

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

In the Matter of Application of )  
 )  
THE NISQUALLY INDIAN TRIBE ) File No. 0004713667  
 )  
For a 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 grant the request of the Nisqually Indian Tribe (Nisqually or the Tribe) for a waiver of the filing freeze on new Educational Broadband Service (EBS) applications and for a waiver of Section 1.1913(b) of the Commission’s rules to permit manual filing of its application.

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,<sup>1</sup> 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.<sup>2</sup> 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).<sup>3</sup> In conjunction with this re-allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.<sup>4</sup>

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

<sup>2</sup> 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.).

<sup>3</sup> 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*).

<sup>4</sup> *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).<sup>5</sup> 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.<sup>6</sup> In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> In 2008, the Commission sought comment on how to license unassigned EBS spectrum.<sup>10</sup>

4. *Nisqually Indian Tribe License Application.* Nisqually is a federally recognized, self-governing Indian Tribe with a single reservation, located along the Nisqually River in rural Washington State, where the Tribe has lived for thousands of years and where many of its members still live.<sup>11</sup> The reservation is the center of the Tribe's efforts to practice, preserve and perpetuate its unique culture and values, but, according to Nisqually, it has experienced a cycle of extraordinarily high rates of high school drop-outs and consequent poverty.<sup>12</sup> Many of those who did graduate could not afford to continue their educations because there was no accessible college, but the Tribe has recently contracted with Northwest Indian College to open a campus on the reservation.<sup>13</sup> Northwest Indian College currently offers 1,600

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<sup>5</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands. *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*).

<sup>6</sup> See *NPRM and MO&O*, 18 FCC Rcd at 6811 ¶ 226, 6825 ¶ 260 (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.").

<sup>7</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other advanced Services in the 2150-2162 and 2500-2690 Bands. *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

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

<sup>9</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other advanced Services in the 2150-2162 and 2500-2690 MHz Bands. *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*).

<sup>10</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *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*).

<sup>11</sup> File No. 0004713667, Nisqually Indian Tribe Request for Waiver of FCC Rule and Filing Freeze (filed Apr. 28, 2011) (Waiver Request) at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1-2.

hybrid and Web-based courses in its curriculum targeted at the over 6,000 students who live off campus and are not always able to attend classes in person during the winter months.<sup>14</sup> Wireless Internet access could also meet essential needs of K-12 students on the reservation, the vast majority of whom do not have access to broadband at home.<sup>15</sup> Nisqually contends that there is a particular opportunity in this situation because broadband can greatly assist the Tribe in its efforts to practice, preserve, continue and pass along its unique culture and values to the younger generation.<sup>16</sup> Moreover, Nisqually says that it plans to offer wireless broadband service at no charge to all Tribal members on the reservation, whether or not they are enrolled in a formal education program.<sup>17</sup> For any member who cannot afford a computer, the Tribe will provide one at no charge.<sup>18</sup>

5. Nisqually says that it considered other means of providing broadband but found them to be unsuitable or significantly inferior to the service proposed in its application. Nisqually says that it conducted a search for EBS stations located within 70 miles of the reservation to determine if EBS channels were available to satisfy the Tribe's needs but found only one EBS channel group with a GSA that covers the reservation, the B-Group channels licensed to the City University of Seattle under call sign WNC422, but those channels are already leased to Clearwire Spectrum Holdings II, LLC.<sup>19</sup> Nisqually also considered using unlicensed spectrum or spectrum in the 3650-3700 MHz band but rejected those options because the terrain and foliage on the reservation made it impossible to provide the needed penetration using those bands.<sup>20</sup> Nisqually says that it is proposing a minimal use of the EBS spectrum resource, tailored closely to its needs, by limiting the request to one EBS channel group and limiting the GSA assigned to this group to an eight mile radius centered on the reservation.<sup>21</sup> It states that the EBS channel group that it seeks, the G group, is used nowhere else in the Olympia, Washington BTA where the reservation is located.<sup>22</sup>

6. Nisqually submits that these benefits, standing alone, more than justify a grant of the waivers sought by this application. Nisqually also argues that it has presented a stronger case for waiver than in two cases where the Commission or the Wireless Telecommunications Bureau ("Bureau") has granted waivers of the EBS filing freeze.<sup>23</sup> Nisqually notes that, like the situations addressed in the *NMU Order* and *StratusWave Order*, there are no licensed EBS channels available for lease in its proposed service area.<sup>24</sup>

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<sup>14</sup> *Id.* at 2. *See also* File No. 0004713667, Exhibit 1 to Application for EBS License (Exhibit 1) at 11.

<sup>15</sup> Waiver Request at 2, Exhibit 1 at 12.

<sup>16</sup> Waiver Request at 2, Exhibit 1 at 13.

<sup>17</sup> Waiver Request at 3, Exhibit 1 at 12, 14 and 17.

<sup>18</sup> Waiver Request at 3, Exhibit 1 at 12.

<sup>19</sup> Waiver Request at 4. *See* File No. 0003202716.

<sup>20</sup> Exhibit 1 at 15.

<sup>21</sup> Waiver Request at 3.

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

<sup>23</sup> *Id.* at 3-4, *citing* Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 23 FCC Rcd 11832 (2008) ("*NMU Order*") and Gateway Telecom LLC d/b/a StratusWave Communications, *Memorandum Opinion and Order*, 22 FCC Rcd 15789 (2007) ("*StratusWave Order*").

<sup>24</sup> Waiver Request at 4.

7. Nisqually's application was listed on public notice as accepted for filing on May 18, 2011.<sup>25</sup> Nobody filed any petition to deny or other opposition.

### III. DISCUSSION

8. As noted, Nisqually seeks both a waiver of the filing freeze on new EBS applications and a waiver of the electronic filing requirement for such applications, to permit it to use available EBS channels to operate a wireless broadband network for the provision of educational and instructional material.<sup>26</sup> 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.<sup>27</sup> As discussed below, we conclude that Nisqually has met the second prong of the waiver standard with respect to both of its requests, and accordingly we grant its waiver request, subject to the conditions outlined in the following discussion.

9. With respect to the electronic filing requirement contained in Section 1.1913(b) of the Commission's Rules,<sup>28</sup> we observe that the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the one submitted by Nisqually. 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 Nisqually a waiver to permit manual filing of its Application.

10. We conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by Nisqually. The Tribe has shown that there is a compelling need for additional educational services on its reservation. As of 2000, while more than 84 percent of Nisqually Tribal members aged 25 years and over were high school graduates, only 14 percent of the Nisqually had earned four-year college degrees, and less than half had attended college at all.<sup>29</sup> The new campus that Northwest Indian College is opening on Nisqually's reservation can help make a college education a practical possibility for the first time to many of Nisqually's Tribal members, but that opportunity will be both eased and substantially expanded if Nisqually's student members are equipped with wireless broadband access to the college's 1,600 hybrid and web-based courses.<sup>30</sup> Moreover, given that no EBS channels are available for lease from the sole commercial EBS operator in its area, Nisqually does not have the option of leasing spectrum from an existing EBS licensee. In addition, the low population density of the area where the Nisqually live make broadband access to the Internet unaffordable.

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<sup>25</sup> See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 6856, *Public Notice* (rel. May 18, 2011) at 2.

<sup>26</sup> See Waiver Request at 1.

<sup>27</sup> 47 C.F.R. § 1.925(b)(3).

<sup>28</sup> See 47 C.F.R. § 1.913(b).

<sup>29</sup> U.S. Census 2000 American Indian and Alaska Native Summary File (AIANSF) – Sample Data (Nisqually table generated by U.S. Census Bureau's American FactFinder database management system at [factfinder2.census.gov](http://factfinder2.census.gov)).

<sup>30</sup> See Waiver Request at 2.

11. The Commission has recognized that “members of federally-recognized American Indian Tribes and Alaska Native Villages (“Native Nations or Tribes”) and other residents of Tribal lands have lacked meaningful access to wired and wireless communications services.”<sup>31</sup> It has also recognized that “[g]reater access to wireless services would offer members of Tribes and others on Tribal lands significant economic opportunities and increased social benefits.”<sup>32</sup> The Commission has also recognized that “[t]he lack of robust communications services presents serious impediments to Native Nations’ efforts to preserve their cultures and build their internal structures for self-governance, economic opportunity, health, education, public safety, and welfare – in short, to secure a brighter future for their people.”<sup>33</sup> We believe that Nisqually’s proposal to use EBS and broadband will serve the vital interests of developing educational opportunities and helping to preserve the Tribe’s culture. We therefore conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by Nisqually’s situation.

12. We note that Nisqually’s proposed use of the EBS channels is consistent with the Commission’s policy for EBS. Section 27.1201(a) of the Commission’s Rules states that a “license for an Educational Broadband Service stations will be issued only to an accredited institution...engaged in the formal education of enrolled students.”<sup>34</sup> Nisqually has its own education department that provides K-12 education,<sup>35</sup> has signed an agreement with Northwest Indian College, an accredited college, and has indicated that the wireless broadband project will be a completely non-profit effort of the Tribe, leasing none of its capacity to commercial entities.<sup>36</sup> The provision of broadband services via a new EBS license would be consistent with the Commission’s view 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].”<sup>37</sup>

13. We also find that granting a waiver to Nisqually is consistent with precedent. In particular, we believe the Bureau’s grant of a waiver of the filing freeze on new EBS applications and of the electronic filing requirement to Northern Michigan University.<sup>38</sup> In the *NMU Order*, the Bureau found that unique circumstances were presented by NMU’s situation; *i.e.*, there was no EBS license that covered Marquette, Michigan, and NMU proposed to use the spectrum solely to meet its educational needs and the needs of the surrounding community.<sup>39</sup> In this case, the only EBS license that covers the Nisqually reservation is unavailable to Nisqually, and Nisqually has shown that the licenses will be used to meet the Tribe’s educational and cultural needs. In the *NMU Order*, the Bureau adopted as a license

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<sup>31</sup> See Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, WT Docket No. 11-40, *Notice of Proposed Rulemaking*, 26 FCC Rcd 2623 ¶ 1 (2011) (*Wireless Spectrum Tribal Lands NPRM*).

<sup>32</sup> *Id.*

<sup>33</sup> See Improving Communications Services for Native Nations, CG Docket No. 11-41, *Notice of Inquiry*, 26 FCC Rcd 2672 (2011) (*Native Nations NOI*).

<sup>34</sup> 47 C.F.R. § 27.1201(a).

<sup>35</sup> See Exhibit 1 at 11.

<sup>36</sup> See Waiver Request at 3.

<sup>37</sup> See *StratusWave Order*, 22 FCC Rcd at 15796 ¶ 15.

<sup>38</sup> See *NMU Order*.

<sup>39</sup> *Id.*, 23 FCC Rcd at 11836 ¶¶ 10-11.

condition NMU's commitment not to lease its spectrum.<sup>40</sup> Nisqually makes a similar commitment here,<sup>41</sup> and we will adopt that commitment as a license condition.

14. We will allow Nisqually two years from the date of license grant to demonstrate that it is providing substantial service. While new BRS licenses are given four years to demonstrate substantial service,<sup>42</sup> given the urgent need for broadband services on the reservation and the small GSA, we believe it is appropriate to require a substantial service showing within two years of license grant.

15. Based upon the evaluation of the record before us, we conclude that Nisqually has demonstrated that continued application of the filing freeze and electronic filing requirement would be inequitable, unduly burdensome and contrary to the public interest, given the unique circumstances of this case. We also find that waiving the filing freeze and the electronic filing requirement will facilitate the provision of educational material through a broadband network in the vicinity of the Nisqually reservation and will further the Commission's goals of ultimately providing all Americans, especially members of Tribal Nations, with access to ubiquitous wireless broadband connections, regardless of their location.<sup>43</sup> We note that the waivers granted in the instant Order are based on the unique circumstances of this case, and do not prejudice the Commission's consideration of the appropriate mechanism generally for licensing unassigned EBS spectrum.<sup>44</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

16. For the reasons discussed above, we grant Nisqually's requests for waiver of (1) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*, and, (2) the electronic filing requirement in Section 1.1913(b) of the Commission's Rules. We also direct the Broadband Division to process Nisqually's Application in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

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 the Nisqually Indian Tribe on April 28, 2011, in connection with File No. 0004713667 ARE GRANTED, subject to the conditions noted below.

18. 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 licensing staff of the Broadband Division SHALL PROCESS File No. 0004713667 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

19. 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 following condition SHALL BE IMPOSED on any authorizations issued to the Nisqually Indian Tribe as a result of the application it has filed:

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<sup>40</sup> *Id.* at 11837 ¶ 13.

<sup>41</sup> Exhibit 1 at 14.

<sup>42</sup> See 47 C.F.R. § 27.14(o) (initial BRS licensees granted after November 6, 2009 must make a showing of substantial service within four years of license grant).

<sup>43</sup> FCC Strategic Plan 2006-2011 at 5. In turn, this goal is based upon the statutory requirement that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Telecommunications Act of 1996, P.L. 104-104, Section 706(a).

<sup>44</sup> See *Second FNPRM*, *supra*.

The Nisqually Indian Tribe shall not lease any spectrum associated with this license to another entity.

The Nisqually Indian Tribe shall make a showing of substantial service within two years after the date of initial license grant.

20. 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

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