Memorandum Opinion and Order*, 24 FCC Rcd 4715 (WTB 2009) (granting request by Central Texas Communications, Inc. (Central Texas) for a permanent waiver to opt out of the transition for its MVPD systems in Goldthwaite, Lohn, and San Saba, Texas); *Dakota Central Telecommunications Cooperative, et al., Memorandum Opinion and Order*, 24 FCC Rcd 4729 (WTB 2009) (partially granting request by Dakota Central Telecommunications Cooperative (Dakota Central) for a permanent waiver to opt out of the transition for its MVPD system in Brush Hill, ND); *United Telephone Mutual Aid Corporation, Memorandum Opinion and Order*, 24 FCC Rcd 4743 (WTB 2009) (granting request by United Telephone Mutual Aid Corporation (United) for a permanent waiver to opt out of the transition for its MVPD systems in Milton and Egeland, North Dakota). While a waiver was also granted to WHTV Broadcasting Corp. d/b/a/ Digital TV One, that entity has turned in the waiver for cancellation. See *Return of Waiver for Cancellation*, WHTV Broadcasting Corp. d/b/a/ Digital TV One (filed Aug. 19, 2009).

⁶⁵ See 47 C.F.R. § 27.1231(g) (establishing April 30, 2007 deadline).

resulting in more than a *de minimis* reduction in NCC's ability to serve its then-existing subscribers;

- Every main, booster, and base station currently used in conjunction with NCC'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);
- Any channel used for the transmission of analog video programming on NCC'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);
- Sections 27.1220 (regarding the 5.5 MHz wide channels in the LBS and UBS) and 27.1222 of the Commission's Rules (regarding the establishment of guardbands around the MBS) shall not be applicable to NCC.

IV. CONCLUSION AND ORDERING CLAUSES

17. NCC has justified a waiver by demonstrating that it has a viable business for high-powered operations, that it is economically infeasible for it to transition to the new band plan and technical rules, that it will not harm its neighbors by maintaining current operations, and that it is in the public interest to continue to provide service to its customers in the Bowbells, North Dakota GSA. The Commission also concludes that requiring NCC to transition to the new band plan would be inequitable, unduly burdensome and contrary to the public interest because it would be required to discontinue its existing service to customers.

18. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 27.1231(g) of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.1231(g), that the Request for Waiver filed by Northwest Communications Cooperative on April 25, 2007 IS GRANTED to the extent indicated herein and is otherwise DENIED.

19. 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

Jane E. Jackson
Associate Chief
Wireless Telecommunications Bureau