

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

In the matter of)
ANTILLES WIRELESS, L.L.C. d/b/a)
USA DIGITAL)
Request for Permanent Waiver of Commission)
Rules Regarding Transition of Broadband Radio)
Service and Educational Broadband Service to)
Revised Band Plan)

ORDER ON RECONSIDERATION

Adopted: April 17, 2009

Released: April 17, 2009

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us two petitions for reconsideration filed by Libmot Communications Partnership (Libmot) and Clearwire Corporation (Clearwire) seeking reconsideration of the Memorandum Opinion and Order (MO&O) released by the Wireless Telecommunication Bureau (Bureau) on May 24, 2007 granting Antilles Wireless L.L.C. d/b/a USA Digital (USA Digital) a waiver permitting it and its licensees/lessors to permanently opt-out of the transition of the 2.5 GHz band. For the reasons discussed below, the Bureau dismisses both petitions.

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. 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. In most areas of the country, however, the deployment of wireless cable was not successful.

1 Petition for Reconsideration (filed Jun. 25, 2007) (Libmot Petition).

2 Petition for Partial Reconsideration (filed Jun. 25, 2007) (Clearwire Petition).

3 Antilles Wireless, L.L.C. d/b/a USA Digital, Memorandum Opinion and Order, 22 FCC Rcd 9348 (WTB 2007) (MO&O).

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

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 gives 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 (MVPD) to seek a waiver from the Commission to “opt-out” of the transition, thus permitting them to continue high-power, high-site operations throughout the entire 2500-2690 MHz band.¹¹ On April 27, 2006, the Commission released the *Third Memorandum Opinion and Order and Second Report and Order (3rd MO&O)*, in which it affirmed its decision to consider these waivers on a case-by-case basis.¹²

4. On November 16, 2006, USA Digital filed a Waiver Request seeking on behalf of itself and its licensees/lessors to permanently opt-out of the transition of the 2.5 GHz band.¹³ On May 24, 2007, the Bureau granted USA Digital’s waiver request.¹⁴ The Bureau concluded that USA Digital had 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.¹⁵ The Bureau found that USA Digital had shown that it could not transition to the new band plan because it needs more than seven high-powered digitized channels to deliver digitally compressed multichannel video service to its customers and that it is a viable business.¹⁶ Based on engineering analyses before it, the Bureau rejected the arguments of Sprint Nextel, Montana State University, and Clearwire that USA Digital’s continued operations under the old band plan and technical rules would cause them harmful

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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.

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 Rcd. 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 ¶ 84.

¹³ Request for Waiver (filed Nov. 16, 2006).

¹⁴ *MO&O*, 22 FCC Rcd at 9349 ¶ 1.

¹⁵ *Id.*, 22 FCC Rcd at 9356 ¶ 16.

¹⁶ *Id.*, 22 FCC Rcd at 9352-9353 ¶¶ 9-10.

interference and prevent them from offering new and innovative wireless services.¹⁷ The Bureau also rejected Clearwire's arguments that permitting USA Digital to opt-out of the transition would prevent Clearwire, the Billings, Montana BTA holder, from providing service in Billings.¹⁸ The Bureau further found that because Clearwire owned only four megahertz of spectrum in Billings (Channel BRS-2A), it did not have enough spectrum to operate a system using its current technology even if USA Digital was forced to transition.¹⁹

5. On June 25, 2007, Libmot and Clearwire filed Petitions for Reconsideration.²⁰ Libmot is an incumbent BRS licensee that leases its license to operate BRS Station WNTA850 (BRS Channel H3) in Billings, Montana to USA Digital.²¹ Libmot seeks reconsideration because USA Digital asked for a permanent waiver on its own behalf and on behalf of all of its licensees/lessors, without consulting Libmot.²² Also, Libmot argues that permitting USA Digital to opt-out of the transition would prohibit the Commission from auctioning the vacant G-channel group.²³ Clearwire is the licensee of BRS Station BTA 041 in Billings. Clearwire seeks reconsideration because the Bureau failed to consider the negative effect that permanent relief would have on potential future subscribers of the band, failed to justify the technical relief given USA Digital, and improperly applied the standard for granting a waiver by failing to adequately consider the importance of the underlying regulations.²⁴

III. DISCUSSION

6. *Libmot Petition.* With respect to Libmot, which did not participate in the initial proceeding to consider USA Digital's opt-out request, we must evaluate whether Libmot is eligible to enter this proceeding at the reconsideration stage, a matter governed by Section 1.106(c) of the Commission's Rules. Section 1.106(c) provides that, if a party that has not hitherto participated in a proceeding chooses to file a petition for reconsideration, the petition may only be granted if: (1) the petition relies on events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) the petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or (3) consideration of the facts relied on is in the public interest.²⁵ A petitioner must also show good reason why it was not possible for it to participate in the earlier stages of the proceeding.²⁶

7. We dismiss Libmot's Petition for Reconsideration for failure to meet the standards contained in Section 1.106(c) of the Commission's Rules. Libmot claims that it did not know that USA Digital was seeking an opt-out waiver on its behalf until the *MO&O* was released on May 24, 2007.²⁷

¹⁷ *Id.*, 22 FCC Rcd at 9354-9355 ¶¶ 11-13.

¹⁸ *Id.*, 22 FCC Rcd at 9355 ¶ 14.

¹⁹ *Id.*

²⁰ Libmot Petition, Clearwire Petition.

²¹ Opposition to (Libmot) Petition for Reconsideration (filed Jul. 9, 2007) at 5.

²² Libmot Petition at 1.

²³ Reply to Opposition to Petition for Reconsideration (filed Jul. 19, 2007) at 2.

²⁴ Clearwire Petition at i.

²⁵ 47 C.F.R. §§ 1.106(b)(2), (c).

²⁶ 47 C.F.R. § 1.106(b)(1) states: "If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it ... shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."

²⁷ Libmot Petition at 1-2.

Libmot's statement that it was unaware of USA Digital's waiver request until the Bureau released the *MO&O* on May 24, 2007 is insufficient because the Bureau released Public Notices on December 15, 2006²⁸ and on December 28, 2006²⁹ seeking comment on USA Digital's request to permanently opt-out of the transition of the 2.5 GHz band. Accordingly, Libmot has failed to show why it could not have participated in the proceeding.

8. Moreover, even if we were to consider Libmot's arguments on their merits, we do not find them to present a basis for reconsidering our prior action. For example, Libmot argues that although it is customary for BRS leases to permit the lessee to handle many details of the operations of their stations, the Commission expects licensees to have the final say over critical license issues.³⁰ While we agree with that principle, nothing in the *MO&O* or the Commission's Rules requires Libmot to accept the waiver granted in the *MO&O*. To the extent that the lease agreement between USA Digital and Libmot may require Libmot to accept the waiver, this is not a matter within the Commission's purview. The Commission "generally does not adjudicate private contractual disputes, but instead attempts to reach a fair accommodation between its exclusive authority over licensing matters and the authority of state and local courts through procedures that defer contractual matters to courts to decide under state and local law."³¹ We see no reason to depart from that principle in this case.

9. Finally, we reject Libmot's argument that USA Digital should not be permitted to opt-out because doing so would prevent the Commission from auctioning the available G-group channels.³² Because all of the channels would remain in their legacy locations under the old band plan, the Commission could still auction licenses for the G-group channels in their present locations.

10. *Clearwire Petition.* With respect to a party such as Clearwire that previously participated in a proceeding, it is well established that "rehearing will not be granted merely for the purpose of debating matters on which the tribunal has once deliberated and spoken."³³ As discussed in greater detail below, for the most part, Clearwire's petition for reconsideration simply reargues matters considered and addressed in the *MO&O*. We therefore dismiss the Clearwire Petition.

11. Contrary to Clearwire's claims,³⁴ the *MO&O* discussed the waiver standard³⁵ and appropriately applied that standard.³⁶ Clearwire's argument that the Bureau did not consider the

²⁸ Wireless Telecommunications Bureau Seeks Comment On Request By Antilles Wireless, L.L.C. d/b/a USA Digital For Waiver Of The Requirement To Transition To The New BRS/EBS Band Plan, *Public Notice*, 21 FCC Rcd 14499 (WTB 2006).

²⁹ Wireless Telecommunications Bureau Seeks Comment On Request By Antilles Wireless, L.L.C. d/b/a USA Digital For Waiver Of The Requirement To Transition To The New BRS/EBS Band Plan, *Public Notice*, 21 FCC Rcd 15042 (WTB 2006). The Bureau placed USA Digital's waiver request on Public Notice a second time in response to Clearwire's motion for an extension of time to file comments and reply comments. *Id.* at 15044.

³⁰ *Id.* at 2.

³¹ S.A. Dawson, *Memorandum Opinion and Order*, 17 FCC Rcd 472, 474 n.15 (WTB 2002) *citing* Airtouch Paging, Inc., *Order*, 14 FCC Rcd 9658 (WTB CWB P&RB 1999); *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987)

³² Reply to Opposition to Petition for Reconsideration (filed Jul. 19, 2007) at 2.

³³ *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC 685, 686 ¶ 2 (1965), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

³⁴ Clearwire Petition at 3-8.

³⁵ *MO&O*, 22 FCC Rcd at 9351-9352 ¶¶ 6-7.

³⁶ *Id.*, 22 FCC Rcd at 9352-9356 ¶¶ 8-15.

importance of the underlying regulations when it granted USA Digital a permanent opt-out waiver³⁷ is similarly unavailing. As discussed in the *MO&O*, in the *BRS/EBS R&O*, the Commission weighed the benefits of transitioning the entire band throughout the nation against the benefits of allowing viable MVPD operators to permanently opt-out of the transition of the 2.5 GHz band.³⁸ The Commission stated that it was sympathetic to the predicament of those MVPD licensees that developed a successful business under the old rules, and to their customers that receive both video and broadband services from MVPD licensees.³⁹ Based on this analysis, the Commission adopted criteria to ensure that viable MVPD systems could be excused from transitioning to the new band plan and technical rules.⁴⁰ Thus, the Commission found that it was in the public interest to consider waivers on a case-by-case basis, from among others, an MVPD operator that had a viable business, but who needed more than seven digitized channels.⁴¹ Clearwire did not seek reconsideration of the Commission's decision to allow MVPD opt-out waivers or ask the Commission to modify the criteria, and may not now use the instant reconsideration petition to belatedly seek modification of these policies.

12. We further reject Clearwire's argument that the Bureau should have limited USA Digital's relief to two years.⁴² As explained in the *BRS/EBS R&O*, the purpose of the waiver is to permit operators that have a viable business to continue to operate.⁴³ USA Digital has shown that it is a viable business with 2700 subscribers to its digital video service, 200 subscribers to its broadband data service, and 300 subscribers to its telephony service.⁴⁴ Clearwire does not explain why it believes a two year deadline is appropriate in this instance,⁴⁵ and we agree with USA Digital that a temporary two-year waiver would make it difficult for USA Digital to make investments in its system.⁴⁶ We note that USA Digital has already made significant investments to expand its service offerings to the citizens of Billings, Montana.⁴⁷

13. Finally, we reject Clearwire's argument that the Bureau did not justify the waiver of the technical rules afforded USA Digital. USA Digital requested a waiver of Sections 27.50(h)(1)(i) and (ii), 27.53(l)(3), 27.53(l)(5), 27.55(a)(4)(i), and 27.1221,⁴⁸ and supported this request with an engineering

³⁷ Reply to Opposition to Petition for Reconsideration (filed Jul. 19, 2007) at 2-3.

³⁸ *MO&O*, 22 FCC Rcd at 9351-9352 ¶¶ 6-7; *BRS/EBS R&O*, 19 FCC Rcd at 14198-14199 ¶¶ 75-77.

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

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Clearwire Petition at 9; Clearwire Reply at 7.

⁴³ *BRS/EBS R&O*, 19 FCC Rcd at 14199-14200 ¶ 77.

⁴⁴ *MO&O*, 22 FCC Rcd at 9353 ¶ 10.

⁴⁵ Opposition to (Clearwire) Petition for Reconsideration (filed Jul. 9, 2007) at 12-16.

⁴⁶ *Id.* at 14.

⁴⁷ *MO&O*, 22 FCC Rcd at 9353 ¶ 10. Clearwire partially disputes the *MO&O*'s finding that Clearwire will not offer service in a market unless it can obtain at least five channels of six megahertz each. Compare *MO&O*, 22 FCC Rcd at 9355 ¶ 14 and Clearwire Petition at 6. While Clearwire admits the *MO&O* correctly describes its current practice, it states that its technology may improve in the future. Clearwire Petition at 6. This argument provides no basis for granting reconsideration. It is entirely speculative, based on the current record, whether Clearwire will be able to provide a viable service using the 4 MHz channel currently available to it. In contrast, USA Digital currently 2700 current subscribers.

⁴⁸ *Id.*, 22 FCC Rcd at 9350-9351 ¶ 4.

analysis that addressed the interference concerns of USA Digital's neighbors.⁴⁹ In the face of such a showing, we find that the Bureau properly waived these rules, and explained its rationale for doing so.

IV. CONCLUSION AND ORDERING CLAUSES

14. For the reasons discussed above, we conclude that Libmot's Petition does not comply with Section 1.106(b)(1) or 1.106(c) of the Commission's Rules. We further find that the Bureau properly applied the waiver standard in Section 1.925(b)(3) of the Commission's Rules. Accordingly, we dismiss Libmot's and Clearwire's Petitions.

15. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petitions for reconsideration filed by Libmot Communications Partnership and Clearwire Corporation on June 25, 2007 ARE DISMISSED.

16. 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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson
Associate Chief, Wireless Telecommunications Bureau

⁴⁹ *Id.*, 22 FCC Red at 9354-9356 ¶¶12-15.