

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

In the Matter of	)	
	)	
Gateway Telecom LLC dba	)	
STRATUSWAVE COMMUNICATIONS,	)	
Assignor	)	
	)	
WHEELING JESUIT UNIVERSITY, Assignee	)	File No. 0004320696
	)	
Application for Commission Consent to Assign	)	
Educational Broadband Service Station WQHJ858	)	
	)	
Gateway Telecom LLC dba	)	
STRATUSWAVE COMMUNICATIONS,	)	
Assignor	)	
	)	
DAVIS & ELKINS COLLEGE, Assignee	)	File No. 0004281076
	)	
Application for Commission Consent to Assign	)	
Educational Broadband Service Station WQHJ859	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: January 10, 2017**

**Released: January 10, 2017**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Order on Reconsideration*, we affirm the Wireless Telecommunications Bureau's ("Bureau") prior holding that Gateway Telecom LLC d/b/a/ StratusWave Communications ("StratusWave") has failed to justify the removal of the remaining two conditions on its licenses to operate Educational Broadband Service ("EBS") Stations WQHJ858 and WQHJ859 (the "Licenses").

**II. BACKGROUND**

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

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

StratusWave served over 3,000 dial-up customers and 500 broadband residential and business customers, and had over 1,300 business telephone local lines and more than 500 resale local residential lines.<sup>2</sup>

3. On October 25, 2005, StratusWave applied for four vacant A-group and four vacant B-group EBS channels in Centerville, Ohio<sup>3</sup> and Arden, West Virginia.<sup>4</sup> In addition to filing these applications, StratusWave requested a waiver of the following Commission requirements: (a) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*;<sup>5</sup> (b) Section 27.1201(c)(3) of the Commission's Rules to permit StratusWave to hold licenses for EBS channels without holding a license or lease rights for at least four channels to be used in conjunction with the facilities proposed in the application;<sup>6</sup> and (c) Section 1.913(b) of the Commission's rules to permit manual filing of the applications.<sup>7</sup>

4. On August 8, 2007, the Commission, in the *StratusWave Waiver Order*,<sup>8</sup> found that it was in the public interest to grant StratusWave's waiver requests and permit StratusWave to file applications for two EBS licenses because doing so "would increase the availability of competitive broadband services to consumers in north central West Virginia and the upper Ohio River Valley."<sup>9</sup> To ensure that the anticipated public interest benefits materialized and that StratusWave would not receive a windfall without

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

<sup>3</sup> Application, File No. 0002362083 (filed Oct. 25, 2005).

<sup>4</sup> Application, File No. 0002362089 (filed Oct. 25, 2005).

<sup>5</sup> See Waiver Requests 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.")

<sup>6</sup> See Waiver Requests at 1. Section 27.1201(c)(3) of the Commission's Rules stated at that time in relevant part that "[t]o be licensed on EBS channels, a wireless cable applicant must hold a license or a lease, or must have filed an unopposed application for at least four BRS channels to be used in conjunction with the facilities proposed on the EBS frequencies." 47 C.F.R. § 27.1201(c)(3) (2005). We note that this rule and the other rules dealing with the "wireless cable" exception to the EBS eligibility rule were eliminated on July 19, 2006. 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 Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5754-5756 ¶¶ 360-366 (2006). However, the Commission stated that any pre-existing requests for spectrum under the wireless cable exception would be grandfathered. 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, 14292-93 ¶¶ 347-350 (2004) (*BRS/EBS R&O and FNPRM*). Since StratusWave's applications were pending at the time the rules were eliminated, the Commission considered its request using the rules in effect at the time it filed.

<sup>7</sup> See Waiver Requests 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).

<sup>8</sup> Gateway Telecom LLC d/b/a StratusWave Communications, *Memorandum Opinion and Order*, 23 FCC Rcd 15789 (2007) ("*StratusWave Waiver Order*").

<sup>9</sup> *Id.* at 15798 ¶ 20.

delivering its proposed service, the Commission imposed a series of conditions on the licenses.<sup>10</sup> The license conditions required that StratusWave: (1) make a showing of substantial service by December 31, 2009, rather than on or before May 1, 2011, the general substantial service deadline for all Broadband Radio Service and EBS licensees operating in the 2496-2690 MHz band;<sup>11</sup> (2) not assign or transfer the license until the Commission accepted its substantial service showing; (3) not be permitted to renew the license; and (4) reduce, modify, or terminate operations in any areas in which a new co-channel or adjacent-channel EBS licensee begins service.<sup>12</sup> The Bureau subsequently issued two licenses authorizing StratusWave to operate EBS Stations, WQHJ858, which covers the northern panhandle of West Virginia and adjacent portions of Ohio and Pennsylvania, and WQHJ859, which covers part northeastern West Virginia including the cities of Fairmont, Clarksburg, Morgantown, and numerous rural communities, with the conditions imposed by the Commission in the *StratusWave Waiver Order*.<sup>13</sup> StratusWave did not protest or note any objection to these conditions.

5. In 2009, StratusWave timely filed two Construction Notifications and associated amendments.<sup>14</sup> StratusWave also filed an application and an associated amendment to modify Station WQHJ859 to permit it to operate four point-to-point links on the campus of Davis and Elkins College, which is located inside the National Radio Astronomy Observatory's Quiet Zone and Station WQHJ859's Geographic Service Area ("GSA").<sup>15</sup>

6. On June 30, 2010, StratusWave applied to assign its license for Station WQHJ858 to Wheeling Jesuit University ("WJU") and to assign its license for Station WQHJ859 to Davis & Elkins

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<sup>10</sup> *Id.* at 15799 ¶ 23.

<sup>11</sup> On March 22, 2011, the Wireless Telecommunications Bureau ("Bureau") extended the deadline for EBS licensees to demonstrate substantial service from May 1, 2011 to November 1, 2011. *See* National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 (WTB 2011).

<sup>12</sup> *StratusWave Waiver Order*, 22 FCC Rcd at 15800 ¶ 27.

<sup>13</sup> Call Signs WQHJ858 and WQHJ859. *See* Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 3387, *Public Notice* (rel. Aug. 22, 2007) at 3. *See also* Authorizations for EBS Stations WQHJ858 and WQHJ859.

<sup>14</sup> File Nos. 0003872836 (filed Jun. 16, 2009, amended Dec. 30, 2009), 0004079884 (filed Dec. 30, 2009) ("Construction Notifications").

<sup>15</sup> *See* File No. 0004040579 (filed Nov. 20, 2009, amended Dec. 8, 2009) ("Quiet Zone Application"). Part of the GSA of StratusWave's Station WQHJ859 is located within the zone that requires coordination with the National Radio Astronomy Observatory in Green Bank, West Virginia, and the Naval Radio Research Observatory at Sugar Grove, West Virginia. *See* 47 C.F.R. § 1.924(a)(1). Notwithstanding BRS and EBS's conversion to geographic area licensing, a BRS or EBS station must be individually licensed if the station would affect radio quiet zones. *See* 47 C.F.R. § 27.1209(b)(1)(iii).

College (“Davis & Elkins”).<sup>16</sup> StratusWave sought a waiver of Sections 1.110<sup>17</sup> and 1.945(e)<sup>18</sup> of the Commission’s Rules, to enable it to assign the Licenses without the third and fourth conditions adopted by the Commission in 2007 in the *StratusWave Waiver Order*.<sup>19</sup> In other words, the parties sought to be able to renew the license and to not be required to reduce, modify, or terminate operations in any areas in which a new co-channel or adjacent-channel EBS licensee begins service. Both Sections 1.110 and 1.945(e) of the Commission’s Rules required StratusWave to request removal of the conditions by September 17, 2007, 30 days from the date the licenses were granted.<sup>20</sup>

7. On March 20, 2010, the Rural Utilities Service (“RUS”) approved a loan/grant combination to StratusWave under the Broadband Initiatives Program (“BIP”) for a loan amount of \$1,475,459 and a grant of \$1,417,597.<sup>21</sup> The legal documents to close the award were transmitted to StratusWave on June 10, 2010 and were to be executed and returned to RUS within 60 days.<sup>22</sup> On August 5, 2010, StratusWave requested an extension of time to execute the legal documents for the loan/grant RUS award until October 1, 2010 to further investigate potential tax obligations and to address certain licensing issues with the FCC.<sup>23</sup> A year later, on October 12, 2011, RUS terminated the loan/grant offer to StratusWave because StratusWave did not return the documents necessary to close the award.<sup>24</sup>

8. On June 13, 2012, the Bureau adopted the *StratusWave MO&O*.<sup>25</sup> The Bureau found that StratusWave had complied with the substantial service condition for Stations WQHJ858 and WQHJ859 by

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<sup>16</sup> File No. 0004320696, Application for Assignment to Wheeling Jesuit University of Educational Broadband Service Station WQHJ858; File No. 0004281076, Application for Assignment of Educational Broadband Service Station WQHJ859 to Davis & Elkins College (filed June 30, 2010) (“StratusWave Assignment Applications”).

<sup>17</sup> 47 C.F.R. § 1.110 (“Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.”).

<sup>18</sup> 47 C.F.R. § 1.945(e) (“The FCC may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the FCC does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the FCC revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.”).

<sup>19</sup> See StratusWave Assignment Applications, Public Interest Statement, Request for Removal of License Conditions and Contingent request for Waiver at 1.

<sup>20</sup> 47 C.F.R. §§ 1.110, 1.945(e).

<sup>21</sup> Gateway Telecom LLC, Petition for Partial Reconsideration (filed July 16, 2012) (“Petition”) at Exhibit B, Letter from Kenneth Kuchno, Director, Broadband Division, Telecommunications Program, Rural Utilities Service to Mr. Howard R. Irvin, III, President, Gateway Telecom, LLC (Oct. 12, 2011) (“RUS Letter”).

<sup>22</sup> RUS Letter.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Gateway Telecom LLC d/b/a/ StratusWave Communications, *et al.*, Memorandum Opinion and Order and Order on Reconsideration, 27 FCC Rcd 6302 (“StratusWave MO&O”).

building point-to-point links under both licenses.<sup>26</sup> The Bureau also found that WJU and Davis & Elkins met the qualifications to hold EBS licenses and held that StratusWave could assign the licenses because it had demonstrated substantial service for both licenses.<sup>27</sup> The Bureau also approved arrangements under which WJU and Davis & Elkins would lease spectrum back to StratusWave.<sup>28</sup> The Bureau, however, denied StratusWave's requests to waive Section 1.110 and 1.945(e) of the Commission's Rules and thus did not remove the remaining two conditions from the licenses.<sup>29</sup> The Bureau also found that there were no changed circumstances that would warrant the removal of the conditions.<sup>30</sup> Consequently, under the *StratusWave MO&O*, StratusWave may assign only the remainder of its license term, which expires on August 16, 2017, to WJU and Davis & Elkins. And if they consummate the assignment, WJU and Davis & Elkins must reduce, modify, or terminate operations in any area where a new co-channel or adjacent channel EBS licensee begins service, which in effect imposes secondary status on the licenses.<sup>31</sup>

9. On June 15, 2012, the Bureau, acting pursuant to the StratusWave MO&O, accepted StratusWave's Construction Notifications for Stations WQHJ858 and WQHJ859.<sup>32</sup> Thus, StratusWave met the first condition associated with Stations WQHJ858 and WQHJ859, to demonstrate substantial service by December 31, 2009. StratusWave also met the second condition because its assignment applications were not consented to until the Bureau accepted the Construction Notifications for the Stations.

10. On July 16, 2012, StratusWave petitioned for partial reconsideration of the *StratusWave MO&O* and asked the Bureau to remove the remaining two conditions from the licenses.<sup>33</sup> StratusWave argues that the Bureau made two errors in the *StratusWave MO&O*.<sup>34</sup> First, StratusWave argues that the Bureau erred in characterizing StratusWave's request for a waiver of Section 1.110 as untimely collateral attack on the license conditions and in not considering the public interest benefits in removing the remaining two conditions from the licenses.<sup>35</sup> Second, StratusWave argues that the Bureau erred in holding that circumstances have not changed since the licenses were granted.<sup>36</sup> StratusWave states that it and WJU and

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<sup>26</sup> *Id.* at 6307-6308 ¶¶ 9-10.

<sup>27</sup> *Id.* at 6309-6310 ¶ 12.

<sup>28</sup> *Id.* at 6310 ¶ 12.

<sup>29</sup> *Id.* at 6311 ¶ 15, 6312-6313 ¶¶ 18-19.

<sup>30</sup> *Id.* at 6313 ¶ 20.

<sup>31</sup> The *StratusWave MO&O* also took several other actions that are not at issue in the instant *Order on Reconsideration*. It authorized processing of StratusWave's application to add sites to the license for Station WQHJ859 located within the National Radio Astronomy Observatory Quiet Zone. *StratusWave MO&O*, 27 FCC Rcd at 6308-6309 ¶ 11. It addressed issues relating to a license application filed by Utopian for four Auction 86 Broadband Radio Service licenses, including a petition to deny filed by StratusWave against that application. *Id.* at 6314-6316 ¶¶ 22-26. It also denied a petition filed by Vermont Telephone Company, Inc. against lease applications involving Utopian. *Id.* at 6316-6317 ¶¶ 27-29. Finally, it rejected abuse of process allegations that the parties had raised against each other. *Id.* at 6317-6318 ¶¶ 30-31.

<sup>32</sup> Construction Notifications.

<sup>33</sup> Petition at 2.

<sup>34</sup> *Id.* at iii.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Davis & Elkins withdraw their applications for approval of their excess capacity leases.<sup>37</sup> Utopian opposed StratusWave's petition for reconsideration.<sup>38</sup>

### III. DISCUSSION

11. It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.<sup>39</sup> Much of StratusWave's Petition merely reargues points previously considered and rejected by the Bureau. For example, the *StratusWave MO&O* thoroughly considered StratusWave's request for waiver of Section 1.110 of the Commission's Rules but concluded that a waiver was not warranted because a waiver would not protect the Commission's valid interest in the finality of its decisions and because StratusWave's voluntary decision to assign the licenses with associated lease-backs was not an unusual or unique circumstance.<sup>40</sup> While StratusWave takes issue with the Bureau's analysis,<sup>41</sup> it cites no precedent in support of its argument, and we see no basis in the Petition for disturbing the analysis in the *StratusWave MO&O*.

12. To the extent StratusWave presents new claims and arguments, however, we believe additional discussion is warranted. With respect to its waiver request, StratusWave now represents that it no longer seeks authority to enter into excess capacity leases with WJU and Davis & Elkins and that this case is now indistinguishable from *The Board of Trustees of Northern Michigan University* case.<sup>42</sup> StratusWave also now offers several new factors that it claims are changed circumstances that would justify relief from the conditions. StratusWave argues that the following circumstances constitute a material change, thus undermining the original purpose for imposing the conditions and rendering the conditions no longer in the public interest: (1) StratusWave has satisfied two of the four conditions; (2) StratusWave's efforts have been constrained by petitions filed by Utopian, which have caused protracted proceedings, which in turn has prevented StratusWave from obtaining the required investment needed to make the operations successful; (3) the Rural Utilities Service ("RUS") withdrew its approval of the funding for StratusWave's Broadband Infrastructure Program project because of the uncertainties caused by the protracted proceedings; and (4) the economic conditions in the largely rural areas of West Virginia and Ohio have deteriorated markedly since the Licenses were issued.<sup>43</sup> We will consider those arguments further.

13. The Bureau rejected StratusWave's argument that it was similarly situated to Northern Michigan University, which received a waiver of the EBS filing freeze, "because, unlike StratusWave,

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<sup>37</sup> *Id.* at 6.

<sup>38</sup> Opposition to Petition for Partial Reconsideration, Utopian Wireless Corporation, (filed July 26, 2012) ("Opposition"). The Bureau previously held that Utopian lacked standing to challenge the StratusWave Assignment Application. *StratusWave MO&O*, 27 FCC Rcd at 6310 ¶ 14. Accordingly, while we have considered the Opposition and StratusWave's reply, we see no need to extensively discuss those pleadings. See Reply to Opposition to Petition for Partial Reconsideration, Gateway Telecom LLC d/b/a StratusWave Communications, (filed Aug. 7, 2012).

<sup>39</sup> See Regents of the University of California, *Order*, 17 FCC Rcd 12891, 12892 ¶ 2 (WTB PS&PWD 2002) (citing Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles, *Order*, 3 FCC Rcd 1667 ¶ 2 (1988)); and M&M Communications, Inc., *Memorandum Opinion and Order*, 2 FCC Rcd 5100 ¶ 7 (1987).

<sup>40</sup> *StratusWave MO&O*, 27 FCC Rcd at 6312-6313 ¶¶ 18-19.

<sup>41</sup> Petition at 4-6.

<sup>42</sup> *Id.* at 6-7, citing Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 23 FCC Rcd 11832 (WTB 2008) ("*NMU MO&O*").

<sup>43</sup> Petition at 8-9.

Northern Michigan University was eligible to hold an EBS license, intended to use the license solely for educational purposes, and agreed not to lease the spectrum.”<sup>44</sup> StratusWave now argues that because WJU and Davis & Elkins are no longer obliged to lease spectrum to StratusWave, its situation is now controlled by the *NMU MO&O*.<sup>45</sup> The Petition does not explain how WJU and Davis & Elkins would construct or operate facilities if they were not leasing spectrum to StratusWave. In any event, even with that new representation, this situation is not similar to Northern Michigan University because these licenses have no educational programming obligations and WJU and Davis & Elkins would be free to sell these licenses to commercial entities. StratusWave obtained the licenses pursuant to the former “wireless cable” exception to the old ITFS eligibility requirements, which allowed commercial entities to acquire access to ITFS spectrum under limited circumstances.<sup>46</sup> EBS licenses issued pursuant to the old “wireless cable” exception are grandfathered and are not subject to the educational programming requirements of Sections 27.1203 and 27.1214 of the Commission’s Rules.<sup>47</sup> Furthermore, while most EBS licenses can only be assigned to entities meeting the strict EBS eligibility requirements,<sup>48</sup> EBS licenses obtained pursuant to the “wireless cable” exception may be assigned to commercial entities.<sup>49</sup> The Commission explained in 2007 that the conditions StratusWave now complains about were necessary to meet the public interest in ensuring that educators could access the spectrum in the future.<sup>50</sup> In this case, if we remove the conditions that StratusWave objects to, we would have no way of protecting educational use of the spectrum because WJU and Davis & Elkins would be under no obligation to use the spectrum for educational purposes and would be free to sell the spectrum to StratusWave or another commercial entity. In contrast, Northern Michigan University was subject to the educational programming requirements and could only assign its licenses to another EBS-eligible entity.

14. In making a decision to terminate a license condition, the Commission considers whether the circumstances have changed in a material way that undermines the purpose of the condition. The Commission evaluates whether the condition remains necessary in the public interest based on that analysis.<sup>51</sup> We conclude that StratusWave has not demonstrated that there has been a material change in circumstances that renders the conditions no longer in the public interest.

15. First, we reject StratusWave’s argument that satisfying the first two conditions constitutes a material change that undermines the original purpose of the conditions. The first two conditions were

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<sup>44</sup> *StratusWave MO&O*, 27 FCC Rcd at 6313 ¶ 19. In the *NMU MO&O*, the Bureau granted waivers of the EBS filing freeze and the electronic filing requirement to allow Northern Michigan University to build and to operate a wireless broadband network “solely to meet the educational needs of the University and the surrounding community.” *NMU MO&O*, 23 FCC Rcd at 11836 para. 11. The Bureau also imposed a condition prohibiting the applicant from leasing its spectrum but noted that additional conditions imposed in this case were unnecessary because the Northern Michigan University license could only be assigned to another EBS-eligible entity. *Id.* at 11837 ¶ 13.

<sup>45</sup> Petition at 6-7.

<sup>46</sup> *StratusWave Waiver Order*, 22 FCC Rcd at 15789-15790 n.5, citing 47 C.F.R. § 27.1201(c)(3). The Commission explained that while the “wireless cable” exception to the EBS eligibility rule was eliminated in 2006, StratusWave’s pre-existing request to proceed under that rule was considered because it was grandfathered. *Id.*

<sup>47</sup> See 47 C.F.R. § 27.1201(d).

<sup>48</sup> See 47 C.F.R. § 27.1201(a).

<sup>49</sup> See 47 C.F.R. § 27.1201(d).

<sup>50</sup> *StratusWave Waiver Order*, 22 FCC Rcd at 15796 ¶ 16.

<sup>51</sup> Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, *Order*, 27 FCC Rcd 638, 640-641 ¶ 6 (2012).

legal obligations imposed on StratusWave to ensure that StratusWave rapidly provided service to its service areas and to prevent StratusWave from reaping a substantial windfall by transferring or assigning the Licenses before it provided substantial service.<sup>52</sup> Satisfying the first two conditions satisfied the purpose of imposing those two conditions, but the Commission imposed the remaining two conditions for different reasons. The remaining two conditions were imposed on StratusWave to protect educational entities that wish to access educational spectrum in the future.<sup>53</sup> As explained above, assigning or transferring the Licenses to WJU and Davis & Elkins does not protect the educational nature of the spectrum associated with the Licenses. In other words, only by conditioning the Licenses to a ten-year non-renewable term, did the Commission ensure that the spectrum associated with the Licenses would remain EBS spectrum, which would be available in the future to EBS eligible entities. Assigning or transferring the Licenses to EBS eligible entities does not change that fact.

16. Second, StratusWave does not explain how the pleadings filed by Utopian should affect the Commission's determination that the conditions in question should apply. StratusWave claims that it has been unable to obtain the required investment needed to make the operations successful.<sup>54</sup> The Bureau has rejected a similar argument StratusWave made earlier that the conditions in question deterred investment, noting, "In accepting the conditional license, however, StratusWave accepted the costs and risks associated with undertaking this project with the conditions prescribed."<sup>55</sup> If StratusWave was unable to obtain investment in 2009 because of the presence of conditions on its license, it is not apparent how Utopian's oppositions would have any material impact on StratusWave's attempts to obtain investment.

17. Third, the letter from RUS terminating the offer of the grant/loan award does not support StratusWave's argument that RUS withdrew its approval for StratusWave's Broadband Initiatives Program ("BIP") project because of the uncertainties caused by the protracted proceedings between StratusWave and Utopian.<sup>56</sup> On the contrary, the letter states that the grant/loan award was terminated because StratusWave had not made any progress on closing the award, "has had limited communication with RUS over the past year," and did not return the documents necessary to close the award.<sup>57</sup> Thus, it appears that StratusWave lost RUS financing because of its failure to communicate with RUS. The termination of the grant/award under those circumstances is not a changed circumstance that would support removing the conditions.

18. Finally, the deteriorating economic conditions in the largely rural areas of West Virginia and Ohio are not changed circumstances for purposes of removing license conditions.<sup>58</sup> The decision to impose conditions on StratusWave's licenses was based on the need to ensure that StratusWave provided the benefits it was serving and to protect the educational nature of EBS, not on the economic conditions in West Virginia. Thus, the deteriorating condition of the economies of West Virginia and Ohio is not a relevant change in circumstance.

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<sup>52</sup> *StratusWave Waiver Order*, 23 FCC Rcd at 15799 ¶ 23.

<sup>53</sup> *Id.* at 15798-15799 ¶¶ 22-23.

<sup>54</sup> Petition at 8.

<sup>55</sup> *StratusWave MO&O*, 27 FCC Rcd at 6312 ¶ 19.

<sup>56</sup> Petition at 8.

<sup>57</sup> RUS Letter.

<sup>58</sup> Petition at 8.



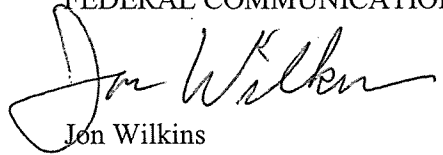
**IV. CONCLUSION AND ORDERING CLAUSES**

19. For the reasons discussed above, we conclude that StratusWave has failed to justify the removal of the remaining two conditions from its licenses to operate Stations WQHJ858 and WQHJ859. Thus, neither station may be renewed, and StratusWave (or WJU and Davis & Elkins) must protect a new adjacent-channel or co-channel EBS licensee within 30 days after the EBS licensee informs StratusWave that it is ready to commence service within any portion of StratusWave's geographic service areas.

20. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.106 the Petition for Partial Reconsideration filed by Gateway Telecom LLC, dba StratusWave Communications on July 16, 2012 IS DENIED.

21. This action is taken under designated 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



Jon Wilkins

Chief, Wireless Telecommunications Bureau