

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

In the Matter of	)	
	)	
Gateway Telecom LLC dba	)	
STRATUSWAVE COMMUNICATIONS	)	
	)	
Notifications of Completion of Construction of	)	File Nos. 0003872836, 0004079884
Educational Broadband Service Stations	)	
WQHJ858 and WQHJ859	)	
	)	
Application to Modify Educational Broadband	)	File No. 0004040579
Service Station WQHJ859	)	
	)	
Application for Special Temporary Authority	)	File No. 0004254759
	)	
Gateway Telecom LLC dba	)	
STRATUSWAVE COMMUNICATIONS,	)	
Assignor	)	
	)	File No. 0004320696
WHEELING JESUIT UNIVERSITY, Assignee	)	
	)	
Application for Commission Consent to Assign	)	
Educational Broadband Service Station WQHJ858	)	
	)	
Gateway Telecom LLC dba	)	
STRATUSWAVE COMMUNICATIONS,	)	
Assignor	)	
	)	File No. 0004281076
DAVIS & ELKINS COLLEGE, Assignee	)	
	)	
Application for Commission Consent to Assign	)	
Educational Broadband Service Station WQHJ859	)	
	)	
UTOPIAN WIRELESS CORPORATION	)	File No. 0004040539
	)	
Application for New Broadband Radio Service	)	
Licenses	)	
	)	
VERMONT TECHNICAL COLLEGE,	)	
CASTLETON STATE COLLEGE, LYNDON	)	
STATE COLLEGE, Lessors	)	
	)	File Nos. 0004300112, 0004300140,
UW-RUTLAND, LLC, Lessee	)	0004300155
	)	
Application for Commission consent to long-term	)	
<i>de facto</i> transfer lease arrangements for	)	
Educational Broadband Service Stations	)	
WQCI646, WQCN270, and WQCN711	)	
	)	

**MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION****Adopted: June 13, 2012****Released: June 14, 2012**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order and Order on Reconsideration*, we act on a series of interconnected wireless license applications and petitions involving Gateway Telecom LLC dba StratusWave Communications (StratusWave), Utopian Wireless Corporation (Utopian) and its subsidiary UW-Rutland, LLC (UW-Rutland), and Vermont Telephone Company (VTel). By acting on these applications, we help ensure that consumers and students in West Virginia, Ohio, and Vermont can receive wireless broadband service using Broadband Radio Service (BRS) and Educational Broadband Service (EBS) spectrum. Specifically, we take the following actions:

**StratusWave**

- We conclude that StratusWave has demonstrated substantial service for EBS Stations WQHJ858 and WQHJ859.
- We authorize processing of an application to add facilities to Station WQHJ859 within the radio “quiet zone.”
- We authorize processing of applications to assign EBS Stations WQHJ858 and WQHJ859 from StratusWave to Wheeling Jesuit University and Davis & Elkins College, respectively. We deny requests to remove certain conditions associated with those licenses upon assignment.

**Utopian**

- We find that Utopian must provide additional information to allow the Bureau to evaluate Utopian’s eligibility for an entrepreneur bidding credit for its Auction 86 BRS licenses. We direct Utopian to provide that information.
- We reject allegations of abuse of process that StratusWave and Utopian have made against each other.

**VTel**

- We dismiss VTel’s petition to deny the Vermont State Colleges’ applications seeking consent to lease EBS spectrum to UW-Rutland.

**II. BACKGROUND****A. Parties**

2. Formed in 1998, StratusWave is a facilities-based provider of local telephone service, long distance telephone service, and Internet dial-up and broadband services to residential and business customers in the northern panhandle of West Virginia.<sup>1</sup> As of 2005, StratusWave served over 3,000 dial-

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<sup>1</sup> See Waiver Requests, File Nos. 0002362083 and 0002362089 (filed Oct. 25, 2005) at 2.

up customers and 500 broadband residential and business customers, and had over 1,300 business telephone local lines and more than 500 resale local residential lines.<sup>2</sup>

3. Utopian is a wireless broadband service provider that was formed in 2006 to bring fourth-generation wireless broadband service to unserved and underserved areas throughout the United States.<sup>3</sup> In Auction 86, an auction of BRS spectrum, Utopian was the winning bidder for the Clarksburg-Elkins, West Virginia; Fairmont, West Virginia; Harrisonburg, Virginia; and Wheeling, West Virginia Basic Trading Areas (BTAs).<sup>4</sup> Utopian also leases, *inter alia*, EBS spectrum from three licensees in the Rutland, Vermont area.<sup>5</sup>

4. VTel is an independent telephone company providing telephone service to rural towns and villages throughout southern Vermont.<sup>6</sup> VTel provides local exchange and other services to approximately 50,000 Vermonters over 19,000 telephone lines, and has provided service to rural areas in Vermont for more than a decade.<sup>7</sup>

#### **B. StratusWave's Conditional Licenses**

5. In 2007, the Commission granted several requests for waiver to allow StratusWave to obtain licenses for four vacant A-group and four vacant B-group EBS channels in Centerville, Ohio and Arden, West Virginia.<sup>8</sup> In allowing StratusWave to obtain these licenses, the Commission waived the filing freeze and eligibility and electronic filing requirements, concluding it would be in the public interest to do so because it "would increase the availability of competitive broadband services to consumers in north central West Virginia and the upper Ohio River Valley."<sup>9</sup> In granting the waivers, the Commission imposed a series of conditions to ensure that the anticipated public interest benefits materialized and that StratusWave would not receive a windfall without delivering its proposed service.<sup>10</sup> Specifically, the Commission required that StratusWave: (1) make a showing of substantial service by December 31, 2009;

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<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> See Petition to Deny of Utopian Wireless Corporation, File No. 0004040579 (filed Dec. 28, 2009) (Quiet Zone Petition) at 2.

<sup>4</sup> See Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, *Public Notice*, 24 FCC Rcd 13572, 13582, 13585 (WTB 2009) (Auction 86 Closing PN).

<sup>5</sup> See Lease Identifiers L000001967, L000001968, L000001969. These licenses are for Stations WQCI646 (Vermont Technical College), WQCN711 (Lyndon State College), and WQCN270 (Castleton State College) (collectively, Vermont State Colleges).

<sup>6</sup> See Petition to Deny of Vermont Telephone Company, Inc., File Nos. 0004300112, 0004300140, 0004300155 (filed Jul. 21, 2010) (VTel Petition) at 2.

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

<sup>8</sup> See Gateway Telecom LLC d/b/a StratusWave Communications, Applications For New Educational Broadband Service Stations on the A and B Group Channels in Centerville, Ohio; and A and B Group Channels in Arden, West Virginia, *Memorandum Opinion and Order*, 22 FCC Rcd 15789 (2007) (*StratusWave Waiver Order*).

<sup>9</sup> *Id.* at 15798 ¶ 20. Specifically, the Commission waived: (a) the filing freeze that was imposed by the Commission in 2003 on new EBS applications (*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, 6811 ¶ 226, 6825 ¶ 260 (2003)); (b) Section 27.1201(c)(3) of the Commission's rules to permit StratusWave to hold licenses for EBS channels despite the fact that StratusWave did not meet the eligibility requirements to hold such licenses; and (c) Section 1.913(b) of the Commission's rules to permit manual filing of the applications. *StratusWave Waiver Order*, 22 FCC Rcd at 15789-15790, 15799 ¶¶ 1, 24.

<sup>10</sup> *StratusWave Waiver Order*, 22 FCC Rcd at 15799 ¶ 23.

(2) not assign or transfer the license until the Commission accepted its substantial service showing; (3) not be permitted to renew the license; and (4) reduce, modify, or terminate operations in any areas in which a new co-channel or adjacent-channel EBS licensee begins service.<sup>11</sup> On August 16, 2007, the Wireless Telecommunications Bureau (Bureau) issued StratusWave its EBS authorizations pursuant to the *StratusWave Waiver Order* with the conditions imposed by the Commission.<sup>12</sup> StratusWave did not protest or note any objection to these conditions.

### III. DISCUSSION

#### A. Introduction

6. In this *Memorandum Opinion and Order and Order on Reconsideration*, we address six issues relating to StratusWave, Utopian, and VTel. First, we determine whether StratusWave has demonstrated substantial service for Stations WQHJ858 and WQHJ859. Second, we determine whether StratusWave should be permitted to add facilities for Station WQHJ859 within the Quiet Zone. Third, we address the assignment applications for Stations WQHJ858 and WQHJ859 and the request to remove certain conditions on those licenses. Fourth, we address issues relating to Utopian's Auction 86 long form application. Fifth, we address VTel's petition to deny the lease applications filed by the Vermont State Colleges. Finally, we address the allegations of abuse of process that StratusWave and Utopian have lodged against each other and VTel. In taking these actions today, we dismiss as moot StratusWave's request for expedited action.<sup>13</sup>

#### B. StratusWave's Substantial Service Showings

##### 1. Station WQHJ858

7. As a condition of its license, StratusWave had to demonstrate substantial service for its stations by December 31, 2009.<sup>14</sup> The Commission defines substantial service as a level of service that is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.<sup>15</sup> A BRS or EBS licensee may make a showing based on meeting the definition of substantial service or based on meeting one of the general safe harbors provided by the Commission in Section

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<sup>11</sup> *Id.* at 15800 ¶ 27.

<sup>12</sup> Call Signs WQHJ858 and WQHJ859. *See* Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 3387, *Public Notice* (rel. Aug. 22, 2007) at 3. *See* Authorizations for EBS Stations WQHJ858 and WQHJ859.

<sup>13</sup> *See* Letter from Stephen Coran, Counsel, Gateway Telecom LLC dba StratusWave Communications, to Blaise Scinto, Chief, Broadband Division, Wireless Telecommunications Bureau, FCC, File Nos. 0003872836, 0004040539, 0004040579, 0004079884, 0004281076, 0004320696 (filed Aug. 27, 2010) (Request for Expedited Action).

<sup>14</sup> StratusWave filed a demonstration of substantial service for Station WQHJ858 on June 16, 2009. File No. 0003872836 (filed Jun. 16, 2009). It amended its buildout notification to provide updated information about this station on December 30, 2009. File No. 0003872836, Amendment (filed Dec. 30, 2009) (WQHJ858 Buildout Notification). StratusWave also filed pleadings arguing that Bureau actions accepting substantial service filings made by other licensees, including Utopian, demonstrate that it has demonstrated substantial service for its licenses. *See* Petitions for Leave to File Requests for Official Notice of Gateway Telecom LLC dba StratusWave Communications; Requests for Official Notice of Gateway Telecom LLC dba StratusWave Communications (filed Dec. 9, 2011).

<sup>15</sup> 47 C.F.R. § 27.14(o).

27.14(o)(1) of the Commission's rules.<sup>16</sup> BRS and EBS licensees offering point-to-point services may demonstrate substantial service by constructing six permanent links per one million people.<sup>17</sup>

8. In its Buildout Notification, StratusWave reports that it has constructed six point-to-point links within Station WQHJ858's geographic service area (GSA).<sup>18</sup> StratusWave is using the station to establish point-to-point microwave links that "provide broadband connectivity to public school facilities" in Brooke, Hancock, and Wetzel Counties, West Virginia.<sup>19</sup> Utopian filed a request claiming that one of the sites from which StratusWave was operating – the Archer Heights site – is located outside of the GSA and therefore is unauthorized, and as such, Utopian asserts that the site should not be counted for purposes of determining substantial service.<sup>20</sup> In response, StratusWave filed a Motion to Strike and Opposition to Utopian's request.<sup>21</sup> StratusWave argues that Utopian lacks standing because Utopian is not eligible for an EBS license and does not hold licenses for the overlapping BTAs, and therefore Utopian's request should be stricken.<sup>22</sup> StratusWave admits, however, that although it believed it was properly constructing its Archer Heights facilities within the GSA boundary, its consulting engineer made an error in mapping StratusWave's GSA.<sup>23</sup> StratusWave notified the Commission that it was taking immediate steps to construct alternative facilities to ensure continuous service to the Archer Heights site.<sup>24</sup> In the meantime, StratusWave filed a request for special temporary authority (STA) to continue its operations at the Archer Heights site.<sup>25</sup> The Bureau dismissed the STA Request, finding that under the terms of its license, StratusWave is permitted to continue operations at the Archer Heights site.<sup>26</sup> The

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<sup>16</sup> An EBS or a BRS licensee could meet the substantial service requirement by showing that it meets one or more of the following five general safe harbors: that it constructed six permanent links per one million people for licensees providing fixed point-to-point services; that it provided coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; that it provided service to "rural areas" or areas with limited access to telecommunications services; that it provided specialized or technologically sophisticated service; or that it provided service to niche markets. 47 C.F.R. § 27.14(o)(1). In order to demonstrate substantial service, a licensee must show that it is actually providing service. See *BRS/EBS 2d R&O*, 21 FCC Rcd at 5735-5736 ¶¶ 308-310. Transmitting signals that are not being used to provide service in some way does not constitute substantial service. *Id.* Accordingly, all licensees must demonstrate that their facilities are being used in some fashion to provide service to customers, students, or others.

<sup>17</sup> See 47 C.F.R. § 27.14(o)(1)(i).

<sup>18</sup> WQHJ858 Buildout Notification, Supplement to Demonstration of "Substantial Service" at 2. This GSA has a population of between 313,150 and 347,595 people, depending on the specific channel. *Id.*

<sup>19</sup> *Id.* at 1.

<sup>20</sup> Specifically, Utopian alleges that the Archer Heights site, which is supposed to be in the GSA of StratusWave's Station WQHJ858 is actually within the GSA of co-channel EBS Station WQFY338. See Request for Commission Action; Notice of Unauthorized Operations, Utopian Wireless Corporation (filed Apr. 26, 2010) (Utopian WQHJ858 Request) at 6-8.

<sup>21</sup> See StratusWave Motion to Strike and Opposition to Request for Commission Action and Response to Notice of Unauthorized Operations (filed May 6, 2010).

<sup>22</sup> *Id.* at 4-6.

<sup>23</sup> According to StratusWave, its consulting engineer made an error in mapping the GSA because the program used to generate the maps for this station failed to identify a new station license granted in 2006. *Id.* at 17-18.

<sup>24</sup> See *id.* at Exhibit 3, Declaration of Jeffrey C. Gehman.

<sup>25</sup> Request for Special Temporary Authority, File No. 0004254759 (filed May 19, 2010) at 2 (STA Request).

<sup>26</sup> In dismissing the request, the Bureau stated: "The request for special temporary authority is dismissed as unnecessary. The operation described in the request is authorized under the terms of the license for Station WQHJ858 pursuant to Section 27.55(a)(4) of the Commission's Rules." Notice of Dismissal, Reference No. 4986467 (Jun. 8, 2010).

operations are permitted under Section 27.55(a)(4) of our rules, which permits licensees to exceed signal strengths where there is no affected licensee.<sup>27</sup> Here, there is no evidence that the Archer Heights site ever affected other licensees. Utopian filed a petition for reconsideration of the STA Dismissal Letter, arguing that StratusWave was not authorized to provide service to a point outside its GSA and within the GSA of another station.<sup>28</sup>

9. Since petitions to deny cannot be filed against construction notifications, we will treat Utopian's request as an informal objection.<sup>29</sup> Since standing is not a prerequisite to filing an informal objection, we need not reach StratusWave's standing argument. Further, we conclude that StratusWave has adequately demonstrated substantial service for Station WQHJ858. Under the point-to-point "safe harbor," an EBS licensee can demonstrate substantial service by constructing six permanent links per one million people.<sup>30</sup> As explained above, StratusWave constructed six permanent links for its GSA, which has a population of less than 500,000, and it therefore satisfies the safe harbor threshold of six permanent links per one million people. Even if we disregard the path including the Archer Heights site, StratusWave was operating five point-to-point paths within its GSA and therefore exceeded the threshold as measured proportionally on a per-link basis.<sup>31</sup> Utopian contends that StratusWave has not met the safe harbor because it must construct six permanent links for each of its two channel groups.<sup>32</sup> We reject Utopian's argument because the Commission's rules specify that substantial service determinations are made on a per-license basis, rather than a per-channel basis.<sup>33</sup> We therefore find that StratusWave has met the point-to-point safe harbor for this license.<sup>34</sup> Furthermore, we find that the schools' use of these links adequately demonstrates the provision of service, and therefore StratusWave has met its substantial service showing for Station WQHJ858.

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<sup>27</sup> See 47 C.F.R. § 27.55(a)(4).

<sup>28</sup> Utopian Wireless Corporation Petition for Reconsideration (filed Jun. 24, 2010).

<sup>29</sup> See 47 C.F.R. § 1.41. Construction notifications are not subject to the petition to deny process established in 47 U.S.C. § 309.

<sup>30</sup> See 47 C.F.R. § 27.14(o)(1)(i).

<sup>31</sup> See WQHJ858 Buildout Notification, Supplement to Demonstration of "Substantial Service." Excluding the Archer Heights site, StratusWave was operating five point-to-point paths at the buildout deadline. Although the rule is stated in terms of six links per million people, the Bureau has allowed licensees with populations of less than one million to meet a similar safe harbor for 39 GHz common carrier licensees by providing a proportionate number of links. Specifically, 39 GHz common carrier licensees, who have a safe harbor of four links per million population, are deemed to meet the safe harbor by providing at least one link for each 250,000 people in their service area. See Wireless Telecommunications Service Grants 321 Renewals in the CF Radio Service, *Public Notice*, 16 FCC Rcd 15358 (WTB PS&PWD 2001). In BRS and EBS, the equivalent requirement would be one link per 166,667 people. StratusWave's five links each served fewer than 166,667 people (calculated by dividing the total population served – 347,595 by five).

<sup>32</sup> Utopian WQHJ858 Request at 6.

<sup>33</sup> See 47 C.F.R. § 27.14(o). Indeed, when it adopted this rule, the Commission specifically rejected the idea of requiring that substantial service showings must be made for each channel group of a license. See *BRS/EBS 2<sup>nd</sup> R&O*, 21 FCC Rcd at 5731 ¶ 298 ("While Clearwire proposes that licensees demonstrate substantial service on a per channel group basis, we believe it is more appropriate to require demonstration of substantial service on a per license basis.")

<sup>34</sup> We conclude that StratusWave has demonstrated substantial service solely based on its compliance with the point-to-point safe harbor. We do not address the other bases StratusWave offers to demonstrate substantial service, nor Utopian's arguments in opposition. We also conclude that Utopian's Petition for Reconsideration of StratusWave's STA Request is moot because it was improperly based on Utopian's belief that StratusWave failed to demonstrate substantial service for WQHJ858. Furthermore, StratusWave has long since ceased the operations that were the subject of the STA.

## 2. Station WQHJ859

10. StratusWave reports it has constructed and is operating three point-to-point links, used for communications by first responders, within the GSA of Station WQHJ859, located in Fairmont and Marion County, West Virginia (population 336,835).<sup>35</sup> Utopian argues that StratusWave does not comply with the point-to-point safe harbor because it has not constructed links for each channel, and it asserts that the use by first responders of those links that StratusWave has constructed does not constitute “providing service” for purposes of determining substantial service.<sup>36</sup> We reject Utopian’s arguments. As noted above, StratusWave must demonstrate substantial service on a per-license rather than a per-channel basis.<sup>37</sup> Furthermore, we find that the use of the links by first responders constitutes “providing service.” In determining what constitutes “providing service,” the Commission has explained that a provider needs, “at a minimum, . . . a customer or other person to serve.”<sup>38</sup> The Commission did not further define who must be served but rather emphasized that the purpose of this requirement is to prevent spectrum warehousing, concluding that the transmission of test signals or color bars would not constitute substantial service.<sup>39</sup> Therefore, we conclude that StratusWave can meet the “providing service” component of substantial service by serving first responders. As a result, we find that StratusWave’s operation of Station WQHJ859 complies with the point-to-point safe harbor contained in Section 27.14(o)(1)(i) of the Commission’s rules.<sup>40</sup> We therefore conclude that StratusWave has demonstrated substantial service for Stations WQHJ858 and WQHJ859, and direct processing of its notifications.

### C. StratusWave’s Quiet Zone Application

11. StratusWave has filed a modification application seeking authority to operate four point-to-point links on the campus of Davis and Elkins College, located inside the National Radio Astronomy Observatory’s Quiet Zone (Quiet Zone)<sup>41</sup> and the GSA of WQHJ859.<sup>42</sup> StratusWave also provided the requisite notice of intended operations with the National Radio Astronomy Observatory, which in turn reported that it did not object to StratusWave’s application, and recommended the Commission approve it.<sup>43</sup> Utopian has filed a petition to deny StratusWave’s Quiet Zone Application, arguing that

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<sup>35</sup> File No. 0004079884 (filed Dec. 30, 2009) (WQHJ859 Buildout Notification). StratusWave states that these links enable “first responders to communicate in a bidirectional fashion between each of the specified locations.” See WQHJ859 Buildout Notification, Demonstration of Substantial Service at 2. We do not consider the facilities proposed in the pending Quiet Zone Application because those facilities are not yet authorized.

<sup>36</sup> Request for Commission Action, Utopian Wireless Corporation, File No. 0004079884 (filed Apr. 26, 2010) (Utopian WQHJ859 Request) at 7.

<sup>37</sup> See *BRS/EBS 2<sup>nd</sup> R&O*, 21 FCC Rcd at 5731 ¶ 298; see also Utopian WQHJ859 Request at 5-6.

<sup>38</sup> See *BRS/EBS 2<sup>nd</sup> R&O*, 21 FCC Rcd at 5736 ¶ 310, quoting San Diego MDS Company, *Memorandum Opinion and Order*, 19 FCC Rcd 23120, 23124 ¶ 10 (2004).

<sup>39</sup> *Id.*

<sup>40</sup> See 47 C.F.R. § 27.14(o)(1)(i).

<sup>41</sup> Part of the GSA of StratusWave’s Station WQHJ859 is located within the zone that requires coordination with the National Radio Astronomy Observatory in Green Bank, West Virginia, and the Naval Radio Research Observatory at Sugar Grove, West Virginia. See 47 C.F.R. § 1.924(a)(1).

<sup>42</sup> See File No. 0004040579 (filed Nov. 20, 2009, amended Dec. 8, 2009) (Quiet Zone Application). Notwithstanding BRS and EBS’s conversion to geographic area licensing, a BRS or EBS station must be individually licensed if the station would affect radio quiet zones. See 47 C.F.R. § 27.1209(b)(1)(iii).

<sup>43</sup> Letter from Paulette W. Woody, Interference Office, NRQZ Administrator, to Gateway Telecom LLC (Dec. 8, 2009), submitted as attachment to December 8 amendment to Quiet Zone Application.

StratusWave's proposed operations would fail to comply with the substantial service requirement.<sup>44</sup> We find that Utopian lacks standing to file a petition to deny against the Quiet Zone application. Although Utopian is a winning bidder and prospective BRS licensee in the area covered by StratusWave, it is not yet a licensee in the area.<sup>45</sup> The Commission has previously found that the mere fact that a petitioner has applied to be a competing licensee of the applicant does not confer standing.<sup>46</sup> As a result, we treat Utopian's pleading as an informal objection.<sup>47</sup> Utopian argues that we should dismiss the Quiet Zone application as moot because StratusWave has failed to demonstrate substantial service, and therefore its license for Station WQHJ859 should be canceled.<sup>48</sup> Because we find above that StratusWave has demonstrated substantial service for Station WQHJ859, we reject Utopian's argument. We grant StratusWave's Quiet Zone application, and authorize processing of an application to add facilities to Station WQHJ859 within the radio "Quiet Zone."

**D. Assignment of Stations WQHJ858 and WQHJ859 and Request for Removal of Conditions**

12. StratusWave has applied to assign its authorizations for EBS Stations WQHJ858 and WQHJ859 to Wheeling Jesuit University (WJU) and Davis & Elkins College (Davis & Elkins), respectively.<sup>49</sup> Under the terms of its license, StratusWave must demonstrate substantial service before it can assign or transfer Stations WQHJ858 and WQHJ859. We have already found above that StratusWave has demonstrated substantial service for these stations, and accordingly, it can now assign these licenses.<sup>50</sup> Based on the record before us, WJU and Davis & Elkins are fully qualified to become EBS licensees.<sup>51</sup> StratusWave also asks the Commission to approve a *de facto* spectrum transfer leasing arrangement by which Davis & Elkins College will lease a portion of its excess capacity to StratusWave.<sup>52</sup> We have also

<sup>44</sup> Petition to Deny filed by Utopian Wireless Corporation against Gateway Telecom LLC, dba StratusWave Communications, Application For Modification of Educational Broadband Service Station WQHJ859 (filed Dec. 28, 2009) (Petition to Deny Quiet Zone Application) at 1.

<sup>45</sup> File No. 0004040539 (filed Nov. 23, 2009, amended Dec. 16, 2009) (Long Form Application). Utopian will become a licensee in the area at the time its Long Form Application is granted.

<sup>46</sup> See Pittsburgh Partners, L.P., *Memorandum Opinion and Order*, 10 FCC Rcd 2715 ¶ 4 (1994) (mere status as applicant in one proceeding does not confer standing as a party in interest in another proceeding); WIBF Broadcasting Co., *Memorandum Opinion and Order*, 17 F.C.C. 2d 876, 877 (1969). In fact, even a prospective assignee of a station that has been approved for a license but has not yet consummated the transaction lacks standing. See Syracuse Channel 62, Inc., Assignor, and Thomas J. Flatley, Assignee, *Memorandum Opinion and Order*, 60 Rad. Reg. 2d (P & F) 1161, 1165 ¶ 10 (1986).

<sup>47</sup> See 47 C.F.R. § 1.41.

<sup>48</sup> See Petition to Deny Quiet Zone Application at 1.

<sup>49</sup> File No. 0004320696, Application for Assignment to Wheeling Jesuit University of Educational Broadband Service Station WQHJ858; File No. 0004281076, Application for Assignment of Educational Broadband Service Station WQHJ859 to Davis & Elkins College (filed Jun. 30, 2010) (StratusWave Assignment Applications).

<sup>50</sup> Utopian argues that StratusWave improperly filed these assignment applications because under the terms of the conditional license, StratusWave cannot file assignment applications until its substantial service notifications are accepted. See Petition to Deny of Utopian Wireless Corporation, File Nos. 0004320696 and 0004281076 (filed Aug. 4, 2010) (Utopian Assignment Petition) at 7-8. In fact, the condition only prohibits the actual assignment of the license prior to acceptance of the substantial service notifications. See *StratusWave Waiver Order*, 22 FCC Rcd at 15800 ¶ 27 ("StratusWave shall not assign or transfer this license ... until the Commission has accepted a demonstration of substantial service for this authorization."). We therefore find that the applications were properly filed.

<sup>51</sup> See 47 U.S.C. § 308(a).

<sup>52</sup> StratusWave Assignment Applications, Public Interest Statement, Request for Removal of License Conditions and Contingent Request for Waiver (Request to Delete Conditions) at 1.



reviewed the proposed lease applications, and find that the proposed arrangements comply with the Commission's rules.<sup>53</sup>

13. *Request for Removal of Conditions.* In connection with the assignment applications, the parties seek removal of the conditions that were placed on StratusWave's licenses that prohibited renewal of the license and that required StratusWave to reduce, modify, or terminate operations in any areas in which a new co-channel or adjacent-channel EBS licensee begins service.<sup>54</sup> To the extent necessary, the parties seek waivers of Sections 1.110 and 1.945(e) of the Commission's rules to allow them to seek reconsideration of these license conditions outside of the 30-day deadline.<sup>55</sup> StratusWave claims it has been unable to develop a long-term sustainable business model to expand educational broadband services, in part because of the special conditions.<sup>56</sup> The parties further argue that once the license is assigned to WJU and Davis & Elkins, the conditions placed on the licenses to preserve the primary educational purpose of EBS will be irrelevant and unnecessary.<sup>57</sup> StratusWave argues it has demonstrated its commitment to education by meeting its substantial service obligation, providing service to educators, and agreeing to assign the licenses to local educators.<sup>58</sup> The parties further contend that the Bureau's decision to grant a waiver of the EBS filing freeze to Northern Michigan University supports their request to delete these conditions.<sup>59</sup>

14. Utopian has filed a petition to deny these assignment applications and the associated waiver requests.<sup>60</sup> We find that Utopian lacks standing to file a petition for the same reasons described above with respect to the Quiet Zone Application.<sup>61</sup> We therefore dismiss Utopian's pleading as a petition to deny, and consider Utopian's arguments as an informal objection.<sup>62</sup> Utopian generally argues that StratusWave has provided no unique circumstances that would justify a waiver.<sup>63</sup> It contends that StratusWave's assigning the licenses to WJU and Davis & Elkins is "window dressing" because it is leasing spectrum back from these entities.<sup>64</sup> According to Utopian, economic hardship is not a unique or unusual factor justifying a waiver.<sup>65</sup> Finally, Utopian believes that the waiver grant to Northern Michigan University is readily distinguishable because Northern Michigan University agreed not to lease its spectrum and to use the spectrum solely for educational purposes.<sup>66</sup>

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<sup>53</sup> See 47 C.F.R. § 1.9030.

<sup>54</sup> Request to Delete Conditions at 1; *see also*, *StratusWave Waiver Order* at 15800 ¶ 27.

<sup>55</sup> Request to Delete Conditions at 6-10. These rules provide that grants – including partial grants – of license applications are final unless the applicant rejects the grant or files a petition for reconsideration within 30 days of the action. See 47 C.F.R. §§ 1.110, 1.945(e).

<sup>56</sup> Request to Delete Conditions at 5.

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

<sup>58</sup> *Id.* at 4-5.

<sup>59</sup> *Id.* at 6, *citing* The Board of Trustees of Northern Michigan University For a New Educational Broadband Service Station, *Memorandum Opinion and Order*, 23 FCC Rcd 11832 (WTB 2008) (*Northern Michigan University*).

<sup>60</sup> Utopian Assignment Petition.

<sup>61</sup> See ¶ 11, *supra*.

<sup>62</sup> See 47 C.F.R. § 1.41.

<sup>63</sup> Utopian Assignment Petition at 5.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 9-10.

15. Section 1.945(e) of the Commission rules states that partial or conditional grants of applications for Wireless Radio Services are final unless a petition for reconsideration is filed within 30 days after the partial grant.<sup>67</sup> Although StratusWave seeks a waiver of this rule, the 30-day reconsideration deadline in the rule reflects a statutory requirement. 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.<sup>68</sup> The United States Court of Appeals for the District of Columbia Circuit has held that the Commission cannot extend or waive this statutory thirty-day filing period, except where "extraordinary circumstances indicate that justice would thus be served,"<sup>69</sup> such as where the late-filing is due to the Commission's failure to give a party timely notice of the action for which reconsideration is sought.<sup>70</sup> Since such extraordinary circumstances do not exist in this case, StratusWave has failed to provide sufficient basis for a waiver of Section 1.945.<sup>71</sup>

16. We further do not find that StratusWave has met its burden to justify a waiver of Section 1.110 of our rules. Section 1.110 provides that a Commission order granting an application with conditions not requested by the applicant is deemed a grant unless the applicant rejects the conditions in writing within 30 days, which will result in a Commission order vacating the grant and designating the application for hearing.<sup>72</sup> The Commission has previously held that "Section 1.110 does not allow an

<sup>67</sup> 47 C.F.R. § 1.945(e) ("The FCC may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the FCC does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the FCC revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.").

<sup>68</sup> 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f).

<sup>69</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

<sup>70</sup> See *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d at 1091; Applications of Stephen E. Powell, *Memorandum Opinion and Order*, 11 FCC Rcd 11925, 11926 ¶ 5 (1996) (*Powell*); Satellite Signals of New England, Inc., *Memorandum Opinion and Order*, 24 FCC Rcd 10919, 10924 ¶ 14 (WTB 2009).

<sup>70</sup> See *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). In such circumstances, the petitioner must demonstrate that the delay in filing is attributable to Commission error in giving notice and that it acted promptly upon discovering the adoption of the Commission's decision. *Powell*, 11 FCC Rcd at 11926 ¶ 5

<sup>71</sup> The two cases StratusWave cites in support of its request for waiver of Section 1.110 of the Commission's rules are distinguishable. See Request to Delete Conditions at 9, citing *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1403 (D.C. Cir. 1996) (reviewing *Nationwide Wireless Network Corp.*, *Memorandum Opinion and Order*, 9 FCC Rcd 3635 (1994)); *Shareholders of Tribune Company, Transferors, and Sam Zell, et al., Transferees*, MB Docket No. 07-119, *Memorandum Opinion and Order-Corrected*, 22 FCC Rcd 21266, 21278-21279 n.72 (2007) (*Tribune*). In those cases, the Commission issued waivers at the same time as it conditioned the grants in question so that the applicants could seek immediate judicial review of the conditional grants without rejecting the conditions, which otherwise would have been a prerequisite to the filing of a petition for judicial review and would have resulted in vacatur of the conditional grant and issuance of a hearing designation order. See *Nationwide Wireless Network Corp.*, 9 FCC Rcd at 3644 ¶ 39; *Tribune*, 22 FCC Rcd at 21279 n.72. Here, in contrast, StratusWave seeks permission to request reconsideration years after the Commission conditionally granted its application.

<sup>72</sup> 47 C.F.R. § 1.110 ("Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.").

applicant to first accept a conditional grant and later seek reconsideration of the conditions therein.”<sup>73</sup> StratusWave clearly accepted its conditional license by constructing facilities and filing substantial service notifications for those licenses and it has not demonstrated that a waiver would be warranted.

17. An applicant seeking a waiver must show that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and 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>74</sup> Because StratusWave fails to demonstrate any public interest element to granting the waiver over a strict application of the rules, we reject StratusWave’s application.

18. Addressing the first prong, StratusWave asserts that the underlying purpose of Section 1.110 would not be served because the reasons for imposing the conditions will no longer exist after StratusWave assigns the licenses to these educational entities.<sup>75</sup> StratusWave further asserts that removal of the conditions would advance the public interest goals of expanding wireless broadband services to unserved and underserved areas.<sup>76</sup> The underlying purpose of Section 1.110 is to protect “the Commission’s valid interest in the finality of its decisions.”<sup>77</sup> Allowing applicants to collaterally attack conditions years after the fact, absent evidence of a material change in circumstances rendering the conditions no longer necessary in the public interest,<sup>78</sup> would introduce uncertainty into the Commission’s decision-making process. Further, granting the waiver would create an incentive for licensees to engage in gamesmanship by accepting the benefits of a conditional grant, only to challenge it later to try to make the license grant unconditional. We therefore believe that a waiver would be inconsistent with the underlying purpose of the rule and contrary to the public interest.

19. With respect to the second prong of the waiver standard, StratusWave claims the unique circumstances surrounding its license make application of Section 1.110 unduly burdensome and contrary to the public interest.<sup>79</sup> StratusWave contends that “[t]he 10-year, nonrenewable nature of the License coupled with the potential that new licensees can disrupt existing service have deterred investment at the levels needed to sustain the service.”<sup>80</sup> In accepting the conditional license, however, StratusWave accepted the costs and risks associated with undertaking this project with the conditions prescribed.<sup>81</sup>

<sup>73</sup> See *Western Cities Broadcasting, Inc.*, MM Docket No. 90-424, *Hearing Designation Order*, 5 FCC Rcd 6177, 6179 ¶ 16 (1990), citing *Central Television, Inc. v. FCC*, 834 F.2d 186 (D.C. Cir. 1987) (“Section 1.110 . . . does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions.”); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 739 (D.C. Cir.1974).

<sup>74</sup> 47 C.F.R. § 1.925(b)(3).

<sup>75</sup> *Id.* at 7. StratusWave directs its arguments to waiver of Sections 1.110 and 1.945(e), but since we have found that StratusWave has not met the stringent standard for waiver of the statutory deadline embodied in section 1.945(e), we limit our discussion here to Section 1.110.

<sup>76</sup> *Id.* at 1.

<sup>77</sup> See *Central Television, Inc. v. FCC*, *supra*, 834 F.2d at 190-191; *Capital Telephone Co. v. FCC*, 498 F.2d 734, 739 (D.C. Cir.1974).

<sup>78</sup> See *General Motors Corporation, Hughes Electronics Corp., Transferors and The News Corporation, Limited, Transferee, Memorandum Opinion and Order*, 24 FCC Rcd 8674, 8678, ¶ 8 (2009) (*News Corp.-Hughes*).

<sup>79</sup> Request to Delete Conditions at 9.

<sup>80</sup> See *id.* at 5.

<sup>81</sup> See StratusWave, WJU, and Davis & Elkins’ Joint Consolidated Motion to Strike and Opposition to Petition to Deny of Utopian Wireless Corporation (filed Aug. 23, 2010) at 9. StratusWave asserts that its assessment of “the inability to sustain a successful long-term business model [without removal of the conditions] are based on [its] years of

(continued....)

Further, StratusWave's *voluntary* decision to assign the license with an associated lease-back to StratusWave, an event that happens regularly with spectrum licenses, does not amount to a "unique or unusual factual circumstance."<sup>82</sup> In that regard, we agree with Utopian that *Northern Michigan University* is readily distinguishable from StratusWave because, unlike StratusWave, Northern Michigan University was eligible to hold an EBS license, intended to use the license solely for educational purposes, and agreed not to lease the spectrum.<sup>83</sup> Thus, StratusWave has not shown that strict application of the reconsideration deadline would be contrary to the public interest or that waiver would serve the public interest.

20. To the extent StratusWave seeks removal of the conditions due to changed circumstances,<sup>84</sup> as opposed to reconsideration of the order imposing the conditions, we disagree that assigning the licenses to educational institutions amounts to a substantial change in the original circumstances warranting removal of the conditions. Although assigning the licenses to EBS-eligible entities supports the Commission's goal of providing broadband service for educational purposes, the Commission conditioned its grant to StratusWave not only to achieve this goal but also to ensure that StratusWave would not receive a windfall, either by indefinitely utilizing spectrum that other similarly situated commercial operators could not access, or by selling its long-term lease rights to a third party. In granting StratusWave a waiver, the Commission determined that the conditions in question were necessary to meet the public interest in ensuring that educators could access the spectrum in the future.<sup>85</sup> We also agree with Utopian that granting a waiver under these circumstances would allow the parties to improperly circumvent the EBS filing freeze to the detriment of other educators who could not apply for EBS spectrum.<sup>86</sup> In short, StratusWave has failed to demonstrate that changes in circumstances since the licenses were granted now make the conditions contrary to the public interest.

21. For the foregoing reasons, we deny the request to delete certain conditions from the licenses for Stations WQHJ858 and WQHJ859. Although the parties may decide not to consummate the assignment and associated lease of these conditional licenses,<sup>87</sup> we direct the Broadband Division to process the assignment applications, and we give the parties the opportunity to determine whether they would like to proceed with the applications.

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operating wireless businesses in West Virginia, decades of experience in the wireless business generally, a deep understanding of the terrain and foliage challenges and a firm understanding of the financial wherewithal required to construct, operate and support educational broadband access in rural communities." *Id.* StratusWave has not shown why it could not have used its expertise in this regard to anticipate at the outset that the conditions would likely deter investment.

<sup>82</sup> 47 C.F.R. § 1.925(b)(3).

<sup>83</sup> *Northern Michigan University*, 23 FCC Rcd at 11836-11837 ¶¶ 11-12.

<sup>84</sup> *See, e.g.*, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, *Order*, 27 FCC Rcd 638 (2012) (conditions removed due to corporate restructuring); *News Corp.-Hughes, supra* (same).

<sup>85</sup> *StratusWave Waiver Order*, 22 FCC Rcd at 15796 ¶ 15.

<sup>86</sup> *See* Utopian Assignment Petition at 8. In 2007, StratusWave received a waiver of the EBS filing freeze, which would have normally precluded any entity, including StratusWave, WJU, and Davis & Elkins, from applying for this EBS spectrum. *See StratusWave Waiver Order*.

<sup>87</sup> *See* Request to Delete Conditions at 10.

### E. Utopian's Auction 86 License Application

22. Utopian filed a license application for four Auction 86 BRS licenses, and seeks a bidding credit as a very small business.<sup>88</sup> To qualify for the bidding credit, Utopian must file ownership information to demonstrate it qualifies under the applicable gross revenues threshold.<sup>89</sup> StratusWave opposes Utopian's license application, asserting that the Commission should deny Utopian's application because Utopian misrepresented its gross revenues and is thus not entitled to this bidding credit. StratusWave further argues that because of this misrepresentation, Utopian does not have the character qualifications to hold a Commission license.<sup>90</sup> Although Utopian challenges StratusWave's standing on the basis that StratusWave did not demonstrate any injury from Utopian's alleged conduct,<sup>91</sup> because StratusWave was a bidder for the markets in question, we find that StratusWave has standing to challenge this application.<sup>92</sup>

23. *Designated Entity (DE) rules.* The award of bidding credits to small businesses is the principal means by which the Commission promotes the objective of disseminating licenses to a wide variety of entities designated in the Communications Act.<sup>93</sup> In determining an applicant's eligibility for a bidding credit under the DE rules, the gross revenues of any entity that individual controls are attributable to the applicant under the affiliation rules.<sup>94</sup> In its short form application, Utopian listed ITFS Spectrum Consultants, LLC (ISC) as its affiliate.<sup>95</sup> In its Long Form Application, Utopian reported that ISC was a consulting entity for which Rudy Geist, Utopian's President, Director, and 43.33 percent owner, held a 50 percent ownership interest, but it further noted that ISC has had no activity or income since 2007 and is no longer in existence.<sup>96</sup> Utopian also argues that ISC's revenues are not attributable to Utopian because ISC is "not a going concern." According to Utopian, ISC ceased transacting business prior to December 31, 2006, except for the distribution of property in the liquidation/winding up of its affairs.<sup>97</sup> Utopian

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<sup>88</sup> Utopian was the winning bidder in Auction 86 for four BRS licenses in the Clarksburg-Elkins, West Virginia; Fairmont, West Virginia; Harrisonburg, Virginia; and Wheeling, West Virginia BTAs. *See* Auction 86 Closing PN, 24 FCC Rcd at 13582, 13585; Long Form Application.

<sup>89</sup> *See* 47 C.F.R. § 1.2110.

<sup>90</sup> Petition to Deny or Dismiss of Gateway Telecom LLC, dba StratusWave Communications (filed Mar. 8, 2010) (StratusWave Petition) at 4.

<sup>91</sup> *See* Utopian Opposition and Motion to Strike at 1-2 n.1.

<sup>92</sup> *See* Alaska Native Wireless, L.L.C., *Order*, 18 FCC Rcd 11640, 11643-11645 ¶¶ 9-12 (2003).

<sup>93</sup> *See* 47 U.S.C. § 309(j)(3)(B).

<sup>94</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10086 ¶ 100 (1999); *see also* PVT Networks, Inc., *Order*, 15 FCC Rcd 19105, 19107-19108 ¶ 8 (WTB PS&PWD 2000) (although the personal income of PVT's Treasurer Robert Mayberry, which was derived from Mayberry's personal farm, was not attributable to PVT, the gross revenues of the farm itself were found attributable).

<sup>95</sup> Utopian listed ISC as its affiliate by virtue of Rudy Geist's 50 percent ownership interest in ISC and his status as Managing Member of ISC. Mr. Geist is Utopian's President and Director, and owns 43.33 percent of Utopian. File No. 0003938120 (Short Form Application), Exhibit 2: Ownership Information Addendum (filed Sep. 18, 2009). An affiliate's gross revenues are attributable to the applicant. *See* 47 C.F.R. § 1.2110(b).

<sup>96</sup> Long Form Application, Exhibit C: Designated Entities (filed Dec. 16, 2009).

<sup>97</sup> *See* Utopian Wireless Corporation Consolidated Opposition and Motion to Strike Gateway Telecom, LLC d/b/a StratusWave's Petition to Deny (filed Mar. 15, 2010) at 7 (Utopian Opposition and Motion to Strike).

admits, however, that ISC, a Delaware limited liability corporation, did not file a certificate of cancellation with Delaware until September 2009, after Utopian filed its short form application.<sup>98</sup>

24. We disagree with Utopian, finding that ISC is an affiliate of Utopian with gross revenues attributable to Utopian. The Commission's DE rules provide that the gross revenues of Utopian, its affiliates, its controlling interests, and the affiliates of its controlling interests for the preceding three years must all be included in calculating Utopian's gross revenues.<sup>99</sup> An entity is considered an affiliate of Utopian's if it is directly or indirectly controlled by a third party that also controls Utopian.<sup>100</sup> Furthermore, if Utopian's officers are affiliates of other entities, the gross revenues of those other entities are attributed to Utopian.<sup>101</sup> Mr. Geist is the President of Utopian and a controlling interest holder in Utopian; he is also a controlling interest holder of ISC.<sup>102</sup> Because Mr. Geist controls both Utopian and ISC, ISC is considered an affiliate of Utopian, and its gross revenues are attributable to Utopian.<sup>103</sup> Mr. Geist and ISC are two distinct entities for purposes of our bidding credit gross revenues analysis. Therefore, regardless of whether Mr. Geist received any personal income from ISC, ISC's gross revenues are attributable to Utopian as Utopian's affiliate.

25. We also disagree with Utopian's argument that ISC's revenues are not attributable to Utopian because ISC was "not a going concern" at the time of the long form filing. Under Delaware law, a limited liability company continues to exist as a separate legal entity until cancellation of the limited liability company's certificate of formation.<sup>104</sup> Because ISC was still in existence at the time of the filing of the short form application,<sup>105</sup> and because Mr. Geist was a controlling interest holder of both ISC and Utopian, ISC must be considered an affiliate of Utopian for purposes of Auction 86.<sup>106</sup> Therefore, we direct Utopian, within 30 days from release of this *Memorandum Opinion and Order and Order on Reconsideration*, to amend its pending long form application to provide the gross revenues of ISC for 2006, 2007, and 2008. The Bureau will evaluate this information to determine whether Utopian is eligible for a bidding credit.

26. *Character Qualifications.* We reject StratusWave's argument that Utopian misrepresented facts or lacked candor in connection with ISC.<sup>107</sup> The *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission.<sup>108</sup> The Commission has declined to infer intent to deceive the Commission when information is elsewhere disclosed or available in its records.<sup>109</sup> Although Utopian's

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<sup>98</sup> See Supplement to Consolidated Opposition and Motion to Strike Gateway Telecom LLC d/b/a StratusWave's Petition to Deny (filed Apr. 1, 2010), Affidavit of Rudolph J. Geist.

<sup>99</sup> 47 C.F.R. § 1.2110(b).

<sup>100</sup> 47 C.F.R. § 1.2110(c)(5)(i)(C).

<sup>101</sup> 47 C.F.R. § 1.2110(c)(2)(i)(F).

<sup>102</sup> See n.95, *supra*.

<sup>103</sup> See 47 C.F.R. § 1.2110(c)(5)(i)(C).

<sup>104</sup> 6 Del.C. § 18-201(b).

<sup>105</sup> An applicant seeking treatment as a designated entity must certify that it is qualified as a designated entity at the time it files its short form application. See 47 C.F.R. § 1.2105(a)(2)(iv).

<sup>106</sup> See 47 C.F.R. § 1.2110(c)(5)(i)(C).

<sup>107</sup> See Petition to Deny or Dismiss of Gateway Telecom LLC dba StratusWave Communications, File No. 0004040539 (filed Mar. 8, 2010) at 7-10.

<sup>108</sup> See Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 ¶ 6 (1983).

<sup>109</sup> See Joseph W. Bollinger and Donna M. Bollinger, *Memorandum Opinion and Order*, 16 FCC Rcd 18107, 18109 ¶ 5 (2001).

disclosure was inadequate, we do not find sufficient evidence of intent to deceive the Commission when Utopian initially disclosed ISC in its short form application, and StratusWave has failed to provide any additional support for its claims. Further, as explained in Section G below, we reject StratusWave's claim of abuse of process against Utopian. Accordingly, based on the record currently before us, we find that Utopian has the character qualifications to be a Commission licensee.

#### F. UW-Rutland EBS Spectrum Lease

27. The Vermont State Colleges (Vermont Technical College, Castleton State College, and Lyndon State College) have filed applications for new spectrum leasing arrangements for EBS stations WQC1646, WQCN270, and WQCN711, in the Rutland-Bennington, Vermont Basic Trading Area.<sup>110</sup> These applications assign the existing leases from Utopian to UW-Rutland, LLC, a wholly owned subsidiary of Utopian.<sup>111</sup> VTel filed a petition to deny the Vermont State Colleges' lease applications, claiming that the applications are procedurally defective and that Utopian lacks the necessary character qualifications to hold these licenses.<sup>112</sup> We agree with Utopian that VTel lacks standing to file a petition.<sup>113</sup> Although VTel was the winning bidder for the Rutland, Vermont, BRS BTA license, that status is insufficient to confer standing.<sup>114</sup> We therefore consider VTel's filing as an informal objection.<sup>115</sup>

28. VTel first claims that the applications should be denied because they raise a number of unanswered questions procedurally.<sup>116</sup> We disagree. As noted above, the instant applications propose to assign Utopian's lease rights to UW-Rutland, LLC, a wholly-owned subsidiary of Utopian.<sup>117</sup> Although these are *pro forma* assignments, the parties must submit a new lease filing due to the limitations of the form used to notify the Commission of leasing arrangements, Form 608.<sup>118</sup> We reject VTel's contention that we need additional information to determine compliance with the Commission's rules before granting the leases.<sup>119</sup> While VTel appears to believe that there may have been an improper transfer of control,

<sup>110</sup> Utopian has been leasing EBS stations WQC1646, WQCN270, and WQCN711 from Vermont Technical College, Castleton State College, and Lyndon State College, respectively, since 2007. See File Nos. 0004300112 (Vermont Technical College), File No. 0004300140 (Castleton State College), and File No. 0004300155 (Lyndon State College) (filed Jun. 28, 2010). The applications propose to assign Utopian's lease rights to UW-Rutland, LLC, a wholly-owned subsidiary of Utopian. Although these are *pro forma* assignments, the parties must submit a new lease filing due to the limitations of the form used to notify the Commission of leasing arrangements, Form 608. See The Wireless Telecommunications Bureau Announces FCC Form 608 Is Available for Filing Spectrum Leasing Notifications and Applications and Private Commons Arrangements, *Public Notice*, 21 FCC Rcd 9748, 9750 (WTB 2006). Form 608 does not provide a purpose for assigning a lease.

<sup>111</sup> See File Nos. 0004300112 (Vermont Technical College), File No. 0004300140 (Castleton State College), and File No. 0004300155 (Lyndon State College) (filed Jun. 28, 2010).

<sup>112</sup> See Petition to Deny of Vermont Telephone Company, Inc., File Nos. 0004300112, 0004300140, 0004300155 (filed Jul. 21, 2010) (VTel Petition) at 2.

<sup>113</sup> See Consolidated Opposition and Motion to Strike of Utopian Wireless Corporation to Petition to Deny, File No. 0004300155 (filed Aug. 4, 2010).

<sup>114</sup> See ¶11, *supra*. We note that VTel became a licensee after it filed the VTel Petition. See Wireless Telecommunications Bureau Grants Broadband Radio Service Licenses, *Public Notice*, 26 FCC Rcd 6990 (WTB 2011).

<sup>115</sup> See 47 C.F.R. § 1.41.

<sup>116</sup> See VTel Petition at 6.

<sup>117</sup> See n.110, *supra*.

<sup>118</sup> See *id.*

<sup>119</sup> VTel Petition at 6-7.

and asks for further information concerning the transfers and the leases,<sup>120</sup> our review shows that the Vermont State Colleges have valid lease notifications on file with Utopian, and that the instant filings merely propose to assign the lease rights to a new subsidiary.

29. VTel also asserts that the lease applications should be denied because the Vermont State Colleges failed to follow proper procedure under Vermont state law in entering into leases to Utopian, and therefore it may not be in the public interest to allow the leases to remain with Utopian/UW-Rutland.<sup>121</sup> We find that the Vermont State Colleges' alleged procedural mistakes do not have any bearing on this case. VTel has not alleged that these defects were challenged or adjudicated in any state court of competent jurisdiction.<sup>122</sup> Moreover, VTel has not asserted that Utopian or the Vermont State Colleges have violated the Communications Act or our rules. Additionally, because we conclude herein that Utopian has the requisite character qualifications to be a Commission licensee, we render moot VTel's request that the application be held in abeyance until Utopian's character qualifications are resolved.<sup>123</sup> We therefore deny the VTel Petition and direct the Broadband Division to process the lease filings made by the Vermont State Colleges and UW-Rutland, LLC.

### G. Abuse of Process Allegations

30. StratusWave, Utopian, and VTel have repeatedly accused each other of filing abusive and frivolous pleadings that lack merit. In our view, the parties have filed an excessive number of pleadings that are repetitive and overly contentious in nature.<sup>124</sup> The Bureau has the authority to impose sanctions on parties whose primary purpose is to abuse the Commission's processes. Given the Commission's goal of encouraging participation in FCC proceedings, however, we impose sanctions only "in egregious cases where the abusive nature of the pleadings is clear."<sup>125</sup> The Commission examines whether the petitioner filed a pleading for the primary purpose of delay using a number of factors, including statements by the licensee's principals or officers admitting the obstructive purpose, the withholding of information relevant to disposition of the requested issues, and the absence of any reasonable basis for the allegations raised in

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<sup>120</sup> *Id.*

<sup>121</sup> VTel Petition at 4-7. Specifically, the Vermont State Auditor concluded that the Vermont State Colleges should have: (1) sought a professional appraisal of the potential lease value of its licenses, (2) bid the lease opportunity publicly, and (3) engaged expert counsel to review any proposed lease agreement. *Id.* at 4-5; *Vermont State Colleges—Leasing of Educational Broadband Service (EBS) Spectrum & Competitive Bidding Review*, Report of the Vermont State Auditor, RPT. No. 07-11 (Nov. 2, 2007) (Auditor Report).

<sup>122</sup> The Commission has traditionally declined to interfere in questions of alleged State law violations where no challenge has been made in the State courts and the determination is one that is more appropriately a matter of State resolution. See *Abundant Life, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 4972, 4974 (2001); *North American Broadcasting, Inc., Memorandum Opinion and Order*, 15 FCC 2d 979, 983 (Rev. Bd. 1969). In addition, the Vermont State Auditor found no violation of state law. See Auditor Report at 4.

<sup>123</sup> See VTel Petition at 7-8. VTel did not raise any new character qualifications issues against Utopian but simply referred to the allegations made by StratusWave. *Id.*

<sup>124</sup> For example, StratusWave argues that Utopian's Petition should be stricken because it is a frivolous pleading that was designed to cause harm or delay. Consolidated Motion to Strike and Opposition of Gateway Telecom LLC, dba StratusWave Communications, to Petition Deny of Utopian Wireless Corporation, (filed Jan. 12, 2010) at 11-12. Utopian argues that the StratusWave Petition filed against its Long Form Application is a strike petition designed to delay licensing of Utopian's BTA authorizations "unless and until Utopian adheres to StratusWave's demands to withdraw from participating in an unrelated licensing proceeding, and should immediately be stricken from the record." Utopian Opposition and Motion to Strike at 1. Utopian accuses VTel of abuse of process for allegedly filing the VTel Petition to Deny solely for purposes of delay. Consolidated Opposition and Motion to Strike of Utopian Wireless Corporation to Petition to Deny, File Nos. 0004300112, 0004300140, 0004300155 (filed Aug. 4, 2010) at 3 (Utopian Lease Opposition).

<sup>125</sup> Litigation Recovery Trust, *Memorandum Opinion and Order*, 17 FCC Rcd 21852, 21857-58 ¶ 11 (2002).



the pleadings.<sup>126</sup> The evidentiary standard is high: the party filing the petition to strike the pleading must make a strong showing of an improper purpose.<sup>127</sup>

31. *Extrinsic Evidence against StratusWave.* Utopian presents evidence that it believes demonstrates that StratusWave has filed a pleading in abuse of process.<sup>128</sup> Utopian provides an email from Rusty Irvin, StratusWave's President, to Rudy Geist, Utopian's President, which references StratusWave's intent to file against Utopian's Long Form Application if a settlement between the parties is not reached.<sup>129</sup> Although the email raises concern, it does not prove that StratusWave filed an opposition to Utopian's license application in order to delay the licensing process. Further, StratusWave's actions exhibit no other factors that demonstrate its pleading's primary purpose was to delay. In fact, StratusWave's petition raises legitimate factual and legal questions about whether ISC's gross revenues are attributable to Utopian.<sup>130</sup> Utopian has therefore failed to meet its high burden of showing that StratusWave filed its pleadings for an improper purpose. Further, after reviewing all of the other pleadings and the arguments presented therein, we conclude that none of the parties has engaged in conduct so egregious to merit striking pleadings or imposing sanctions. We therefore deny all motions to strike pleadings in these collective proceedings.

#### IV. CONCLUSION AND ORDERING CLAUSES

32. For the reasons discussed above, we conclude that StratusWave has demonstrated substantial service for EBS Stations WQHJ858 and WQHJ859. We authorize processing of an application to add facilities to Station WQHJ859 within the radio "Quiet Zone." We authorize processing of applications to assign EBS Stations WQHJ858 and WQHJ859 from StratusWave to Wheeling Jesuit University and Davis & Elkins College, respectively, but we deny requests to remove certain conditions associated with those licenses. We direct Utopian to provide additional information necessary for staff to determine Utopian's eligibility for a bidding credit and process its long form application for BRS licenses for which it was the winning bidder in Auction 86. In other respects, we deny StratusWave's petition to deny filed against Utopian. We dismiss as moot StratusWave's request for expedited action. We deny VTel's petition to deny the Vermont State Colleges' lease applications seeking consent to lease EBS spectrum from the Vermont State Colleges to UW-Rutland. We reject allegations of abuse of process the parties in this proceeding have made against each other.

33. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.946(d) and 27.14(o) of the Commission's rules, 47 C.F.R. §§ 1.946(d), 27.14(o), that the construction notifications filed by Gateway Telecom, LLC dba StratusWave Communications for Educational Broadband Service Stations WQHJ858 and WQHJ859 (File Nos. 0003872836, 0004079884) ARE ACCEPTED, and it IS FOUND that EBS Stations WQHJ858 and WQHJ859 are providing substantial service.

34. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, that the two Requests for Commission Action filed by Utopian Wireless Corporation on April 26, 2010, filed concerning Stations WQHJ858 and WQHJ859, respectively, ARE DENIED.

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<sup>126</sup> Radio Carrollton, *Memorandum Opinion and Order*, 69 FCC 2d 1139, 1152 ¶ 26 (1978), *recon. denied*, 72 FCC 2d 264 (1979) (*Radio Carrollton*); Greater Portland Broadcasting Corp., *Letter*, 3 FCC Rcd 1953, 1954 (1988).

<sup>127</sup> *Radio Carrollton*, 69 FCC 2d at 1151-1152 ¶ 25.

<sup>128</sup> Utopian Opposition and Motion to Strike at 2-4.

<sup>129</sup> *Id.* at Exhibit 1.

<sup>130</sup> See StratusWave Petition.

35. 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 Sections 1.106, and 1.931 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.931, that the Petition for Reconsideration filed by Utopian Wireless Corporation on June 24, 2010, IS DISMISSED AS MOOT.

36. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny filed by Utopian Wireless Corporation on December 28, 2009, IS DISMISSED as a petition to deny and IS DENIED as an informal objection.

37. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.110 and 1.945(e) of the Commission's rules, 47 C.F.R. §§ 1.110, 1.945(e), that the request to delete conditions from the licenses for Stations WQHJ858 and WQHJ859 contained in application File Nos. 0004320696 and File No. 0004281076 filed by Wheeling Jesuit University and Davis & Elkins College, respectively, on July 15, 2010, ARE DENIED.

38. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny of Utopian Wireless Corporation filed on August 4, 2010, IS DISMISSED as a petition to deny and IS GRANTED IN PART and is otherwise DENIED as an informal objection.

39. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.2110 of the Commission's rules, 47 C.F.R. § 1.2110, that within 30 days of the release of this *Memorandum Opinion and Order and Order on Reconsideration*, Utopian Wireless Corporation SHALL AMEND its pending Long Form Application (File No. 0004040539) to provide the gross revenues of ITFS Spectrum Consultants, LLC, for 2006, 2007, and 2008.

40. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny or Dismiss of Gateway Telecom LLC dba StratusWave Communications filed on March 8, 2010, IS GRANTED IN PART and is otherwise DENIED.

41. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny filed by Utopian Wireless Corporation on December 28, 2009, IS DISMISSED as a petition to deny and IS DENIED as an informal objection.

42. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Petition to Deny of Vermont Telephone Company, Inc. filed on July 21, 2010, IS DISMISSED as a petition to deny and IS DENIED as an informal objection.

43. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309 that the Broadband Division of the Wireless Telecommunications Bureau SHALL PROCESS the following applications in accordance with this *Memorandum Opinion and Order and Order on Reconsideration*: File Nos. 0004040579, 0004281076, 0004300112, 0004300140, 0004300155, and 0004320696.

44. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Request for Expedited Action filed by Gateway Telecom LLC dba StratusWave Communications on August 27, 2010, IS DISMISSED AS MOOT.

45. 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, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Rick Kaplan  
Chief, Wireless Telecommunications Bureau