

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

In the Matter of)
INDIANA STATE UNIVERSITY) File Nos. 0003612208, 0003542580
BOARD OF TRUSTEES)
Application for New Educational Broadband)
Service Station on the G Group Channels in)
Terre Haute, Indiana)
Application for Special Temporary Authority for)
New Educational Broadband Service Station on)
the G Group Channels in Terre Haute, Indiana)

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2013

Released: November 8, 2013

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the request of the Indiana State University Board of Trustees (ISU) for a waiver of the filing freeze on new Educational Broadband Service (EBS) applications, and direct dismissal of its application for four G group EBS channels in Terre Haute, Indiana.

II. BACKGROUND

2. 2500-2690 MHz Band Generally. In developing regulatory policies in the 2500-2690 MHz band over the last several decades, the Commission has been cognizant of this band's potential to host a variety of services. In 1963, the Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band, envisioning that it would be used for transmission of instructional material to accredited public and private schools, colleges and universities for the formal education of students. In 1983, in response to the demand for additional spectrum for delivery of video entertainment programming to subscribers, the Commission re-allotted eight ITFS channels (the E and F channel

1 We use the acronym in reference to the university or its board of trustees, as contexts require.

2 See Educational Television, Docket No. 14744, Report and Order, 39 FCC 846 (1963), recon. denied 39 FCC 873 (1964) (ETV Decision).

3 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.).

blocks) and associated response channels for use by the Multipoint Distribution Service (MDS).⁴ In conjunction with this re-allotment, the FCC permitted ITFS licensees to lease “excess capacity” on their facilities to commercial entities.⁵

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).⁶ 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.⁷ In August 2003, the Commission modified the freeze by permitting the filing of applications for new BRS licenses and major modifications of those licenses.⁸ 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.⁹ 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.¹⁰ In 2008, the Commission sought comment on how to license unassigned EBS spectrum.¹¹

4. *Indiana State University Applications.* Indiana State University (ISU) is located in Terre Haute, Indiana, which in 2000 had a population of 59,614 and a median income of \$28,018.¹² Founded in 1865, the university has been named one of the nation’s “best value” undergraduate institutions and

⁴ 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*).

⁵ *Id.* at 1206-07 ¶ 4.

⁶ 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 (2003)

⁷ 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.”)

⁸ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of fixed and Mobile Broadband Access, Educational and Other advanced Services in the 2150-2162 and 2500-2690 Bands. *Second Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 16848 ¶ 1 (2003) (*Second MO&O*).

⁹ *Id.*

¹⁰ 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*).

¹¹ 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*).

¹² Amended Waiver Request at 2, *citing* 2000 U.S. Census.

included on the list of “Best Midwestern Colleges” by *The Princeton Review*.¹³ With a faculty-to-student ratio of 1-to-17.3, ISU is the third largest employer in Terre Haute.¹⁴

5. In 2008, ISU launched an effort to obtain EBS authorizations to provide its own wireless broadband service to faculty and students. Specifically, in August 2008, ISU filed an application for special temporary authority (STA) to operate on channels G1-G4 in Terre Haute, Indiana, under the old EBS channel plan.¹⁵ In October 2008, ISU filed an application for permanent authorization to use these channels, also accompanied by a waiver request.¹⁶ As discussed in greater detail below, ISU amended its application on June 29, 2009.¹⁷ ISU sought waiver of: (a) the filing freeze on new EBS applications¹⁸ and (b) Section 1.913(b) of the Commission’s rules to permit manual filing of the Application.¹⁹

6. In its application, ISU states that it intends to use the EBS frequencies to deploy and operate a wireless broadband service in and around the university’s campus, to provide internet access and connectivity to ISU students and faculty.²⁰ ISU says that in 2007, it began phase one of its “Laptop University” program by providing laptop computers to members of its incoming freshman class and members of the faculty, and indicates that it wishes to expand the success of this program by offering seamless broadband connectivity on a consistent and reliable wireless network.²¹ ISU claims that its situation is similar to that of Northern Michigan University (NMU), which was granted a waiver of the EBS filing freeze to deploy several EBS channels.²² Like NMU, ISU represents that the majority of its students live off campus, many in places where they do not have access to affordable, consistent or reliable broadband service.²³ ISU also claims that like NMU, it lacks opportunity to lease spectrum from an incumbent EBS licensee.²⁴ ISU also compares its circumstances to that of another successful waiver

¹³ Amended Waiver Request at 2, citing *The Princeton Review* website at <http://ir.princetonreview.com/ReleaseDetail.cfm?ReleaseID=191273> (retrieved on Jan. 21, 2010) and ISU news release at <http://indstate.edu/news/news.php?newsid=982> (retrieved on Jan. 21, 2010).

¹⁴ Amended Waiver Request at 2, citing Terre Haute Economic Development Corp. website at http://www.terrehauteareaedc.com/econ_top_emp.htm (retrieved on Jan. 21, 2010).

¹⁵ Request for Special Temporary Authority, File No. 0003542580 (filed Aug. 8, 2008) (STA Application). In the STA Application, ISU filed an accompanying request for waiver of the EBS filing freeze.

¹⁶ File No. 0003612208 (filed Oct. 14, 2008) (Original Application or Original Waiver Request as contexts require). In the Original Application, ISU sought channels G1-G4 under the old EBS channel plan for this band. Earlier, ISU had filed an application for special temporary authority (STA) and an accompanying request for waiver to operate on those same channels. Request for Special Temporary Authority, File No. 0003542580 (filed Aug. 8, 2008) (STA Application).

¹⁷ Amendment, File No. 0003612208 (filed Jun. 29, 2009) (Amended Application or Amended Waiver Request as contexts require). In the Amended Application, ISU changed the channels that it seeks to G1-G4 under the post-transition EBS channel plan. It did not file a corresponding amendment to the STA Application.

¹⁸ See Original and Amended Waiver Requests at 1.

¹⁹ See Original and Amended 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).

²⁰ See Original and Amended Waiver Requests at 1.

²¹ Original and Amended Waiver Request at 3.

²² *Id.* at 4, citing Board of Trustees of Northern Michigan University, *Memorandum Opinion and Order*, 23 FCC Rcd 11832 (WTB 2008) (“*Northern Michigan Order*”).

²³ See Original and Amended Waiver Requests at 2.

²⁴ Original and Amended Waiver Requests at 4.

applicant, StratusWave Communications, whose commercial service provides broadband access to student and educators in underserved areas.²⁵

7. ISU's original application was listed on public notice as accepted for filing on October 21, 2009.²⁶ Two parties – the Instructional Telecommunications Foundation, Inc. (ITF) and Clearwire Corp. (Clearwire) – filed pleadings in response to the PN. ITF filed a petition to deny on May 21, 2009.²⁷ ITF, which owns EBS station WHR509 in Indianapolis, located 69.4 miles from ISU's proposed transmitter site, filed a petition to deny.²⁸ ITF argues that, if ISU's proposed station were to be authorized, ITF would be denied the chance to extend its GSA into EBS "white space" in the Terre Haute area.²⁹ It notes that the Commission is preparing to adopt procedures for assigning unlicensed EBS spectrum in WT Docket No. 03-66,³⁰ and argues that granting ISU's application would result in "me too" EBS waiver applications that would impede the Commission's efforts to establish an orderly method for allocating EBS white space through rulemaking.³¹ ITF also contends that ISU's situation differs from StratusWave's and NMU's in two respects: residents of Terre Haute have abundant access to broadband telecommunications,³² and the surrounding area is replete with nearby EBS and BRS operations.³³ An engineering report attached to the ITF Petition lists 20 licensed BRS or EBS channels whose GSAs largely overlap ISU's proposed GSA.³⁴

8. Clearwire Corp. filed comments also opposing ISU's application as filed but stating that it would not oppose grant of a license to ISU on a secondary basis, if the secondary license were conditioned to ensure that existing licensees could maintain their existing service areas and the Commission could award primary licenses later.³⁵ Clearwire cites with approval the following conditions

²⁵ *Id.*, citing Gateway Telecom LLC d/b/a StratusWave Communications, *Memorandum Opinion and Order*, 22 FCC Rcd 15789, 15794 ¶ 11 (2007) ("*StratusWave Order*").

²⁶ See Wireless Telecommunications Market-Based Applications Accepted for Filing, Report No. 5346, *Public Notice* (rel. Oct. 21, 2009) at 2.

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²⁸ Petition to Dismiss or Deny, Instructional Telecommunications Foundation, Inc. (filed May 21, 2009) ("ITF Petition"). The center of Station WHR509's geographic service area (GSA) is located at 39° 46' 11.2" N latitude and 86° 09' 26.0" W longitude. ITF originally argued that ISU's proposed station, if authorized, would receive a part of ITF's 35-mile GSA by operation of Section 27.1206 of the Commission's Rules. ITF Petition at 1-2. ISU's Amended Application moots that concern by excluding any areas within the GSAs of previously authorized EBS stations. See Amended Application at 1.

²⁹ ITF Petition at 2.

³⁰ *Id.* See *Second FNPRM*, 23 FCC Rcd at 6060-6068 ¶¶ 180-204.

³¹ ITF argues that granting ISU's application would set a precedent that would be binding upon the Commission and require the grant of any application for a new EBS station at almost any location. ITF Petition at 6, citing *Tel. & Data Sys. V. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987); *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

³² ITF states that Time Warner provides cable broadband service in Terre Haute with a system that passes 39,150 homes; that the county containing Terre Haute, Vigo County, is also served by Avenue Broadband Communications, Inc., and Suddenlink Communications, and that each of the surrounding counties has between two and four cable operators. It further states that AT&T Mobility, Sprint Nextel, Verizon Wireless, T-Mobile and US Cellular offer wireless broadband service through major portions of the area. ITF Petition at 4.

³³ *Id.* at 5.

³⁴ *Id.*, Exhibit A.

³⁵ Clearwire Comments at 5. Clearwire claims standing on the ground that it is the proponent for EBS/BRS spectrum transition for the Terre Haute BTA, and that it is a licensee and lessee of BRS and EBS spectrum in the market. *Id.* at 1.

that the Commission attached to the StratusWave license grant and recommends that they be applied to ISU: 1) that the licensee make its substantial service showing within 30 months; 2) that it not assign its licenses before its substantial service showing; that the license grant be limited to a ten-year, non-renewable term, and 3) that the licensee either reduce or terminate its service prior to the expiration of its term if an EBS licensee wishes to commence service in any part of the spectrum assigned to the licensee.³⁶ Clearwire further contends that ISU has not demonstrated any compelling need for the spectrum that it requests.³⁷

9. The parties filed subsequent pleadings that generally reiterate their positions.³⁸ ISU contends that it is essential to integrate broadly the use of computer technology throughout the ISU curriculum,³⁹ and provides statements of support from several other educational institutions to which it plans to make its wireless broadband system available.⁴⁰ ISU acknowledges that many of its faculty and students can obtain commercial, retail broadband service, and that while Terre Haute may not be in as uniquely remote a location as Northern Michigan University, but argues that its proposal meets the waiver standard.⁴¹ ISU further notes that grant of its application cannot impede the Terre Haute market's transition to the new band plan because that transition has already occurred in the Terre Haute BTA.⁴² For its part, ITF reiterates that the Commission has previously waived the EBS filing freeze only where there were no incumbent EBS licensees that could provide the applicant with broadband service on a leased basis.⁴³ ITF asserts that there are 12 EBS and seven BRS channels licensed in the Terre Haute

³⁶ *Id.* at 5. Clearwire also argued that ISU's Original Application did not meet two conditions in Northern Michigan University's EBS license: that the licensee's GSA not include any area within the GSA of any previously granted co-channel EBS license, and that the licensee commit not to lease any spectrum associated with its license to another entity. *Id.* ISU later satisfied both of the latter two conditions in its Amended Application. *See* Amended Application at 1. Clearwire also objected to the Original Application's request for pre-transition rather than post-transition channels, a concern that ISU resolved in the Amended Application by changing its request to post-transition channels. *See* Clearwire Comments at 3 and Amended Application at 1.

³⁷ Clearwire Comments at 3.

³⁸ ISU filed two extensions of time to respond to the ITF Petition and Clearwire Comments. *See* Consent Motion for Extension of Time to Respond (filed Jun. 2, 2009); Consent Motion for Further Extension of Time to Respond (filed Jun. 16, 2009). ITF and Clearwire consented to the requested extensions. *Id.* We grant the requested extensions pursuant to 47 C.F.R. § 1.46.

³⁹ ISU Response to Comments and Opposition to Petition to Dismiss or Deny (ISU Response) at 2. ISU further contends that its Amended Application has addressed the petitioners' technical objections, and it makes the following representations: (1) its GSA shall not include any area within the GSA of a currently authorized EBS station; (2) it agrees to exclude the 0.5 miles of overlap between the proposed ISU G1-G4 boundaries and ITF's WHR509 G1-G4 GSA boundary; (3) that it will not lease any portion of the spectrum to another party; (4) it does not intend to assign the spectrum in the near future; and (5) that it will deploy the service prior to May 1, 2011. *Id.* at 4-5.

⁴⁰ ISU Response at 3. ISU states that it performed a needs study in conjunction with IBM, Ivy Tech Community College, Rose-Hulman Institute of Technology and Union Hospital. *Id.* at 9-10. It attaches letters of support from Ivy Tech and Saint Mary-of-the-Woods College. *Id.* at 11 and attached letters from C. Jack Maynard, Provost and Vice President for Academic Affairs, Indiana State University; Don Arney, Dean, School of Technology & Director of Technology, Ivy Tech Community College, Wabash Valley Region, and Gordon Afdahl, Vice President for Finance & Administration, Saint Mary-of-the-Woods College.

⁴¹ ISU Response at 5-6.

⁴² ISU attaches Clearwire's Terre Haute post-transition notification indicating that EBS channels A1-A4, C1-C4, D1-D4, E1-E4 and H1-H4 have all transitioned to the new band plan, which ITF says implies that EBS channels B1-B4, F1-F4 and G1-G4 remain unlicensed and therefore fallow. ITF Response at 7.

⁴³ ITF Reply to Consolidated Response to Comments and Opposition to Petition to Dismiss or Deny (ITF Reply) at 4.

area, that all of them are non-operational and therefore vacant, and that the licensees or their commercial lessees would probably begin service and lease channels to ISU if it offered reasonable compensation, which ITF says would cost ISU less than building and operating its own EBS system.⁴⁴

10. Subsequently, in June 2009, ISU filed an amended application and waiver request to address some of the concerns raised by ITF and Clearwire. The amended request specifies that ISU seeks the G-group channels on the post-transition frequency assignments listed in Section 27.5(h)(2) of the Commission's rules, and that it excludes from its proposed geographic service area (GSA) the entire GSAs of any co-channel incumbent licensees within 35 miles of its proposed transmitter site.⁴⁵ ISU also commits not to lease any portion of its spectrum to another party, not to reassign the spectrum in the near future, and to deploy the service by May 1, 2011.⁴⁶

III. DISCUSSION

11. ISU seeks waiver of: (a) Section 1.913(b) of the Commission's rules to permit manual filing of its application;⁴⁷ and (b) the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003 *NPRM and MO&O*.⁴⁸ 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.⁴⁹

12. With respect to the electronic filing requirement contained in Section 1.913(b) of the Commission's Rules,⁵⁰ we observe that the Commission's electronic Universal Licensing System (ULS) is not currently configured to accept applications such as the one submitted by ISU. 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 ISU a waiver to permit manual filing of its Original and Amended Applications.

⁴⁴ ITF Reply at 4-5. ITF states that eight of those channels are licensed to the Trustees of Indiana University, which it characterizes as an affiliate of ISU. ITF Reply at 5 and ITF Petition at 5. ISU acknowledges that ISU and Indiana University are both public universities that receive state funds but argues that such a connection does not constitute an affiliate relationship. ISU Clarification for the Record at 1-2.

⁴⁵ With the exception of the excluded areas, ISU seeks authorization for a circular GSA with a 35-mile radius, centered at 39° 28' 20.3" N latitude and 087° 24' 11.9" W longitude. Amended Application at 1. In the Original Application, ISU had sought pre-transition G-Group channels and proposed a GSA that would have overlapped the 35-mile GSA of EBS station WHR509 and triggered the "splitting the football" rule to divide the overlap between the two stations' 35-mile radius areas. See 47 C.F.R. §§ 27(h)(2) and 27.1206.

⁴⁶ Amended Waiver Request at 1. On September 12, 2009, ISU filed a pleading addressing the issue of whether there is a relationship between it and Indiana University, to which ITF responded. See Clarification for the Record (filed Aug. 12, 2009); Reply to Clarification for the Record (filed Sep. 4, 2009). We strike these pleadings from the record, as we do not find them to address issues material to the resolution of this proceeding. See D. H. Overmyer Communications Co., Docket No. 16388, *Memorandum Opinion and Order*, 4 FCC 2d 496, 505 (Rev. Bd. 1966).

⁴⁷ See Amended Waiver Request at 1 and 47 C.F.R. § 1.913(b).

⁴⁸ See Amended Waiver Request at 1. See also *NPRM and MO&O*, *supra* note 4, at 18 FCC Rcd 6811 ¶ 226 and 6825 ¶ 260.

⁴⁹ 47 C.F.R. § 1.925(b)(3).

⁵⁰ See 47 C.F.R. § 1.913(b).

13. We conclude, however, that ISU has not justified a waiver of the filing freeze on new EBS applications. With respect to the first prong of the waiver standard, ISU argues that while the Commission imposed the filing freeze to avoid disrupting the transition to the new band plan, that concern is not a factor in the Terre Haute market because that Terre Haute BTA has already been transitioned.⁵¹ We believe that another purpose of the freeze is to ensure an orderly process which gives all eligible educational institutions the opportunity to apply for EBS spectrum. We believe allowing ISU to obtain EBS spectrum outside a regular licensing process would be inconsistent with the underlying purposes of the freeze. In the cases where waivers of the EBS filing freeze have been granted, the applicants had no other means of acquiring spectrum.⁵²

14. On the other hand, ISU persuasively demonstrates that its faculty and students and those of other local institutions would benefit from wireless broadband connectivity. We could see waiving the freeze if ISU demonstrated that a waiver of the freeze would be the only means of accomplishing the public interest benefits that would result from its system. We conclude, however, that ISU has failed to make such a showing because it does not explain why those needs could not be met by the many EBS and BRS channels that are already licensed in its immediate vicinity. ISU has not challenged ITF's assertions that there are 12 EBS and seven BRS channels licensed in the Terre Haute area.⁵³ ISU has not shown that it attempted to obtain or lease spectrum from other licensees in the area. To the extent that licensed EBS and BRS channels in ISU's vicinity are inactive, that spectrum would presumably be available for ISU's use.

15. It is inarguable that the residents of Terre Haute, would benefit from an additional wireless broadband provider, but that is equally true for the many other similarly situated communities whose needs the Commission is addressing in WT Docket No. 03-66. Recent Congressional legislation has underscored the importance of broadband to the nation and its position as a top priority at the Commission.⁵⁴ The nation is in the midst of a massive proceeding to ensure that all Americans have access to broadband.⁵⁵ In this case, however, we believe that the best way to meet that concern is for the Commission to adopt and implement an orderly licensing process that takes the needs of all potential applicants and their users into account, and provides all of them with a fair and equal opportunity to obtain the spectrum that they seek.

⁵¹ ISU Response at 7.

⁵² See *Choice MO&O*, (Choice was currently using all licensed BRS and EBS spectrum in connection with its system, and there was no other licensed BRS or EBS spectrum in the Virgin Islands); *StratusWave MO&O*, (No other BRS or EBS spectrum licensed within StratusWave's GSA); *NMU MO&O*, (No active EBS licensees within NMU's proposed GSA).

⁵³ See ITF Petition at 5 and Exhibit A; ITF Reply at 4-5.

⁵⁴ See, e.g., American Recovery and Reinvestment Act of 2009, § 6001(k)(2), Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act) (tasking the Commission with developing a national broadband plan to seek to ensure that all people of the United States have access to broadband); Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, title VII, Sec. 706, 110 Stat. 56, 153 (1996) (1996 Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. § 1301 *et. seq.*; 47 U.S.C. § 1301(1) (finding that the expansion of broadband technology "has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans"); BDIA § 102(2); 47 U.S.C. § 1301(2) (recognizing that continued deployment and adoption of broadband technology is necessary "to ensuring that our Nation remains competitive and continues to create business and job growth").

⁵⁵ A National Broadband Plan for Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 4342 (2009); MICHAEL J. COPPS, ACTING CHMN., FCC, BRINGING BROADBAND TO RURAL AMERICA: REPORT ON A RURAL BROADBAND STRATEGY (May 22, 2009), *attached to* Acting Chairman Copps Releases Report on Rural Broadband Strategy, GN Docket No. 09-29, *Public Notice*, 24 FCC Rcd 7366 (2009).

16. We also conclude that ISU does not meet the second prong of the waiver standard because it has not shown that its situation is “unique or unusual” or that it lacked any reasonable alternative. In the cases where the Commission has granted waivers of the EBS filing freeze, the applicants had no means of acquiring spectrum on the secondary market, either because there was no licensed BRS/EBS spectrum in the area or because the applicant had already licensed or leased all available spectrum in the market. The Commission has applied that policy to commercial as well as educational applicants. For example, in granting a waiver to StratusWave Communications, the Commission noted that there were no BRS or EBS licensees in the five BTAs encompassing the area where the applicant sought to expand its service, north central West Virginia and the upper Ohio River Valley.⁵⁶ When the Bureau granted Choice Communications’ application for a waiver to seek four of the 12 vacant EBS channels in its service area, the St. Thomas/St. Croix, Virgin Islands community, the Bureau noted that only eight EBS channels had been licensed in that area in the past 40 years, that all of them were held by an entity that leased its excess capacity to Choice, and that Choice, as the BRS BTA authorization holder for the U.S. Virgin Islands, had the exclusive right to apply for commercial EBS channels in that area.⁵⁷ Finally, Northern Michigan University, the other entity that has received a waiver of the EBS filing freeze, demonstrated that there were no EBS licenses in the area where it wished to develop an educational broadband system.⁵⁸ While ISU claims that the difference between Northern Michigan University and itself is just a matter of degree of how uniquely remote their communities are,⁵⁹ there is actually a fundamental difference between the two communities because ISU had the alternative of obtaining licensed spectrum from another licensee. Given the availability of licensed spectrum in the Terre Haute market, ISU is no differently situated than other educational institutions that have meritorious plans for using EBS spectrum to support their educational mission.

17. In light of the deficiencies in the Amended Waiver Request, we believe that it would be inequitable to deprive other educators of an equal opportunity to apply for the spectrum once the Commission has developed a new mechanism for assigning unassigned EBS spectrum.⁶⁰ The large number of EBS and BRS channels that are already licensed in the Terre Haute area implies that there could be considerable demand for the spectrum requested by ISU. This situation contrasts with previous successful waiver requests, where it seemed unlikely that other potential applicants were waiting to file competitive applications for the spectrum being sought by the applicants. In *StratusWave*, where there were no prior EBS licensees, the grant of a waiver left three full EBS channel groups unassigned and available for other applicants.⁶¹ In *Northern Michigan University*, the applicant’s transmitter site was located in a relatively remote rural region on Michigan’s upper peninsula, with no nearby EBS stations.⁶² Furthermore, all Lower Band Segment and Upper Band Segment EBS channels remained unassigned after grant of Northern Michigan University’s application. In *Choice Communications*, the Bureau concluded that “there would appear to be a relatively small number of local educational institutions that would be interested in applying for EBS spectrum” because of the “relative isolation and small population” of the Virgin Islands.⁶³ Thus, the applicants that received waivers were able to overcome the

⁵⁶ *StratusWave Order*, 22 FCC Rcd at 15794 ¶ 11.

⁵⁷ Choice Communications LLC, *Memorandum Opinion and Order*, 20 FCC Rcd 10906, 10909-10910, ¶ 10 (WTB 2005) (“*Choice Order*”).

⁵⁸ *Northern Michigan Order*, 23 FCC Rcd at 11836 ¶ 10.

⁵⁹ ISU Response at 5.

⁶⁰ See *BRS/EBS 2nd FNPRM*.

⁶¹ *StratusWave Order*, 22 FCC Rcd at 15794 ¶ 12.

⁶² *Northern Michigan Order*, 23 FCC Rcd at 11833 ¶ 5.

⁶³ *Choice Communications Order*, 20 FCC Rcd at 10913 ¶ 17.

presumption that granting waivers would have a preclusive effect on other educators. ISU's application does not pass that test.

18. In sum, ISU has not provided a convincing argument that granting its Amended Application and Waiver Request would accelerate the deployment of wireless broadband Internet service in its area. It does not provide an adequate justification for the preclusive effect that its proposal would have on other likely applicants, including the licensees of several EBS stations in its immediate vicinity. ISU has not shown that the underlying purpose of the Commission's rules would be frustrated if it complies with them, nor has it shown that applying those rules in this situation would be inequitable, unduly burdensome or contrary to the public interest.⁶⁴ We therefore deny its request for waiver of the EBS filing freeze and dismiss the Amended Application without prejudice.⁶⁵ We also deny the STA Request because ISU has not justified grant of special temporary authority for its proposed operations.

IV. CONCLUSION AND ORDERING CLAUSES

19. For the reasons discussed above, we grant ISU's request for waiver of the electronic filing requirement of Section 1.913(b) of the Commission's Rules, but we deny its request for a waiver of the filing freeze that was imposed by the Commission on new EBS applications in the Commission's April 2003, *NPRM and MO&O*. We therefore dismiss its Amended Application. We also deny the STA Request.

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 Sections 1.913(b) and 1.925(b)(3) of the Commission's Rules, 47 C.F.R. §§ 1.913(b), 1.925(b)(3), that the Waiver Request filed by the Indiana State University Board of Trustees on June 29, 2009 in connection with File No. 0003612208 IS GRANTED with respect to the request for waiver of Section 1.913(b) of the Commission's Rules but is otherwise DENIED.

21. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL DISMISS the application filed by the Indiana State University Board of Trustees for a new Educational Broadband Service Station on March 27, 2009, as amended on June 29, 2009 (File No. 0003612208).

22. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), that the licensing staff of the Broadband Division SHALL DISMISS the application filed by the Indiana State University Board of Trustees for special temporary authority for a new Educational Broadband Service Station on August 6, 2008 (File No. 0003542580).

23. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, that the Consent Motion for Extension of Time to Respond filed on June 2, 2009 and the Consent Motion for Further Extension of Time to Respond filed on June 16, 2009 by the Indiana State University Board of Trustees ARE GRANTED.

24. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.45, that the Clarification for the Record filed by the Indiana State University Board of Trustees on August 12,

⁶⁴ See 47 C.F.R. § 1.925(b)(3).

⁶⁵ See 47 C.F.R. § 1.934(d)(2) (application may be dismissed if it requests waiver, waiver is denied, and application does not contain alternative proposal that complies with rules).

2009 and the Reply to the Clarification for the Record filed by Instructional Telecommunications Foundation, Inc. on September 2, 2009 ARE STRICKEN.

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

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau