

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)
)
C&W ENTERPRISES, INC.)
)
Petition for Waiver of the FCC's Rules Regarding)
Transition of Broadband Radio Service and)
Educational Broadband Service to the Revised)
Band Plan)
)
CENTRAL TEXAS COMMUNICATIONS, INC.)
)
Petition for Waiver of the FCC's Rules Regarding)
Transition of Broadband Radio Service and)
Educational Broadband Service to the Revised)
Band Plan)
)
DAKOTA CENTRAL)
TELECOMMUNICATIONS COOPERATIVE)
)
FESSENDEN PUBLIC SCHOOL)
)
MIDKOTA PUBLIC SCHOOL)
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GACKLE/STREETER PUBLIC SCHOOL)
)
WIMBLEDON/COURTENAY PUBLIC)
SCHOOL)
)
JAMESTOWN PUBLIC SCHOOL)
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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)
)
 Request for Special Temporary Authority)
)
 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 AND ORDER ON RECONSIDERATION

Adopted: June 23, 2010

Released: June 24, 2010

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order and Order on Reconsideration*, we decline to reconsider waivers to that have allowed certain Multichannel Video Programming Distributors (MVPDs) to opt out of the transition of the 2.5 GHz band. To the extent Clearwire Corporation (“Clearwire”) seeks clarification regarding the procedures MVPDs that have received opt-out waivers should use if they decide they wish to transition to the new band plan, we provide guidance on that issue.

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.¹ 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.² In most areas of the country, however, the deployment of wireless cable was not successful.

¹ 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 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*

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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.³ 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).⁴ The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.⁵ 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.⁶ 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.⁷ Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted certain MVPDs to seek waivers 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.⁸ 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.⁹

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.¹⁰ On May 24, 2007, the Bureau granted USA Digital’s waiver request.¹¹ On June 25, 2007, Libmot Communications Partnership and Clearwire filed petitions for reconsideration of the order granting USA Digital’s waiver request.¹² In April 2007, C&W, Central Texas, Dakota Central, and United filed waiver requests seeking to opt out of

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Rulemaking and Memorandum Opinion and Order, WT Docket No. 03-66, 18 FCC Rcd 6722, 6744 ¶ 47 (2003) (*NPRM*).

³ See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

⁴ *Id.* at 14169 ¶ 6.

⁵ *Id.* at 14168 ¶ 4.

⁶ *Id.* at 14185-14186 ¶ 4.

⁷ *Id.* at 14197-14198 ¶ 72.

⁸ *Id.* at 14199-14200 ¶ 77.

⁹ 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 5650 ¶ 84.

¹⁰ Request for Waiver (filed Nov. 16, 2006).

¹¹ Antilles Wireless, L.L.C. d/b/a USA Digital, *Memorandum Opinion and Order*, 22 FCC Rcd 9348 (WTB 2007).

¹² Petition for Reconsideration, Libmot Communications Partnership (filed Jun. 25, 2007); Petition for Partial Reconsideration, Clearwire Corporation (filed Jun. 25, 2007).

the transition.¹³ Clearwire, along with others, opposed the waiver requests filed by C&W, Central Texas, Dakota Central, and United.¹⁴

5. On April 17, 2009, the Bureau dismissed Clearwire's petition for reconsideration of the grant of a waiver to USA Digital and partially granted the waiver requests filed by C&W, Central Texas, Dakota Central, and United.¹⁵ With respect to USA Digital, the Bureau held that Clearwire's petition for reconsideration was improper because it reargued matters previously considered and addressed.¹⁶ With respect to C&W, Central Texas, Dakota Central, and United, the Bureau held that waivers were needed to allow those MVPD Providers to continue serving their customers.¹⁷ The Bureau rejected the argument made by Clearwire and others that any waivers should be limited to December 31, 2008 or two years.¹⁸

6. On May 12, 2009, Clearwire filed the instant Petition.¹⁹ Clearwire expresses concern that the Bureau has not provided "guidance on the actions the Commission intends to take when its granted opt-out decisions no longer logically apply."²⁰ Clearwire asks the Bureau to establish a process for transitioning to the new band plan if a party decides an opt-out waiver is no longer needed.²¹ Clearwire

¹³ Request for Limited Waiver, C & W Enterprises, Inc. (filed Apr. 30, 2007); Petition for Waiver, Central Texas Communications, Inc. (filed Apr. 11, 2007); Request for Partial Waiver, Dakota Central Telecommunications Cooperative, *et al.* (filed Apr. 25, 2007); Request for Waiver, United Mutual Telephone Aid Corporation (filed Apr. 5, 2007).

¹⁴ 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). *See also* Supplement to Comments in Opposition to Petition for Waiver, Clearwire Corporation (filed Nov. 10, 2008).

¹⁵The orders in question are: Antilles Wireless, LLC, *Order on Reconsideration*, 24 FCC Rcd 4696 (WTB 2009) (affirming grant of opt-out request filed by Antilles Wireless, LLC d/b/a USA Digital (USA Digital) for its MVPD system in Billings, MT); C & W Enterprises, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 4705 (WTB 2009) (granting request by C & W Enterprises, Inc. (C&W) for a temporary waiver to opt out of the transition for its MVPD system in San Angelo, TX); Central Texas Communications, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 4715 (WTB 2009) (granting request by Central Texas Communications, Inc. (Central Texas) for a permanent waiver to opt out of the transition for its MVPD systems in Goldthwaite, Lohn, and San Saba, Texas); Dakota Central Telecommunications Cooperative, *et al.*, *Memorandum Opinion and Order*, 24 FCC Rcd 4729 (WTB 2009) (partially granting request by Dakota Central Telecommunications Cooperative (Dakota Central) for a permanent waiver to opt out of the transition for its MVPD system in Brush Hill, ND); United Telephone Mutual Aid Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd 4743 (WTB 2009) (granting request by United Telephone Mutual Aid Corporation (United) for a permanent waiver to opt out of the transition for its MVPD systems in Milton and Egeland, North Dakota). Collectively, these orders will be referred to as the Opt-Out Orders. The MVPD providers that received relief in the Opt-Out Orders, together with W.A.T.C.H. TV Company, will be collectively referred to as the MVPD Providers.

¹⁶ Antilles Wireless, LLC, *supra*, 24 FCC Rcd at 4699 ¶ 10.

¹⁷ *See* C & W Enterprises, Inc., *supra*, 24 FCC Rcd at 4711-4712 ¶ 12; Central Texas Communications, Inc., *supra*, 24 FCC Rcd at 4724-4725 ¶ 20-21; Dakota Central Telecommunications Cooperative, *et al.*, *supra*, 24 FCC Rcd at 4739 ¶ 20; United Telephone Mutual Aid Corporation, *supra*, 24 FCC Rcd at 4750 ¶ 12.

¹⁸ *See* Antilles Wireless, LLC, *supra*, 24 FCC Rcd at 4700 ¶ 12; C & W Enterprises, Inc., *supra*, 24 FCC Rcd at 4711 ¶ 11; Central Texas Communications, Inc., *supra*, 24 FCC Rcd at 4723-4724 ¶ 17; Dakota Central Telecommunications Cooperative, *et al.*, *supra*, 24 FCC Rcd at 4739 ¶ 18; United Telephone Mutual Aid Corporation, *supra*, 24 FCC Rcd at 4749 ¶ 10.

¹⁹ Petition for Reconsideration or Clarification of Clearwire Corporation (filed May 12, 2009) (Clearwire Petition).

²⁰ *Id.* at 5.

²¹ *Id.* at 5-6.

claims that if such a process is not established, Clearwire may need to seek an extension of the May 1, 2011 deadline for demonstrating substantial service in markets adjacent to opt-out waivers because of potential interference.²² Second, Clearwire claims that there may be difficulties in determining a licensee's geographic service area when a licensee with an opt-out waiver is adjacent to a transitioned licensee.²³

7. Central Texas, Dakota Central, and United (together, Joint Opponents) contend that the Commission's existing rules are sufficient to accommodate an MVPD provider who no longer wishes to opt out.²⁴ Specifically, they suggest that an MVPD Provider who wishes to transition to the new band plan could file self-transition notices with a request for waiver of the April 21, 2009 deadline for filing self-transitions contained in Section 27.1236(b)(1) of the Commission's Rules, together with modification applications to change to the new band plan.²⁵ The Joint Opponents are concerned that establishing new processes will limit the flexibility that Clearwire, MVPD Providers, and lessors may have to tailor transitions to specific market circumstances.²⁶ They also claim that Clearwire's purported reasons for seeking those procedures are speculative, unsupported, and invalid.²⁷ The Joint Opponents also argue that it would be improper to subject them to procedures when prior MVPD waiver grants were not subject to those procedures.²⁸ Finally, they argue that imposing additional regulatory constraints on their operations "would create substantial uncertainty in their ability to finance operations and make long-term business plans."²⁹

8. USA Digital contends that the Petition is a procedurally improper attempt to seek reconsideration of the Bureau's decision to grant Antilles a permanent MVPD opt-out waiver.³⁰ It also argues there is no logical nexus between the harms Clearwire alleges and its request that the Bureau establish procedures for MVPD Providers who wish to transition to the new band plan.³¹

9. W.A.T.C.H. TV Company ("WATCH TV") asks the Bureau to strike the Petition as an untimely petition for reconsideration of the Commission's 2006 decision to grant WATCH TV an opt-out waiver.³² WATCH TV notes that the Bureau lacks authority to reconsider the Commission's decision to grant a waiver to WATCH TV.³³ It also claims that Clearwire violated the Commission's rules by failing

²² *Id.* at 6-7.

²³ *Id.* at 7-8.

²⁴ Joint Opposition to Petition for Reconsideration or Clarification of Clearwire Corporation, Central Texas Communications, Inc., Dakota Central Telecommunications Cooperative, and United Telephone Mutual Aid Corporation (filed May 28, 2009) (Joint Opposition) at 4.

²⁵ *Id.* See 47 C.F.R. § 27.1236(b)(1).

²⁶ Joint Opposition at 5-6.

²⁷ *Id.* at 6.

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ Opposition, Antilles Wireless, L.L.C. d/b/a USA Digital (filed May 28, 2009) at 2-6.

³¹ *Id.* at 6-9.

³² Motion of W.A.T.C.H. TV Company to Strike (filed May 27, 2009) (Motion to Strike).at 5-8.

³³ *Id.* at 8-9.

to serve the Petition on WATCH TV.³⁴ WATCH TV also believes that the issues Clearwire identifies are best dealt with on an *ad hoc* basis if and when it becomes necessary.³⁵

10. In response, Clearwire argues that the Bureau can consider its request for relief regardless of how the Petition is characterized.³⁶ Clearwire contends that announcing definitive procedures now would provide certainty.³⁷ It also argues that MVPD operators should not use their waiver grants as leverage for negotiating a sale of their spectrum or for interference protection.³⁸ Clearwire argues that if there is a change in circumstances that formed the basis for granting an opt-out waiver, the Bureau should establish a process for transitioning the licenses to the new band plan.³⁹ It alleges that the waivers that were granted “deprive Clearwire of the use of available spectrum to provide commercial services.”⁴⁰

III. DISCUSSION

11. First, we grant, in part, WATCH TV’s Motion to Strike. To the extent Clearwire’s Petition seeks reconsideration of the grant of opt-out waivers to WATCH TV, we agree that the Petition would be improper for two reasons. First, the Petition would be untimely with respect to WATCH TV. Section 405(a) of the Communications Act, as implemented by Section 1.106(f) of the Commission’s Rules, requires that a petition for reconsideration be filed within thirty days from the date of public notice of Commission action.⁴¹ Since the order granting WATCH TV an opt-out waiver was released in 2006, any petition for reconsideration of that order would be grossly untimely. Furthermore, we agree with WATCH TV and the other MVPD Providers that Clearwire’s Petition does not meet the standards for a petition for reconsideration. Specifically, Clearwire does not challenge the Bureau’s basis for granting opt-out waivers. Section 1.106 of the Commission’s Rules requires petitions to cite the findings of fact and/or conclusions of law which the petitioner believes are erroneous, and state with particularity the respects in which such findings and conclusions should be changed.⁴² Clearwire has not attempted to make such a showing. We therefore grant WATCH TV’s motion to strike to the extent Clearwire seeks reconsideration of any of the opt-out waiver orders referenced in its Petition.

12. Nonetheless, we decline to strike the Clearwire Petition in its entirety because it also seeks clarification of the procedures that should be used if a party holding an opt-out waiver decides to transition to the new band plan. Such a request can be made without challenging the underlying decision to grant opt-out waivers. Furthermore, we believe it was legitimate for Clearwire to raise this issue for the first time after the Bureau decided to grant opt-out waivers. We therefore reach the merits of Clearwire’s Petition to the extent it seeks clarification of the procedures to be used when a party holding an opt-out waiver wishes to transition to the new band plan.⁴³

³⁴ *Id.* at 9-10.

³⁵ Reply of W.A.T.C.H. TV Company (filed Jun. 22, 2009) at 4-5.

³⁶ Consolidated Reply and Opposition of Clearwire Corporation (filed Jun. 8, 2009) (Clearwire Reply) at 3-4.

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 8.

³⁹ *Id.*

⁴⁰ *Id.* at 9.

⁴¹ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

⁴² See Mike Gruss, *Order on Reconsideration*, 17 FCC Rcd 466 ¶ 3 (WTB PSPWD 2002); Federal Express Corporation, *Order*, 15 FCC Rcd 4289, 4293 n.40 (WTB PSPWD 2000); 47 C.F.R. § 1.106(d)(1).

⁴³ We decline to strike the Petition because of Clearwire’s failure to serve WATCH TV. While Clearwire should have served the Petition on WATCH TV to the extent it was seeking to modify WATCH TV’s rights, we note that (continued....)

13. Initially, we conclude that it is up to the party holding the opt-out waiver to use its good faith discretion to determine when it wishes to transition to the new band plan. One of the primary goals of the rule changes made for BRS and EBS is “promoting innovation by maximizing flexibility in the service rules”⁴⁴ We believe the licensees holding the opt-out waivers are in the best position to exercise that flexibility and determine when, if ever, it would be appropriate to transition to the new band plan. Clearwire has offered no justifiable reason for a process under which a third party could request termination of an opt-out waiver.⁴⁵ We agree with the Joint Opponents that allowing third parties to seek cancellation of the waivers could create uncertainty that could hinder investment in their systems.

14. If a holder of an opt-out waiver decides it wishes to transition to the new band plan, it should file a notification to the Commission in WT Docket No. 06-136. The notification shall list the relevant licenses, describe the plan for transitioning to the new band plan, and provide an estimated schedule for completing the transition. The notification shall be served on all licensees and lessees that are part of the waiver, all other licensees whose reference points are located within the same BTA, and any other licensees whose geographic service areas (GSAs) overlap with the GSAs included in the opt-out waiver. Any objections to or comments on the proposed plan shall be filed within 30 days after the notification is filed with the Commission. Once the transition is complete, the relevant licensees shall file applications using the Bureau’s Universal Licensing System to modify their licenses to the new band plan.

15. We note that there may be additional issues that need to be addressed when a party holding an opt-out waiver wishes to transition to the new band plan. We agree with the Joint Opponents that it would be premature to attempt to address all such possible issues at this time because the issues and appropriate resolution of those issues will depend on the specific circumstances present in each market and the transition plan proposed by the MVPD Provider. Accordingly, we decline to establish further procedures at this time.

IV. CONCLUSION AND ORDERING CLAUSES

16. We dismiss Clearwire’s Petition to the extent it seeks reconsideration of the decisions to grant opt-out waivers. To the extent Clearwire seeks clarification of the procedures to be used when a party holding an opt out waiver wishes to transition to the new band plan, we establish certain procedures while noting that other issues cannot be resolved at this time.

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WATCH TV was not a party to the proceedings that Clearwire was immediately responding to. Furthermore, we are fully considering WATCH TV’s pleadings. We therefore conclude that there has been an insufficient showing of prejudice to support striking the Petition. *See* Rev. David P. McAfee and Dan J. Alpert, Esq., *Letter*, 24 FCC Rcd 5306, 5307 (MB Audio 2009); Mr. Stephen Wendell, *Letter*, 21 FCC Rcd 8665, 8665-8666 (MB Audio 2006).

⁴⁴ *See BRS/EBS R&O*, 19 FCC Rcd at 14182 ¶ 36.

⁴⁵ Clearwire offers a hypothetical scenario in which licenses subject to an opt out waiver are cancelled by the licensee or terminated by the Commission. Clearwire Reply at 7. If such licenses were BRS licenses, the BTA licensee for that BTA would acquire the right to operate on the frequencies, and the area would operate pursuant to whichever band plan the BTA license was authorized for. *See* 47 C.F.R. § 27.1206(b). If the licenses in question were EBS licenses, the area would become unassigned spectrum subject to the mechanism the Commission eventually adopts for licensing unassigned EBS spectrum. 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 Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6060-6068 ¶¶ 180-204 (2008).

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Motion to Strike filed by W.A.T.C.H. TV Company on May 27, 2009 IS GRANTED IN PART AND DENIED IN PART.

18. IT IS FURTHER ORDERED, pursuant to Sections 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 Petition for Reconsideration or Clarification of Clearwire Corporation filed on May 12, 2009 IS DISMISSED IN PART, GRANTED IN PART, AND OTHERWISE DENIED.

19. These actions are 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