

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

In the matter of
UNITED TELEPHONE MUTUAL AID
CORPORATION
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: 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 United Telephone Mutual Aid Corporation (United), seeking a waiver of Sections 27.1230-27.1239 of the Commission's Rules for itself and all of its Broadband Radio Service (BRS) and Educational Broadband Service (EBS) licensees/lessors in the Geographic Service Areas (GSAs) of Milton and Egeland, North Dakota, rural areas in northeast North Dakota, adjacent to the Canadian border. United has demonstrated

1 Request for Waiver (filed Apr. 5, 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 United's licensees/lessors in the Milton, ND GSA are as follows: BRS Station B166 (Channel BRS 2A/Polar Communications); EBS Station WNC551 (Channels A1-A4/Cavalier Public School District #6); EBS Station WNC550 (Channels B1-B4/Park River School District); and EBS Station WNC553 (Channels C1-C4/Grafton School District), BRS Station WLW985 (Channels F1-F4/ Cavalier Rural Electric Cooperative, Inc.) and BRS Station WHEZ907 (Channel H2/ Cavalier Rural Electric Cooperative, Inc.). Waiver Request at Appendix A. United is the licensee for BRS Station WMY447 (Channel BRS 1); Commercial EBS (C-EBS) Station WMX661 (Channels D1-D4); BRS Station WLW984 (Channels E1-E4); C-EBS Station WMX662 (Channels G1-G4); BRS Station WNEZ913 (Channel H1); and BRS Station WNTC633 (Channel H3). Waiver Request at Appendix A. On March 5, 2007 Cavalier School District #6 filed an application for renewal and a petition for reinstatement of its license (File No. 0002935508) for Station WNC551. Id. at Appendix A n.1. United further reports that it expects Park River School District and Grafton School District to file applications for renewal and petitions for reinstatement of their respective expired authorizations. Id.

3 United's licensees/lessors in the Egeland, ND GSA are as follows: BRS Station B166 (Channel BRS 2A/Polar Communications); BRS Station WLW982 (Channels F1-F4/ Cavalier Rural Electric Cooperative, Inc.); and BRS
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that a waiver is necessary for it to continue serving its customers as it has since 1990. We therefore grant United's Waiver Request to the extent indicated herein.<sup>4</sup>

## 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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).<sup>8</sup> The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Not all licensees, however, are required to transition to the new band plan and technical rules.

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Station WNTA471 (Channel H2/ Cavalier Rural Electric Cooperative, Inc.). United is the licensee for Station BRS WMY208 (Channel BRS 1); C-EBS Station WMX715 (Channels B1-B4); C-EBS Station WMX714 (Channels C1-C4); BRS Station WLW986 (Channels E1-E4); BRS Station WNTA554 (Channel H1); and BRS Station WNTC634 (Channel H3).

<sup>4</sup> 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 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)..

<sup>5</sup> 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).

<sup>6</sup> 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*).

<sup>7</sup> See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

<sup>8</sup> *Id.* at 14169 ¶ 6.

<sup>9</sup> *Id.* at 14168 ¶ 4.

<sup>10</sup> *Id.* at 14185-14186 ¶ 4.

<sup>11</sup> *Id.* at 14197-14198 ¶ 72.

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.<sup>12</sup> 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.<sup>13</sup>

4. Formed in 1952 as a rural telephone cooperative, United has over the years expanded its service offerings to include paging, cable television, web hosting, and cellular resale services.<sup>14</sup> In 1990, United further expanded its service to provide wireless cable MVPD service to rural customers in the United, Cavalier Rural Electric Cooperative, Inc. (Cavalier), and Polar Communications (Polar) areas that did not have access to cable television.<sup>15</sup> United did this, in part, by using its own BRS channels and leasing BRS and EBS spectrum from Cavalier, Polar, and local school districts.<sup>16</sup> United asserts that it is using all of the available authorized BRS and leased EBS channels to provide MVPD service.<sup>17</sup> In 2001, United, working in partnership with Polar, again expanded its service to provide data services by using BRS channel E4 for downstream communications and channels BRS 1 and BRS 2 for the upstream communications.<sup>18</sup> Because United’s high-speed broadband system is co-located with its MVPD system, both systems have a common footprint, thus maximizing United’s ability to offer more services to its customers.<sup>19</sup> The Milton and Egeland systems provide MVPD service to 900 customers with 18 channels of programming for \$25.00 per month, thus providing a low-cost alternative to Digital Broadcast Service (DBS).<sup>20</sup> In addition, United provides data services to approximately 250 customers, most of whom would not be able to obtain DSL or cable modem broadband services.<sup>21</sup>

5. United asks to “opt-out” of the transition of the 2500-2690 MHz band in Milton and Egeland, North Dakota and seeks a waiver of Section 27.1230-27.1239 of the Commission’s rules.<sup>22</sup> In addition, United requests that the waiver state that:

- United and its channel lessors will have permanent authority to operate within the Milton and Egeland GSAs pursuant to Section 27.1209 on the “pre-transition” BRS/EBS band plan set forth in Section 27.5(i)(1);

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<sup>12</sup> *Id.* at 14199-14200 ¶ 77.

<sup>13</sup> 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.

<sup>14</sup> Waiver Request at 2-3.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1.

- United 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, United 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 United's ability to serve its then-existing subscribers;
- Every main, booster, and base station currently used in conjunction with United'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 digital video programming on United'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);<sup>23</sup>
- Consistent with Section 27.55(a)(4)(i), all of the BRS and EBS channels in United's Milton and Egeland systems 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;
- 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 United and its EBS and BRS channel lessors; and
- United and its BRS and EBS channel lessors shall not be subject to the height benchmarking obligations set forth in Section 27.1221.<sup>24</sup>

6. On June 25, 2007, Clearwire Corporation (Clearwire), Sprint Nextel Corporation (Sprint Nextel), Xanadoo, LLC (Xanadoo), and NextWave Wireless, Inc. (NextWave) filed comments<sup>25</sup> addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.<sup>26</sup> Also on June 25, 2007,

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<sup>23</sup> In fact, because United 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.

<sup>24</sup> *Id.* at 12-13.

<sup>25</sup> 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).

<sup>26</sup> On June 25, 2007, the Commission had pending before it opt-out waiver requests from United; C&W Enterprises, Inc.; Central Texas Communications, Inc.; Choice Communications LLC; CNI Wireless, Inc.; Dakota Central Telecommunications Cooperative *et al*; Evertex, Inc.; Northern Wireless Communications Inc.; RC Technologies Corporation; Starcom, Inc.; and Northwest Communications Cooperative. 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); 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

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the National Telecommunications Cooperative Association (NTCA) filed comments in support of United's waiver request.<sup>27</sup> 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.<sup>28</sup> Also on July 10, 2007, United, 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 Northwest Communications Cooperative (NCC) (collectively, Waiver Proponents) filed a letter in reply to the Joint Commenters.<sup>29</sup> In addition to participating in the Joint Reply Comments, NCC filed its individual reply comments on July 10, 2007.<sup>30</sup> On July 17, 2007, United, C&W, CTC, Choice, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and NCC responded to the comments filed by CTN and NIA.<sup>31</sup> On July 19, 2007, Clearwire, Sprint Nextel, Xanadoo, and NextWave, Inc. filed

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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 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 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).

<sup>27</sup> Comments of the National Telecommunications Cooperative Association (NTCA) (filed Jun. 25, 2007).

<sup>28</sup> 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).

<sup>29</sup> 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).

<sup>30</sup> Reply Comments (filed Jul. 10, 2007).

<sup>31</sup> 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).

comments in response to the Joint Reply.<sup>32</sup> On July 25, 2007, NCC, CTC, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the Second Joint Comments.<sup>33</sup>

7. The Joint Commenters, along with CTN and NIA, oppose the grant of permanent, unconditioned opt-out waivers of the transition rules going forward.<sup>34</sup> 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.<sup>35</sup> The Joint Commenters also argue that any waiver should be conditioned upon compliance with existing Part 27 operational and technical rules.<sup>36</sup> The National ITFS Association and the Catholic Television Network support the position of the Joint Commenters.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

### 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.<sup>40</sup> 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).<sup>41</sup> The Commission further found that it is in the public interest to consider waivers for any BRS

<sup>32</sup> 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).

<sup>33</sup> 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).

<sup>34</sup> Joint Comments at 3.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 3-4.

<sup>37</sup> CTN/NIA Letter.

<sup>38</sup> 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.

<sup>39</sup> Second Joint Comments at 3.

<sup>40</sup> *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

<sup>41</sup> *Id.* This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

or EBS licensee that is co-located with any qualified MVPD licensee that elects to opt-out.<sup>42</sup> 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.<sup>43</sup>

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 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.<sup>44</sup> 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.<sup>45</sup> United 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 United's request under the general waiver standard contained in Section 1.925 of the Commission's Rules.<sup>46</sup>

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 United is granted a waiver. The Joint Commenters, however, 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 United's situation. The Joint Commenters have not established that December 31, 2008 is an appropriate date with respect to United, nor do they attempt to show that United could operate its video system under the post-transition rules. Furthermore, we agree with United 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. 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 United with the certainty it needs to conduct its operations. Thus, we deny all requests to limit any waiver granted to United to December 31, 2008, and proceed with an individual analysis of the merits of United's Waiver Request.

11. United 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, United has shown that it is a viable business in the Milton and Egeland GSAs. United has provided service since 1990 and is the only operator offering a "triple play" of video, mobile, and broadband services in the Milton and Egeland GSAs.<sup>47</sup> In most areas, United is the only terrestrial MVPD service provider and is the only competitor to high-priced DBS services.<sup>48</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, 19 FCC Rcd at 14199-14200 ¶ 77, 47 C.F.R. § 1.925(b)(3).

<sup>46</sup> 47 C.F.R. § 1.925.

<sup>47</sup> Waiver Request at 3.

<sup>48</sup> *Id.* at 3-4.

12. Second, United has shown that it is not economically feasible for it to transition to the new band plan and technical rules. United explains that, post-transition, it would have only four high-power MBS channels (D4, E4, F4, and G4) in both Milton and Egeland to provide MVPD service.<sup>49</sup> Providing a four-channel video service, United submits, would not be viable under any circumstances, whereas its current 18-channel system has proved a viable alternative to DBS.<sup>50</sup> Because of the sparse population and low-density of the Milton and Egeland GSAs, it is uneconomical for United to install expensive digital equipment to expand the number of channels its offers.<sup>51</sup> United explains that as a business proposition, there is little or no demand for digital video services because consumers in the Milton and Egeland GSAs want a low-cost alternative rather than a choice between a high-cost digital wireless cable service and a high-cost DBS service.<sup>52</sup> United makes a similar argument with regard to its high-speed broadband service. Post-transition, United would be required to replace its high-powered broadband service with a low-power cellularized system.<sup>53</sup> Low-power cellularized broadband operations are costly to deploy and they may not replicate the footprint of video operations, which, in turn, would reduce United's ability to offer customers both high-speed internet and MVPD services.<sup>54</sup> United reports that if it were forced to transition it would cease operations because "in no way" could United maintain its viable business with a four-channel video system and a multi-site, low-power broadband system.<sup>55</sup>

13. United has shown that it is in the public interest to grant its waiver request. As mentioned above, United started its MVPD service in 1990 to provide wireless cable to customers who did not have access to coaxial cable. With regard to high-speed internet access, United reports that cable modem service is non-existent and other local exchange carriers do not offer service to many households in the region.<sup>56</sup> Thus, United is the only high-speed broadband service competitor to the satellite high-speed broadband service offered by WildBlue.<sup>57</sup>

14. United has also shown that neighboring licensees will not be harmed by a grant of the waiver. The Milton GSA is entirely within the Grand Forks BTA (BTA 166), while the Egeland GSA is almost entirely within the Grand Forks BTA.<sup>58</sup> Polar Communications, the authorization holder for the Grand Forks BTA, supports United's waiver request and has cooperated with United in coordinating their post-transition systems.<sup>59</sup> United and Polar also coordinated the United's filing of the waiver request with

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<sup>49</sup> *Id.* at 9. In Milton, United would have the channels D4, E4, F4, and G4. *Id.* at 9 n.13. If their licenses were renewed, United's lessors would have channels A4 (Cavalier Public School District #6), B4 (Park River School District), and C4 (Grafton School District). *Id.* at Appendix A. In Egeland, United would have channels B4, C4, E4, and F4. *Id.* at 9, n.13.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at ii.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at ii and 9.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 10-11.

<sup>59</sup> *Id.* at 11 and Appendix B, Letter from David Dunning, General Manager/CEO to Kenneth Carlson, General Manager, United Mutual Telephone Corporation (Apr. 5, 2007).



Polar's filing of an Initiation Plan to transition the Grand Forks BTA.<sup>60</sup> On April 5, 2007, the same day that United filed this waiver request, Polar filed an Initiation Plan to transition the remainder of the Grand Forks BTA.<sup>61</sup> Therefore, with regard to the Milton GSA, there is no potential for interference because, other than Polar, there are no other neighboring licensees that would be affected by the grant of United's waiver request.<sup>62</sup> We further find that there is little likelihood of United causing interference to a neighboring licensee from the Egeland site. Although the Egeland GSA slightly overlaps a remote area of the Minot BTA, United reports that any inhabitants of this area most probably receive MVPD and broadband service from United rather than from any other provider.<sup>63</sup> United also acknowledges that it may be forced to reduce power if a licensee in the Minot BTA desires to use BRS spectrum.<sup>64</sup> Furthermore, United states that there are no other BRS or EBS licensees or operators that would be affected by continued operation of United's system.<sup>65</sup>

15. As described above, United asks that the waiver contain seven conditions, which would grant United the right to continue to operate under the pre-transition band plan and technical rules. Although we conclude that United has met the Commission's waiver standard and may opt out of the transition of the 2.5 GHz band, we find that United does not need all seven of these conditions to continue its current operations. For instance, because United operates an analog video system, it is unnecessary to waive Section 27.53(l)(3) of the rules, which concerns digital video programming. Moreover, we find that permitting United to operate at the greater signal strength of 47 dB  $\mu$ V/m<sup>66</sup> or the strength authorized in their underlying licenses as of January 10, 2005 along the boundaries of the Milton and Egeland GSAs is unnecessary. With regard to the Milton GSA, United has already reached an agreement with Polar on how their two systems can continue to operate, so United can continue to operate pursuant to the consent from Polar, as opposed to needing a waiver. With regard to the Egeland system, United may continue to operate its system pursuant to its consent with Polar and Section 27.55(a)(4) of the Commission's Rules, which allows a licensee to exceed the 47 dB  $\mu$ V/m level when there is no neighboring licensee providing service.<sup>67</sup> We note that United has acknowledged that it may need to reduce power if needed to accommodate future operations in the Minot BTA.<sup>68</sup> Finally, United does not need waiver of the height benchmarking rule because it has consent from its neighbor licensee and because it is not seeking protection from any future operations in the Minot BTA.

16. 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

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<sup>60</sup> *Id.* at 2.

<sup>61</sup> See Letter from David Dunning, General Manager/CEO to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 06-136, (filed Apr. 5, 2007).

<sup>62</sup> Waiver Request at 10-11.

<sup>63</sup> *Id.* at 11.

<sup>64</sup> *Id.* at 11 n.15.

<sup>65</sup> *Id.* at 11.

<sup>66</sup> 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 dBu to 47 dB  $\mu$ 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).

<sup>67</sup> 47 C.F.R. § 27.55(a)(4).

<sup>68</sup> Waiver Request at 9 n.15.

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,<sup>69</sup> licensees who wish to offer low-power, cellularized broadband services can now plan with certainty knowing that no other such requests will be entertained.

17. Therefore, we grant United's waiver request with the following conditions:

- United and its channel lessors will have permanent authority to operate within the Milton and Egeland GSAs pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1);
- United 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, United 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 a *de minimis* reduction in United's ability to serve its then-existing subscribers;
- Every main, booster, and base station currently used in conjunction with United'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

18. United 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 Milton and Egeland, ND GSAs. The Bureau also concludes that requiring United to transition to the new band plan would be inequitable, unduly

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<sup>69</sup> See 47 C.F.R. § 27.1231(g) (establishing April 30, 2007 deadline).

burdensome and contrary to the public interest because it would be required to discontinue its existing service to customers.<sup>70</sup>

19. 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 United Telephone Mutual Aid Corporation on April 5, 2007 IS GRANTED to the extent indicated herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson  
Associate Chief, Wireless Telecommunications Bureau

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<sup>70</sup> We note that certain of the licenses of certain licensees that United leases spectrum from have expired. *See* Waiver Request at Appendix A n.1. Our waiver grant does not authorize operation pursuant to these expired licenses. We do not prejudge any action that may be taken on any late-filed renewal applications for these stations.