

**BRS Rural Advocacy Group
Central Texas Communications, Inc.**

April 5, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***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***
WT Docket No. 03-66
NOTICE OF EX PARTE PRESENTATION

Dear Ms. Dortch:

On behalf of the BRS Rural Advocacy Group (the "Group") and Central Texas Communications, Inc. ("CTC"), this is to provide notice that on April 5, 2006, Donald L. Herman, Jr., counsel to CTC, and the undersigned, counsel to the Group, met with John Grant, Special Advisor for Policy to Commissioner Deborah Taylor Tate, to discuss certain issues pending in the above-referenced proceeding.

The parties urged adoption of their proposal that would allow eligible multichannel video programming distributors ("MVPDs") to "opt out" of a transition to the new BRS/EBS band plan upon meeting specified criteria. The parties pointed out that the Commission's decision to require BRS/EBS operators and licensees to file waiver requests with the FCC in order to maintain their MVPD operations was problematic in two respects. First, the Commission did not provide adequate guidelines on what criteria it would look favorably upon in reviewing waiver requests. Second, the Commission's failure to act on long-pending waiver requests confirms that the waiver process results in delays that create uncertainty in the market transition process. The parties discussed their waiver proposal and the process for opting out of transitions. These are summarized on the attached outline, which was distributed at the meeting.

The parties also stated that, if the Commission did not adopt the "opt-out" proposal and process advocated by CTC and the Group, the Commission should provide more specific guidance on those facts and criteria the Commission would look upon favorably in acting on waiver requests. In particular, the parties submitted that the Commission should act favorably on waiver requests filed by rural BRS/EBS operators and licensees that demonstrate they are serving a critical mass of customers, transmitting on a significant number of channels or providing meaningful competition to other MVPDs. Moreover, the Commission should act on waiver requests within 60-to-90 days following the filing of the last authorized pleading in the waiver proceeding. By

committing to act within a specific timeframe, the Commission can provide the public with certainty and facilitate rapid transitions to the new band plan consistent with the Commission's waiver action.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this notice is being filed electronically.

Please contact the undersigned if there are any questions concerning this matter.

Respectfully submitted,

/s/ Stephen E. Coran

/s/ Donald L. Herman, Esq.

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cc: John Grant, FCC

Enclosure

**BRS Rural Advocacy Group
Central Texas Communications, Inc.
WT Docket No. 03-66**

The BRS Rural Advocacy Group and Central Texas Communications, Inc. are **rural** BRS/EBS operators providing MVPD service to sparsely-populated, underserved areas of the country. We have participated in this proceeding as independent advocates for a self-effectuating **transition “opt-out” process** that would allow certain rural BRS/EBS systems to preserve their existing operations in easily-defined circumstances.

Existing policies are unfair and have proven to be inefficient

The policy adopted in the *Report and Order* requires licensees to seek waiver of the transition rules in order to continue providing MVPD services to the public. This policy is unfair.

- Licensees that complied with FCC rules and invested millions of dollars in constructing and operating systems should not bear the *WAIT Radio* burden of obtaining waiver of Commission rules and policies to continuing providing service to the public.
- The Commission has provided scant guidance on the criteria it will favorably consider in acting on waiver requests.
- Case-by-case consideration of waiver requests creates administrative burdens, delays of indefinite duration, uncertainty in the outcome and “line-drawing.”

The Commission’s experience in considering waiver requests confirms the fears that rural interests identified and discussed in their pleadings and *ex parte* presentations.

- On April 29, 2005, W.A.T.C.H.TV Company filed a Request for Waiver of the transition rules. W.A.T.C.H. TV’s arguments were not opposed. In the eleven months since it was filed, Commission staff has taken no action on the waiver request.
- On September 30, 2005, Digital One TV filed a similar Request for Waiver. In the five months since it was filed, Commission staff has taken no action on the waiver request. Nevertheless, the waiver request has been opposed.

In sum, the waiver process unfairly prejudices the legitimate rights of incumbent operators and has been administered in a way that does not work.

The rural proposal and opt-out/waiver process solves these problems

The BRS Rural Advocacy Group and Central Texas Communications, Inc. have developed a criterion that addresses the concerns of rural BRS/EBS licensees and support a detailed process that provides certainty and flexibility without unreasonably disrupting the transition process.¹

The proposal

A BRS/EBS licensee would be eligible to automatically opt out of a transition if:

- (a) the center of its geographic service area (“GSA”) (*i.e.*, the site of its main transmitter) is located in a county that is a defined “rural area” under FCC rules; *and*
- (b) as of October 7, 2002 (i) it was part of system that provided MVPD and/or broadband service to more than 15 percent of the households within that “rural area;” *or* (ii) it was part of system composed of at least 20 collocated analog BRS/EBS channels that provided MVPD service to at least 500 customers (as few as 11 channels if the licensee can demonstrate that channels were not available because of the 1995 EBS filing “freeze”). Licensees collocated with a licensee meeting any of the above criteria also would be eligible to “opt out.”

We also support the “opt-out” proposal advanced by the Coalition (*i.e.*, as of October 7, 2002, provision of MVPD service on more than seven digital channels or provision of service to at least five percent of the households in the licensee’s GSA). Benefits of the proposal include the following:

- The opt-out plan applies only to a narrowly-defined class of rural systems that have achieved critical mass in customers, competitiveness and/or channels, and permits such systems to avoid draconian results such as channel loss, transition expense and shift in business objectives (from video to other services) if forced to transition.
- The opt-out plan is a self-effectuating process that is easy to administer and relies on information that can be readily determined and verified without FCC involvement
- The opt-out plan preserves BRS/EBS as a low-cost competitive alternative to high-cost DBS video service, which often is the only other MVPD serving rural areas, and “greenfield” broadband service.
- The opt-out plan allows rural systems to engage in long-range business planning critical to their vitality and to maximize investment opportunities.

The process

- As initially proposed by other parties, a licensee eligible to opt out under pre-established criteria (and any co-located licensee) would file a certification with the Commission demonstrating opt-out eligibility within 30 days of the effective date of new rules adopted in this proceeding. After reviewing the opt-out certifications, the Commission would publish a list of those licensees deemed eligible to opt out of a transition. As noted below, even in cases where a licensee is eligible to opt out, it may still want to participate in a transition if the Initiation Plan accommodates its service objectives.

¹ This process was articulated by the National Telecommunications Cooperative Association, OPASTCO and the Rural Telecommunications Group, Inc. in a joint *ex parte* presentation filed December 1, 2005 in this proceeding.

- Within 30 days from the release of the published list of licensees eligible to opt out, a licensee that did not qualify could file a request for waiver of the transition rules. The Commission would issue a public notice listing the waiver requests it received. Parties with standing would have 15 days to oppose a waiver request, and the waiver proponent would have 10 days to reply. The Commission would issue a decision within 60 days from the last-filed pleading granting the waiver in whole or in part or denying the waiver request.
- On or before the 30th day of the Transition Planning Period, any licensee deemed eligible to opt out could either participate in the transition or file a notice with the Commission that it is opting out of a transition.
- A licensee deemed eligible to opt out could itself initiate a transition at any time before the end of the period for filing an Initiation Plan. Similarly, a licensee that either opted out or obtained a waiver could, as part of the transition process, agree to relocate its analog operations to digital spectrum in the MBS, if the transition proponent and/or other licensees were willing to pay the costs associated with such relocation. As proposed by the BRS Rural Advocacy Group, at the beginning of the self-transition period, any licensee that did not participate in a transition (whether by opting out or waiver), could elect to either: (a) transition its channels to the new band plan; (b) exchange all of its spectrum for bidding credits; or (c) vacate its analog LBS and UBS spectrum in exchange for financial assistance to migrate operations to digital spectrum in the MBS that would permit an equivalent number of programming streams at the same or better quality.
 - In cases where the auction for “white area” LBS and UBS spectrum has occurred as of the election date, the analog MVPD operator selecting the digital exchange option would be required to relocate operations to the MBS subject to the financial assistance rules adopted by the Commission.
 - In cases where the auction for “white area” LBS and UBS spectrum has not occurred as of the election date, any licensee selecting the digital exchange option would not be permitted to actually exchange its LBS/UBS license for an MBS spectrum license until a new licensee has been selected for the vacated LBS and UBS channels in the area, thereby assuring the analog MVPD that it would be compensated for the digital technology upgrade.
 - In cases where the auction for “white area” LBS and UBS spectrum has occurred as of the election date but no auction participant has bid for the spectrum, any licensee selecting the last option could continue to operate “as is” subject to any opt-out or waiver relief it obtained.

Benefits of this process include the following:

- The process establishes specific deadlines for seeking opt-out or waiver relief and requires Commission action within a specified period of time to ensure certainty for all BRS/EBS licensees, including those desiring to transition.
- This process requires substantially less administrative input without unduly compromising the rights of those licensees that desire to transition.
- The process encourages flexibility and expedites transitions by clearing the LBS and UBS bands, yet affords the analog MVPD an early opportunity to migrate to more efficient digital operations in the MBS.