

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

In the Matter of Applications of)
EDUCATIONAL BROADBAND) File No. 0005690754, 0005690755
CORPORATION)
For New Educational Broadband Service Stations)

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 Educational Broadband Corporation ("EBC") for a waiver of the filing freeze on new Educational Broadband Service (EBS) applications, and direct dismissal of its applications for four D-group EBS channels in Madison, Tennessee on the A-group channels in Lauderdale, Tennessee.

II. BACKGROUND

2. 2500-2690 MHz Band Generally. 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 and 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-allotment, the FCC permitted ITFS licensees to lease "excess capacity" on their facilities to commercial entities.

1 See Educational Television, Docket No. 14744, Report and Order, 39 FCC 846 (1863) (MDS R&O), recon. denied 39 FCC 873 (1964) (ETV Decision).

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 846, 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).

4 Id. at 1206-07 ¶ 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). 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, which would permit the orderly and effective resolution of issues in the BRS/EBS proceeding.⁵ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.⁶ 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.⁷ On June 10, 2004, the Commission adopted new rules that initiated a fundamental restructuring of the 2500-2690 MHz band, which would provide both existing EBS and BRS licensees and potential new entrants greater flexibility to encourage the highest and best use of spectrum domestically and internationally.⁸ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.⁹ Under the current band plan, the A, B, C, D, and G channel groups are EBS channels, while the E, F, and H channel groups are BRS channels, although there are some EBS licensees that hold grandfathered E and F channels.

4. *Educational Broadband Corporation License Application.* EBC, a 501(c)(3) nonprofit corporation, provides educational broadband service to schools in Madison and Lauderdale, Tennessee.¹⁰ Madison and Lauderdale, located next to each other in western Tennessee, are described by EBC as rural and “somewhat depressed” areas, as evidenced by the high rate of free and subsidized lunch programs, where 80-90 percent of students receive free or subsidized school lunches.¹¹ EBC reports that a large percentage of students, by some estimates are as high as 50 percent, do not have internet access at home.¹²

⁵ See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260.

⁶ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of fixed and Mobile Broadband Access, Educational and Other advanced Services in the 2150-2162 and 2500-2690 Bands. *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

⁷ *Id.*

⁸ 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*).

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, *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*).

¹⁰ File No. 0005690754, Exhibit A: Request for Waivers and Public Interest Statement (filed Mar. 11, 2013) (Madison Waiver Request) at 1; File No. 0005690755, Exhibit A: Request for Waivers and Public Interest Statement (filed Mar. 11, 2013) (Lauderdale Waiver Request) at 1. EBC provides broadband service to Alexander Elementary School, Jackson Central-Merry High School, Jackson Careers & Technology Magnet Intermediate School, Lane Technology Magnet Elementary School, Lincoln Magnet School for Mathematics, Madison Academic High School, and Whitehall Enhanced Option Community Elementary School in the Madison market. See Required Notification of Construction, File No. 0004894013, Demonstration of Substantial Service (filed Sep. 29, 2011). EBC provides broadband service to Andrew Jackson Intermediate School, Arlington International Leadership School, and I.B. Tigrett Middle School in the Lauderdale market. See Required Notification of Construction, File No. 0004918561, Demonstration of Substantial Service (filed Oct. 20, 2011).

¹¹ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

¹² Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

Without internet access at home, students must compete for lab time at school, thus straining the schools' existing bandwidth capacity.¹³

5. EBC operates EBS Station WLX817 on the G-group channels in Madison, Tennessee and Station WLX621 on the G-group channels in Lauderdale, Tennessee.¹⁴ EBC became the licensee of Station WLX817 on October 30, 2010 when the Commission approved the assignment of Station WLX817 from Lane College, located in Jackson, Tennessee, to EBC.¹⁵ EBC then executed a Long Term De Facto Lease Agreement, leasing WLX817's excess capacity to N-1 Communications, Inc.¹⁶ After N-1 Communications entered into receivership, however, EBC executed a new Long Term De Facto Lease Agreement ("Madison Lease Agreement"), leasing WLX817's excess capacity to Wisper, LLC, a local internet service provider that serves rural areas of western Tennessee.¹⁷ EBC then became the licensee of Station WLX621 on July 15, 2011 when the Commission approved the assignment of WLX621 from Trenton Special School District, located in Trenton, Tennessee, to EBC.¹⁸ EBC then executed another Long Term De Facto Lease Agreement ("Lauderdale Lease Agreement"), leasing WLX621's excess capacity to Wisper, LLC.¹⁹ EBC reports that Wisper has built out more than 30 new tower sites for Stations WLX817 and WLX621.²⁰

6. EBC is applying for the D-group channels in Madison and the A-group channels in Lauderdale, the only EBS channels available in those markets.²¹ The remaining EBS channels in both markets are licensed to EBS-qualified entities and then leased to a commercial operator.²² Thus, EBC asks the Wireless Telecommunications Bureau ("Bureau") to permit it to operate on the D-group channels in Madison, Tennessee with reference points identical to those of EBC's Station WLX817 (G-group channels)²³ and on the A-group channels with reference points identical to those of EBC's Station WLX621 (G-group channels) in Lauderdale, Tennessee.²⁴ Because it has tower sites under lease with the

¹³ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

¹⁴ Madison Waiver Request at 1; Lauderdale Waiver Request at 1.

¹⁵ File No. 0004436710 (filed Oct. 29, 2010, consented to and consummated Oct. 30, 2010).

¹⁶ File No. 0004449917 (filed Nov. 12, 2010, granted Nov. 13, 2010).

¹⁷ File No. 0005110789 (filed Mar. 19, 2012, granted Mar. 21, 2012).

¹⁸ File No. 0004776074 (filed June 22, 2011, consented to and consummated July 15, 2011).

¹⁹ File No. 0005110789 (filed Mar. 19, 2012, granted Mar. 21, 2012).

²⁰ Madison Waiver Request at 1; Lauderdale Waiver Request at 1.

²¹ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

²² In Madison, the A-group channels (Station WLX819) are licensed to Freed-Hardeman University and leased to Clearwire; the B-groups channels (Station WLX818) are licensed to Lambuth University and leased to Clearwire; the C-group channels (Station WNC986) are licensed to Jackson State Community College and leased to Clearwire; and the G-group channels (Station WLX817) are licensed to EBC and leased to Wisper. *See* File No. 0005690754, Exhibit A. In Lauderdale, the B-group channels (Station WNC201) are licensed to Cooter Reorganized School District R-IV (B-group channels) and leased to Clearwire; the C-group channels (Station WLX617) are licensed to Armored School District #9 and leased to Clearwire; the D-group channels (Station WLX618) are licensed to South Pemiscot District R-V and leased to Clearwire; and the G-group channels (Station WLX621) are licensed to EBC and is leased to Wisper. File No. 0005690755, Exhibit A.

²³ Madison Waiver Request at 2.

²⁴ Lauderdale Waiver Request at 2.

ability to expand throughout both market areas, EBC pledges to provide substantial service for both channel groups in a “very brief period of time.”²⁵

7. EBC reports that for the past two years, it has spent “a very large amount of time meeting with various schools” in Madison and Lauderdale to determine how best to meet their needs.²⁶ Through these meetings, EBC learned that two new developments within western Tennessee showed a “large need” for additional bandwidth: a new student laptop program where schools issue laptops to students and a new electronic testing program (voluntary this year, mandatory next) where students will be tested only electronically.²⁷ EBC stresses that neither of these programs were in place at the time EBC entered into the Madison or the Lauderdale Lease Agreements.²⁸ Although EBC has the ability to recapture some of its spectrum capacity under both the Madison and Lauderdale Lease Agreements, it states that it cannot satisfy the bandwidth needs for these new uses in either Madison or Lauderdale even if it recaptured all 22.5 megahertz of spectrum from both WLX817 and WLX621 because the concentration of users within and near schools would exceed the existing bandwidth capabilities at those locations.²⁹ And, EBC argues, recapturing this spectrum would distract EBC from its current educational mission.³⁰

8. EBC’s applications were listed on public notice as accepted for filing on March 13, 2013.³¹ On April 16, 2013, the Catholic Television Network (“CTN”) and the National EBS Association (“NEBSA”), nonprofit organizations that represent a large segment of the EBS community, jointly opposed EBC’s waiver requests for both Madison and Lauderdale.³² They argue that EBC should wait with other interested applicants for any application opportunity that arises following the Commission’s “white space” decision, (WT Docket No. 03-66) where the Commission will decide on a scheme to license the vacant and available EBS spectrum.³³ They also argue that there is no Commission precedent that makes educational needs alone a valid basis for a waiver seeking permanent licenses.³⁴ EBC urges the Bureau to disregard CTN’s and NEBSA’s opposition because they lack standing.³⁵

III. DISCUSSION

9. As a preliminary matter, we will consider the objection filed by CTN and NEBSA as an informal objection filed under Section 1.41 of the Commission’s Rules, which does not require

²⁵ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

²⁶ Madison Waiver Request at 1; Lauderdale Waiver Request at 1.

²⁷ Madison Waiver Request at 1-2; Lauderdale Waiver Request at 1.

²⁸ Madison Waiver Request at 1; Lauderdale Waiver Request at 1.

²⁹ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

³⁰ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

³¹ See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 8537, *Public Notice* (rel. Mar. 20, 2013) at 3.

³² Objection to Applications and Waivers, National EBS Association and Catholic Television Network (filed Apr. 16, 2013) (“CTN/NEBSA Objection”).

³³ CTN/NEBSA Objection at 1.

³⁴ CTN/NEBSA Objection at 3.

³⁵ Reply to Objection to Applications and Freezes, Educational Broadband Corporation (filed Apr. 30, 2013).

standing.³⁶ Thus, we decline to address EBC's argument that CTN and NEBSA lack standing to object to its waiver requests.

10. As explained above, to enable it to apply for additional EBS spectrum, EBC seeks waivers of the filing freeze on new EBS applications and waivers of the electronic filing requirements. To receive a waiver under the Commission's Rules, EBC must show that (i) the underlying purpose of the rule(s) would not be served or would be frustrated by applying it to EBC's case, and that a grant of its waiver request would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the its case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or that it has no reasonable alternative.³⁷

11. With respect to the electronic filing requirement contained in Section 1.913(b) of the Commission's Rules, we observe that the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the one submitted by EBC. 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 EBC a waiver to permit manual filing of its applications.

12. We find that EBC has not justified a waiver of the filing freeze because it has not shown an immediate need for the requested spectrum. EBC argues that because of its unique factual circumstances, it is contrary to the public interest to apply the EBS filing freeze to its case.³⁸ EBC states that because Madison and Lauderdale are rural, somewhat depressed areas, more than 50 percent of students do not have internet access at home; thus, most students must access the internet from school.³⁹ Since the schools adopted the laptop program and the electronic testing requirement, however, the schools will have insufficient capacity to meet these new demands on their networks—EBC states that even the schools' fiber networks will be strained under these new demands.⁴⁰ EBC argues that if the D-group channels in Madison and the A-group channels in Lauderdale are licensed to it, it can help solve this problem because it has tower sites under lease in both Madison and Lauderdale with the ability to expand throughout the Madison and Lauderdale areas.⁴¹ EBC also argues that it did not know of these new requirements when it entered into either the Madison or Lauderdale Lease Agreements.⁴² EBC argues that a grant of its waiver requests is in the public interest because additional educational spectrum in rural Tennessee would further the goals of the National Broadband Plan, would not harm any other party, and would provide a more balanced opportunity for K-12 to have access to educational spectrum.⁴³ Also, EBC argues, a grant of its waiver requests is in the public interest because the filing freeze frustrates a licensee's ability to grow.⁴⁴

³⁶ See 47 C.F.R. § 1.41.

³⁷ 47 C.F.R. § 1.925(b)(3).

³⁸ Madison Waiver Request at 2-3; Lauderdale Waiver Request at 2-3.

³⁹ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

⁴⁰ Madison Waiver Request at 1-2; Lauderdale Waiver Request at 1-2.

⁴¹ Madison Waiver Request at 2; Lauderdale Waiver Request at 2.

⁴² Madison Waiver Request at 1-2; Lauderdale Waiver Request at 1-2.

⁴³ Madison Waiver Request at 2-3; Lauderdale Waiver Request at 2-3.

⁴⁴ Madison Waiver Request at 3; Lauderdale Waiver Request at 3.

13. Although we are sympathetic to the needs of students in Madison and Lauderdale, we find that EBC has not met its burden to show that it is contrary to the public interest to impose the EBS filing freeze. We find that it is not in the public interest to grant EBC's waiver request because EBC already has access to 22.5 megahertz of spectrum in both Madison and Lauderdale through Stations WLX817 and WLX621, respectively; EBC is leasing "excess capacity" to Wisper, a commercial provider of internet services; and EBC has not shown that it has a need for additional spectrum or that additional spectrum would meet its claimed needs.

14. We find that it is not in the public interest to waive the EBS filing freeze and the electronic filing requirement because EBC is licensed to operate four EBS channels in Madison (Station WLX817) and four EBS channels in Lauderdale (Station WLX621). As mentioned above, in 2003, the Commission implemented a filing freeze on all new EBS applications. Since that time, we have granted a waiver of the filing freeze to only two entities, Northern Michigan University ("NMU")⁴⁵ and Stratus Wave Communications ("Stratus Wave").⁴⁶ In both of those instances, neither NMU nor StratusWave could use EBS spectrum because all of the EBS channels, in their respective areas, were vacant, precluding them not only from holding an EBS license, but also from pursuing other options such as leasing excess capacity from other licensees, seeking an license assignment or transfer, or pursuing a partitioning or disaggregation agreement.⁴⁷ Here, EBC is already become an EBS licensee in Madison when it was assigned Station WLX817 and in 2011 in Lauderdale when it was assigned Station WLX621. Because EBC already holds two EBS licenses, (the G-channel groups in both Madison and Lauderdale), 22.5 megahertz of spectrum in each area, we are not persuaded that EBC needs additional spectrum to meet the educational needs of the schools. Many EBS licensees are able to meet their educational needs with only one channel group. EBC's claims that it needs additional spectrum because of the new student laptop program and electronic testing program are not adequately supported. Meanwhile, unlike EBC, many EBS-eligible entities have not been able to gain access to EBS spectrum at all.

15. We also find that it is not in the public interest to waive the filing freeze because EBC is leasing the "excess capacity" of Stations WLX817 and WLX621 to Wisper, a commercial provider of broadband services. We cannot say that EBC's situation is unique or unusual because the Commission contemplated that educational licensees would need additional capacity and ensured that EBS licensees would have the right to recapture additional capacity to meet increased educational needs.⁴⁸ The right of EBS licensees to recapture educational spectrum is designed to allow EBS licensees to obtain additional capacity and plays an important role in maintaining the traditional educational role of EBS.⁴⁹ We would expect that licensees such as EBC that needed additional capacity would take advantage of their right to recapture additional spectrum. EBC's claim that recapturing spectrum from Wisper would "distract" from its educational mission is not explained and is insufficient to justify a waiver. EBC also fails to explain how licensing the D-group channels (22.5 megahertz of spectrum) in Madison and the A-group channels in Lauderdale (22.5 megahertz of spectrum) would solve the capacity problem of the schools. If the needs of the schools cannot be met with the 22.5 megahertz of spectrum from the G-group channels, which are leased to Wisper, how can those needs to be met with the 22.5 megahertz of spectrum from the D-group channels (in Madison) and from the A-group channels (in Lauderdale)? Nowhere in its waiver

⁴⁵ Application of the Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 23 FCC Rcd 11832 (2008) ("NMU MO&O").

⁴⁶ Gateway Telecom LLC d/b/a StratusWave Communications, *Memorandum Opinion and Order*, 22 FCC Rcd 15789 (2007) ("StratusWave MO&O").

⁴⁷ NMU MO&O, 23 FCC Rcd at 11834 ¶ 5; StratusWave MO&O, 22 FCC Rcd at 15794 ¶ 12.

⁴⁸ See 47 C.F.R. § 27.1214.

⁴⁹ See BRS/EBS R&O and FNPRM, 19 FCC Rcd at 14234 ¶ 181.

request does EBC indicate that to meet the needs of the schools it intended to use both the D-group and the G-group channels in Madison and the A-group and the G-group channels in Lauderdale.

IV. CONCLUSION AND ORDERING CLAUSES

16. For the reasons discussed above, we grant EBC's request for waiver of the electronic filing requirement in Section 1.1913(b) of the Commission's Rules, but deny EBC's request for 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 direct dismissal of EBC's Applications.

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3), that the waiver requests filed by Educational Broadband Corporation on March 11, 2013 in connection with File Nos. 0005690754 and 000560755 ARE GRANTED with respect to the request for waiver of Section 1.913(b) of the Commission's Rules but are otherwise DENIED.

18. 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 applications filed by Educational Broadband Corporation on March 11, 2013 for new Educational Broadband Service stations (File Nos. 0005690754 and 000560755).

19. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
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