

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

In the matter of)	
)	
DAKOTA CENTRAL)	
TELECOMMUNICATIONS COOPERATIVE)	
)	
FESSENDEN PUBLIC SCHOOL)	
)	
MIDKOTA PUBLIC SCHOOL)	
)	
GACKLE/STREETER PUBLIC SCHOOL)	
)	
WIMBLEDON/COURTENAY PUBLIC)	
SCHOOL)	
)	
JAMESTOWN PUBLIC SCHOOL)	
)	
PINGREE/BUCHANAN PUBLIC SCHOOL)	
)	
FESSENDEN-BOWDON PUBLIC SCHOOL)	
)	
TAPPEN PUBLIC SCHOOL)	
)	
MEDINA PUBLIC SCHOOL)	
)	
Request for Partial Waiver of Commission Rules)	
Regarding Transition of Broadband Radio Service)	
and Educational Broadband Service Stations in the)	
Carrington, North Dakota Geographic Service)	
Area to the Revised Band Plan)	
)	
DAKOTA CENTRAL)	
TELECOMMUNICATIONS COOPERATIVE)	File No. 0003004682
)	
Request for Special Temporary Authority)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 2009

Released: April 17, 2009

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (WTB or Bureau) has before it a request by Dakota Central Telecommunications Cooperative (DCTC), licensee of Broadband Radio Service (BRS) Stations

WLW751, WLW752, WNTB718, WNTE464, and WNTF478, in the Brush Hill, North Dakota Geographic Service Area (GSA) for waiver of Sections 27.1230 – 27.1239 of the Commission’s Rules¹ for itself² and its Educational Broadband Service (EBS) lessors.³ DCTC also filed an application seeking special temporary authority (STA) to operate on EBS Channels C2, C3, and D3 to provide video programming and broadband services to rural customers in and around Brush Hill, North Dakota.⁴ For the reasons discussed below, the Bureau denies the STA Request. DCTC has demonstrated that a waiver is necessary for it to continue serving its video customers as it has since 1991. We therefore grant DCTC’s Waiver Request to the extent indicated herein.⁵

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.⁶ 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.⁷ In most areas of the country, however, the deployment of wireless cable was not successful.

¹ Request for Partial Waiver (filed Apr. 25, 2007) (Waiver Request). 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 DCTC is the licensee of BRS Stations WLW751 (Channels E1-E4), WLW752 (Channels F1-F4), WNTB718 (Channel H1), WNTE464 (Channel H2), and WNTF478 (Channel H3).

³ DCTC’s lessors are as follows: Station WLX921 (Channel A1/Fessenden Public School); Stations WLX899 and WNC543 (Channels B1, G3-4/Midkota Public School); Station WLX959 (Channel A2/Gackle/Streeter Public School); Stations WLX902 and WLX909 (Channels B2, C4/Wimbledon/Courtenay Public School); Stations WLX942 and WLX439 (Channels A3, G1-2/Jamestown Public School); Stations WLX970 and WLX982 (Channels B3, D4/Pingree/Buchanan Public School); Station WLX944 (Channel A4/Fessenden-Bowdon Public School); Station WLX901 (Channel B4/Tappen Public School); and Station WLX973 (Channel C1/Medina Public School). Unless specifically noted otherwise, we herein refer to the parties collectively as DCTC.

⁴ File No. 0003004682 (filed Apr. 24, 2007); see also *id.*, Exhibit 1, Justification for Special Temporary Authority (STA Request).

⁵ On May 24, 2007, the Broadband Division/WTB released a Public Notice seeking comment on the waiver request. Comments were due on June 25, 2007 and replies were due on July 10, 2007. Wireless Telecommunications Bureau Seeks Comment on Request by Dakota Central Telecommunications Cooperative for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan and for Special Temporary Authority on Certain EBS Channels in Brush Hill, North Dakota, *Public Notice*, 22 FCC Rcd 9371 (WTB BD 2007).

⁶ 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).

⁷ In the EBS and BRS services, channels are usually licensed in groups of four. When EBS was created, EBS reception equipment could not receive on 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, (continued...)

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.⁸ 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).⁹ The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.¹⁰ 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.¹¹ 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.¹² Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted a limited number of 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.¹³ 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.¹⁴

4. DCTC is a rural telecommunications cooperative formed in 1952 to bring local exchange services to rural communities in central North Dakota.¹⁵ DCTC established a wireless cable television system at Brush Hill, North Dakota in 1991 and assembled rights to 17 of the BRS and EBS channels in the Brush Hill GSA.¹⁶ DCTC’s service includes five local channels that many customers cannot receive over the air.¹⁷ DCTC charges \$10.00/month for the five local channels, \$24.50/month for its 17 channel package, and \$10.00/month for HBO.¹⁸ DCTC provides multi-channel video programming to approximately 585 subscribers.¹⁹

(...continued from previous page)

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*).

⁸ See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

⁹ *Id.* at 14169 ¶ 6.

¹⁰ *Id.* at 14168 ¶ 4.

¹¹ *Id.* at 14185-14186 ¶ 4.

¹² *Id.* at 14197-14198 ¶ 72.

¹³ *Id.* at 14199-14200 ¶ 77.

¹⁴ 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 5649-5650 ¶¶ 82-84.

¹⁵ Waiver Request at 3.

¹⁶ Waiver Request at 3.

¹⁷ Waiver Request at 3.

¹⁸ Waiver Request at 3.

¹⁹ Waiver Request at 3.

5. In 2001, DCTC began offering a high-power, high-speed broadband service using EBS channels C3 and D3, which were not licensed anywhere within the Brush Hill GSA.²⁰ DCTC claims that it was “unaware” that it was not authorized to use those channels.²¹ DCTC currently provides broadband service to approximately 265 subscribers.²² Since 1991, DCTC has invested more than \$1.5 million to design, construct and operate its wireless MVPD and wireless broadband systems.²³

6. On April 24, 2007, DCTC filed a request for an STA to utilize vacant EBS channels C2, C3 and D3 within a 35-mile GSA centered on the coordinates N. Lat. 47-13-41.0 and W. Long. 99-12-02.0 to provide MVPD and broadband services from a transmit site located in Brush Hill, North Dakota.²⁴ The STA is requested for an initial period of six months so that DCTC will be able to continue to provide MVPD and broadband service to its customers until the Brush Hills, North Dakota GSA transition is completed and the existing services on the unlicensed spectrum can be migrated to authorized spectrum.²⁵

7. DCTC asks on behalf of itself and lessors to partially “opt-out” of the transition of the 2500 - 2690 MHz band in the Brush Hill, North Dakota GSA, and seeks a waiver of Section 27.1230-27.1239 of the Commission’s rules for itself and its lessors.²⁶ Specifically, DCTC proposes to replace a point-to-point distance learning network used by DCTC’s EBS lessors with a T-1 based landline service.²⁷ Seven of the nine schools would either submit their licenses for cancellation or lease their excess capacity to a commercial operator.²⁸ The other two schools would move their distance learning system to channels A4 and B4 in the MBS.²⁹ DCTC would move its services to the MBS and UBS, and would leave the LBS available for other services.³⁰ DCTC does not anticipate being the transition proponent in its area, but it agrees to cooperate with the proponent.³¹ DCTC requests that the waiver state that:

(1) DCTC and its channel lessors will have permanent authority to operate within the Brush Hill GSA pursuant to Section 27.1209 on the “pre-transition” BRS/EBS band plan set forth in Section 27.5(i)(2)(ii) and (iii);

(2) The Licensees and DCTC’s 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, the Licensees and DCTC’s 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

²⁰ Waiver Request at 3.

²¹ Waiver Request at 4.

²² Waiver Request at 4.

²³ Waiver Request at 4.

²⁴ STA Request at 1.

²⁵ STA Request at 1.

²⁶ Waiver Request at 1.

²⁷ Waiver Request at 5.

²⁸ Waiver Request at 6.

²⁹ Waiver Request at 6.

³⁰ Waiver Request at 6.

³¹ Waiver Request at 6.

modifications can be accomplished without cumulatively resulting in more than a *de minimis* reduction in DCTC's ability to serve its then-existing subscribers;

(3) Every main, booster, and base station currently used in conjunction with the Licensees' systems 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) until such time as the EBS licensees' facilities are migrated to an alternative system and after such time, every main, booster, and base station currently used in conjunction with DCTC's system shall be permitted to continue operating under the maximum EIRP limits set forth for "pre-transition" operations in Sections 27.50(h)(1)(i) and (ii) on the "post-transition" BRS/EBS band plan set forth in Sections 27.5(i)(2)(ii) and (iii);

(4) Any channels used for the transmission of digital video programming on DCTC'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);³²

(5) Consistent with Section 27.55(a)(4)(i), all of the BRS and EBS channels in DCTC's Brush Hill 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 UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to DCTC and its channel lessors operating on the "post transition" BRS/EBS band plan set forth in Sections 27.5(i)(2)(ii) and (iii); and

(7) DCTC and its channel lessors shall not be subject to the height benchmarking obligations set forth in Section 27.1221.³³

DCTC contends that their acceptance of these conditions confirms that they will participate in good faith in any transition planning process and will make reasonable modifications to their facilities "to reduce interference and rationalize spectrum use, so long as those modifications do not result in more than a *de minimis* reduction in DCTC's ability to serve its then-existing subscribers."³⁴

8. DCTC also proposes the following additional conditions relating to the EBS licenses:³⁵

(1) Upon replacement of their existing point-to-point EBS facilities, the licensees of two of the EBS point-to-point stations will, consistent with the spectrum plan depicted in Appendix C, swap or assign (subject to Commission approval) the licenses so that they are licensed on channels A4 and B4 as designated by the "post-transition" BRS/EBS band plan set forth in Section 27.5(i)(2)(ii);

³² In fact, because DCTC 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.

³³ Waiver Request at 18-19.

³⁴ Waiver Request at 19.

³⁵ Waiver Request at 19.

(2) Upon replacement of their existing point-to-point EBS facilities, the licensees of the remaining seven EBS point-to-point stations will make available their channels for excess capacity lease at nominal consideration to the holder of the BTA authorization where their licensed GSA centerpoint is situated. If the holder of the BTA authorization does not desire to lease any or all of the excess capacity of such stations, such licensees will submit their authorizations for cancellation; and

(3) The two EBS licensees that migrate to MBS channels A4 and B4 will apply to the Commission to conform their GSAs to the GSA of the channels that compose DCTC's MVPD system, and will request waiver of the Commission's rules to the extent necessary.

9. Approximately 410 DCTC subscribers submitted form letters supporting the STA Request and Waiver Request.³⁶ On June 25, 2007, the National Telecommunications Cooperative Association (NTCA) filed comments in support of DCTC's Waiver Request.³⁷ Also on June 25, 2007, Clearwire Corporation (Clearwire)³⁸ filed an opposition to the Waiver Request. Clearwire opposes the Waiver Request and the STA Request. Clearwire argues that DCTC has failed to explain why the services it offers cannot be accommodated under the post-transition band plan.³⁹ In addition, Clearwire contends that DCTC has also failed to demonstrate that compliance with the transitional rules would be unduly burdensome or contrary to the public interest.⁴⁰ Clearwire asserts that grant of the Waiver Request will hinder Clearwire's ability to provide competitive broadband service in areas affected by the waiver and will also cause interference to Clearwire's operations in adjacent areas.⁴¹ Clearwire also argues that granting the waiver will negatively impact Clearwire's ability to transition the surrounding market area.⁴² Clearwire specifically objects to a waiver that would permit DCTC to: (1) operate under the maximum EIRP limits set forth for "pre-transition" operations;⁴³ (2) operate under the pre-transition emission limits;⁴⁴ (3) operate with field strengths along adjacent services area boundaries at the greater signal strength of 47 dBu or the strength authorized in underlying licenses as of January 10, 2005;⁴⁵ and (4) disregard the height benchmarking obligations set forth in Section 27.1221 of the Commission's Rules.⁴⁶ Moreover, Clearwire urges that any waiver granted to DCTC expire no later than December 31, 2008 so that the Commission can reevaluate

³⁶ See Letter from Stephen E. Coran, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jun. 25, 2007) and accompanying letters.

³⁷ Comments of the National Telecommunications Cooperative Association (NTCA) (filed Jun. 25, 2007).

³⁸ Clearwire Corporation, Opposition to and Comments on Request for Waiver (filed June 25, 2007) (Clearwire Opposition).

³⁹ See, e.g., Clearwire Opposition at 4-7.

⁴⁰ See, e.g., Clearwire Opposition at 4-5. For example, Clearwire notes that DCTC is intending to migrate its distance learning services to wireline based facilities. See *id.* at 5.

⁴¹ Clearwire Opposition at 6-7.

⁴² Clearwire Opposition at 7.

⁴³ See 47 C.F.R. § 27.50(h)(1)(i), (ii).

⁴⁴ See 47 C.F.R. § 27.53(1)(3).

⁴⁵ See 47 C.F.R. § 27.55(a)(4)(i).

⁴⁶ 47 C.F.R. § 27.1221.

such waiver in light of advances in technology.⁴⁷ In addition, Clearwire strongly opposes extending any relief to DCTC for its unauthorized operations on channels that DCTC was not and could not have been authorized to use pursuant to the Commission's Rules.⁴⁸

10. Also on June 25, 2007, Clearwire, Sprint Nextel Corporation (Sprint Nextel), Xanadoo, LLC (Xanadoo), and NextWave Wireless, Inc. (NextWave) filed comments⁴⁹ addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.⁵⁰ 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.⁵¹ Also on July 10, 2007, DCTC, C&W Enterprises, Inc. (C&W), Central Texas Communications, Inc. (CTC), Choice Communications LLC (Choice), CNI Wireless, Inc. (CNI), Northwest Communications Cooperative (NCC), Evertek, Inc. (Evertek), Northern Wireless Communications Inc. (Northern), RC Technologies Corporation (RC Technologies), Starcom, Inc. (Starcom), and United Telephone Mutual Aid Corporation (United)

⁴⁷ Clearwire Opposition at 9.

⁴⁸ See Clearwire Opposition at 5.

⁴⁹ 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, Secretary, Federal Communications Commission (dated Jun. 25, 2007) (Joint Comments).

⁵⁰ On June 25, 2007, the Commission had pending before it opt-out waiver requests from DCTC; C&W Enterprises, Inc.; Central Texas Communications, Inc.; Choice Communications LLC; CNI Wireless, Inc.; Northwest Communications Cooperative; Evertek, Inc.; Northern Wireless Communications Inc.; RC Technologies Corporation; Starcom, Inc.; and United Telephone Mutual Aid Corporation. See *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 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 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 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 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)*.

⁵¹ Letter from Todd D. Gray, National ITFS Association and Edwin N. Lavergne, Catholic Television Network to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 10, 2007) (CTN/NIA Letter).

(collectively, Waiver Proponents) filed a letter in reply to the Joint Commenters.⁵² In addition to participating in the Joint Reply Comments, NCC filed its individual reply comments on July 10, 2007.⁵³ On July 17, 2007, DCTC, C&W, CTC, Choice, NCC, Evertek, Northern, RC Technologies, Starcom, and United responded to the comments filed by CTN and NIA.⁵⁴ On July 19, 2007, Clearwire, Sprint Nextel, Xanadoo, and NextWave, Inc. filed comments in response to the Joint Reply.⁵⁵ On July 25, 2007, NCC, CTC, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the Second Joint Comments.⁵⁶

11. The Joint Commenters, along with CTN and NIA, oppose the grant of permanent, unconditioned opt-out waivers of the transition rules going forward.⁵⁷ 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, 2008.⁵⁸ The Joint Commenters also argue that any waiver should be conditioned upon compliance with existing Part 27 operational and technical rules.⁵⁹ The National ITFS Association and the Catholic Television Network support the position of the Joint Commenters.⁶⁰ 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

⁵² 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).

⁵³ Reply Comments (filed Jul. 10, 2007).

⁵⁴ 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).

⁵⁵ 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, Secretary, Federal Communications Commission (dated Jul. 19, 2007) (Second Joint Comments).

⁵⁶ 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).

⁵⁷ Joint Comments at 3.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 3-4.

⁶⁰ CTN/NIA Letter.

light of the facts and circumstances of the particular waiver requests.⁶¹ 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.⁶²

12. In a separate reply to Clearwire, DCTC argues that Clearwire's interference claims are not supported by any reliable documentation.⁶³ DCTC also asserts that there is a public need for continuation of the MVPD and wireless broadband services it provides in the Brush Hill, North Dakota GSA.⁶⁴

III. DISCUSSION

A. STA Request

13. Pursuant to Section 1.931(a)(1) of the Commission's Rules, applicants may request special temporary authority (STA) in circumstances requiring immediate or temporary use of a station in the wireless telecommunications services to operate new or modified equipment.⁶⁵ STA requests must be filed prior to the proposed date of operations.⁶⁶

14. We disagree with DCTC that grant of an STA is appropriate in this instance. DCTC has been transmitting video programming on EBS channel C2 since approximately 1994 and providing broadband services on EBS channels C3 and D3 since 2001 without authorization.⁶⁷ Section 301 of the Communications Act of 1934, as amended,⁶⁸ and Section 1.903(a) of the Rules⁶⁹ prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by a wireless radio station except under, and in accordance with, a Commission granted authorization. DCTC failed to file the instant STA Request or any request prior to the operation of services on EBS Channels C2, C3, and D3 and has been operating without authority on EBS Channel C2 for approximately 13 years and on EBS Channels C3 and D3 for approximately six years.

15. Moreover, DCTC fails to satisfy the criteria for granting an STA. Although DCTC cites to the lack of competition in video programming and the general need for broadband services in the rural areas within the Brush Hill BTA,⁷⁰ we find such justifications do not qualify as "circumstances which are of such extraordinary nature that delay in the institution of temporary operation would seriously prejudice the

⁶¹ 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.

⁶² Second Joint Comments at 3.

⁶³ Reply Comments of Dakota Central Telecommunications Cooperative (filed Jul. 10, 2007) at 7-8 (DCTC Reply).

⁶⁴ DCTC Reply at 11-12.

⁶⁵ 47 C.F.R. § 1.931(a)(1).

⁶⁶ *See* 47 C.F.R. § 1.931(a)(1).

⁶⁷ *See* STA Request at 1-3.

⁶⁸ 47 U.S.C. § 301.

⁶⁹ 47 C.F.R. § 1.903(a).

⁷⁰ *See, e.g.*, STA Request at 3. DCTC cites to a number of cases that do not involve STA requests, including instances where the Commission has waived the application filing freeze. *See, e.g.*, STA Request at 7-9. We find such cases inapplicable to the instant matter.

public interest.”⁷¹ Rather, the circumstances described by DCTC are circumstances which, as DCTC itself notes, generally describe the rural community in central North Dakota.⁷² Such circumstances, which face other rural communities as well, are more appropriately addressed through the Commission’s application or, if necessary, rulemaking processes. Furthermore, DCTC is not eligible to hold spectrum in the EBS, where eligibility is limited to educational institutions and qualified non-profit educational organizations.⁷³ We find that the public interest would not be served by rewarding DCTC for operating without authority on frequencies that it was not eligible to hold and thereby inviting other parties to act in a similar manner. Accordingly, we deny the STA Request. Since DCTC has no authorization to operate its broadband system, we will deny the Waiver Request with respect to its broadband system.

B. Waiver Request

16. 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.⁷⁴ 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).⁷⁵ 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.⁷⁶ 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.⁷⁷

17. 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 effect 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 Commission.⁷⁸ The Commission stated that waivers will be granted if it is shown that: (i) the underlying purpose of the rules(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.⁷⁹ DCTC has not attempted to demonstrate that it satisfies either of the specific bases for waiver established in the

⁷¹ See 47 C.F.R. § 1.931(a)(2)(iv); see also STA Request at 3.

⁷² See STA Request at 3-8.

⁷³ See 47 C.F.R. § 27.1201(a).

⁷⁴ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

⁷⁵ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77. This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

⁷⁶ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 14199-14200 ¶ 77; 47 C.F.R. § 1.925(b)(3).

BRS/EBS R&O. We therefore consider DCTC's request under the general waiver standard contained in Section 1.925 of the Commission's Rules.⁸⁰

18. 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. With the exception of Clearwire, however, none of the Joint Commenters has alleged that it would be harmed if DCTC is granted a waiver. Furthermore, the proposals to terminate any waivers at the end of 2008 and to require compliance with the post-transition technical rules are made without individual analyses of DCTC's situation. Neither Clearwire nor the Joint Commenters have established that December 31, 2008 is an appropriate date with respect to DCTC, nor do they attempt to show that DCTC could operate its video system under the post-transition rules.⁸¹ Furthermore, we agree with DCTC 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. Clearwire and the Joint Commenters' suggestion that a waiver could be renewed after the end of 2008 if circumstances supported an extension at that time would fail to provide DCTC with the certainty it needs to conduct its operations. Thus, we deny all requests to place a time limitation on any waiver granted to DCTC and proceed with an individual analysis of the merits of the instant Waiver Request.

19. DCTC 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. First, DCTC has shown that it has developed a viable MVPD business. DCTC has provided declarations from Keith Larson, General Manager of DCTC, and from Kathy McCracken, Director of DCTC, attesting to the facts contained in the Waiver Request.⁸² In light of the detailed information presented by DCTC, the Commission finds that DCTC has developed a viable business.

20. We also conclude that granting DCTC a waiver to continue its authorized operations would serve the public interest. DCTC, which was founded in 1952, has provided MVPD service to rural subscribers in central North Dakota for more than 17 years. According to DCTC, it is the only terrestrial MVPD service provider in most areas and is the only competitor to DBS services.⁸³ DCTC also states that it provides five local channels that for many consumers in the GSA cannot be received using off-air antennas and are not provided by the Direct Broadcast Satellite or cable operators.⁸⁴ In addition, DCTC asserts that compliance with the Commission's transition rules would end its ability to provide consumers with MVPD services, and the cost of rebuilding its system would not be feasible.⁸⁵ These factors demonstrate that DCTC provides an important service to the consumers in the Brush Hill community, and that it would be forced to shut down if it is not granted a waiver. In contrast, Clearwire has not provided any meaningful information about the areas where it plans to provide service or the time frame within which such service will be established. Consequently, we find that on balance, the public interest favors granting DCTC a waiver request with respect to those frequencies it is currently authorized to operate.

⁸⁰ 47 C.F.R. § 1.925.

⁸¹ *See, e.g.*, DCTC Reply at 11-12.

⁸² Waiver Request, Appendix A.

⁸³ Waiver Request at 4.

⁸⁴ Waiver Request at 4, 9.

⁸⁵ Waiver Request at 9-10.

21. We find that the conditions that DCTC asks to be placed on its waiver request are more than it requires to continue its current operations. With regard to DCTC's EIRP limits, we note that Section 27.50(h)(1)(i) and (ii), the pre-transition emission limits are 33 dBW. DCTC indicates that it currently operates at 26.2 dBW at a center radiation of approximately 493 feet above ground level (AGL), that it does not plan any upgrades that would increase the EIRP, and that it commits to maintaining its current facilities.⁸⁶ In light of this information, we will condition DCTC's waiver on operating at a maximum EIRP of 26.2 dBW.

22. With regard to DCTC's field strength limits, DCTC indicates that it does not generally exceed the 47 dB $\mu\text{V}/\text{m}$ ⁸⁷ limit at any point beyond its GSA contiguous with Clearwire's territory with the exception of a few hilltops covering no more than 20 square miles.⁸⁸ Under Section 27.55(a)(4) of our Rules, licensees may exceed the 47 dB $\mu\text{V}/\text{m}$ signal level where there is no affected party providing service.⁸⁹ Because Clearwire is not constructed and providing service, and because Clearwire has not shown that it would be harmed by allowing DCTC to maintain its current operations, we will grant DCTC a limited waiver of Section 27.55(a)(4) of the Commission's Rules to maintain its current operations.

23. We also agree with DCTC's indication that it can comply with Section 27.1221 of the Commission's Rules, the height benchmarking rule.⁹⁰ Accordingly, we conclude that it is unnecessary to grant DCTC a waiver of that rule. Clearwire's contentions regarding potential interference into its operations in adjacent areas stem from its line of sight analysis, and assume a base station antenna height of 150 feet AGL.⁹¹ DCTC's analysis correctly notes that Clearwire's base stations would have to comply with the height benchmarking rule with respect to DCTC's existing transmitter. Because that requirement limits Clearwire's ability to place base stations near the boundary of its GSA, DCTC estimates that the area where Clearwire could place a base station consistent with the height benchmarking rule would constitute only about a 130 square mile area with a population of only 110 households.⁹² Furthermore, the height benchmarking rule does not restrict the heights of antennas *per se*.⁹³ Instead, it limits the signal that a noncompliant transmitting antenna can place at a base station receive antenna that complies with the height benchmark.⁹⁴ Given that DCTC operates with less than the maximum allowable power (26.2 dBW), and considering the distance from DCTC's transmitter to the edge of its GSA, it appears that DCTC could maintain its existing service while providing the appropriate protection to any Clearwire base station that meets the height benchmark. Accordingly, we will not grant DCTC a waiver of Section 27.1221 of

⁸⁶ DCTC Reply, Engineering Statement of John Dalager, P.E. (Dalager Statement) at 2.

⁸⁷ In the *BRS/EBS 4th MO&O*, the Commission corrected an error in Section 27.55(a)(4)(i) of the Commission's rules changing the reference from 47 dB[m μ]V/m to 47 dB μ V/m. 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, *Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6023 ¶ 84 (2008).

⁸⁸ Dalager Statement at 2.

⁸⁹ 47 C.F.R. § 27.55(a)(4).

⁹⁰ DCTC Reply at 5.

⁹¹ Clearwire Opposition, Engineering Statement of George W. Harter, at 1.

⁹² Dalager Statement at 1-2.

⁹³ 47 C.F.R. § 27.1221(a).

⁹⁴ 47 C.F.R. § 27.1221(c).

the Commission's Rules because it has not shown that a waiver is necessary to continue its operations. In the absence of a waiver, Clearwire cannot show any harm to its ability to provide service.⁹⁵

24. 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 have been 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 the waivers we have granted to date 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,⁹⁶ licensees who wish to offer low-power, cellularized broadband services can now plan with certainty knowing that no other such requests will be entertained.

25. Therefore, we grant DCTC's waiver request to the following extent with the following conditions:

- DCTC and its channel lessors will have permanent authority to operate in the UBS within the Brush Hill GSA pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1);
- DCTC must participate in good faith in any transition planning process relating to any geographic area that overlaps its GSAs. In conjunction with any transition, DCTC 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 resulting in more than a *de minimis* reduction in DCTC's ability to serve its then-existing subscribers;
- Every main, booster, and base station currently used in conjunction with DCTC's system shall be permitted to continue operating with the EIRP as operated on April 25, 2007;
- Any channel used for the transmission of digital video programming on DCTC'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(1)(1);
- Sections 27.1220 (regarding the 5.5 MHz wide channels in the UBS) and 27.1222 of the Commission's Rules (regarding the establishment of guardbands around the MBS) shall not be applicable to DCTC and its channel lessors.

⁹⁵ While Clearwire also objects to allowing DCTC to operate pursuant to the pre-transition out-of-band emission limitations (Clearwire Opposition at 4), Clearwire has not shown how it can be harmed by such a waiver because it does not allege it has any adjacent channel operations within the Brush Hill, North Dakota GSA.

⁹⁶ See 47 C.F.R. § 27.1231(g) (establishing April 30, 2007 deadline).

- Section 27.55(a)(4)(i) of the Commission's Rules is waived to allow DCTC and its channel lessors to continue their current operations within the Brush Hill Geographic Service Area.

IV. CONCLUSION AND ORDERING CLAUSES

26. DCTC has failed to demonstrate that an STA is appropriate or warranted to cover its unauthorized operation. With respect to its MVPD operations, DCTC has justified a waiver by demonstrating that it has a viable business for high-powered operations and that it needs more than seven digitized high-powered MBS channels to deliver its service to its customers. The Commission also concludes that requiring DCTC 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.

27. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 1.931 of the Commission's Rules, 47 C.F.R. § 1.931, that the Request for Special Temporary Authority, File No. 0003004682, filed by Dakota Central Telecommunications Cooperative on April 24, 2007 IS DENIED.

28. IT IS FURTHER 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 Dakota Central Telecommunications Cooperative on April 25, 2007 IS GRANTED to the extent indicated and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson
Associate Chief, Wireless Telecommunications Bureau