

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

In the matter of)
PERFORMANCE LEARNING COOPERATIVE) File No. 0003879047
d/b/a PERFORMANCE LEARNING ACADEMY)
Application for New Educational Broadband)
Service Station)

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2013

Released: November 8, 2013

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the request of Performance Learning Cooperative d/b/a Performance Learning Academy (PLA) for a waiver of the filing freeze on new Educational Broadband Service (EBS) applications, and direct dismissal of its application for four vacant A group and four vacant B group Educational Broadband Service (EBS) channels in Cookeville, Tennessee.

II. BACKGROUND

2. In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's potential to host a variety of services. In 1963, the Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band, envisioning that it would be used for transmission of instructional material to accredited public and private schools, colleges and universities for the formal education of students. In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted eight ITFS channels (the E and F channel blocks) and associated response channels for use by the Multipoint Distribution Service (MDS). In conjunction with this re-

1 See Educational Television, Docket No. 14744, Report and Order, 39 FCC 846 (1963) (ETV Decision), recon. denied 39 FCC 873 (1964).

2 See Amendment of the Commission's Rules With Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service; and Applications for an Experimental Station and Establishment of Multi-Channel Systems, Report and Order, 48 Fed. Reg. 33873, 33875 ¶ 9 (1983) (1983 R&O) (citing ETV Decision, 39 FCC at 853 ¶ 25.).

3 See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen Docket No. 80-112 and CC Docket No. 80-116, Report and Order, 94 FCC 2d 1203 (1983) (First Leasing Decision).

allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.⁴

3. In April 2003, the Commission proposed new technical rules and a new band plan for ITFS and MDS spectrum (changing the service names to EBS and Broadband Radio Service (BRS), respectively).⁵ At the same time, it implemented a filing freeze with respect to all applications for new BRS and EBS licenses, as well as for major modifications of those licenses, in order to permit the orderly and effective resolution of issues in the BRS/EBS proceeding.⁶ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.⁷ The Commission also permitted the filing of applications for major modifications of EBS licenses, but still maintained the filing freeze with respect to applications for new EBS licenses.⁸ On June 10, 2004, the Commission adopted new rules that initiated a fundamental restructuring of the 2500-2690 MHz band in order to provide both existing EBS and BRS licensees and potential new entrants greater flexibility in order to encourage the highest and best use of spectrum domestically and internationally.⁹ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.¹⁰

4. PLA is a non-profit, accredited private school in Cookeville, Tennessee.¹¹ PLA states that its mission is to promote an environment for success and to create a partnership with parents and the community.¹² PLA states that it is constantly looking for new and unique ways to teach and engage children, such as, PLA notes, utilizing interactive whiteboards in classrooms.¹³ PLA notes that it is ambitiously pursuing charter status in the state of Tennessee, a charter school being one in which the state pays for a child to attend school in a private school environment when the child has been unable to learn effectively in a traditional public school setting.¹⁴ Because the state of Tennessee only supports charter schools in metropolitan areas, and not in rural areas, and because Cookeville is only considered a

⁴ *Id.* at 1206-07 ¶ 4.

⁵ *See NPRM and MO&O.*

⁶ *See NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

⁷ *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 Bands. Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

⁸ *Id.*

⁹ *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*).

¹⁰ *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, 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) (*Second FNPRM*).

¹¹ File No. 0003879047 (filed June 18, 2009) (“Application”), Performance Learning Cooperative d/b/a Performance Learning Academy Request for Waiver of FCC Filing Freeze and Section 1.913(b) of the Commission’s Rules (“Waiver Request”) at 1.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.*

micropolitan area, PLA is actively seeking to change Tennessee legislation.¹⁵ PLA states that it has partnered with the Communications Academy to undergo a major project in which PLA plans to increase the scope of its classes through a virtual school.¹⁶ PLA hopes to provide these on-line classes to students in rural areas at no or little cost through the use of potential EBS channels and prospective charter school status.¹⁷ Specifically, PLA states that it plans to provide on-line charter classes to students within a thirty mile radius of Cookeville, an area of approximately 5000 square miles.¹⁸ According to PLA, the projected area, most of which encompasses rural areas, would reach a potential student population of 50,000 students who currently have no access to charter classes.¹⁹ PLA contends that many of the students within these communities are in desperate need of non-traditional educational opportunities.²⁰ PLA notes that the parents of some of these children must travel great distances each day to drop their children off at PLA, an expensive task given the price of fuel, and PLA submits letters of support from several parents.²¹

5. On June 18, 2009, PLA filed its Application for four vacant A group and four vacant B group Educational Broadband Service (EBS) channels in Cookeville, Tennessee.²² In its Application, PLA seeks waiver of: (a) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O* that proposed new technical rules and a new band plan for EBS and Broadband Radio Service (BRS) spectrum;²³ and (b) Section 1.913(b) of the Commission's rules to permit manual filing of the Application.²⁴ PLA's Application is opposed by the National EBS Association (NEBSA),²⁵ the Tennessee Board of Regents (TBR),²⁶ and Clearwire Corporation (Clearwire).²⁷ For the reasons stated below, we grant PLA's request for waiver of the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 2 and Exhibit 2.

²² Application.

²³ See Waiver Request at 1. See also 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) (*NPRM and MO&O*) (stating in relevant part that "[i]t is ordered that applications for new MDS or ITFS licenses, major modifications of MDS stations, or major changes to ITFS stations other than applications for license assignments or transfers of control WILL NOT BE ACCEPTED until further notice.")

²⁴ See Waiver Request at 1. Section 1.913(b) of the Commission's Rules states in relevant part that "all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS." 47 C.F.R. § 1.913(b).

²⁵ National EBS Association Objection to Application (filed Aug. 13, 2009) ("NEBSA Objection").

²⁶ Petition to Deny or Dismiss of the Tennessee Board of Regents and its Member Institutions (filed Aug. 20, 2009) ("TBR Petition to Deny"). TBR is joined in its filing by its member institutions Chattanooga State Technical Community College (CSTCC), licensee of EBS Station WHR519 at Chattanooga, Tennessee; Roane State Community College (RSCC); and Tennessee Technological University (TTU).

²⁷ Clearwire Corporation Comments on Application of Performance Learning Academy for a New Educational Broadband Service Station (filed Aug. 21, 2009) ("Clearwire Comments").

electronic filing requirement, deny PLA's request for waiver of the filing freeze, and dismiss PLA's Application.

6. PLA states that the proposed Geographic Service Areas (GSAs) would cover Cookeville, Tennessee, where the Communications Academy is located, as well as portions of the following counties: Clay, Cumberland, Fentress, Jackson, Overton, Pickett, Putnam, and White (collectively, Upper Cumberland).²⁸ PLA further states that the proposed GSAs include EBS A-group and B-group spectrum that encompasses an area of complete 2.5 GHz white space and is structured in compliance with the *Second FNPRM*, as well as with the Commission's most recent EBS waiver grant,²⁹ so as not to include any portion of the GSAs of adjacent co-channel licensees.³⁰ PLA describes Upper Cumberland as a generally rural area, anchored by the micropolitan city of Cookeville, Tennessee.³¹ Citing online Cookeville and United States Census Bureau sources, PLA states that approximately 15,000 Upper Cumberland residents travel to Cookeville each day to work, attend school, receive health care, shop, or participate in leisure activities.³² PLA notes that in 2000, 23.2 percent of the individuals residing in Cookeville were under the poverty line, almost double the national average of 12.4%, while median household income for Cookeville was only \$26,533, much lower than the national average of \$41,994.³³ PLA contends that broadband adoption in Upper Cumberland has been slow, noting that while 57% of Tennessee residents do not have broadband service in their own home, comparatively far more residents in Upper Cumberland lack such service: 77% of Clay County residents, for example, and 74% of Overton County residents do not have broadband at home.³⁴ PLA claims that an alarming percentage of residents using dial-up services in Upper Cumberland claim that broadband service is unavailable in their area, while others explain that broadband service is unaffordable.³⁵ PLA notes that 31 percent of Clay County residents using dial-up allege that broadband is unavailable, and 39% of those residents claim that the broadband offered is too expensive.³⁶

7. PLA maintains that application of the filing freeze rules would not serve their underlying purpose and would be contrary to Commission precedent and the public interest.³⁷ PLA argues that the Commission imposed the current filing suspension in order to adopt geographic area licensing in the 2.5 GHz spectrum band, to take steps to streamline the application process from BLS to ULS, and to transition the spectrum from ITF to EBS.³⁸ PLA states that, since the imposition of the filing freeze, EBS licenses have been converted to geographic service areas and EBS licensees have fully come to employ ULS to file applications.³⁹ PLA contends that the only purpose left to the filing freeze is to allow

²⁸ *Id.* at 2.

²⁹ See The Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 23 FCC Rcd 11832, 11837 ¶ 14 (WTB 2008) (*NMU Order*).

³⁰ Waiver Request at 2-3.

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 3-4.

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Id.* at 5.

³⁸ *Id.*, citing *NPRM and MO&O*, 18 FCC Rcd at 6811-13 ¶¶ 220-226.

³⁹ Waiver Request at 5.

licensees to transition the spectrum.⁴⁰ PLA argues that its proposed GSAs are in almost complete white space and therefore any transition to the applied-for channel groups would be unnecessary.⁴¹ PLA contends that the Commission has granted four waiver requests of the filing freeze, three of which presented circumstances very similar to those faced by PLA: to Choice Communications (Choice),⁴² to StratusWave Communications (StratusWave),⁴³ and to the Board of Trustees of Northern Michigan University (NMU).⁴⁴ PLA maintains that the Commission found that the unique insular or rural location of the license area in question created few available choices for broadband,⁴⁵ and that approval of the waiver requests would result in substantial benefits to consumers, while denial of the requests would limit consumers' ability to receive broadband services.⁴⁶ PLA states that the Commission also noted that grant of the waivers would not cause harm to educational entities and had the support of educators.⁴⁷ PLA argues that its circumstances are very similar to those of Choice, StratusWave, and NMU: the area covered by PLA's proposed GSAs is rural and in need of a competitive broadband choice, and grant of PLA's waiver request and application would create new or additional competitive broadband choices to the benefit of consumers residing in Upper Cumberland.⁴⁸ PLA states that, as with Choice's, StratusWave's, and NMU's applications, PLA's application enjoys the string support of its educational community.⁴⁹ PLA notes that, like NMU, PLA is eligible to hold an EBS license.⁵⁰ PLA does ask that the Commission not restrict its ability to lease its spectrum, as the Commission required of NMU.⁵¹ PLA argues that NMU is a state university with significant resources at its disposal, while PLA is a small private school, and does not have the capital to build out a WiMAX system on its own.⁵² PLA contends that allowing it to lease the channels would let PLA ensure that the channels are put to their highest and best use: specifically, that PLA has the necessary internet capacity to run its on-line classes and that PLA's prospective students in Upper Cumberland have access to broadband at competitive prices.⁵³

8. PLA argues that a primary objective of Congress in adopting the Telecommunications Act of 1996 was to promote competition and encourage the rapid deployment of new telecommunications technologies.⁵⁴ PLA states that Congress specifically tasked the Commission with encouraging timely,

⁴⁰ *Id.*

⁴¹ *Id.* at 5-6.

⁴² Choice Communications LLC, *Memorandum Opinion and Order*, 20 FCC Rcd 10906 (WTB 2005) (*Choice Order*).

⁴³ Gateway Telecom LLC d/b/a Stratus Wave Communications, *Memorandum Opinion and Order*, 22 FCC Rcd 15789 (2007) (*StratusWave Order*).

⁴⁴ *NMU Order, supra.*

⁴⁵ Waiver Request at 6, *citing Choice Order*, 20 FCC Rcd at 10911-12 ¶ 15; *StratusWave Order*, 22 FCC Rcd at 15794-95 ¶¶ 12-14; and *NMU Order*, 23 FCC Rcd at 11834 ¶ 6, 11836 ¶ 10.

⁴⁶ Waiver Request at 6-7, *citing Choice Order*, 20 FCC Rcd at 10911-12 ¶ 15; *StratusWave Order*, 22 FCC Rcd at 15795 ¶ 14; and *NMU Order*, 23 FCC Rcd at 11836 ¶ 10.

⁴⁷ Waiver Request at 7, *citing Choice Order*, 20 FCC Rcd at 10912-13 ¶ 17; *StratusWave Order*, 22 FCC Rcd at 15799 ¶ 22; and *NMU Order*, 23 FCC Rcd at 11836 ¶ 11.

⁴⁸ Waiver Request at 7.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 7 n.24, *citing NMU Order*, 23 FCC Rcd at 11837 ¶ 13.

⁵² Waiver Request at 7 n.24.

⁵³ *Id.*

⁵⁴ *Id.* at 7, *citing Telecommunications Act of 1996*, Pub. L. 104-104, 110 Stat. 56 preamble (1996).

advanced telecommunications capability to all Americans.⁵⁵ PLA notes that when the Commission established the EBS, the agency noted that one of its goals was to encourage the provision of new technologies and services to the public.⁵⁶ PLA contends that the Commission has recognized that wireless broadband service in the 2.5 GHz band may offer consumers another broadband alternative, which may lead to reduced prices and more competition in the delivery of high-speed internet access.⁵⁷ PLA states that, currently, no EBS license covers the entire Upper Cumberland area, leaving it in an area of almost complete white space.⁵⁸ PLA notes that, while the FCC has requested comment on how to allocate EBS white space spectrum, the agency has not yet proposed rules on how it intends to do so.⁵⁹ PLA suggests that the method and process of allocation may not be resolved for some time, leaving the spectrum fallow for years to come and frustrating the stated goals of Congress and Commission policy, noting that the Commission has previously found that allowing licenses to lie fallow until the Commission reauctioned spectrum to be contrary to the public interest when the Commission granted forty-one late-filed waiver requests by EBS licensees.⁶⁰ PLA states that it intends to lease the excess capacity on the channels to a wireless internet provider prepared to build out and provide services to the educational community and local consumers immediately, noting that Utopian Wireless Corporation (Utopian) has committed to leasing the requested channels in order to build a WiMAX system in the Upper Cumberland area.⁶¹ PLA argues that this will add a much needed competitive choice to consumers in Upper Cumberland, most areas of which are underserved by broadband options while many areas have no access to broadband speed internet service whatsoever.⁶² PLA states that the Commission established ITFS (since renamed EBS) in 1963, to be used for the transmission of instructional material to accredited public and private schools,⁶³ and that the Commission's view has long been that the public interest favors preserving EBS spectrum for licensing to educators and that doing so will further the educational objectives that led to the establishment of EBS.⁶⁴ PLA states that it seeks the instant waiver for the exact purpose of EBS: so that PLA can advance its educational goal of reaching students in rural areas through the transmission of on-line instructional classes.⁶⁵ PLA argues that grant of its waiver request and accompanying application will advance the Commission's long-standing EBS policy, while denial of PLA's request will come at the expense of students in need of alternative instructional classes in rural areas of Upper Cumberland.⁶⁶

⁵⁵ Waiver Request at 7, citing § 706(a) of the Telecommunications Act of 1996, *supra*.

⁵⁶ Waiver Request at 7, citing *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14167-68 ¶ 2.

⁵⁷ Waiver Request at 7-8, citing *NMU Order*, 23 FCC Rcd at 11835 ¶ 8.

⁵⁸ Waiver Request at 8.

⁵⁹ *Id.*, citing *2d FNPRM*.

⁶⁰ Waiver Request at 8 and n.31, citing *In the Matter of Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations, Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB 2007).

⁶¹ Waiver Request at 8 and n.32.

⁶² *Id.*

⁶³ *Id.*, citing, *inter alia*, *NMU Order*, 23 FCC Rcd at 11832 ¶ 2 and *ETV Decision* at 853 ¶ 25.

⁶⁴ Waiver Request at 8, citing *NMU Order*, 23 FCC Rcd at 11836 ¶ 11 and *StratusWave Order*, 22 FCC Rcd at 15795-96 ¶ 15.

⁶⁵ Waiver Request at 9.

⁶⁶ *Id.*

9. PLA's Application was accepted for filing on July 22, 2009.⁶⁷ The National EBS Association ("NEBSA"), the Tennessee Board of Regents ("TBR"), and Clearwire Corporation ("Clearwire") oppose PLA's Application. NEBSA is a non-profit, professional organization of EBS licensees, applicants, and others interested in EBS, whose goals are to gather and exchange information about EBS, to act as a conduit for those seeking information or assistance about EBS, and to represent the interests of EBS licensees and applicants.⁶⁸ As a representative of the EBS community, and as a consistent participant for decades in proceedings relating to the FCC's regulation of the EBS service, the adoption of its applicable rules and policies, including those for licensing of EBS "white space," and the development of services in the 2.5 GHz band, NEBSA states that it has a significant and legitimate interest in the processes and rules by which new EBS stations are applied for and licensed.⁶⁹ TBR states that it oversees a system of 47 institutions with a combined annual enrollment of more than 190,000 students; that its six state universities, 13 community colleges, and 28 technology centers offer classes in 90 of Tennessee's 95 counties; and that TBR exists to promote education to provide Tennessee with the workforce it needs for sound economic development.⁷⁰ TBR further states that its technology centers focus exclusively on workforce development, which is also a major emphasis in community colleges.⁷¹ TBR notes that TBR institutions hold six EBS licenses at five institutions across Tennessee, and that TBR is currently cooperating with Governor Bredeson's task force to expand broadband coverage across the state, part of which plan will have TBR lease its excess capacity to commercial broadband providers that have committed to build out, thus increasing broadband coverage across the state.⁷² TBR states that it has three constituent institutions (CSTCC, RSCC, and TTU) with a need and an interest in using EBS spectrum to further their educational mission, and argues that the area covered by PLA's proposed GSA could be a strategic part of the task force's comprehensive plan, but only if the spectrum is not unfairly awarded to private interests such as PLA.⁷³ CSTCC, which has used its licenses to help promote TBR's educational goals, holds multiple EBS licenses, including the B-group license at Chattanooga that is co-channel with some of the channels sought by PLA.⁷⁴ In addition, PLA's proposed GSA would share a border with CSTCC's GSA.⁷⁵ Clearwire states that it has standing in this proceeding as the proponent for BTA 096 and as a licensee and lessee of both BRS and EBS spectrum in the market.⁷⁶

10. NEBSA, TBR, and Clearwire make a series of arguments in opposition to PLA's application. NEBSA (and Clearwire, which joins in NEBSA's objection)⁷⁷ believes that PLA is attempting to "jump the gun" by seeking a license ahead of others who might be interested in applying for EBS spectrum in the area.⁷⁸ While NEBSA is sympathetic to PLA's desire to serve its students, it argues

⁶⁷ See Wireless Telecommunications Market-Based Applications Accepted for Filing, Report No. 5114, *Public Notice* (rel. Jul. 22, 2009) at 5.

⁶⁸ Objection to Application, The National EBS Association (filed Aug. 13, 2009) ("NEBSA Objection") at 1.

⁶⁹ *Id.* at 1-2.

⁷⁰ Petition to Deny or Dismiss of The Tennessee Board of Regents and its Member Institutions (filed Aug. 20, 2009) ("TBR Petition to Deny") at 2.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Comments on Application of Performance Learning Academy for New Educational Broadband Service Station, Clearwire Corporation (filed Aug. 21, 2009) ("Clearwire Comments") at 1.

⁷⁷ *Id.*

⁷⁸ NEBSA Objection at 2.

that PLA should have to wait for the Commission to develop rules for licensing EBS white space.⁷⁹ TBR argues that the freeze helps ensure the orderly licensing of EBS white space spectrum and that PLA's Application would disrupt that process.⁸⁰ TBR notes that certain commenters in the EBS white spaces proceeding have proposed allowing existing licensees to expand their GSAs, and grant of PLA's Application would preclude CSTCC from expanding its GSA into PLA's proposed area of operation.⁸¹ TBR and Clearwire express concern that grant of channels to PLA pursuant to the pre-transition band plan could disrupt the ongoing transition to the new band plan in the Cookeville, Tennessee Basic Trading Area because PLA's pre-transition channels would overlap with various post-transition channels licensed to other licensees.⁸² TBR also argues that there is nothing unique or unusual about PLA's Application that would justify a waiver of the filing freeze.⁸³ In particular, it argues that PLA has not shown why it cannot wait for the Commission to develop a regular means of licensing unassigned EBS spectrum, as proposed in the 2nd FNPRM.⁸⁴ TBR notes that while the letters in support of PLA's Application are dated as of October 2008, the Application was not filed until June 2009.⁸⁵

11. NEBSA, TBR, and Clearwire all believe that PLA's application is inconsistent with the Commission decisions that have waived the current filing freeze on new EBS applications. With respect to the *Choice Order*, NEBSA contends that the waiver was granted in the very narrow context of a commercial party in the U.S. Virgin Islands filing for vacant EBS A-group channels under the remnants of the wireless cable exception of former Section 27.1201(c) of the Rules.⁸⁶ NEBSA states that this exemption was still available at the time of Choice's application,⁸⁷ and, in addition, a series of unique factors were found to be applicable in that case.⁸⁸ TBR states that the *Choice Order* relied upon the unique insular location of the U.S. Virgin Islands and the demonstrated shortage of media outlets, and found that there would appear to be a relatively small number of local educational institutions that would be interested in filing for EBS spectrum in the Virgin Islands, nor would waiver negatively impact the rights of any licensees in adjacent markets.⁸⁹ TBR notes that in contrast, PLA does not seek additional

⁷⁹ *Id.*

⁸⁰ TBR Petition at 5.

⁸¹ *Id.*

⁸² *Id.* at 4-5, Clearwire Comments at 3-4.

⁸³ TBR Petition at 6-7.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.*

⁸⁶ NEBSA Objection at 3, citing 47 C.F.R. § 27.1201(c) (2005).

⁸⁷ The wireless cable exception was eliminated for post-transition areas by the *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14293 ¶ 349. The exception was eliminated for even pre-transition areas in 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5755 ¶ 364 (2006).

⁸⁸ NEBSA Objection at 3. NEBSA notes that when Choice tried to expand its operations in 2008 to use the C- and D-group channels as well, over the objections of NEBSA and the Catholic Television Network (CTN), Choice agreed, in a settlement with NEBSA and CTN, to conditions that protected the integrity of the EBS licensing process, including: (a) receiving only special temporary authorization for six months, with no more than one six-month renewal term, after which use of the channels by Choice would cease; the authorization would not be permitted to delay, compromise, or otherwise prejudice the outcome of the licensing of EBS white space; and the authorization would not provide Choice any rights or interest in the ultimate EBS authorization issued for the channels. NEBSA Objection at 4.

⁸⁹ TBR Petition to Deny at 8, citing *Choice Order*, 20 FCC Rcd at 10911-12 ¶ 15.

channels for a video distribution system but rather seeks channels for a broadband service that will be immediately leased to Utopian.⁹⁰ TBR further notes that while Choice secured the support of local educators that could have claimed prejudice from grant of the waiver request, PLA clearly has not.⁹¹ With respect to the *StratusWave Order*, NEBSA and TBR argue that the licenses ultimately granted by the Commission were also subject to conditions that blunted any potential impact on the future availability of EBS white space licenses on these channels in the area, including limiting the licenses to a single ten-year term with no chance of renewal, and requiring that StratusWave reduce or terminate its service on the channels even prior to expiration of the licenses if and when an EBS licensee commenced service on the spectrum, even as a result of a later-granted license.⁹² With respect to the *NMU Order*, NEBSA states that this decision involved only four middle band segment channels, was based on NMU's commitment to use the spectrum only for educational purposes, and was conditioned on NMU not leasing any of the spectrum associated with its license to another entity.⁹³ NEBSA argues that PLA has not agreed to any of the foregoing special licensing conditions, and seeks full-fledged EBS licenses for two whole channel groups (including lower band segment channels) with no restrictions on assignment, no limitations on license terms, no limitations on leasing, and no requirement to terminate service if and when EBS white space is ultimately licensed through normal processes to some other entity in the area.⁹⁴ NEBSA further contends that PLA comes to the table late: more than four years after Choice, nearly four years after StratusWave, nearly two years after NMU, and at a time when an EBS white space licensing decision is anticipated soon.⁹⁵ TBR notes that NMU pledged to use the spectrum only for educational purposes, and not to lease the spectrum to another entity,⁹⁶ while PLA makes no commitment to benefit education, nor promises to restrict leasing of its excess capacity.⁹⁷ TBR further notes that all three waiver applications were unopposed, and the requests were filed before the Commission signaled its intent to assign white space spectrum by issuing the *Second FNPRM*.⁹⁸ Clearwire argues that PLA's Application does not propose the conditions imposed on StratusWave and NMU.⁹⁹

12. In response to the objections, PLA amended its Application to accept as a voluntary condition a requirement that PLA immediately file a self transition notification for the channels requested, as well as a waiver request for late filing within ten days after grant.¹⁰⁰ PLA states that it also agrees to abide by all remaining self transition requirements within the time requirements set forth by the Commission.¹⁰¹

⁹⁰ TBR Petition to Deny at 8.

⁹¹ *Id.* at 8-9.

⁹² NEBSA Objection at 4, *citing StratusWave Order*, 22 FCC Rcd at 15796 ¶ 16; TBR Petition to Deny at 9, *citing StratusWave Order*, 22 FCC Rcd at 15799 ¶ 23, 15800 ¶ 27.

⁹³ NEBSA Objection at 5, *citing NMU Order*, 23 FCC Rcd at 11837 ¶ 13.

⁹⁴ NEBSA Objection at 5.

⁹⁵ *Id.*

⁹⁶ TBR Petition at 9, *citing NMU Order*, 23 FCC Rcd at 11834-35 ¶ 7, 11836 ¶ 11.

⁹⁷ TBR Petition to Deny at 9.

⁹⁸ *Id.*

⁹⁹ Clearwire Comments at 2-5.

¹⁰⁰ Performance Learning Cooperative d/b/a Performance Learning Academy, Amendment to Application (filed Sept. 29, 2009) (PLA Amendment).

¹⁰¹ PLA Amendment.

III. DISCUSSION

13. PLA seeks waiver of: (a) Section 1.913(b) of the Commission's rules to permit manual filing of its application;¹⁰² and (b) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O*.¹⁰³ The Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of 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.¹⁰⁴

14. With respect to the electronic filing requirement contained in Section 1.1913(b) of the Commission's Rules,¹⁰⁵ we observe that the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the one submitted by PLA. We therefore conclude that, in light of these circumstances, application of the rule would be inequitable and contrary to the public interest because it would be unfair to reject an application for failure to file electronically when electronic filing capability is not available. We therefore grant PLA a waiver to permit manual filing of its Application.

15. We conclude, however, that PLA has not justified a waiver of the filing freeze on new EBS applications. Initially, we note that while PLA asserts that the only purpose remaining to the filing freeze is to allow licensees to transition the spectrum, we agree with TBR that the freeze continues to serve the purpose of effectuating an orderly licensing of EBS white space spectrum.¹⁰⁶ In this case, PLA has failed to demonstrate that a waiver is necessary to obtain the claimed public interest benefits. First, while PLA has described an online classroom and wireless broadband system, neither it nor Utopian have made any commitment as to when their systems would be constructed and operating. Accordingly, they have failed to show that they cannot wait for the Commission to develop a new mechanism for licensing EBS white space and apply for spectrum pursuant to that new mechanism. Second, Utopian and PLA had an alternative means of acquiring spectrum. Specifically, the BRS Basic Trading Area license for the Cookeville, Tennessee BTA has been auctioned.¹⁰⁷ While Utopian was an eligible bidder in that auction, and obtained several other licenses in that auction, it was not the winning bidder for the Cookeville, TN BTA.¹⁰⁸ Obtaining that license would have been another means by which Utopian could have obtained the spectrum for its contemplated wireless broadband system while also allowing PLA to proceed with its online classroom. In contrast, in the cases where waivers of the EBS filing freeze have been granted, the applicants had no other means of acquiring spectrum.¹⁰⁹ While we could see waiving the freeze if an

¹⁰² See Waiver Requests at 1 and 47 C.F.R. § 1.913(b).

¹⁰³ See Waiver Request at 1. See also *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

¹⁰⁴ 47 C.F.R. § 1.925(b)(3).

¹⁰⁵ See 47 C.F.R. § 1.913(b).

¹⁰⁶ See TBR Petition to Deny at 5.

¹⁰⁷ See Auction of Broadband Radio Service Licenses Closes Winning Bidders Announced for Auction 86, *Public Notice*, 24 FCC Rcd 13572 (WTB 2009).

¹⁰⁸ *Id*

¹⁰⁹ See *Choice MO&O*, 20 FCC Rcd at 10909 ¶ 9 (Choice was currently using all licensed BRS and EBS spectrum in connection with its system, and there was no other licensed BRS or EBS spectrum in the Virgin Islands); *StratusWave MO&O*, 22 FCC Rcd at 15794-15795 ¶ 12 (No other BRS or EBS spectrum licensed within StratusWave's GSA); *NMU MO&O*, 23 FCC Rcd at 11836 ¶ 10 (No active EBS licensees within NMU's proposed GSA).

immediate need for spectrum was demonstrated that outweighed the disruption that would result from waiving the freeze, PLA has failed to show that granting a waiver would meet such an immediate need.

16. We are also concerned that granting a waiver would not be consistent with the underlying educational purposes of EBS. In the cases of StratusWave and Northern Michigan University, special conditions were imposed to preserve the educational purposes of EBS. In the case of StratusWave, the licenses were limited to a single ten-year term with no chance of renewal, StratusWave was required to demonstrate substantial service by the end of 2009, and StratusWave was required to reduce or terminate its service on the channels even prior to expiration of the licenses if and when an EBS licensee commenced service on the spectrum, even as a result of a later-granted license.¹¹⁰ Northern Michigan University agreed to a condition under which it would not lease its spectrum.¹¹¹ PLA has not agreed to any such conditions, and indeed has stated its desire to lease its spectrum to Utopian because it is unable to build a system without assistance from a commercial operator.¹¹² We conclude that without such safeguards, a waiver would not be consistent with the underlying educational purposes of EBS. We therefore conclude that a waiver is not in the public interest.

17. PLA has also failed to justify a waiver under the second prong of the waiver standard because it has not shown that its situation is unique or unusual. We agree with PLA that the residents of Upper Cumberland could benefit from Utopian's proposed wireless broadband system and PLA's proposed online classroom, but that is equally true for the many other similarly situated communities whose needs the Commission is addressing in WT Docket No. 03-66. We note with concern the residents and businesses that do not have access to broadband. In this case, however, we believe that the best way to meet that concern is for the Commission to adopt and implement an orderly licensing process that takes the needs of all potential applicants and their users into account, and provides all of them with a fair and equal opportunity to obtain the spectrum that they seek. Furthermore, as noted above, Utopian had the alternative of acquiring spectrum in the BRS auction.

18. PLA's situation is readily distinguishable from those cases where waivers of the EBS freeze have been granted. Choice involved a BRS licensee who had the exclusive right to apply for commercial EBS channels pursuant to the former "wireless cable" exception to the EBS eligibility rule.¹¹³ The Bureau also relied upon the unique insular location of the U.S. Virgin Islands, which ensured that grant of a waiver would not negatively impact the rights of any licensees in adjacent markets or impact any spectrum transitions in neighboring markets.¹¹⁴ We further note that, in contrast to PLA, Choice secured the support of local educators that could have claimed prejudice from grant of the waiver request.¹¹⁵ Similarly, with respect to StratusWave, we found that there was no current licensee that would be negatively impacted by grant of a waiver.¹¹⁶ NMU pledged to use the spectrum obtained as a result of waiver only for educational purposes, and not to lease it to another entity.¹¹⁷ StratusWave's waiver was conditioned in ways to preserve the primary educational purpose of the channels.¹¹⁸ We note, too, that

¹¹⁰ *StratusWave MO&O*, 22 FCC Rcd at 15796 ¶ 16.

¹¹¹ *NMU MO&O*,

¹¹² Waiver Request at 7 n.27.

¹¹³ *See Choice Order*, 20 FCC Rcd at 10910 ¶ 12.

¹¹⁴ *Choice Order*, 20 FCC Rcd at 10912 n.70.

¹¹⁵ *Id.* at 10913 ¶ 17.

¹¹⁶ *StratusWave Order*, 22 FCC Rcd at 15795 ¶ 13.

¹¹⁷ *NMU Order*, 23 FCC Rcd at 11834-35 ¶ 7, 11836 ¶ 11.

¹¹⁸ *StratusWave Order*, 22 FCC Rcd at 15799 ¶ 23, 15800 ¶ 27.

each of the three waiver requests granted was unopposed, and, as TBR and NEBSA note,¹¹⁹ were filed prior to the issuance of the *Second FNPRM*, in which the Commission has indicated its intent to assign white space spectrum. In the present case, grant of PLA's waiver request would clearly negatively impact neighboring licensees, PLA has clearly not secured the support of local educators, and PLA proposes immediately to lease its excess capacity.

19. In sum, PLA has not provided a convincing explanation of why it immediately needs access to EBS spectrum for the provision of educational content. PLA does not provide an adequate justification for the preclusive effect that its proposal would have on other likely applicants, including the licensees of several EBS stations in its immediate vicinity. PLA has not shown that the underlying purpose of the Commission's rules would be frustrated if it complies with them, nor has it shown that applying those rules in this situation would be inequitable, unduly burdensome or contrary to the public interest.¹²⁰ We therefore deny PLA's request for waiver of the EBS filing freeze and dismiss the Application without prejudice to PLA refile once the Commission has established a means of licensing EBS white space.

IV. CONCLUSION AND ORDERING CLAUSES

20. For the reasons discussed above, we grant PLA's request for waiver of the electronic filing requirement of Section 1.913(b) of the Commission's Rules, but we deny its request for a waiver of the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O*. We therefore direct dismissal of its Application.

21. 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 1.913(b) and 1.925(b)(3) of the Commission's Rules, 47 C.F.R. §§ 1.913(b), 1.925(b)(3), that the Waiver Request filed by Performance Learning Cooperative d/b/a Performance Learning Academy on June 18, 2009 in connection with File No. 0003879047 IS GRANTED with respect to the request for waiver of Section 1.913(b) of the Commission's Rules and in all other respects IS DENIED.

22. 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 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL DISMISS the application filed by Performance Learning Cooperative d/b/a Performance Learning Academy for a new Educational Broadband Service Station on March 27, 2009 (File No. 0003789021).

23. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

¹¹⁹ TBR Petition to Deny at 9, NEBSA Objection at 5.

¹²⁰ See 47 C.F.R. § 1.925(b)(3).