

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

In the Matter of Application of)
)
 CHOICE COMMUNICATIONS LLC) File No. 0008700428
)
 For a New Educational Broadband Service Station)

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 2019

Released: September 4, 2019

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On June 18, 2019, Choice Communications, LLC, d/b/a Viya (Viya) filed an application¹ for permanent authorization to use 2.5 GHz spectrum in St. Croix, St. Thomas, and St. John in the U.S. Virgin Islands (USVI)² for which it currently holds Special Temporary Authorizations under call signs WQXS462, WQXS464, and WQUT992 (the STAs). In this *Memorandum Opinion and Order*, we grant the Waiver Request subject to certain conditions specified herein.

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, in establishing the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band,³ envisioned that the band 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 blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁵

¹ See Choice Communications LLC: Application for Educational Broadband Service (EBS) License, File No. 0008700428 (Application) and Request for Waiver (Waiver Request) (filed June 18, 2019).

² The U.S. Virgin Islands consist of the main islands of St. Croix, St. Thomas, and St. John and several other surrounding islands.

³ See *Amendment of Parts 2 and 4 of the Commission's Rules and Regulations to Establish a New Class of Educational Television Service*, 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, 852-53 para. 25).

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*, Report and Order, 94 FCC 2d 1203 (1983) (*First Leasing Decision*).

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 (and it changed the service names to EBS and Broadband Radio Service (BRS), respectively). It also imposed a freeze on all applications for new BRS and EBS licenses.⁷ In June 2004, the Commission adopted new rules that fundamentally restructured the 2500-2690 MHz band, but it left the EBS filing freeze in place.⁸ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.⁹

4. In July 2019, the Commission adopted the *2.5 GHz Band Report and Order*, which changed the licensing requirements applicable to EBS, making the EBS regulatory requirements similar to those that apply to BRS.¹⁰ Among other changes, the Commission removed the eligibility requirements,¹¹ the educational use requirements,¹² and the leasing restrictions applicable to EBS.¹³ The Commission also created a Tribal priority filing window,¹⁴ after which it will auction three overlay licenses per county of any remaining white space.¹⁵ The Commission also adopted bidding procedures¹⁶ and performance requirements.¹⁷

5. *Viya’s Application.* Viya, through Choice Communications (Choice), has been using spectrum in the 2.5 GHz band in the USVI for more than 20 years.¹⁸ In the 1990s, Choice deployed a fixed wireless network over which it offered multichannel video programming distribution (MVPD) services, fixed wireless Internet access, and other related services.¹⁹ The demand for Choice’s 2.5 GHz fixed wireless broadband service grew rapidly throughout the early 2000s because of the lack of adequate wireline broadband alternatives available in the USVI at the time and the ability of Viya’s fixed wireless network to reach areas that the USVI’s incumbent local exchange carrier (ILEC) found it difficult to serve with wireline facilities.²⁰ Viya found that it did not have adequate spectrum resources to keep pace with

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, 18 FCC Rcd 6722 (2003) (*NPRM and MO&O*). Subsequently, the Commission lifted the freeze on applications for new BRS licenses but maintained it the freeze for applications for new EBS licenses. *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, 18 FCC Rcd 16848 para. 1, 16853, para. 13 (2003) (*Second MO&O*).

⁸ *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 *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*).

¹⁰ *Transforming the 2.5 GHz Band*, Report and Order, FCC 19-62 (2019) (*2.5 GHz Report and Order*).

¹¹ *Id.* at paras. 15-25.

¹² *Id.* at paras. 26-31.

¹³ *Id.* at paras. 32-35.

¹⁴ *Id.* at paras. 47-65.

this growth. As a result, and with the increased availability of Direct Broadcast Satellite video service in the USVI, Viya phased out its MVPD offering by mid-2009 in order to free its 2.5 GHz band spectrum exclusively for the provision of fixed wireless data services.²¹ This enabled Viya to expand the capacity and coverage of its broadband offering.²²

6. Viya currently uses all of the 2.5 GHz spectrum in St. Croix, St. Thomas, and St. John to operate its 4G LTE network.²³ Choice is the licensee of the Broadband Radio Service Basic Trading Area (BTA) license for the USVI.²⁴ With respect to EBS, Viya has accumulated the spectrum necessary to build this network by using a combination of STAs, spectrum leases, and its own commercial EBS authorization.²⁵

7. On June 18, 2019, Viya filed the instant Application, seeking permanent authority for all the EBS licenses that cover those portions of the USVI (BTA 491) that are not currently licensed to Choice or Shekinah.²⁶ Viya states that the scope of the geographic coverage of its existing STAs on the A, C, D, and G-group channels in St. Croix and the B, C, and D-group channels in St. Thomas and St. John is consistent with the geographic coverage of BTA 491.²⁷ Viya requests three waivers pursuant to section 1.925.²⁸ First, Viya seeks a waiver of the Commission's 2003 freeze on the filing of new applications new Educational Broadband Service licenses.²⁹ Second, Viya seeks a waiver of Section 1.913(b) of the Commission's rules to permit manual filing of the application.³⁰ Third, Viya seeks a waiver of the eligibility and educational use requirements in Sections 27.1201 and 27.1203 of the Commission's rules.³¹ Viya's Application was listed on public notice as accepted for filing on June 26, 2019.³² No petitions to deny or other oppositions were filed.

¹⁵ *Id.* at paras. 93-100.

¹⁶ *Id.* at paras. 87-92.

¹⁷ *Id.* at paras. 100-112.

¹⁸ Waiver Request at 2.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2.

²¹ *Id.* at 2-3.

²² *Id.* at 3.

²³ *Id.* at 3.

²⁴ Station B491.

²⁵ On St. Croix, Viya is authorized to operate on the A-group channels, through an STA for station WQXS464; the B-group channels, through a lease agreement with Shekinah Network (Shekinah) for Station WND210; the C and D-group channels, through an STA for station WQUT992, and the G-group channels, through an STA for station WQXS462. On St. Thomas and St. John, Viya is authorized to operate on the A-group channels, through its own commercial EBS station WQCY880; the B-group channels, through an STA for station WQXS462; the C and D-group channels, through an STA for station WQUT992; and the G-group channels, through a lease agreement with Shekinah for Station WNC892.

²⁶ *See* Waiver Request.

²⁷ *Id.* at 1-2 n.5.

²⁸ 47 CFR § 1.925.

²⁹ Waiver Request at 1.

III. DISCUSSION

8. To be granted a waiver, Viya must show that (i) “[t]he 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) “[i]n 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.”³³ As discussed below, we conclude that Viya has met the the waiver standard with respect to its requests, and accordingly, we grant its Waiver Request, subject to the conditions specified below.

9. We conclude that application of the filing freeze would be inequitable and contrary to the public interest under the unique circumstances presented by Viya. Other than Viya’s network, there is limited broadband available in the USVI. Viya’s 4G LTE network is better able to reach more areas than the island’s wireline broadband network.³⁴ In addition, Viya is using all of the available EBS spectrum and has no other immediate alternative than to seek permanent authorization.³⁵ If Viya were required to relinquish the spectrum it utilizes under its STAs, Viya would have to redesign the network to reduce both capacity and coverage area. Specifically, Viya would be required to drop from 3:1 frequency reuse to 1:1 frequency reuse. This change likely would require Viya to significantly reduce transmitter power at each cell site and, as a result, would require Viya to deploy more base stations to offer comparable capacity and coverage, especially in rural mountainous regions. This change in network architecture would fundamentally alter Viya’s cost structure to provide mobile broadband service in the USVI.³⁶ Particularly given factors unique to the USVI, as noted below, such a result would not be in the public interest. Viya therefore has justified a waiver of the EBS filing freeze under the second prong of the waiver standard.

10. Viya’s 4G LTE network has proven able to provide critical connectivity during the recovery from natural disasters.³⁷ The USVI is particularly vulnerable to hurricanes, as witnessed in 2017 when the USVI was struck by back-to-back Category 5 hurricanes, Irma and Maria. Those hurricanes caused catastrophic damage to homes, businesses, and communications infrastructure, including virtually all of the USVI’s wireline communication facilities, as well as Viya’s legacy wireless networks and its recently-completed 4G LTE network Viya.³⁸ Viya claims that it restored its 4G LTE network in a matter of weeks after the storms had passed, and, using its 2.5 GHz spectrum, turned up its 4G LTE network shortly after the hurricanes to provide sorely needed connectivity in the USVI in the aftermath of the storms.³⁹ Viya reports that its new 4G LTE network provided critical communications services for residents, businesses, the USVI government, as well as the USVI and federal first responders

³⁰ *Id.* at 1.

³¹ *Id.* at 1.

³² *Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing*, Report No. 14158, Public Notice at 5 (rel. June 26, 2019).

³³ 47 CFR § 1.925(b)(3).

³⁴ Waiver Request at 2.

³⁵ *Id.* at 3.

³⁶ *See id.* at 8-9.

³⁷ *Id.* at 2.

³⁸ *Id.* at 2.

³⁹ *Id.* at 2.

who were crucial to the USVI's post-hurricane recovery.⁴⁰ Viya also claims that the availability of the 2.5 GHz spectrum enabled it to distribute over 11,000 mobile Wi-Fi devices in the USVI, establish over two dozen public Wi-Fi hotspots, carry other mobile carriers' traffic while they addressed the damage to their networks, and provide fixed wireless broadband services to many of Viya's wireline customers as a substitute for the USVI's devastated wireline network.⁴¹

11. Moreover, Viya has made significant investment in the development of the 2.5 GHz band in the USVI. For over 20 years, Viya and its predecessor-in-interest have constructed and operated various wireless services over the in the 2.5 GHz band. As noted above, since 1996, Viya has deployed private capital to construct several generations of 2.5 GHz wireless networks in the USVI to provide a variety of fixed and mobile wireless services to residential and business customers.⁴²

12. To ensure that grant of the requested waivers will produce the public interest benefits we anticipate, we place two conditions on the waiver grant, which will be included in Viya's license. Both of these conditions are consistent with conditions imposed on prior grants of waivers of the EBS filing freeze.⁴³ First, the Geographic Service Areas (GSAs) of these licenses will not include any area within the GSA of any previously licensed co-channel EBS station.⁴⁴ Second, to ensure that the licensed spectrum is quickly put to use to serve a community that lacks broadband alternatives, we will require Viya to provide substantial service pursuant to Section 27.14(o) of the Commission's Rules within two years from the date that the license is granted by the Bureau.⁴⁵

13. With respect to the electronic filing requirement contained in Section 1.913(b) of the Commission's Rules,⁴⁶ we observe that the Commission's electronic ULS currently is not configured to accept applications such as the ones submitted by Viya. 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 Viya a waiver to permit manual filing of its Applications.

14. We further conclude that it would be inequitable and contrary to the public interest to apply the eligibility and educational use requirements to this case. Although the rules the Commission adopted in its July 2019 *2.5 GHz Report and Order* are not yet in effect, the rules will remove the eligibility and educational use requirements from the rules.⁴⁷ In light of the Commission's recent action, we find that it is not in the public interest to apply those rules here when they soon will no longer be effective.

IV. CONCLUSION AND ORDERING CLAUSES

15. For the reasons discussed above, we grant Viya'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,

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 2.

⁴² See para. 5, *supra*, Waiver Request at 2.

⁴³ See, e.g., *The Board of Trustees of Northern Michigan University*, Memorandum Opinion and Order, DA 19-687 (WTB rel. July 22, 2019); *Kings County Superintendent of Schools*, Memorandum Opinion and Order, 34 FCC Rcd 3226 (WTB 2019).

⁴⁴ VIYA has not requested authorization for any EBS spectrum already authorized to another entity. Waiver Request at 1 n.5.

⁴⁵ 47 CFR § 27.14(o).

⁴⁶ 47 CFR § 1.913(b).

⁴⁷ *2.5 GHz Report and Order* at paras. 26-31.

NPRM and MO&O; (2) Section 1.913(b) of the Commission's rules to permit manual filing of the application; and (3) the eligibility and educational use requirements in Sections 27.1201 and 27.1203 of the Commission's rules. We also direct the Broadband Division to process Viya's Application in accordance with the requirements set forth in this *Memorandum Opinion and Order* and the Commission's rules.

16. 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 CFR § 1.925(b)(3), that the Waiver Request filed by Choice Communications, LLC on June 18, 2019 in connection with File No. 0008700428 IS GRANTED, subject to the conditions noted below.

17. 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 No. 0008700428 in accordance with this *Memorandum Opinion and Order* and the Commission's Rules.

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 following conditions SHALL BE IMPOSED on any authorization issued to Choice Communications, LLC d/b/a Viya 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.

Choice Communications, LLC shall demonstrate that it has met the substantial service requirement contained in 47 CFR § 27.14(o) within two years after the grant of its application.

19. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale, Jr.
Chief, Wireless Telecommunications Bureau