

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

In the Matter of Applications of)
)
KINGS COUNTY SUPERINTENDENT OF) File Nos. 0007432862 and 0007432863
SCHOOLS)
)
For New Educational Broadband Service Stations)
)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2016

Released: December 20, 2016

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

I. INTRODUCTION

1. On August 17, 2016, the Kings County Superintendent of Schools (KCSS) filed applications and a waiver request in support of those applications for new Educational Broadband Service (EBS) channels for certain areas covering Kings County, California outside of areas already permanently licensed to KCSS.¹ In this *Memorandum Opinion and Order*, subject to certain conditions, we grant to KCSS a waiver of the filing freeze on new EBS applications and a waiver of Section 1.913(b)² of the Commission’s rules to permit manual filing of its applications.

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,³ 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.⁴ 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

¹ Application File Nos. 0007432862 and 0007432863 (2016 Applications); Request for Waiver (2016 Waiver Request) (filed August 17, 2016).

² 47 CFR § 1.913(b).

³ See Amendment of Parts 2 and 4 of the Commission’s Rules and Regulations to Establish a New Class of Educational Television Service, Docket No. 14744, *Report and Order*, 39 FCC 846 (1963), *recon. denied*, 39 FCC 873 (1964) (*ETV Decision*).

⁴ 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 para. 9 (1983) (*1983 R&O*) (*citing ETV Decision*, 39 FCC 846, 852-853 para. 25).

blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁵ In conjunction with this re-allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.⁶

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).⁷ 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.⁸ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.⁹ The Commission also permitted the filing of applications for major modifications of EBS licenses, but maintained the filing freeze with respect to applications for new EBS licenses.¹⁰ 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.¹¹ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.¹²

4. *Kings County Applications.* KCSS is the official name for the Kings County Office of Education, one of fifty-eight county offices of education in the State of California.¹³ KCSS provides technical assistance, curriculum and instructional support, staff development, financial support services, and oversight to all Kings County public school districts.¹⁴ KCSS delivers education to more than 27,000

⁵ 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*).

⁶ *Id.* at 1206-07 para. 4.

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 MHz Bands. *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722 (2003) (*NPRM and MO&O*).

⁸ See *NPRM and MO&O*, 18 FCC Rcd at 6813 para. 226, 6825 para. 260.

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. *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 para. 1, 16853 para. 13 (2003) (*Second MO&O*).

¹⁰ *Id.*

¹¹ 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*).

¹² 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 paras. 180-204 (2008) (*Second FNPRM*).

¹³ 2016 Waiver Request at 1.

¹⁴ *Id.*

K-12 public school students in the county.¹⁵ In addition, KCSS is itself an accredited educational institution, providing direct instruction to students by operating four schools: two alternative schools for Court and Community School, and two special education schools providing for pupils with special needs throughout Kings County.¹⁶

5. KCSS is the current licensee of EBS station WNC785 on the B channel group, with a GSA that covers the eastern-most portion of Kings County.¹⁷ KCSS also utilizes capacity on the G channel group channels of EBS station WNC790 within the same portion of Kings County under a cooperative arrangement with neighboring Tulare County Superintendent of Schools, which is the licensee of WNC790.¹⁸

6. On June 27, 2011, KCSS applied for Special Temporary Authority (STA) to operate the B and G group EBS channels within the portions of Kings County that were not within the GSA of any other licensed co-channel EBS station.¹⁹ The Wireless Telecommunications Bureau (“Bureau”) granted STAs on the B group (call sign WQOE779) and G group (call sign WQOE778) on September 2, 2011.²⁰ The Bureau placed conditions on the grants of STA, based on commitments made by KCSS. First, the Bureau adopted as a license condition KCSS’s commitment not to lease its spectrum.²¹ Second, the Bureau held, consistent with KCSS’s request, that KCSS’s GSAs shall not include any area within the GSA of any previously licensed co-channel EBS station.²²

7. Subsequently, KCSS constructed and operated a WiMAX system that has been since converted to an LTE wireless system on the B and G groups within the combined GSAs of EBS Stations WNC785, WNC790, WQOE778 and WQOE779 in Kings County.²³ Because the term of an STA is limited to six months, KCSS has (to date) sought eight (8) renewals of the STA for each channel group, the current term of which expired on September 3, 2016,²⁴ and for which requests for renewal were timely filed and remain pending.²⁵

8. KCSS has recently transitioned from a 2.5 GHz WiMAX network to a 2.5 GHz LTE network which it utilizes to provide educational services within its coverage area.²⁶ The system currently

¹⁵ *Id.* at 1-2.

¹⁶ 2016 Waiver Request at 1-2.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2. *See* Substantial Service Showing of WNC790 (File Number 0004617308, granted April 29, 2011).

¹⁹ File Nos. 0004787800 and 0004787793 (filed June 27, 2011) (2011 STA Applications).

²⁰ Wireless Telecommunications Bureau Market Based Applications Action, Report No. 7175, *Public Notice* (rel. Sep. 21, 2011) at 4.

²¹ *See* Licenses for WQOE778 and WQOE779. *See also* 2011 STA Applications at 3.

²² *Id.*

²³ 2016 Waiver Request at 2.

²⁴ *See, e.g.*, File Nos. 0005057970, 0005368741, 0005673210, 0005955307, 0006281626, 0006569394, 0006887790 and 0007120666 (Applications for renewal of EBS STA WQOE779); File Nos. 0005057995, 0005368730, 0005673214, 0005955327, 0006281682, 0006569444, 0006887878 and 0007120723 (Applications for renewal of EBS STA WQOE778).

²⁵ Application for Renewal of License for Station WQOE779, File No. 0007406368 (filed Aug. 22, 2016) and Application for Renewal of License for Station WQOE778, File No. 0007406331 (filed Aug. 22, 2016).

²⁶ 2016 Waiver Request at 1-2.

consists of seven LTE cell sites – two in Corcoran, and one each in Kit Carson, Island, Lemoore, Avenal and Kettleman City.²⁷ Using this network, the school districts in those locations are now providing wireless broadband service to about 4,200 students.²⁸ In addition, the network currently serves over a thousand staff accounts and KCSS managed home user accounts not served by the local school district.²⁹ This includes 31 families are located on the Santa Rosa Rancheria of the Tachi Yokuts Tribe, a federally recognized tribal entity.³⁰ Participating school districts provide students with computing devices that are connected to the KCSS LTE network.³¹ Students are encouraged to take such devices home to share with their families.³² Many of these students are from the “lower end of the socio-economic spectrum and are very challenged to obtain alternative Internet access services, which in many cases are limited even if they exist at all.”³³

9. On August 17, 2016, KCSS filed the instant applications and associated requests for waivers of the EBS filings freeze and the electronic filing requirement of Section 1.913(b) of the Commission’s rules, in support of those applications requesting additional permanent EBS channels (to replace channels being operated pursuant to STA) in unserved and underserved areas in Kings County, California. KCSS explains that it plans to deploy an additional eight sites within Kings County, including five sites in Hanford, one site in Armona, one site in Central and one site in Stratford.³⁴ Construction of these eight additional sites will ensure that all populated areas of Kings County will be served and will allow KCSS to provide wireless broadband service to most of their 27,000 students and their families.³⁵ Without the grant of the subject applications (or the grant of the pending STA renewal applications), only three of these additional sites could be constructed, and certain of the constructed sites would have to be shut down.³⁶

10. Based on the comparison of certain metrics from before and after the construction and deployment of the existing KCSS wireless broadband network, and the provision of devices and broadband services to students, KCSS has found that student suspensions and failures have decreased, the number of students being promoted and making the honor roll has increased, the number of high school students taking and passing college level courses has increased, and there has been significant improvement in student reading and math proficiency.³⁷ In addition to these substantial educational benefits, the schools have launched applications that have successfully increased parental involvement.³⁸ In addition, the city of Avenal is now partnering with KCSS to make KCSS’s wireless broadband service available to the entire community.³⁹ To that end, the city recently dedicated the Avenal Technology

²⁷ *Id.* at 2 and Exhibit A.

²⁸ 2016 Waiver Request at 2-3.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 4.

³³ *Id.* at 3.

³⁴ 2016 Waiver Request at 3.

³⁵ *Id.* at 3.

³⁶ *Id.* at 4.

³⁷ *Id.* at 4-5 and Exhibit D.

³⁸ *Id.* at 4-5.

³⁹ *Id.* at 5.

Center, a facility intended to help members of the communication develop new skills and increase opportunities for success.⁴⁰ According to KCSS, all of this at risk if the 2016 Applications are not granted.⁴¹

11. Included as attachments to the 2016 Applications are letters of support from the Honorable David G. Valado, United States Representative; the Honorable Andy Vidak, California State Senator; Thomas Addington, Superintendent of the Central Union School District; Superintendent David East of the Reef-Sunset Unified School District; and Melissa Whitten, City Manager for the City of Avenal, all indicating support for the grant to KCSS of the 2016 Applications, and their desire to work with KCSS to bring broadband access to students (and their families) located throughout Kings County.⁴²

12. KCSS's Applications were listed on public notice as accepted for filing on September 7, 2016.⁴³ No petitions to deny or other oppositions were filed.

III. DISCUSSION

13. As noted, KCSS seeks both a waiver of the filing freeze on new EBS applications and a waiver of the electronic filing requirement contained in Section 1.913(b) of the Commission's rules for such applications, to permit it to use available EBS channels to operate a LTE network for the provision of educational and instructional material.⁴⁴ 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.⁴⁵ As discussed below, we conclude that KCSS has met the waiver standard with respect to both of its requests, such a grant would be consistent with Bureau precedent⁴⁶ and accordingly we grant its Waiver Requests, subject to the conditions outlined below.

14. We conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by KCSS. Specifically, we find that, absent access to the additional channels of EBS spectrum, KCSS would face substantial challenges in building the network necessary for providing educational content to unserved and underserved areas of Kings County, California. Similar to what has determined in other cases, there is limited broadband available in

⁴⁰ *Id.*

⁴¹ *Id.* at 5 and 8.

⁴² *Id.* at Exhibit E.

⁴³ Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 11670, *Public Notice* (rel. Sep. 7, 2016) at 3.

⁴⁴ 2016 Waiver Request at 5-9.

⁴⁵ 47 C.F.R. § 1.925(b)(3).

⁴⁶ *See, e.g.*, Application of 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); Application of The Nisqually Indian Tribe, *Memorandum Opinion and Order*, 28 FCC Rcd 15569 (WTB BD 2013); The Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 28 FCC Rcd 15576 (WTB BD 2013); The Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 28 FCC Rcd 15583 (WTB BD 2013); Application of The Board of Trustees of Northern Michigan University For a New Educational Broadband Service Station, *Memorandum Opinion and Order*, 31 FCC Rcd 3371 (WTB BD 2016).

those areas, and where such service is available, it is not affordable for these communities.⁴⁷ In addition, there are no available EBS licensees that cover these areas.⁴⁸ Without other EBS licensees in these areas, KCSS cannot attempt to acquire or lease spectrum from another EBS licensee. It therefore has no alternative to asking the Commission for additional channels. Furthermore, given the urgent need for continued and additional educational broadband service in these areas, we do not believe that asking KCSS to wait until the Commission develops a new mechanism for assigning unassigned EBS spectrum is appropriate. We therefore conclude that KCSS has justified a waiver of the EBS filing freeze under the second prong of the waiver standard.

15. We will impose the same conditions on the grant of this authorization that the Bureau has imposed in previous cases. In this regard, we adopt as a license condition KCSS's continued commitment not to lease its spectrum.⁴⁹ 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 or to a governmental organization engaged in the formal education of enrolled students."⁵⁰ KCSS is such an accredited institution and such a governmental organization and has indicated that it will use the proposed EBS system solely for educational purposes.⁵¹ The provision of educational broadband services via new EBS licenses 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]."⁵² We find that KCSS's concrete plan to put the spectrum to use immediately solely for educational purposes⁵³ and its commitment not to lease the spectrum⁵⁴ constitute unique circumstances that will ensure "that the spectrum is used for educational purposes"⁵⁵ justifying a waiver of the filing freeze.

16. We place the further condition on KCSS's license that its GSAs shall not include any area within the GSA of any previously licensed co-channel EBS station.⁵⁶ In addition, we recognize that granting these waivers will result in KCSS obtaining valuable spectrum. While we believe that there are substantial public interest benefits to granting these waivers, we also believe it appropriate to place conditions on the waiver grant to ensure that the anticipated public interest benefits materialize. Thus, given the lack of broadband alternatives in the areas in questions, we believe it is appropriate to require KCSS to build out on an accelerated schedule. As KCSS has already committed to an accelerated

⁴⁷ 2016 Waiver Request at 6-7.

⁴⁸ 2011 STA Applications, Exhibit at 3.

⁴⁹ 2016 Waiver Request at 7.

⁵⁰ 47 CFR § 27.1201(a).

⁵¹ 2016 Waiver at 6.

⁵² 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 the A and B Group Channels in Arden, West Virginia, *Memorandum Opinion and Order*, 22 FCC Rcd 15789, 15796 para. 15 (2007) *citing BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14222 para. 152.

⁵³ 2016 Waiver Request at 3.

⁵⁴ *Id.* at 7.

⁵⁵ *2008 Waiver Order*, 23 FCC Rcd at 11837 para. 13.

⁵⁶ As indicated in the Waiver Request, KCSS has not requested authorization for any EBS spectrum already authorized to another entity. 2016 Waiver Request at 8.

construction schedule,⁵⁷ we will require KCSS to provide substantial service pursuant to Section 27.14(o) within two years from the date the Applications are granted by the Bureau.⁵⁸

17. With respect to the electronic filing requirement contained in Section 1.1913(b) of the Commission's Rules,⁵⁹ we observe that the Commission's electronic ULS is not currently configured to accept applications such as the ones submitted by KCSS. 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 KCSS a waiver to permit manual filing of its Applications.

18. Based upon the evaluation of the record before us, we conclude that KCSS 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 unserved and underserved areas in Kings County, California and will further the Commission's goal of ultimately providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.⁶⁰ We note that the waivers granted in the instant *Memorandum Opinion and 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.⁶¹

IV. CONCLUSION AND ORDERING CLAUSES

19. For the reasons discussed above, we grant KCSS'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 Kings County's Applications in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

20. 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 Kings County Superintendent of Schools on August 17, 2016 in connection with File Nos. 0007432862 and 0007432863 ARE GRANTED, subject to the conditions noted below.

21. 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, Wireless Telecommunications Bureau SHALL PROCESS File Nos. 0007432862 and 0007432863 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

⁵⁷ 2016 Waiver Request at 3.

⁵⁸ 47 CFR § 27.14(o).

⁵⁹ 47 CFR § 1.913(b).

⁶⁰ FCC, Strategic Plan for the FCC for Fiscal Years 2015 through 2018, at 11 (2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-331866A1.pdf. 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." 47 U.S.C. § 1302(a).

⁶¹ See *Second FNPRM*, *supra*.

22. 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 conditions SHALL BE IMPOSED on each authorization issued to Kings County Superintendent of Schools as a result of the applications it has filed:

The Geographic Service Area of this station shall not include any area within the GSA of any previously licensed co-channel EBS station.

The Kings County Superintendent of Schools shall not lease any spectrum associated with this license to another entity.

The Kings County Superintendent of Schools shall demonstrate substantial service within two years after the grant of their applications.

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

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