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

In the Matter of	)	
	)	
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 RM-10586
	)	WT Docket No. 03-67
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	
	)	WT Docket No. 02-68
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	RM-9718
	)	IB Docket No. 02-364
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands	)	ET Docket No. 00-258
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems	)	

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

Adopted: March 18, 2008 **Released: March 20, 2008**

Comment Date: 60 days after publication in the Federal Register
Reply Comment Date: 90 days after publication in the Federal Register

By the Commission:

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I. INTRODUCTION

1. In this *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking (Big LEO 3rd Order on Reconsideration and AWS 6th MO&O and BRS/EBS 4th MO&O and 2nd FNPRM)*, we continue our efforts to transform our rules and policies governing the licensing of the Educational Broadband Service (EBS) and the Broadband Radio Service (BRS) in the 2495-2690 MHz (2.5 GHz band). In particular, we adopt rules for auctioning unassigned BRS spectrum as proposed in the *Further Notice of Proposed Rulemaking (BRS/EBS FNPRM)*,[1] and seek further comment on alternatives for licensing unassigned EBS spectrum. In addition, we address petitions for reconsideration filed in response to the *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order* (*Big LEO Order on Reconsideration and AWS 5th MO&O and BRS/EBS 3rd MO&O and 2nd R&O*, as appropriate) in this proceeding[2] by, among other things, further refining our technical rules to enable licensees to deploy new and innovative wireless services in the 2.5 GHz band. We believe that the actions we take today will facilitate the promotion of broadband service to all Americans.

[1] 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, 14270, 14271-14272 ¶¶ 281, 286 (2004) (*BRS/EBS R&O and FNPRM,* as appropriate).

[2] 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 (2006) (*BRS/EBS 3rd MO&O & 2nd R&O*).

II. EXECUTIVE SUMMARY

2. In the *Big LEO 3rd Order on Reconsideration and AWS 6th MO&O and BRS/EBS 4th MO&O*, we take the following actions with respect to petitions for reconsideration filed in response to the *Big LEO Order on Reconsideration and AWS 5th MO&O and BRS/EBS 3rd MO&O* and *2nd R&O*:

- Grant a petition, in part, by adopting the Part 1, Subpart Q competitive bidding rules for future BRS auctions, seeking further comment on rules for future licenses for EBS spectrum, and directing WTB to review inventory and schedule auction(s) of unassigned BRS spectrum as soon as practicable.
- Adopt the small business size standards and bidding credits proposed in the *BRS/EBS FNPRM* ("small business" -- an entity with attributed average annual gross revenues not exceeding $40 million for the preceding three years; "very small business" -- an entity with attributed average annual gross revenues not exceeding $15 million for the same period; and an "entrepreneur" -- an entity with attributed annual average gross revenues not exceeding $3 million for the same period).
- Deny a petition requesting that the Commission permit licensees to self-transition before January 21, 2009, the deadline for proponents to file an Initiation Plan with the Commission.
- Grant a petition asking the Commission to correct the inconsistency between the *BRS/EBS 3rd MO&O* and the text of Section 27.1236(b)(6), and on the Commission's own motion, change references in Sections 27.1231(f), 27.1236(a), 27.1236(b)(1) and 27.1236(b)(6) to dates certain.
- Deny as moot a petition requesting that the Commission clarify the requirements for multichannel video programming distribution (MVPD) operators seeking to opt-out of the transition.
- Deny a petition seeking reconsideration on the effect of MVPD opt-out on adjacent licensees with overlapping geographic service areas (GSAs).
- Grant a petition asking the Commission to modify the height benchmarking rule to establish deadlines for compliance.
- Grant a petition asking the Commission to modify the out-of-band emissions rule to establish deadlines for compliance.
- Grant a petition asking the Commission to modify the out-of-band emissions rule to provide that out-of-band emissions are to be measured from the outermost edge of the channels when two or more channels are combined.
- Deny a petition and reaffirm that only first adjacent channel licensees may file an interference complaint concerning adjacent channel interference.
- Deny a petition and affirm the Commission's decision regarding out-of-band emissions for mobile digital stations.
- Deny a petition asking to establish different deadlines for user stations to cure interference where an existing base station suffers interference from an outdoor antenna user station.

- Grant a petition and allow licensees to maintain existing operations post-transition in the mid-band segment (MBS) at 2572-2614 MHz, even if such operations exceed the current -73.0 dBW/m^2 contour limit.
- Deny a petition asking the Commission to adopt technical standards should it become necessary to "split the football" to determine each licensee's GSA.
- Grant a petition and permit BRS Channels No. 1 and 2/2A licensees to operate simultaneously in the 2150-2160/62 MHz and 2496-2690 MHz bands until every subscriber is relocated to the 2496-2690 MHz band.
- Deny a petition asking the Commission to provide greater protection to BRS Channel No. 1 operations by reducing the power flux density (PFD) radiated from the Mobile Satellite Service (MSS) in the 2496-2500 MHz band.
- Deny a petition and affirm the use of splitting the football for BRS Channels No. 2 and 2A licensees.
- Deny petitions concerning overlaps between grandfathered EBS E and F Group licensees and co-channel BRS E and F Group licensees and affirm the existing rule.
- Deny a petition asking for procedural changes to the 90-day negotiation period for significant GSA overlaps (more than 50 percent) between grandfathered EBS E and F Group channel licensees and incumbent BRS E and F Group channel licensees.
- Grant a petition and reinstate a Gulf of Mexico Service Area.
- Establish the Gulf of Mexico boundary 12 nautical miles from the shore.
- Apply the existing technical rules to the Gulf of Mexico Service Area.
- Grant a petition and affirm that EBS excess capacity leases executed before January 10, 2005, are limited to 15 years.
- Deny a petition relating to pre-1998 legacy, video-only excess capacity leases but affirm that leases executed before January 10, 2005, are limited to 15 years.
- Grant a petition and amend rules to permit lessees to offer EBS licensees/lessors the actual equipment used or comparable equipment on lease termination.
- Deny a petition asking that licensees be permitted to demonstrate substantial service based on past-discontinued service.
- Grant a petition asking for a new safe harbor for heavily encumbered or highly truncated Basic Trading Areas (BTAs) and GSAs.
- Grant a petition seeking minor changes in the EBS eligibility rule to conform it to other changes made by the Commission.
- Grant a petition asking the Commission to adopt a rule that clarifies that commercial EBS licensees are not subject to educational programming requirements or the special EBS leasing restrictions.
- Deny a petition asking the Commission to reinstate pending mutually exclusive applications for new EBS stations.

- Grant in part requests for declaratory ruling and clarify how the splitting the football process for determining GSAs works with respect to licenses that were expired on January 10, 2005.

In the *BRS/EBS 2nd FNPRM*, we seek comment on whether and how to license EBS spectrum in the Gulf of Mexico. We also seek comment on various alternatives for licensing unassigned EBS spectrum. Specifically, we seek comment on the following issues:

- We ask whether it would be in the public interest to develop a scheme for licensing unassigned EBS spectrum that avoids mutual exclusivity.
- We ask whether EBS eligible entities could participate fully in a spectrum auction.
- We seek comment on the use of small business size standards and bidding credits for EBS if we adopt a licensing scheme that could result in mutually exclusive applications.
- We seek comment on the proper market size and size of spectrum blocks for new EBS licenses.
- We seek comment on issuing one license to a State agency designated by the Governor to be the spectrum manager, using frequency coordinators to avoid mutually exclusive EBS applications, as well as other alternative licensing schemes.

III. BACKGROUND[3]

A. BRS/EBS R&O and FNPRM

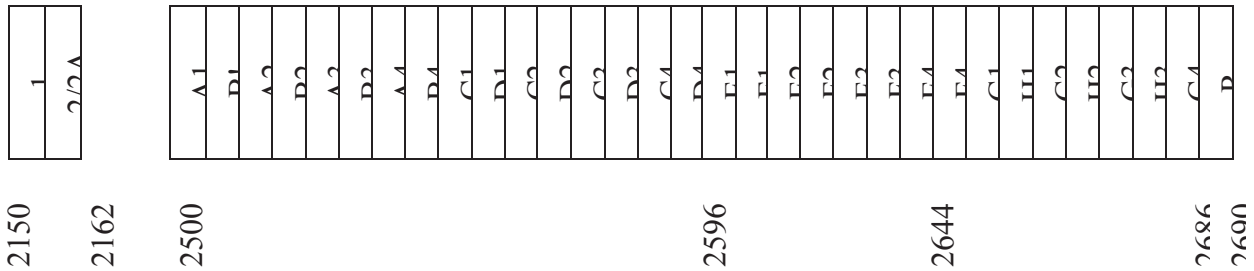
3. On July 19, 2004, the Commission, in response to a "White Paper" submitted by the Wireless Communications Association International, Inc. (WCA), the Catholic Television Network (CTN), and the National ITFS Association (NIA) (the Coalition) released the *BRS/EBS R&O & FNPRM.*[4] In the *BRS/EBS R&O & FNPRM*, the Commission restructured the 2500-2690 MHz band from an interleaved band plan to a three-segment band plan divided into upper and lower-band segments (UBS and LBS, respectively) for low-power operations and a mid-band segment (MBS) for high-power operations, and designated the 2495-2500 MHz band for use in connection with the 2500-2690 MHz band.[5] The following charts illustrate the former and current band plans:

FORMER BRS/EBS BAND PLAN:

[3] A full discussion of the background and history involving this band is contained in 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, 6726-6739 ¶¶ 6-31 (2003) (*BRS/EBS NPRM*), *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14171-14176 ¶¶ 9-20*,* and *BRS/EBS 3rd MO&O & 2nd R&O*, 21 FCC Rcd at 5614-5618 ¶¶ 9-19.

[4] *BRS/EBS R&O* and *FNPRM.*

[5] *BRS/EBS R&O* and FNPRM, 19 FCC Rcd at 14182-14187 ¶¶ 36-47.



CURRENT BRS/EBS BAND PLAN:

Commission Band Plan				
Channel Designation	Lower Frequency	Upper Frequency		
N/A	2495	2496	Guard Band	
BRS 1	2496	2502		LBS
A1	2502	2507.5		
A2	2507.5	2513		
A3	2513	2518.5		
B1	2518.5	2524		
B2	2524	2529.5		
B3	2529.5	2535		
C1	2535	2540.5		
C2	2540.5	2546		
C3	2546	2551.5		
D1	2551.5	2557		
D2	2557	2562.5		
D3	2562.5	2568		
J	2568	2572	Guard Band	
A4	2572	2578		MBS
B4	2578	2584		
C4	2584	2590		
D4	2590	2596		
G4	2596	2602		
F4	2602	2608		
E4	2608	2614		
K	2614	2618	Guard Band	UBS
BRS 2	2618	2624		
E1	2624	2629.5		
E2	2629.5	2635		
E3	2635	2640.5		
F1	2640.5	2646		
F2	2646	2651.5		
F3	2651.5	2657		
H1	2657	2662.5		

H2	2662.5	2668		
H3	2668	2673.5		
G1	2673.5	2679		
G2	2679	2684.5		
G3	2684.5	2690		

The Commission also renamed the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) as the "Broadband Radio Service" and "Educational Broadband Service," respectively, to better reflect the new services anticipated for this band.[6] In addition, the Commission retained conditions on the use of EBS licenses in continued furtherance of the educational objectives that led to the establishment of ITFS, and removed all non-statutory eligibility restrictions applicable to cable and digital subscriber line (DSL) operators for the BRS (thus permitting these operators to provide non-video services like broadband internet access).[7] Further, the Commission adopted service rules and took actions that gave licensees increased flexibility, reduced administrative burdens on both licensees and the Commission, and promoted regulatory parity. In particular, among other actions, the Commission implemented geographic area licensing for all licensees in the band; consolidated licensing and service rules for EBS and BRS in Part 27; allowed spectrum leasing for BRS and EBS under our secondary markets spectrum leasing policies and procedures; provided licensees with the flexibility to employ the technologies of their choice in the band; applied the Part 1 Wireless Telecommunications Bureau rules to the BRS/EBS spectrum; and dismissed pending mutually exclusive applications for new ITFS stations.[8]

4. To facilitate the transition to the new band plan, the Commission adopted a market-oriented transition mechanism, in which a proponent would transition the 2.5 GHz band within a Major Economic Area (MEA).[9] The transition timeline consisted of the following three phases: the Initiation Phase (which was to have lasted three years starting on January 10, 2005), in which potential proponents contact all the BRS and EBS licensees in the MEA by sending them a Pre-transition Data Request and a Transition Notice; the 90-day Transition Planning Phase, in which the proponent and BRS and EBS licensees negotiate the Transition; and the 18-month Transition Completion Phase, in which the proponent replaces downconverters and migrates video programming tracks for EBS licensees in the MEA.[10] Under this transition mechanism, the transition costs of EBS licensees were to be shared by the proponent and all commercial licensees and lessees in the MEA.[11] Transition plans were required to conform to certain safeguards to ensure a smooth transition and equitable treatment of incumbents. The Commission permitted qualifying MVPD operators to seek a waiver to opt-out of the transition.[12]

[6] *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14182, 14227 ¶¶ 6, 164.

[7] *BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14221-14227, 14230-14232 ¶¶ 149-164, 170-176.

[8] *BRS/EBS R&O* and *FNPRM*, 19 FCC Rcd at 14169-14170 ¶ 6.

[9] *BRS/EBS R&O*, 19 FCC Rcd at 14198 ¶ 74.

[10] *BRS/EBS R&O*, 19 FCC Rcd at 14200, 14203 ¶¶ 78, 88.

[11] *BRS/EBS R&O*, 19 FCC Rcd at 14205 ¶ 93.

[12] *BRS/EBS R&O*, 19 FCC Rcd at 14198-14199 ¶ 75.

5. In addition, the *BRS/EBS R&O* resolved certain technical issues as follows: set the signal strength limits for the low-power bands at the boundaries of the geographic service areas to 47 dBμV/m; restricted the transmitter output power of response stations to 2.0 watts; modified emission limits for stations that would operate on the LBS and UBS channels; and refrained from allowing high-power unlicensed operations in the 2500-2690 MHz band, but allowed unlicensed operation under our existing Part 15 rules in the 2655-2690 MHz band.[13]

6. In the *BRS/EBS FNPRM*, the Commission sought comment on a proposal to use competitive bidding to assign any new licenses, as well as competitive bidding mechanisms to transition licensees to the extent that licensee-negotiated transitions do not occur within the three-year transition period.[14] Among other methods, we sought comment on a process whereby the Commission would offer incumbent licensees modified non-renewable licenses that would become secondary to new licenses to be assigned pursuant to the new band plan.[15] Under this process, the Commission also would offer incumbent licensees tradable bidding offset credits that could be used to obtain new licenses, and that would provide spectrum access valued comparably to that provided by the incumbent's existing license.[16] In addition to alternate transition methods, we also sought further comment on the following issues: the Gulf of Mexico service area; performance requirements for licensees in the band; grandfathered ITFS stations on the E and F channel groups; limitations on the holdings of ITFS stations; the "wireless cable" exception to the ITFS eligibility rules; regulatory fees; methods of streamlining our review of transactions involving these services; and continuing our review of rules relating to these services.[17]

B. BRS/EBS 3rd MO&O and 2nd R&O

7. In the *BRS/EBS 3rd MO&O*, the Commission made further changes to the transition rules to further encourage the transition of the 2.5 GHz band. In reviewing the petitions filed in response to the *BRS/EBS R&O and FNPRM*, the Commission found that the selection of MEAs as the transition area size discouraged potential proponents from filing Initiation Plans.[18] Thus, the Commission changed the transition area size from MEA to the much-smaller Basic Trading Area (BTA).[19] Moreover, since at the time the Commission released the *BRS/EBS 3rd MO&O* not one Initiation Plan had been filed, the Commission changed the timeframe of the Initiation Planning Period from January 10, 2005 through January 10, 2008 to July 19, 2006 through January 21, 2009.[20] Also, in response to petitioners who were afraid that they would lose their licenses if a proponent did not file or withdrew an Initiation Plan on or before January 21, 2009, the Commission adopted a rule permitting licensees to self-

[13] *BRS/EBS R&O*, 19 FCC Rcd at 14208, 14211, 14218 ¶¶ 106, 116, 139.

[14] *BRS/EBS FNPRM*, 19 FCC Rcd at 14265 ¶ 265-266.

[15] *BRS/EBS FNPRM*, 19 FCC Rcd at 14266 ¶ 269.

[16] *BRS/EBS FNPRM*, 19 FCC Rcd at 14273 ¶ 290.

[17] *BRS/EBS FNPRM*, 19 FCC Rcd at 14282-14301 ¶¶ 320-374.

[18] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5641 ¶ 64.

[19] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5642 ¶ 65.

[20] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5658-5659 ¶ 106.

transition to their default channel locations after January 21, 2009 if a proponent has not filed or has withdrawn an Initiation Plan on or before January 21, 2009.[21] Other significant changes made by the Commission to the transition included the following: adopting a cost-sharing formula for proponent-driven and self transitions; adopting a "first-in time" rule in which the first entity to file an Initiation Plan with the Commission for a given BTA would be the proponent; requiring licensees to respond to the Pre-transition Data request within 45 days; and permitting proponents to file the Post-transition notification on behalf of itself and all of the BRS and EBS licensees in the BTA.[22] The Commission clarified that BRS licensees and lessees, EBS lessees, and commercial EBS licensees must pay their own transition costs and share the cost to transition EBS licensees; that BRS licensees and lessees and EBS licensees and lessees may be a proponent; and that channel swapping to effectuate the transition is permitted.[23] The Commission declined, however, to permit qualifying multichannel video programming distributors (MVPD) operators to automatically opt-out of the transition, but reaffirmed their right to seek a waiver to opt-out of the transition.[24]

8. The Commission also made a series of decisions concerning the technical rules applicable to BRS and EBS. Specifically, the Commission clarified that during the transition, all downconverters within the EBS geographic service area (GSA) must be replaced regardless of the desired or undesired signal strength, allowed a -10 dB adjacent channel desired-to-undesired signal ratio (D/U) for transitioned EBS receive sites, and reaffirmed its decision to permit licensees to exceed the signal level at the GSA boundary provided no constructed licensee providing service is affected.[25] The Commission also reaffirmed its decision to require that a licensee receive a documented interference complaint before it is subject to a stricter emission mask for base stations, reaffirmed its decision that only the first adjacent channel licensee may submit a documented interference complaint, and amended the rules to permit the interfering licensee 60 days after receiving the documented interference complaint to resolve the complaint.[26] In addition, the Commission declined to modify its decision to apply the attenuation factor, not less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) dB at 5.5 megahertz from the channel edges, only to mobile digital stations; and reaffirmed its decision to require licensees to measure emission limits as close to the edges, both upper and lower, of the licensee's bands of operation as the design permits, including BRS Channel No. 1 licensees.[27] Further, the Commission reaffirmed its decision to bifurcate and define overlapping GSA boundaries by drawing a chord between the intersection points of the licensee's previous 35-mile Protected Service Area (PSA) and those of the respective adjacent market co-channel licensee.[28] Also, the Commission reaffirmed its decision to permit two-way mobile operations prior to the

[21] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5671, 5673-5674 ¶¶ 135, 142.

[22] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5652, 5656, 5677-5686 ¶¶ 91, 101, 152-176.

[23] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5650, 5665, 5678-5679 ¶¶ 87, 122, 157-158.

[24] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5645-5646 ¶¶ 72-74.

[25] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5687-5689, 5699 ¶¶ 181-190, 219-220.

[26] *BRS/EBS 3rd MO&O,* 21 FCC Rcd at 5689-5691 ¶¶ 191-197.

[27] *BRS/EBS 3rd MO&O,* 21 FCC Rcd at 5691-5694 ¶¶ 198-204.

[28] *BRS/EBS 3rd MO&O,* 21 FCC Rcd at 5694-5695 ¶¶ 205-208.

transition, and reaffirmed its decision to permit low-power unlicensed operations in the 2655-2690 MHz portion of the band.[29]

9. In response to a request from EBS licensees, the Commission modified the application of the Secondary Markets rules and policies to EBS excess capacity leases entered into on or after July 19, 2006.[30] Specifically, the Commission limited the term of these leases to 30 years and required them to permit the EBS licensee/lessor to retain the right at year 15 and every five years thereafter to review the lease in light of their educational requirements.[31] The Commission also stated that these leases could not be automatically renewed, although they could contain a right of first refusal clause.[32] Also, the Commission affirmed its decision not to specify the manner in which EBS licensees reserve 5 percent of the capacity of their channels for educational usage when they lease their channels to a commercial lessee and reaffirmed its decision to permit cable operators and incumbent local exchange carriers (ILECs) to acquire or lease BRS or EBS spectrum for non-MVPD services.[33] The Commission also reaffirmed its decision to dismiss mutually exclusive applications for new EBS stations.[34]

10. In the *BRS/EBS 2nd R&O*, the Commission declined to adopt assignment rules for unassigned BRS or EBS spectrum at that time and terminated the Gulf of Mexico proceeding.[35] The Commission did, however, adopt substantial service as the performance standard for EBS and BRS licensees; established May 1, 2011 as the deadline for licensees to demonstrate substantial service for each license they hold; adopted safe harbors, including safe harbors for EBS licensees and rural areas; and indicated that a licensee's prior, discontinued service may be considered as a factor in the substantial service determination made by the Commission.[36] Also, the Commission adopted rules to resolve conflicts between the overlapping GSAs of grandfathered E and F Group EBS licensees and co-channel BRS E and F Group licensees.[37]

IV. DISCUSSION

A. Licensing Unassigned Spectrum in the Band

11. *Background.* The Commission previously assigned all spectrum allocated to the MDS and Multichannel Multipoint Distribution Service (MMDS), the predecessor services to BRS. Specifically, in 1996, the Commission conducted competitive bidding and issued 493 BTA licenses granting access to all BRS spectrum nationwide that was not assigned to pre-

[29] *BRS/EBS 3rd MO&O,* 21 FCC Rcd at 5695-5699 ¶¶ 209-218.

[30] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 268.

[31] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 268.

[32] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 270.

[33] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5701-5703 ¶¶ 227, 231-232.

[34] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5703-5704 ¶¶ 236-238. The Commission, however, reinstated one application based on evidence presented by the petitioner showing that its settlement agreement was approved before the April 2, 2003 deadline. *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5704 ¶ 239.

[35] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5737, 5762 ¶¶ 313, 383.

[36] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5718-5736 ¶¶ 274-310.

[37] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5749-5750 ¶¶ 348-350.

existing MDS or MMDS site-based licenses.[38] Since the auction, 73 of the 493 BRS overlay licenses have cancelled and the related spectrum access rights are now unassigned although any underlying, pre-existing site-based licenses remain intact. With respect to EBS spectrum, the Commission has extensively, but not exhaustively, assigned this spectrum through site-based licensing. Commission analysis indicates that in 11 of 493 BTAs, there are currently no geographic or site-based BRS or EBS licensees. In addition, there are six additional BTAs where only a very small portion of the BTA is covered by a BRS or EBS license.

12. In the *BRS/EBS FNPRM*, the Commission sought comment on procedures for assigning new licenses in these services by competitive bidding.[39] Commenters were asked to address these issues in addition to a larger proposal to use competitive bidding to transfer existing licensees to the new band plan.[40] Specifically, the Commission asked parties to comment on adopting Part 1 competitive bidding rules for these services, as well as the adoption of three levels of size-based bidding credits.[41]

13. Commenters addressing competitive bidding issues in response to the *BRS/EBS FNPRM* generally focused on when to conduct competitive bidding, and whether and how to distinguish among EBS applicants for purposes of offering small businesses bidding preferences.[42] Then, as now, several parties sought early auctions of currently unassigned spectrum.[43] Organizations representing EBS licensees, however, argued that auctions of EBS licenses should wait until after the transition, so that EBS licensees could devote appropriate attention to the transition process.[44] In addition, there were divergent views regarding what frequencies in the band should be licensed together (particularly whether or not to group low and high power frequencies) and the appropriate geographic area for licensing.[45] These latter concerns primarily pertained to new EBS licenses.

14. In the *BRS/EBS 2d R&O*, the Commission concluded that it would be premature to decide how to license currently unassigned spectrum in the band until after the period for existing licensees to transition to the new band plan expires.[46] The Commission reached this conclusion based on the limited amount of currently unassigned spectrum relative to assigned spectrum subject to transitioning; the limited utility of new licenses in areas where existing licensees were transitioning from the old to the new band plan; and the efficiency of licensing all

[38] These types of licenses are commonly referred to as geographic "overlay" licenses. *See* Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas, *Public Notice* (MMB WTB Mar. 29, 1996).

[39] *BRS/EBS FNPRM*, 19 FCC Rcd at 14265-14272 ¶¶ 266-288.

[40] *BRS/EBS FNPRM*, 19 FCC Rcd at 14272-14282 ¶¶ 289-319.

[41] *BRS/EBS FNPRM*, 19 FCC Rcd at 14270-14272 ¶¶ 281-288.

[42] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5738-5739, 5741 ¶¶ 317-319, 325.

[43] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5738 n.786.

[44] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5738-5739 ¶ 318.

[45] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5740-5741 ¶ 325.

[46] *BRS/EBS 2d R&O*, 21 FCC Rcd at 5739 ¶ 320.

available spectrum at one time.[47] Moreover, the Commission observed that completion of the transition would permit an assessment of existing and potential uses of new licenses and might lead to the identification of additional spectrum available for assignment.[48] The Commission concluded that waiting to assign new licenses until after the completion of the transition therefore might enable a more effective initial assignment of new licenses.[49]

15. NextWave Broadband, Inc. (NextWave) asks the Commission to reconsider this conclusion and immediately auction "all available and unassigned" BRS and EBS spectrum.[50] In seeking reconsideration, NextWave asserts that the benefits from assigning new licenses prior to the end of the transition outweigh any potential benefits that could be obtained from waiting to assign licenses for more available spectrum at one time.[51] WiMAX Forum (WiMAX), Sprint Nextel, Clearwire Corporation (Clearwire), the Hispanic Information and Telecommunications Network (HITN) and WCA support NextWave's request.[52] Proponents of earlier licensing of BRS BTA licenses contend that new BRS BTA licensees may be more likely to initiate transitions to the new band plan than other existing licensees, thereby furthering the transition.[53] More broadly, WCA and NextWave contend that the sooner the Commission licenses unassigned spectrum, the sooner new licensees can begin planning their post-transition deployments.[54]

16. A few parties, specifically NIA, CTN, and ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED), oppose NextWave's petition with respect to assigning EBS spectrum. NIA and CTN contend that "EBS licensees will be significantly occupied with other matters over the next few years, including transitions to the new band plan, spectrum lease negotiations, and, critically, the development of educational service plans that focus on new technologies tailored to the revised plan and rules."[55] IMWED contends that auctioning EBS spectrum in urban areas is unnecessary because there is insufficient white space available to institute new services in those areas.[56] IMWED states that the primary purpose of EBS is educational, not commercial.[57] Finally, IMWED anticipates that auctions would not

[47] *BRS/EBS 2d R&O*, 21 FCC Rcd at 5739-5740 ¶¶ 320-324.

[48] *BRS/EBS 2d R&O*, 21 FCC Rcd at 5740 ¶ 322.

[49] *BRS/EBS 2d R&O*, 21 FCC Rcd at 5740 ¶ 322.

[50] NextWave PFR at 3-12. In referring to pleadings filed in response to the *BRS/EBS 3rd MO&O*, we will use the short name of the party as indicated in Appendix D to this document, followed by "PFR" if the document is a petition for reconsideration, "Comments" or "Opposition" if the document is comments on or oppositions to petitions for reconsideration, and "Reply" if the pleading is a reply to an opposition or comment.

[51] NextWave PFR at 5.

[52] WCA Opposition at 12-16. In addition to WCA, WiMAX (a non-profit corporation formed to help promote and certify the compatibility and interoperability of broadband wireless products using the IEEE 802.16 and ETSI HiperMAN wireless MAN specifications), Clearwire, and HITN all support early auction of new licenses. WiMAX Comments at 5-6; Sprint Nextel Opposition at 13-15; Clearwire Opposition at 3-5; HITN Opposition at 3-4.

[53] Clearwire Opposition at 4, NextWave Reply at 4.

[54] WCA Opposition at 15, NextWave Reply at 4.

[55] CTN NIA Opposition at 3-4.

[56] IMWED Opposition at 3.

[57] IMWED Opposition at 4.

materially expedite the provision of wireless broadband service because widespread deployment will not occur until after transitions take place.[58]

17. *Discussion.* With respect to BRS spectrum, we now conclude that the public interest favors expeditious relicensing of BTA authorizations in those areas where the authorization was forfeited or turned in for cancellation, regardless of the presence of other BRS or EBS incumbents. BTA authorization holders eligible to pay for their licenses in installments recently submitted their final payments. With final payment in hand, the possibility that additional BTA licenses will be added to the FCC's auction inventory due to failure to pay is now foreclosed. In addition, initial action has been taken with respect to requests regarding forfeited authorizations.[59] These developments provide greater certainty regarding the geographic areas available for the grant of new BRS licenses.

18. We find that the expeditious licensing of BRS in those 11 BTAs where there is no existing BRS or EBS licensee serves the public interest by facilitating service in unserved areas.[60] Expedited licensing in those markets will not disrupt the band plan transition process because there are no existing operations. Transitions in adjacent BTAs will be protected by the requirements in our technical rules that new BTA licensees operate pursuant to the post-transition band plan and provide protection to adjacent operations. We also note that Sprint Nextel and Clearwire, two entities that have proposed transitions in other markets, support expeditious relicensing of available BRS spectrum.[61]

19. We also conclude that, on balance, early issuance of BTA authorizations serves the public interest in markets where there are incumbent non-BTA BRS or EBS licensees. Unlike the handful of markets without any existing BRS or EBS licensees, issuance of licenses where there are existing incumbents will supplement – rather than initiate – service within the BTA. Nonetheless, a new BTA authorization will make service more widely available and will increase the opportunities for competitive offerings within the market. We believe that our existing technical rules afford incumbent licensees protection against unwarranted interference. Specifically, any new BTA licenses will be required to limit their signal strength at the border of their GSA,[62] provide adjacent channel protection in the same manner as any other licensee,[63] and comply with the height benchmarking rule to ensure that base stations near the border of GSAs

[58] IMWED Opposition at 4.

[59] *See*, *e.g.*, Satellite Signals of New England, *Order*, 22 FCC Rcd 1937 (WTB 2007), *petition for reconsideration pending*, TV Communications Network, Inc., *Order*, 22 FCC Rcd 1397 (WTB 2007), *application for review pending*, Virginia Communications, Inc., *Order*, 22 FCC Rcd 1386 (WTB 2007), *petition for reconsideration pending*.

[60] Three of these eleven BTAs previously were licensed to TV Communications Network, Inc. (TVCN). TVCN sought relief from the cancellation of these and other BTA licenses. The Wireless Telecommunications Bureau denied TVCN's initial request for relief and TVCN has filed a pending application for review of that denial. TV Communications Network, Inc., *Order*, 22 FCC Rcd 1397 (WTB 2007), *application for review pending*.

[61] Sprint Nextel Opposition at 13-15; Clearwire Opposition at 3-5. Sprint Nextel, Clearwire, and Polar Communications have filed transition initiation plans for 375 BTAs**.**

[62] *See* 47 C.F.R. § 27.55(a)(4).

[63] *See* 47 C.F.R. § 27.53(m).

do not interfere with stations in neighboring GSAs.[64] We also note that no party to this proceeding expressed concern that awarding new BRS BTA licenses would cause problems to existing operations. Moreover, we will require new licensees to operate pursuant to the new band plan. This requirement will protect existing licensees by ensuring that any future high-power video operations are restricted to the MBS. To the extent a market has existing pre-transition operations, requiring the BTA operator to operate pursuant to the new band plan will provide that operator with maximum incentive to transition existing operations. Furthermore, as an increasing number of adjacent markets are transitioned, requiring new licensees to operate pursuant to the new band plan will ensure that the new licensees operate in conformity with adjacent markets. We expect that these requirements on how BRS licensees may operate under new BTA licenses pending the transition to the new band plan should provide an incentive for these licensees to propose transitions in markets currently lacking a transition plan.

20. Although we decide to move forward with auctioning licenses for unassigned BRS spectrum, we believe that a broader record should be developed on how to distribute licenses for unassigned EBS spectrum. EBS is a unique service designed to meet the unique needs of educators and students.[65] Given the wide variety of educators and educational needs, we could foresee situations in which the ideal license size could be as small as a school district or as large as a state. Furthermore, educators may encounter a variety of unique challenges that commercial operators may not face, such as state or county imposed budgeting cycles, the need to obtain grants, or state-imposed limitations on their ability to participate in spectrum acquisition. Accordingly, as noted in further detail below, the *Second Further Notice of Proposed Rulemaking* seeks further comment on the best means of licensing unassigned EBS spectrum.

B. BRS Competitive Bidding Rules

21. *Background*. The *BRS/EBS FNPRM* proposed to conduct any auction of new licenses in the BRS/EBS band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, for example, rules governing competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[66] We did not receive any noteworthy objection to the use of these competitive bidding rules with respect to new BRS licenses.

22. In the *BRS/EBS FNPRM*, the Commission sought comment on the appropriate geographic area size for new licenses in this band.[67] With limited exceptions, commenters generally assert that new geographic area licenses should be BTAs.[68] Commenters contend that BTAs are consistent with prior geographic area licensing in the band, *i.e.* MDS BTA overlay licenses; that BTAs are closer to the market size likely to be served by a licensee; and that areas larger than BTAs will result in inefficient license assignments, as bidders' licenses may cover

[64] *See* 47 C.F.R. § 27.1221.

[65] *See generally BRS R&O*, 19 FCC Rcd at 14222-14227 ¶¶ 152-164.

[66] *BRS/EBS FNPRM*, 19 FCC Rcd at 14270 ¶ 281.

[67] *BRS/EBS R&O FNPRM*, 19 FCC Rcd at 14268-14269 ¶ 274-278.

[68] WCA Comments (filed Jan. 10, 2005) at 24-25, Sprint Corporation Comments (filed Jan. 10, 2005) at 4, Comments of Nextel Corporation (filed Jan. 10, 2005) at 8-9.

some areas in which they have no interest.[69] A few commenters suggest geographic areas smaller than BTAs, such as counties (School Board of Miami Dade County Florida), telephone servicing areas (Gila River Telecommunications, Inc.), or MSAs/RSAs (National Telecommunications Cooperative Association – for MBS).[70]

23. With respect to bidding credits, in the *BRS/EBS FNPRM*, the Commission proposed to define three categories: "small business" -- an entity with average annual gross revenues not exceeding $40 million for the preceding three years; "very small business" -- an entity with average gross revenues not exceeding $15 million for the same period; and "entrepreneur" -- an entity with average gross revenues not exceeding $3 million for the same period.[71] The Commission also proposed to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2) of the Commission's Rules.[72]

24. Commenters responding to the *BRS/EBS FNPRM* focused on bidding credits for EBS licenses, rather than BRS licenses. For example, one party proposed substantial bidding credits, of at least 50%, for EBS applicants not receiving financial support from outside parties.[73] WCA, which opposes bidding credits with respect to EBS licenses generally, advocates that any bidding credits for EBS applicants be based on their educational objectives, rather than their revenues.[74]

25. With respect to other competitive bidding rules, the *BRS/EBS FNPRM* proposed to use Part 1, Subpart Q rules to auction geographic area licenses to access spectrum in the 2500-2690 MHz band.[75] We did not receive any comments objecting to the use of these Part 1 rules.

26. *Discussion*. With respect to the assignment of new BRS licenses, we adopt the competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules, consistent with the bidding procedures that have been employed in many previous auctions.[76] Specifically,

[69] *See*, *e.g.*, WCA Comments at 24-25.

[70] Further Comments, The School Board of Miami Dade County Florida (filed Jan. 10, 2005) at 2-3, Comments of Gila River Telecommunications, Inc. (filed Jan. 10, 2005) at 2-3, Comments of the National Telecommunications Cooperative Association in Response to the Further Notice of Proposed Rulemaking and Initial Regulatory Flexibility Analysis (filed Jan. 10, 2005) at 3. NTCA also suggested BTAs could be an alternative for the MBS. *Id*.

[71] *BRS/EBS FNPRM*, 19 FCC Rcd at 14272 ¶ 286. See 47 C.F.R. § 1.2110(f)(2). We will coordinate the small business size standards for BRS in this proceeding with the U.S. Small Business Administration.

[72] 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[73] *See*, *e.g.*, Comments of SpeedNet, L.L.C. (filed Jan. 10, 2005) at 2.

[74] WCA Reply Comments (filed Feb. 8, 2005) at 30-32.

[75] *BRS/EBS NPRM*, 18 FCC Rcd at 6816 ¶ 233.

[76] *See, e.g.,* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making,* 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order)*; *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part 1 Recon Order/ Fifth Report and Order* and *Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order,* 17 FCC Rcd 2962 (2002).

we will adopt the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[77] We note that such rules would be subject to any modifications by the Commission in our ongoing Part 1 proceeding.[78] In addition, consistent with current practice, matters such as the appropriate competitive bidding design, minimum opening bids and reserve prices, will be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[79]

27. We adopt rules providing that new licenses for unassigned BRS spectrum will be assigned by BTA, with each license authorizing access for all BRS spectrum not otherwise assigned either at the time of licensing or in the future.[80] We agree with those commenters that there are benefits to issuing new licenses on a BTA basis because this approach is consistent with the existing BRS geographic overlay licenses. Furthermore, adopting different geographic service areas for the available BRS licenses would be difficult to administer and would not appear to lead to any benefits for either potential licensees or the public.

28. We also adopt rules providing for three size-based bidding credits in competitive bidding for new BRS licenses. We have used similar credits in a range of other services and conclude that they are appropriate for BRS. Applicants with attributable average annual gross revenues not exceeding $3 million for the preceding three years, "entrepreneurs," will be eligible for a 35% discount on their winning bids; those with attributable average annual gross revenues not exceeding $15 million for the same period, "very small businesses," will be eligible for a 25% discount; and those with attributable average annual gross revenues not exceeding $40 million for the same period, "small businesses," will be eligible for a 15 percent discount. Applicants claiming eligibility will do so pursuant to our established Part 1 competitive bidding rules and procedures.

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[77] *See* 47 C.F.R. § 1.2101 *et seq.*

[78] *See, e.g.,* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005) ("*Part 1 Competitive Bidding Second Order on Reconsideration of the Fifth Report and Order*") (adopting modifications to the competitive bidding rules); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, 21 FCC Rcd 891 (2006) (*CSEA/Part 1 Report and Order*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753 (2006) (*Designated Entity Second Report and Order and Designated Entity Second FNPRM*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd 6703 (2006) (*Designated Entity Order on Reconsideration of the Second Report and Order*), *petitions for reconsideration pending*.

[79] *See* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55 ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part 1 Third Report and Order*).

[80] In the event the license for an incumbent non-BTA station cancels or is forfeited, the right to operate in that area automatically reverts to the licensee that holds the license for the corresponding BTA. 47 C.F.R. § 27.1206(b).

C. Transition

1. Self-transitioning before January 21, 2009

29. *Background.* The primary means of transitioning BRS and EBS stations is the proponent-based transition. The proponent-based transition process is a market-oriented process for relocating EBS licensees and BRS licensees from their current interleaved channel locations to their new contiguous spectrum blocks in the LBS, MBS, or UBS. The transition occurs by BTAs and is undertaken by a proponent or multiple proponents. The transition occurs in the following five phases: (1) initiating the transition process by filing an Initiation Plan with the Commission; (2) planning the transition; (3) reimbursing the costs of the transition; (4) terminating existing operations in transitioned markets; and (5) filing the post-transition notification.[81] A proponent must migrate an EBS licensee's eligible video programming tracks to the MBS[82] and provide an EBS licensee with downconverters at every eligible EBS receive site.[83] The proponent may seek reimbursement for the migration and downconverters they provide from BRS licensees and lessees, EBS lessees, and commercial EBS licensees.[84] BRS licensees and lessees, EBS lessees, and commercial EBS licensees must pay their own transition costs.[85]

30. In markets where no transition plan is filed by January 21, 2009, the date the proponent must file an Initiation Plan with the Commission or withdraw a filed Initiation Plan, the Commission permits BRS and EBS licensees to self-transition to their default channel locations.[86] Consistent with the rules applying to proponent-based transitions, the Commission also permits self-transitioning EBS licensees to seek reimbursement from commercial operators in the 2.5 GHz band for the costs of transitioning to their default channel locations.[87] The Commission decided to limit self-transitions to markets where no transition plan had been filed as of January 21, 2009 or where a transition plan had been withdrawn as of that date because allowing earlier self-transitions "would negatively affect the incentives for proponents to transition their BTAs."[88]

31. Although Broward County asks the Commission to reconsider its decision regarding early self-transitions, it expresses different positions in its petition for reconsideration and its reply. First, in its Petition for Reconsideration, Broward County asks the Commission to reconsider its decision and allow licensees to self-transition before January 21, 2009.[89] Broward

[81] 47 C.F.R. §§ 27.1230-27.1239.

[82] 47 C.F.R. § 27.1233(b).

[83] 47 C.F.R. § 27.1233(a).

[84] 47 C.F.R. § 27.1237(a). 47 C.F.R. § 27.1238 identifies the costs that are eligible for reimbursement.

[85] 47 C.F.R. § 27.1237(b).

[86] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5671 ¶ 135. January 21, 2009 is the first non-holiday 30 months after July 19, 2006, the effective date of the amended rules.

[87] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5685 ¶ 175.

[88] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5671 ¶ 135.

[89] Broward County PFR at 4. Broward County's PFR does not distinguish between BRS and EBS licensees in advocating for early self-transitions.

County further asks the Commission to permit early self-transitioning licensees to transition not only to their default channel locations, but also to an MBS channel belonging to another licensee, if certain conditions are met. Specifically, that channel must be the self-transitioning licensee's MBS channel following the transition of the licensee, or the self-transitioning licensee must have an agreement with the other licensee to allow the self-transitioning licensee to maintain its post-transition programming on that MBS channel.[90] Broward County asks that an early self-transitioning licensee be permitted to "take its other channels dark" in anticipation of the arrival of the proponent and the completion of the transition process and to be reimbursed for its transition costs.[91] Broward County argues that a self-transitioning licensee would cause less interruption to school curricula and programming availability, when compared with a proponent-driven transition.[92] In its Reply, however, Broward County asserts that licensees can self-transition before January 21, 2009 and that the only question before the Commission is whether licensees who transition early may be reimbursed for the *costs* of transitioning.[93] WCA, Sprint Nextel, and WiMAX oppose permitting licensees to self-transition before January 21, 2009. They argue that permitting early self-transitions would complicate the transition and be more costly.[94]

32. Discussion. As a preliminary matter, we disagree with Broward County's assertion that a licensee may self-transition before January 21, 2009 and that the only question before the Commission is whether the costs incurred by the early self-transitioning licensees are reimbursable. In the *BRS/EBS 3rd MO&O*, the Commission stated that a licensee may not self-transition before January 21, 2009 because doing so would discourage proponents from transitioning the 2.5 GHz band.[95] Thus, we now turn to Broward County's request that we reconsider this decision.

33. We reaffirm our decision that a licensee may not self-transition before January 21, 2009 and reiterate that a proponent-driven transition is the most efficient method of transitioning a BTA.[96] In particular, we find that early self-transitions would complicate the transition process for the proponent -- as discussed by WCA, Sprint Nextel, and WiMAX[97] -- and would not provide sufficient benefits to the self-transitioning licensee to offset those additional complications.

34. We disagree with Broward County's argument that permitting a licensee to self-transition early would reduce the planning and technical burden on the proponent because the self-transitioning licensee, rather than a proponent, would make the necessary equipment

[90] Broward County PFR at 4.

[91] Broward County PFR at 5.

[92] Broward County PFR at 2.

[93] Broward County Reply at 4.

[94] WiMAX Comments at 12-13, WCA Opposition at 41-42, Sprint Nextel Opposition at 16-17.

[95] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5671 ¶ 135, 47 C.F.R. § 27.1236(a).

[96] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5671 ¶ 135.

[97] WiMAX Comments at 12-13, WCA Opposition at 41-42, Sprint Nextel Opposition at 16-17.

changes for EBS stations.[98] We believe that permitting a licensee to self-transition early would thwart the proponent's ability to develop a BTA-wide transition plan in which some MBS channels are digitized, some licensees swap channels, and other licensees share digitized channels. Under our rules, the proponent is responsible for transitioning all EBS licensees in the BTA through the development of a Transition Plan (to which every BRS and EBS licensee in the BTA must agree). Moreover, if licensees are permitted to self-transition prior to January 21, 2009, a proponent planning to transition a market after these self-transitions will have difficulty determining which licensees in the market already have transitioned.

35. While we acknowledge that permitting licensees to self-transition early may result in a more rapid transition for these individual licensees, we find unpersuasive Broward County's argument that a self-transitioning licensee would cause less interruption to school curricula and programming availability, when compared with a proponent-driven transition. The Commission's Rules already require the proponent to coordinate with every EBS licensee to minimize the extent of any disruption and allow a proponent to interrupt EBS transmissions for only a short time (less than seven days) at any reception site.[99] Moreover, allowing early self-transitions may disrupt other EBS licensees that are participating in the proponent-driven transition process.

36. In addition, the existing proponent-driven transition process provides an opportunity for EBS licensees to make counterproposals to the proponent's Transition Plan.[100] In those circumstances, the proponent either must redraft the Transition Plan to account for the licensee's concerns, or seek dispute resolution. We believe that it is in the interest of the proponent to accommodate an EBS licensee because the transition for the entire BTA will be tolled pending resolution of the dispute. In contrast, if we were to permit self-transitions prior to January 21, 2009, the proponent does not have a similar incentive to reach an agreement with the EBS licensee regarding reimbursement because the transition of the BTA will not be tolled pending dispute resolution (*i.e.*, the EBS licensee has already self-transitioned, which by definition is not under the Transition Plan). In addition, since the reimbursement of costs would not have been pre-negotiated under an early self-transition scenario, we note that the EBS licensee who opts for an early self-transition may not ultimately receive reimbursement for all of its costs under dispute resolution. Furthermore, allowing early self-transitions may increase the possibility of disputes concerning cost reimbursement because EBS licensees who transition without the involvement of the proponent may be more likely to incur expenses that are not reimbursable (or that the proponent may view as not reimbursable).

37. We conclude that early self-transitioning would make the transition process more complicated, more difficult to administer, and unpredictable. We therefore deny Broward County's petition.

[98] See Broward County Reply at 3.

[99] 47 C.F.R. § 27.1232(b)(2).

[100] 47 C.F.R. § 27.1232(c).

2. Proponent-driven transitions

38. *Background*. On November 2, 2006, HITN filed a Request for Clarification of the *BRS/EBS 3rd MO&O*, more than three months after the July 19, 2006 deadline for filing Petitions for Reconsideration. HITN asks the Commission to clarify four alleged inconsistencies between the text of the *BRS/EBS 3rd MO&O* and the text of the adopted rules concerning proponent-driven transitions.[101] Specifically, HITN's Request focuses on the following issues: (1) the penalties imposed on licensees who do not timely respond to pre-transition data requests;[102] (2) whether a proponent may implement its original transition plan after it seeks dispute resolution;[103] (3) whether the rules should specify penalties imposed on the proponent for withdrawing the Initiation Plan;[104] and (4) self-transitions.[105] We discuss the first three issues below. The fourth issue is discussed in the next section, in the context of WCA's Petition for Reconsideration.

39. *Discussion*. We agree with WCA that three of the four issues for which HITN requests clarification are substantive changes and not technical corrections.[106] Thus, we conclude that HITN's request for clarification, which was filed after the deadline for petitions for reconsideration of the *BRS/EBS 3rd MO&O*, is an untimely filed petition for reconsideration, which under Section 405(a) of the Act we are unable to address.[107] Nonetheless, to the extent that there is any uncertainty about the obligations in a proponent-driven transition, we note that, in cases where the text of the rules is inconsistent with the text of an Order, the text of the rule controls. We find that HITN's fourth request is for a technical correction, rather than a substantive change, and can be addressed, notwithstanding the fact that it was raised after the deadline for petitions for reconsideration. In any event, the fourth issue raised by HITN also was raised by WCA in its timely-filed petition for reconsideration, and is discussed in the next section.[108]

3. Technical corrections

40. *Background.* In the *BRS/EBS 3rd MO&O*, the Commission stated that it is necessary to coordinate the timing of self-transitions with proponent-driven transitions.[109] WCA identifies an inconsistency between the text of paragraph 143 of the *BRS/EBS 3rd MO&O* and

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[101] HITN *Ex Parte* Request for Clarification (filed Nov. 2, 2006).

[102] HITN *Ex Parte* Request for Clarification at 2-3.

[103] HITN *Ex Parte* Request for Clarification at 3-4.

[104] HITN *Ex Parte* Request for Clarification at 4-5.

[105] HITN *Ex Parte* Request for Clarification at 5-7.

[106] *Ex Parte* Letter from Paul J. Sinderbrand, Counsel for WCA to Marlene H. Dortch, Federal Communications Commission (dated Nov. 21, 2006).

[107] See *Ex Parte* Letter from Paul J. Sinderbrand, Counsel for WCA to Marlene H. Dortch, Federal Communications Commission (dated Nov. 21, 2006) at 2.

[108] See *infra* ¶ 40.

[109] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5673 ¶ 141.

Section 27.1236(b)(6) of the Commission's Rules.[110] Specifically, paragraph 143 of the *BRS/EBS 3rd MO&O*, states that licensees who decide to self-transition must complete the self-transition within 51 months of the effective date of the amended rules, July 19, 2006.[111] Section 27.1236(b)(6), however, states that self-transitions must be completed within 57 months of July 19, 2006.[112] WCA asks that the Commission amend Section 27.1236(b)(6) of the Rules by deleting "57" and inserting in its place "51."[113] HITN asks that the Commission clarify how long self-transitioning licensees have to transition.[114] HITN insists that the *BRS/EBS 3rd MO&O* is ambiguous because paragraphs 141-143 of the *BRS/EBS 3rd MO&O* state that a self-transitioning licensee must file a notification within 90 days of the date the Initiation Plan has been filed and must complete the self-transition 21 months after the Initiation Plan has been filed.[115]

41. *Discussion.* We agree that a change is appropriate. We also will amend Sections 27.1231(f) and 27.1236(a), 27.1236(b)(1), and 27.1236(b)(6) to specify dates certain.[116] Thus, Sections 27.1231(f) and 27.1236(a) reference January 21, 2009, the date the Initiation Plan must be filed with the Commission; Section 27.1236(b)(1) references April 21, 2009, the date a self-transitioning licensee must notify the Commission; and Section 27.1236(b)(6) references October 20, 2010, the date self-transitions must be completed.[117] Because the time line for self-transitions parallels the timeline for proponent-driven transitions, we note that proponent-driven transitions must also be completed on or before October 20, 2010, unless stayed pending alternative dispute resolution.

D. Multichannel Video Programming Distributors (MVPD) Opt-Out

1. The Waiver Standard

42. *Background*. In the *BRS/EBS 3rd MO&O*, the Commission reaffirmed the right of qualifying MVPD operators to seek a waiver to opt-out of the transition.[118] HITN asks the Commission to clarify the minimum requirements related to the filing of an MVPD opt-out waiver request. HITN contends that the current procedure is unfair to potentially affected parties, many of whom will be non-profit educational licensees, because they must expend large sums of money on legal and engineering counsel to defend themselves against poorly conceived opt-out waiver requests that fail to analyze properly their effect on the operations of neighboring

[110] WCA PFR at 9.

[111] WCA PFR at 9.

[112] WCA PFR at 9.

[113] WCA PFR at 9-10. WiMAX, CTN, and NIA also support this change. WiMAX Comments at 11, CTN/NIA Opposition at 4.

[114] HITN *Ex Parte* Request for Clarification at 5-7.

[115] HITN *Ex Parte* Request for Clarification at 5-7.

[116] Because these rule changes are not substantive and are non-controversial, there is good cause to adopt them without notice and comment. *See* 5 U.S.C. § 553(b)(B).

[117] *See* Appendix A.

[118] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5645-5646 ¶¶ 72-74.

GSA stations, or to provide sufficient discussions of mitigation techniques that might be employed to allow for the opt-out while not impairing the ability of neighbors to transition their channels to the new band plan.[119]

43. HITN urges the Commission to clarify that any MVPD operator seeking an opt-out waiver from the mandatory band plan transition must, at a minimum: (1) serve neighboring EBS and BRS stations and other potentially affected licensees with a copy of the waiver request, including an engineering analysis of the predicted impact of the opt-out request on such stations; (2) if interference is predicted, explain why the MVPD operator cannot provide its services while meeting the interference protection requirements contained within the new rules; (3) detail specific techniques and efforts the MVPD operator will undertake at its sole expense to mitigate any interference its special operating parameters would cause to affected parties; (4) provide sufficient information about its current operations in order to allow for an objective case-specific determination of its eligibility and need for a waiver; and (5) provide signed statements from all licensees that are proposed to participate in the opt-out, thus, making clear that such licensees wish to have their stations excluded from the band transition plan.[120] The BRS Rural Advocacy Group opposes HITN's petition.[121]

44. *Discussion.* We decline to adopt the requirements that HITN requests with respect to MVPD opt-out waiver requests because, at this point, such changes are unnecessary. The last date for filing requests to opt out of the transition plan was April 30, 2007, and that date has passed.[122] To the extent HITN contends that a specific showing is defective, we will consider its arguments in the context of any oppositions or petitions filed against specific waiver requests.

2. Misaligned channels in overlapping GSAs

45. *Background*. HITN describes a set of issues that have arisen due to the overlapping application of several Commission decisions and asks the Commission to clarify how opt-out waiver requests should be handled under these circumstances. The relevant Commission decisions are as follows: first, the Commission established a station's GSA based on the station's PSA under the old rules; second, the Commission adopted a splitting the football methodology for determining a station's GSA when its PSA overlapped another station's PSA;[123] and third, the Commission decided to permit qualified MVPDs to opt out of transitioning to the

[119] HITN PFR at 12-13. On December 1, 2005, HITN filed a Petition to Deny WHTV Broadcasting Corporation's (d/b/a/ Digital TV One) Waiver Request to opt out of the transition of the 2.5 GHz band in San Juan, Puerto Rico. On January 29, 2007, the Wireless Telecommunications Bureau granted Digital TV One's waiver request. WHTV Broadcasting Corp. d/b/a Digital TV One, *Memorandum Opinion and Order*, 22 FCC Rcd 1314 (WTB 2007). HITN filed a petition for reconsideration of the *Memorandum Opinion and Order*, which is pending. Petition for Reconsideration of the Hispanic Information and Telecommunications Network, Inc. (filed Feb. 28, 2007).

[120] HITN PFR at 13. CTN and NIA state that they support these proposals. CTN and NIA Opposition at 5-6.

[121] BRS Rural Advocacy Group Opposition at 5-10.

[122] 47 C.F.R. § 27.1231(g).

[123] Accordingly, an A Group station's GSA was defined by its overlaps with neighboring pre-transition co-channel stations, and, similarly, a B Group station's GSA was defined by its overlaps with neighboring pre-transition co-channel stations. HITN PFR at 14.

new band plan and technical rules.[124] As a result of these three decisions, when one station transitions and its neighboring station (formerly overlapping PSA) does not, the channels become misaligned so that, for example, an untransitioned high-power high-site A3 channel in the opt-out market would be co-channel with a post-transition B2 channel in the neighboring market.[125]

46. Because the GSAs of these two stations differ, and each would have a right under the rules[126] to serve part of the same geographic area, HITN argues that the Commission must clarify: (1) whether an opt-out is possible; (2) whether one station's opt-out would preclude its co-channel neighbor from transitioning; and (3) if it would not, what interference protection and service rights each station would have in such a situation with respect to the overlapping area within their GSAs.[127] The BRS Rural Advocacy Group argues that the Commission should reject any suggestion from HITN that an opt-out is not possible in the case of overlapping GSAs.[128]

47. *Discussion*. We agree with the BRS Rural Advocacy Group that foreclosing an opt-out in the case of overlapping GSAs is unnecessary. Instead, the transitioning operator and the non-transitioning operator may resolve this situation among themselves or the transitioning licensee may file comments for Commission consideration in response to the non-transitioning operator's opt-out waiver request. Because the deadline for filing opt-out waiver requests was April 30, 2007, we have received all of the opt-out waiver requests that will be filed. We conclude that action by the Commission to resolve a situation that affects few operators is inappropriate and unwarranted when the Commission has established a process to individually review opt-out waiver requests.

E. Technical Issues

1. Antenna height benchmarking

48. *Background.* In the *BRS/EBS 2nd R&O*, the Commission adopted antenna height benchmarking criteria in Section 27.1221, based on the concept proposed by WCA, the Catholic Television Network (CTN), and the National ITFS Association (NIA). The rule affords licensees the flexibility to deploy Time Division Duplex (TDD) and Frequency Division Duplex (FDD) technologies in the 2.5 GHz band that present a risk of interference that is not present in other bands where only FDD is permitted upstream and downstream on designated channels.[129]

[124] HITN cites the following example: If in a market in which licensees are seeking an opt-out waiver, the B Group station had a neighboring co-channel station to its east with a PSA reference point some 20 miles away, while the A Group station in the same market had no such co-channel neighbor to its east, then the GSA of the B Group would be truncated to the east to allow for the GSA of its neighbor while the A Group's GSA would extend out to the east 35 miles from its reference point. HITN states that in this common scenario, it is clear that the GSA boundaries between the opt-out market and the market to its east would differ depending upon the channel group. In the example above, HITN notes, an untransitioned high-power high-site A3 channel in the opt-out market would ultimately find itself co-channel with a post-transition B2 channel in the market to its east. HITN PFR at 14.

[125] HITN PFR at 14.

[126] 47 C.F.R. § 27.1209(b).

[127] HITN PFR at 14.

[128] BRS Rural Advocacy Group Opposition at 9.

[129] *BRS/EBS R&O*, 19 FCC Rcd at 14213 ¶123.

The antenna height benchmarking concept is intended to mitigate that risk, by requiring interference protection in certain situations while posing no restrictions on the height of base station antennas.[130] Accordingly, a base station receive antenna with a height above average terrain less than or equal to the threshold showing of the rule is accorded protection from a transmitting antenna that exceeds the threshold showing required by the rule. A base station transmitting antenna with a height above average terrain equal to or less than the threshold showing of the rule is unlikely to cause interference. Finally, a base station transmitting antenna greater than the threshold showing would not need to protect a base station receive antenna that also exceeds the threshold showing.[131]

49. Several proposals to modify the antenna height benchmarking rule were considered by the Commission upon reconsideration of the *BRS/EBS 2nd R&O* but were not adopted in the *BRS/EBS 3rd MO&O*. Thereafter, WCA convened discussions among those who had raised concerns about the benchmarking rule in the hope of reaching a consensus, and now offers a revised proposal to modify Section 27.1221 of the Rules. The proposal would modify the rule by adding deadlines by which licensees must act where documented interference from a base station operating outside its height benchmarking threshold harms a base station operating within its height benchmark.[132] Under WCA's proposal, where the interferer is a new or modified facility, it must bring its operation into compliance, either by modifying its antenna height within the height benchmark, or by limiting its received signal at the other party's base station to no more than -107 dBm/5.5 megahertz, within 24 hours of receiving a documented interference complaint.[133] If the interferer is an existing base station that is causing interference to a new base station, however, the existing licensee would have 90 days to come into compliance.[134] WCA states that its approach strikes a balance among the interests of all involved, particularly those consumers served by existing facilities who might be forced to suffer an extended impairment of service if remedial action was required immediately.[135] WCA also asks that Section 27.1221 require licensees to provide information concerning their base station to any nearby licensee upon request.[136]

50. WiMAX supports WCA's petition on this issue.[137] WiMAX contends that providing specific deadlines will enhance deployments in the 2.5 GHz band by eliminating the present regulatory uncertainty and providing system operators with the assurance that service to consumers from BRS and EBS facilities will not be unreasonably impaired.[138]

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[130] *BRS/EBS R&O*, 19 FCC Rcd at 14213 ¶123.

[131] *BRS/EBS R&O*, 19 FCC Rcd at 14213 ¶123.

[132] WCA PFR at 2.

[133] WCA PFR at 2.

[134] WCA PFR at 2-3.

[135] WCA PFR at 2-3.

[136] *Ex Parte* Letter from Paul Sinderbrand, Counsel for WCA, to Marlene H. Dortch, Federal Communications Commission (dated May 29, 2007) at 4 and Attachment A.

[137] WiMAX Comments at 3.

[138] WiMAX Comments at 3.

51. WCA has also submitted an *Ex Parte* letter seeking to clarify the proper interpretation of Section 27.1221 of our rules with regard to the following issues. First, WCA asks that Section 27.1221 specify that a base station would be within its height benchmark if its height *in meters* does not exceed the distance between the station's location and the boundary of the GSA, *in kilometers* squared, divided by 17.[139] Second, WCA asks that Section 27.1221 clarify that when the GSAs of two neighboring licensees do not touch, the height benchmark is calculated according to the distance between the base station and the nearest boundary of the other station's GSA along the radial between the two base stations.[140] Third, WCA asks that Section 27.1221 require licensees to cooperate in good faith with each other to avoid interference.[141]

52. *Discussion.* After considering WCA's proposal, we agree that in the event a facility operating outside of its height benchmarking threshold would cause interference to an existing licensee, specifying a timeline would expedite the coordination process between the licensees. While we have some concern that requiring a new or modified base station to take corrective action 24 hours after receiving notification could prove challenging, we note that no party opposed this change. We also believe that placing the burden on the interfering operator is appropriate to assure that noncompliant stations provide protection to existing services. We further adopt WCA's modified proposal regarding the formula used to calculate height benchmarking and clarifying how non-contiguous licensees calculate their height benchmark. We reject, however, WCA's request to mandate good faith cooperation as inappropriate. The Commission expects all licensees to cooperate in good faith at all times, and we see no purpose in establishing a special good faith rule for this situation. Thus, we amend Section 27.1221 of the Rules as discussed above.

2. Out-of-band emissions

a. For user stations

53. *Background*. In the *BRS/EBS R&O*, the Commission adopted the Coalition's proposal to establish out-of-band emission requirements for mobile BRS and EBS stations.[142] For mobile digital stations, the Commission established that the attenuation factor shall be not less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) dB at 5.5 megahertz from the channel edges.[143] WCA filed a petition for reconsideration arguing that these restrictions should apply to all user stations, not just mobile digital user stations.[144] In the *BRS/EBS 3rd MO&O*, the Commission found that the rules adopted in the *BRS/EBS R&O* were adequate to protect a licensee from out-of-band emissions.[145] The Commission explained that it will not

[139] *Ex Parte* Letter from Paul Sinderbrand, Counsel for WCA, to Marlene H. Dortch, Federal Communications Commission (dated May 29, 2007) (*WCA May 29 Ex Parte*) at 3 and Attachment A.

[140] *WCA May 29 Ex Parte* at 3 and Attachment A.

[141] *WCA May 29 Ex Parte* at 4 and Attachment A.

[142] *BRS/EBS R&O*, 19 FCC Rcd at 14215 ¶127.

[143] 47 C.F.R. § 27.53(m)(4).

[144] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5692 ¶201.

[145] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5692 ¶201.

modify the emission limits because it has not been demonstrated by any party that the emission limits adopted in the *BRS/EBS R&O* for these services are inadequate.[146]

54. WCA has requested that the Commission reconsider its decision on this issue and raises the same arguments it presented in its previous petition for reconsideration.[147] WCA states that no party to this proceeding has presented a cogent argument against requiring all user stations, not just those that are mobile, to attenuate their emissions at least 55 + 10 log (P) dB measured 5.5 megahertz from the appropriate band edge.[148] Thus, on reconsideration, WCA urges that the Commission adopt the modification proposed by WCA and require all stations to comply with the same spectral mask.[149]

55. *Discussion*. We affirm our prior decision and decline to make the change proposed by WCA. The Commission fully considered WCA's arguments and concluded that the existing rules were adequate. In the instant petition, WCA does not offer any new arguments beyond those previously considered and rejected by the Commission. Accordingly, we will maintain our earlier decision regarding out-of-band emissions for mobile stations in this service.

b. Measuring out-of-band emissions for contiguous channels

56. *Background.* The band plan adopted in the *BRS/EBS R&O* provided for LBS and UBS segments comprised of 12 contiguous 5.5-megahertz channels.[150] The Commission further indicated that these blocks would enable licensees to deploy any possible combination of the most current FDD and TDD standard channel sizes, which are based on five-megahertz channels.[151]

57. In the Coalition White Paper, WCA, CTN, and NIA suggested that the Commission retain the provisions of then-current Section 21.908(a) of the Rules and allow all of the various out-of-band emission requirements imposed on base stations and user stations to be measured at the outermost edges of the combined channels where two or more channels (licensed to one or more entities) are used as part of the same system.[152] Although the *BRS/EBS R&O* did not discuss the issue of measuring across contiguous channels, the Commission adopted Section 27.53(m) which applied out-of-band emission limits at the edge of each individual channel.[153] In the *BRS/EBS Modification Order*, the Commission modified Section 27.53(m) to state that licensees should measure out-of-band emissions at three megahertz from their channel's

[146] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5692 ¶201.

[147] WCA PFR at 4-5.

[148] WCA PFR at 4.

[149] WCA PFR at 4 and Appendix A.

[150] *BRS/EBS R&O*, 19 FCC Rcd at 14184 ¶ 38.

[151] *BRS/EBS R&O*, 19 FCC Rcd at 14185 ¶ 41.

[152] WCA PFR at 6.

[153] 47 C.F.R. § 27.53(m).

edges.[154] WCA filed a petition for reconsideration of the *BRS/EBS R&O* asserting that the Commission should have adopted the Coalition's unopposed proposal on this issue. The *BRS/EBS 3rd MO&O* did not address this issue.

58. On reconsideration, WCA again urges the Commission to adopt the Coalition's approach.[155] WCA contends that imposing the out-of-band emission limits at the edge of each channel within a system provides no identifiable public benefit, yet reduces spectrum capacity and increases the price to consumers of spectrum services in this band.[156] WCA contends that applying the spectral masks proposed by the Coalition worked well for the BRS/EBS industry for years, and a similar approach is utilized with success for broadband Personal Communications Service (PCS).[157] Accordingly, WCA urges the Commission to revise Section 27.53(m) to clarify that where two or more contiguous channels are utilized as part of a system, the out-of-band emission limits are to be measured at the outermost edges of those contiguous channels.[158] WiMAX supports each of WCA's proposed changes to Section 27.53(m) of the Commission's Rules for the reasons stated by WCA.[159]

59. *Discussion*. We agree with WCA that it is appropriate to clarify that when two or more contiguous channels are combined to form a single channel, out-of-band emissions are to be measured at three megahertz from the outermost edges of the combined channel. We believe that measuring out-of-band emissions at the outer limit of each individual channel, when these channels have been combined into one contiguous channel, unnecessarily restrains spectral efficiency without any countervailing benefit. Therefore, we will modify this rule to allow licensees to measure out-of-band emissions from the outermost edges of the combined channels.

c. Interference complaint process

(i) Deadlines for compliance

60. *Background*. As discussed above, Section 27.53(m) of the Commission's Rules sets forth the out-of-band emission limits imposed on BRS and EBS licensees.[160] The rule requires that for fixed and temporary fixed digital stations, the attenuation shall not be less than 43 +10 log (P) dB, unless a documented interference compliant is received from an adjacent channel licensee.[161] In the event that the complaint cannot be mutually resolved between the parties, both licensees of existing and new systems shall reduce their out-of-band emissions by at least 67 + 10 log (P) dB measured 3 megahertz from their channel's edges for distances between

[154] *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, *Order,* WT Docket No. 03-66, 19 FCC Rcd 22284, 22290 (2004) (*BRS/EBS Modification Order*).

[155] WCA PFR at 6.

[156] WCA PFR at 6-7.

[157] WCA PFR at 7.

[158] WCA PFR at 7.

[159] WiMAX Comments at 2-5.

[160] *BRS/EBS Modification Order*, 19 FCC Rcd at 22290-22291.

[161] 47 C.F.R. § 27.53(m)(2).

stations exceeding 1.5 kilometers (km).[162] In the *BRS/EBS 3rd MO&O*, the Commission required that the interfering licensee either resolve the interference situation or employ the more rigorous emission mask within 60 days after receiving a documented interference complaint.[163]

61. In its petition for reconsideration, WCA asserts that a new or modified base station causing out-of-band emission interference should meet the more restrictive spectral mask requirement within 24 hours of receipt of a documented interference complaint from the first adjacent channel licensee.[164] However, an existing base station that causes out-of-band emission interference to a new base station would, consistent with the current rule, have 60 days to comply with the more restrictive spectral mask requirement.[165]

62. In addition, WCA states that Section 27.53(m) should include special provisions for fixed user stations that utilize a transmission antenna that is affixed to an outside structure.[166] WCA asserts that those user stations will employ higher gain antennas and tend to be higher above ground level, thus posing a risk of interference that is not present with other user stations.[167] Therefore, WCA proposes that Section 27.53(m) be revised to require a cure within 24 hours where an existing base station suffers interference from a new or modified outdoor antenna user station, and within 14 days where a new or modified base station suffers such interference from an existing outdoor antenna user station.[168]

63. WCA further proposes that Section 27.53(m) be amended to state that, in other cases of documented interference from a user station to a base station, both licensees have an obligation to cooperate in good faith to reasonably mitigate the interference.[169] WCA states that adoption of its proposed revisions will provide licensees with greater certainty, reduce the length of time that service to consumers is disrupted due to out-of-band emission interference, and minimize the number of disputes that are presented to the Commission for resolution.[170]

64. *Discussion*. As with the height benchmarking rule, we have some concern about requiring the licensee of a new or modified base station to curtail its out-of-band emissions within 24 hours of receipt of a documented interference complaint from an existing base station. We will adopt WCA's proposal, however, because we are committed to insuring that existing facilities are able to provide continuous service, without impermissible interference. We also note that the proposal is unopposed. Therefore, any new or modified outdoor antenna user station, within 24 hours of receipt of a documented interference complaint from an existing base

[162] 47 C.F.R. § 27.53(m)(2).

[163] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5691 ¶197.

[164] WCA PFR at 3.

[165] WCA PFR at 4.

[166] WCA PFR at 5.

[167] WCA PFR at 5.

[168] WCA PFR at 5.

[169] WCA PFR at 5.

[170] WCA PFR at 5.

station regarding out-of-band emissions, must make adjustments to limit out-of-band emissions into that adjacent channel operation.

65. We conclude, however, that WCA has not established a need for special rules for outdoor fixed user stations. Rather, we believe that applying the existing deadlines to disputes between base stations and outdoor user stations will be sufficient. WCA has not demonstrated that outdoor fixed user stations are sufficiently different from other types of facilities to justify a unique 14-day deadline for compliance. Furthermore, WCA has not explained why a special rule provision mandating good faith cooperation is needed. Accordingly, we deny WCA's petition on this issue.

(ii) Limiting Right to File Documented Interference Complaints to First Adjacent Channel Licensees

66. *Background.* Section 27.53(m)(2) of the Commission's Rules states that only adjacent channel licensees may file documented interference complaints.[171] In its petition for reconsideration of the *BRS/EBS R&O*, WCA asserts that any LBS or UBS licensee should be able to invoke the more stringent dual mask set forth in Section 27.53(m)(2) so long as such licensee has a GSA overlapping the GSA of the recipient of the request, regardless of whether it is licensed to operate on a first adjacent channel.[172] In the *BRS/EBS 3rd MO&O*, the Commission affirmed that the right to file a documented interference complaint should be limited to first adjacent channel licensees because the level of interference that would be most severe and most likely to affect a licensee would be from first adjacent channel operations.[173]

67. WCA again urges the Commission to adopt the proposal advanced by the Coalition to allow an out-of-band emission complaint to be filed by any LBS or UBS licensee that had an overlapping GSA, regardless of whether the interferer is licensed to operate on the first channel adjacent to the other party.[174] While the Commission in the *BRS/EBS 3rd MO&O* acknowledged the potential of interference, it reasoned that "the level of interference that would be most severe and most likely to affect a licensee would be from adjacent channel operations.[175]

68. While WCA recognizes that the potential for interference due to out-of-band emissions increases when the frequencies involved are immediately adjacent, it contends permitting all licensees with overlapping GSAs to submit documented interference complaints would help to avoid harmful interference in the band.[176] According to WCA, because the rules permit TDD and FDD in the band and do not require synchronization of TDD operations, interference due to out-of-band emissions is a greater threat than in bands like PCS and 1.7/2.1

[171] 47 C.F.R. § 27.53(m)(2).

[172] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5690 ¶194.

[173] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5690-5691 ¶195.

[174] WCA PFR at 7.

[175] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5690-5691 ¶195.

[176] WCA PFR at 8.

GHz Advanced Wireless Services (AWS), where FDD is mandated and upstream and downstream channels are designated.[177]

69. *Discussion*. The Commission has twice affirmed a limitation on the right to file a documented interference complaint to first adjacent channel licensees because the level of interference that would be most severe and most likely to affect a licensee would be to first adjacent channel operations. WCA's petition repeats arguments previously considered and rejected. We believe that the Commission's previous decisions strike the right balance between protecting against interference that is most likely to occur and avoiding unnecessary limitations on a licensee's ability to operate. Accordingly, we deny WCA's request to amend Section 27.53(m)(2) to allow any licensee to file a documented interference complaint.

3. GSA Boundaries

a. Straight Line v. Great Ellipses

70. *Background*. In the *BRS/EBS R&O*, the Commission established GSAs for all BRS and EBS stations.[178] The Commission noted that in other bands where it contemplated the development of mobile or other wide-area services, it concluded that geographic licensing based on predefined service areas has significant advantages over site-based licensing because of the greater operational flexibility and reduced operating costs for licensees.[179] In addition, the Commission concluded that geographic area licensing reduces administrative burdens for consumers, licensees, and regulators by allowing licensees to modify, move, and add to their facilities within specified geographic areas without prior Commission approval.[180] Therefore, the Commission adopted geographic area licensing for all operations in all segments of the band.[181] The Commission stated that the GSAs for BRS and EBS stations would be based on the licensee's current protected service area, which would extend 56.3255 km (35 miles) from the transmitter site, as provided by former Sections 21.902(d) and 74.903(d) of the Commission Rules.[182]

71. The Commission also recognized that the rules defining protected service areas have changed or otherwise been modified in a manner that has resulted in overlapping PSAs being assigned to co-channel incumbent BRS and EBS licensees.[183] Accordingly, in establishing GSAs, the Commission adopted a mechanism for resolving overlaps by drawing a boundary line or chord through a "football" shaped area where the PSAs intersect, with each licensee agreeing to limit the interference it generates across the boundary line.[184]

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[177] WCA PFR at 8.

[178] *BRS/EBS R&O*, 19 FCC Rcd at 14189 ¶54.

[179] *BRS/EBS R&O*, 19 FCC Rcd at 14189 ¶53.

[180] *BRS/EBS R&O*, 19 FCC Rcd at 14189 ¶53.

[181] *BRS/EBS R&O*, 19 FCC Rcd at 14189 ¶54.

[182] *BRS/EBS R&O*, 19 FCC Rcd at 14189 ¶55.

[183] *BRS/EBS R&O*, 19 FCC Rcd at 14192 ¶59.

[184] *BRS/EBS R&O*, 19 FCC Rcd at 14192 ¶59.

72. In WCA's Petition for Reconsideration of the *BRS/EBS R&O*, WCA requested that the Commission modify Section 27.1206 to clarify how GSA boundaries would be established under certain circumstances.[185] To avoid conflicts regarding GSA boundaries, WCA proposed that the Commission modify this section of the rules to clarify that "great ellipses" should be used instead of straight lines or chords to "split the football."[186] WCA argued that if the ellipses were not employed, there would be areas, sometimes as wide as a kilometer, which would not be assigned to either GSA.[187] In the *BRS/EBS 3rd MO&O*, the Commission rejected WCA's proposal because it received minimal support and the Commission was not convinced that the proposal was "necessary or beneficial."[188]

73. WCA now renews its request to use "great ellipses" in calculating GSA boundaries.[189] WCA argues that the failure to use "great ellipses" will result in areas that will not be assigned to any licensee because licensees could use different methodologies for calculating a straight line.[190] WCA also cites to support it received for its proposal from ComSpec Corp. and CelPlan Technologies, Inc. in comments to the *BRS/EBS NPRM*.[191]

74. *Discussion*. In establishing GSAs, the Commission recognized that there would be overlap of geographical service area boundaries in certain areas and situations and adopted the industry's proposal to "split the football" to bifurcate overlapping GSA boundaries as a means to determine a licensee's service area. We disagree with WCA's proposal that the "great ellipses" methodology should be standardized in the rules to establish GSA boundaries to preclude an area from being unserved. Licensees have been using the splitting the football methodology since January 10, 2005, and it has worked well. Accordingly, we affirm the Commission's prior determination that WCA's proposal to establish the "great ellipses" methodology to establish GSA boundaries is neither necessary nor beneficial.

b. GSA Boundaries – Pending Applications

75. *Background.* In the *BRS/EBS 3rd MO&O*, the Commission addressed the issue of how to handle pending applications for new or modified stations in the newly established geographic area licensing framework.[192] The Commission adopted WCA's unopposed suggestions as to how to accommodate pending applications.[193] One of the suggestions adopted by the Commission was: "Where there is pending as of January 10, 2005, an application for a new incumbent station with a PSA that overlaps that of a licensed incumbent station, the GSA of

[185] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶205.

[186] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶ 205.

[187] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶205.

[188] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶ 205.

[189] WCA PFR at 10-12.

[190] WCA PFR at 11.

[191] WCA PFR at 11-12, *citing* Comments of ComSpec Corp. (filed Sep. 8, 2003) at 2-3; Reply Comments of CelPlan Technologies, Inc. (filed Oct. 22, 2003) at 6.

[192] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶ 206.

[193] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5695 ¶ 208.

the incumbent station is created by splitting the football and, if the pending application is ultimately dismissed or denied, the territory covered by the GSA of the applied for station reverts to the BRS BTA holder (if a BRS application) or to EBS white space (if an EBS application)."[194]

76. Although HITN did not comment on this issue earlier, HITN now seeks reconsideration of that decision.[195] HITN argues that the decision not to restore to an incumbent station the portion of a GSA split with a pending application is inconsistent with other decisions made by the Commission.[196] Specifically, HITN contends that this decision is inconsistent with the treatment of pending modification applications, where the pending application does not affect the GSA until granted.[197] HITN contends that the decision to take away a portion of an incumbent's GSA because of the pendency of an application for a new station is arbitrary and capricious because it is inconsistent with the treatment of GSAs involving modification applications.[198]

77. WCA, Sprint Nextel, and WiMAX oppose HITN on this issue.[199] Those parties contend that there is no inconsistency in the two scenarios because they involve different situations.[200] WCA points out that in the situation involving modification applications, there is no territory to be forfeited, and the only question is where to draw the boundary of the GSA.[201] In contrast, when an application for a new station is involved, there are three interested parties: the incumbent licensee; the applicant for a new station; and the BRS BTA license holder or future EBS licensee.[202] WCA and WiMAX contend that the Commission's approach is reasonable and prevents the incumbent licensee from reaping a windfall.[203] Sprint Nextel argues that the auction winners purchased the rights to acquire forfeited spectrum and that the Commission cannot award those same rights a second time to another party.[204] Sprint Nextel also contends that the two situations are different because applicants for new stations had to "satisfy a more stringent threshold showing" than applicants for modifications.[205]

78. *Discussion*. We disagree with HITN that the rules are inconsistent. We agree with WCA, Sprint Nextel, and WiMAX that the two situations are distinct and that the rules the Commission adopted in the *BRS/EBS 3rd MO&O* strike the appropriate balance among the interests of incumbent licensees, parties with pending applications for new stations, BRS BTA

[194] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5694 ¶ 206.

[195] HITN PFR at 7-9.

[196] HITN PFR at 7-8.

[197] HITN PFR at 8.

[198] HITN PFR at 8-9.

[199] WCA Opposition at 21-23, Sprint Nextel Opposition at 11-12, WiMAX Comments at 10-11.

[200] WCA Opposition at 23, Sprint Nextel Opposition at 12, WiMAX Comments at 11.

[201] WCA Opposition at 23.

[202] WCA Opposition at 23.

[203] WCA Opposition at 23, WiMAX Comments at 10-11.

[204] Sprint Nextel Opposition at 12.

[205] Sprint Nextel Opposition at 12.

license holders, and possible future EBS licensees. We therefore affirm the existing rules and deny HITN's petition for reconsideration.

4. Grandfathering of EBS facilities under Section 27.55 (a)(4)(iii)

79. *Background.* In the *BRS/EBS R&O*, the Commission established signal strength limits at the boundary of each licensee's GSA.[206] In the MBS, the Commission decided to retain the -73.0 dBW/m^2 limit for post-transition operations "because it provides adequate service for high-power stations operating in the MBS.[207] No party sought reconsideration of the *BRS/EBS R&O* on this point, and the rule was not modified in the *BRS/EBS 3rd MO&O*. Now, however, WCA asks that we modify the rule and allow licensees in the MBS to exceed that limit if the facilities "otherwise comport with the Commission's mandate that an EBS licensee be provided with facilities in the MBS that are substantially similar to the licensee's pre-transition facilities."[208] WCA contends that the rule modification is needed to ensure that EBS licensees are provided with comparable facilities after the transition.[209] WCA cites to the Commission's statement in the *BRS/EBS R&O* that the transition plan "must provide for the MBS channels to be authorized to operate with the transmission parameters that are substantially similar to those of the [EBS] licensee's current operation."[210]

80. WiMAX supports WCA's proposed rule change.[211] CTN and NIA also support WCA's proposal, but assert that the grandfathering of signal levels should only apply to the EBS licensee's pre-transition operations (including modifications to those facilities).[212] CTN and NIA point out that an EBS licensee should not be subject to interference from an adjacent licensee that has discontinued high-powered video operations and converted to cellularized, low-power operations.[213] In response, WCA agrees that licensees should not be allowed to exceed the power limit in perpetuity and urges the adoption of CTN's and NIA's proposal with one modification (the underlined material represents WCA's proposed modification):

> Following transition, for stations in the MBS, the signal strength at any point along the licensee's GSA boundary must not exceed the greater of (a) -73.0 + 10 log(X/6) dBW/m², where X is the bandwidth in megahertz of the channel, or (b) for facilities that are substantially similar to the licensee's pre-transition facilities (including modifications <u>that do not alter the fundamental nature or use of the transmissions</u>), the signal strength at such point that resulted from the station's

[206] *BRS/EBS R&O*, 19 FCC Rcd at 14208-14210 ¶¶ 105-110.

[207] *BRS/EBS R&O*, 19 FCC Rcd at 14209 ¶ 108.

[208] WCA PFR at 19-20.

[209] WCA PFR at 20.

[210] WCA PFR at 20, *citing BRS/EBS R&O*, 19 FCC Rcd at 14206 ¶ 96.

[211] WiMAX Comments at 14-15.

[212] CTN NIA Opposition at 5.

[213] CTN NIA Opposition at 5.

operations immediately prior to the transition, provided that such operations comported with § 27.55(a)(4)(i).[214]

81. HITN supports WCA's original proposal as striking the best possible balance under the circumstances between the competing interests of maintaining existing pre-transition service and allowing adjacent licensees to fully utilize their spectrum.[215] HITN urges the Commission to require that a grandfathered facility transitioned pursuant to this provision inform the Commission of the transition and provide the Commission with a copy of its last site-based authorization.[216] HITN also urges that the Commission note in the Universal Licensing System (ULS) that the station has been grandfathered and that the site-based license be placed in the ULS.[217] WCA responds that such a requirement is unnecessary because the post-transition notification required by Section 27.1235(b) of the Commission's Rules provides the information necessary to calculate a predicted signal strength.[218] Finally, HITN asks that the Commission state that any grandfathering shall expire ten years after any new rules are adopted pursuant to WCA's request, unless the EBS licensee requests an extension.[219] WCA believes that such a requirement would be an unnecessary regulatory burden, although it does not object to a requirement that a licensee report when it is no longer eligible to be grandfathered because it discontinued or modified its pre-transition operations.[220]

82. *Discussion*. We will amend our rules as suggested by WCA, CTN, and NIA and allow MBS licensees to exceed the authorized -73.0 dBW/m² limit at the border provided the facilities are needed to comply with the Commission's mandate that an EBS licensee be provided with facilities in the MBS that are substantially similar to the licensee's pre-transition facilities. We agree with the parties that the proposed modification is appropriate to ensure licensees are provided with substantially similar facilities after the transition.

83. We also agree with CTN and NIA that licensees should not be subject to interference from an adjacent licensee and that grandfathering of signal levels should only apply to the licensee's pre-transition operations (including modification to those facilities). A facility in the MBS should not be subject to interference from an adjacent licensee that has discontinued high-powered operations and converted to cellularized, low-power operations. Therefore, we are amending our rules and adopting CTN's and NIA's proposed modification, with WCA's noted exception. Accordingly, stations operating in the MBS, subsequent to transition, may not exceed the greater of (a) -73 + 10 logX/6 dBW/m², where X is the bandwidth of the channel in megahertz, or (b) for facilities that are substantially similar to the licensee's pre-transition facilities (including modifications that do not alter the fundamental nature or use of the transmissions), the signal prior to the transition, provided that such operations comport with Section 27.55(a)(4)(i). We decline to adopt the additional filing requirements proposed by HITN

[214] WCA Reply at 5.

[215] HITN Opposition at 5.

[216] HITN Opposition at 6.

[217] HITN Opposition at 6.

[218] WCA Reply at 6.

[219] HITN Opposition at 6.

[220] WCA Reply at 6-7.

because we believe the information contained in the post-transition notification will provide adequate information to all licensees.

5. Technical corrections

84. We make several rule corrections on our own motion. Specifically, we correct an error in the channel plan for post-transition EBS Channel KG2. Section 27.5(i)(2)(iii) of the Commission's Rules mistakenly assigns EBS channel KG2 at 2615.33333–261**6**.66666 MHz.[221] The correct assignment for EBS Channel KG2 is 2615.33333–261**5**.66666 MHz. We further correct an error in Section 27.5(i)(2)(iii), which mistakenly assigns Channels G1-G3 to the BRS. The correct assignment of channels G1-G3 is to the EBS. We also correct an error in Sections 27.55(a)(4)(i) and (ii), which reference 47 dB [mμ]V/m. The correct reference is 47 dBμV/m. In addition, we correct a typographical error in Section 27.53(m)(4) of our Rules. The second sentence states that "Mobile Service Satellite licensees. . ." when it should state "Mobile Satellite Service licensees . . . ." Finally, we correct an omission and incorporate the existing license terms for BRS and EBS into Section 27.13 of the Commission's Rules.[222]

F. Simultaneous Operation on Old and New BRS Channels 1 and 2/2A

85. *Background*. In the *BRS/EBS 3rd MO&O*, the Commission discussed the relationship between the transition within the 2.5 GHz band and the relocation of the BRS Channels No. 1 and No. 2/2A incumbents currently operating within the 2150-2160/62 MHz band.[223] In that regard, the Commission held that licensees on these channels may operate in either 2150-2156 or 2496-2500 MHz (for BRS Channel 1) or 2156-2160/62 or 2686-2690 MHz band (for BRS Channel 2/2A) pre-transition, but not in both bands.[224]

86. WCA seeks reconsideration of the Commission's decision prohibiting BRS Channels No. 1 and No. 2 from simultaneously operating in their old channel locations in the 2150-2160/62 MHz band and their temporary, pre-transition locations at 2496-2500 MHz (BRS Channel 1) and 2686-2690 MHz (BRS Channel 2) before they are transitioned to their new permanent channel locations at 2496-2502 MHz (BRS Channel 1) and 2618-2624 MHz (BRS Channel 2).[225] WiMAX supports WCA's position.[226]

87. *Discussion*. WCA argues persuasively that it will be impossible to make a "flash cut" of all subscribers from the old frequency band to their pre-transition locations in the 2.5

[221] 47 C.F.R. § 27.5(i)(2)(iii).

[222] *See* 47 C.F.R. § 21.45 (2004); 47 C.F.R. § 21.929 (2004); 47 C.F.R. § 74.15(e) (2004). In 2006, the Wireless Telecommunications Bureau declined WCA's request to initiate a proceeding to adopt a 15-year license term for BRS and EBS. *See* Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau to Paul J. Sinderbrand, Esq. and Robert D. Primosch, Esq. (Sep. 14, 2006).

[223] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5669-5670 ¶¶ 129-132.

[224] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5670 n.358. As WCA notes, the footnote does not list the frequencies for BRS Channel 2, although BRS Channel 2 is mentioned.

[225] WCA PFR at 21-22. As discussed *infra*, the permanent channel location for BRS Channel 2 is intended to incorporate both BRS Channels 2 and 2A. Thus, references to BRS Channel 2 should be read to include BRS Channel 2A, as appropriate.

[226] WiMAX Comments at 14.

GHz band and that it is therefore necessary to have simultaneous operation in order to ensure a seamless relocation.[227] We also are concerned that attempting a "flash cut" will unnecessarily jeopardize service to existing customers. Thus, we agree with WCA and conclude that BRS Channels 1 and 2/2A licensees may operate simultaneously in their old channel locations in the 2150-2160/62 MHz band and their temporary, pre-transition locations at 2496-2500 MHz (BRS Channel 1) and 2686-2690 MHz (BRS Channel 2) until every subscriber is relocated to the 2.5 GHz band, at which point the licensees must cease all operations in the 2150-2160/62 MHz band.

G. 2496-2502 MHz Band Sharing Issues

88. *Background.* The new BRS Channel 1 band at 2496-2502 MHz, relocated from the 2150-2156 MHz band, partly overlaps a number of services in the 2483.5-2500 MHz band, including Broadcast Auxiliary Service (BAS) Channel A10 operations at 2483.5-2500 MHz. As an initial matter, we note that a pending petition for reconsideration filed by the Society of Broadcast Engineers asks us to adopt a revised band plan for BAS Channels A8-A10 that would remove BAS operations from the 2496-2502 MHz band.[228] We defer consideration of this matter to a separate decision. The 2496-2502 MHz band also partially overlaps the Big LEO MSS band at 2483.5-2500 MHz, with Code Division Multiple Access (CDMA) MSS downlink operations operating on an unprotected basis vis-à-vis BRS licensees.[229] In the *Big LEO Order on Reconsideration and AWS 5th MO&O*, to provide protection to BRS-1 operations, the Commission codified requirements for CDMA MSS operators in the 2483.5-2500 MHz band not to exceed the existing, world-wide, ITU power-flux density (pfd) coordination trigger limits established for the band.[230] These pfd limits are set forth in the ITU Radio Regulations at Appendix 5, Annex 1 (ITU-RR App. 5, Annex 1).[231] The Commission stated that these coordination trigger limits would permit BRS-1 licensees to construct and operate comparable facilities to those being relocated from the 2150-2156 MHz band.[232] Although the Commission recognized that the pfd coordination threshold values in ITU-RR App. 5, Annex 1 do not address all potential interference cases between MSS and BRS, such as mobile terrestrial use, the lower gains of antennas associated with mobile handheld units make them less vulnerable to the

[227] WCA PFR at 21.

[228] *See* SBE Petition for Reconsideration, IB Docket No. 02-364 (filed May 22, 2006) at 2-3. *See also* Sprint Nextel Corporation and Society of Broadcast Engineers, Inc. *Ex Parte*, IB Docket No. 02-364, ET Docket No. 00-258 (filed June 4, 2007) supporting SBE's petition.

[229] *See generally Big LEO Spectrum Sharing Order*, 19 FCC Rcd at 13387-13388 ¶¶ 69-71. Big LEO satellite systems provide voice and data communication to users with handheld mobile terminals via non-geostationary satellites in Low Earth Orbit (LEO). For additional background about MSS in the Big LEO bands, *see* Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, CC Docket No. 92-166, *Report and Order*, FCC 94-261, 9 FCC Rcd 5936 (1994), *on reconsideration*, *Memorandum Opinion and Order*, FCC 96-54, 11 FCC Rcd 12861 (1996).

[230] *See Big LEO Order on Reconsideration and AWS 5th MO&O*, 21 FCC Rcd at 5624 ¶ 31; 47 C.F.R. § 25.208(v).

[231] ITU-RR App. 5, Annex 1 includes coordination threshold values of pfd for non-geostationary satellite orbit (NGSO) space stations and degradation of performance values for terrestrial systems, and addresses both analog and digital fixed use in the 2496-2500 MHz band.

[232] *Big LEO Order on Reconsideration and AWS 5th MO&O*, 21 FCC Rcd at 5624 ¶ 31.

emissions of satellite systems than antennas of fixed systems, and thus, the ITU-RR App. 5, Annex 1 pfd coordination threshold values should protect mobile terrestrial uses as well.[233]

89. The Commission noted that Globalstar, the only currently operational MSS provider in the 2483.5-2500 MHz band, has the capability to control its pfd in the 2496-2500 MHz band by limiting the number of users on a particular channel in a given geographical region.[234] The Commission also noted that, since BRS-1 systems were not yet operational, BRS-1 networks could be designed to accept interference-to-noise ratios higher than they might find in a non-shared environment, which should compensate for the effect of low-level, external noise sources, thereby yielding systems with the same throughput, availability and operating costs as currently exist in the 2150-2156 MHz band.[235] To further protect BRS-1 operations, the Commission stated that if MSS operators intend to operate at power levels that exceed the codified pfd limits, or if actual operations routinely exceed the codified pfd limits, those operators are required to receive approval from each operational BRS-1 system in the region in which the pfd limits are exceeded.[236] Furthermore, the Commission emphasized that, if the MSS footprint overlaps multiple BRS areas, later arriving BRS operators are not obligated to accept higher pfd limits previously approved by an adjacent BRS operator.[237]

90. BellSouth's petition for reconsideration of the *Big LEO Order on Reconsideration and AWS 5th MO&O* requests that the Commission modify the adopted pfd limits in the 2496-2500 MHz band to correspond to the more stringent pfd limits set forth in draft U.S. proposals to the WRC-07 regarding protection of terrestrial operations in the 2500-2690 MHz band from satellite downlink interference.[238] BellSouth argues that the pfd limits codified by the Commission in the *Big Leo Order on Reconsideration and AWS 5th MO&O* will not be sufficient to provide BRS protection from MSS.[239] According to BellSouth, the current pfd limits are approximately 10 dB less stringent than the draft U.S. proposal for the 2500-2690 MHz band, and therefore, provide less interference protection than the draft proposal.[240] WCA agrees with BellSouth, though WCA supports the WRC-07 proposed limits somewhat reluctantly, since it is still not convinced that even the proposed pfd limits can fully protect BRS

[233] *Id.* (citing ITU-RR App. 5, Annex 1, NOTE 7).

[234] *Id.* (citing Application of L/Q Licensee, Inc. for Modification to Order and Authorization for Globalstar, File Nos. 88-SAT-WAIV-96 and 90-SAT-ML-96 (March 7, 1996) and *Ex Parte* Letter in IB Docket No. 01-185 from William Wallace, Counsel for Globalstar L.P., to Marlene H. Dortch, Federal Communications Commission (dated July 1, 2002), Attachment at 18, 22-23).

[235] *Id.*

[236] *Id. See* 47 C.F.R. § 25.213(b).

[237] *Big LEO Order on Reconsideration and AWS 5th MO&O*, 21 FCC Rcd at 5624-25 ¶ 31.

[238] BellSouth, *et al.* Petition at 7-8, 10. The actual study was submitted to the ITU-R Joint Task Group 6-8-9 in preparation for developing text for the WRC-07 Conference Preparation Meeting (CPM07). See ITU-R Document 6-8-9/77.

[239] BellSouth, *et al.* Petition at 6-10.

[240] *Id.* at 8-9.

operations within the United States.[241] WCA claims that the expectation that most MSS operations will take place below 2495 MHz does not afford BRS real protection against co-channel interference.[242] BellSouth's position is also supported by Clearwire[243] and WiMAX.[244]

91. Globalstar objects to modifying the pfd limits set for MSS licensees.[245] Specifically, Globalstar claims that MSS providers have been able to operate service downlinks in the 2483.5-2500 MHz band since the initial allocation was made at the 1992 World Administrative Radio Conference, and that the pfd levels for its operational band adopted initially at the 1995 World Radiocommunication Conference (WRC 95), and now codified in the Commission's rules, were extensively studied and adopted at WRC-95.[246] WCA refutes Globalstar's characterization, claiming that the pfd limits Globalstar refers to relate to co-frequency operations with fixed systems and not the types of mobile systems that BRS licensees are likely to deploy in the 2496-2502 MHz band.[247] BellSouth says that maintaining the existing pfd rules for 2496-2500 MHz would "unfairly, unjustifiably and inexplicably result in one standard for domestic licensees and another standard for the international community."[248]

92. Globalstar claims that while the Commission anticipated that both BRS and MSS entities would have to employ engineering solutions – such as network design that would permit BRS to operate with higher interference-to-noise ratios – BellSouth's proposed changes to the pfd limits would render three of Globalstar's channels largely unusable, undermining the shared nature of operations in the band.[249] According to Globalstar, such an outcome is particularly unfair in light of the large amount of spectrum available in the larger BRS band.[250] WCA claims that Globalstar's rationale is flawed because it does not take into account MSS spectrum as a whole and does not consider BRS spectrum that it or any other party could potentially lease.[251]

93. *Discussion.* BellSouth accurately describes how U.S. commercial interests, operating through the U.S. International Telecommunication Union –Radiocommunication (ITU-R) process, submitted a study specifying the pfd limits they believe are necessary to protect terrestrial base stations and mobile stations from potential interference caused by selected

[241] WCA Opposition at 7-12; WCA Reply at 10-13. In that regard, WCA points to the Commission's decision to remove the unused FSS allocation from the 2500-2690 MHz band in setting it aside for BRS. WCA Opposition at 8-11; WCA Reply at 12-13.

[242] WCA Opposition at 12.

[243] Clearwire Opposition at 7.

[244] WiMAX Comments at 8.

[245] Globalstar Opposition at 10-14.

[246] *Id.*

[247] WCA Reply at 11.

[248] BellSouth, *et al.* Petition at 7.

[249] Globalstar Opposition at 12-14.

[250] *Id.* at 14.

[251] WCA Reply at 13.

satellite systems in the 2500-2690 MHz band.[252] This study is one of several studies submitted to ITU-R Joint Task Group 6-8-9 (JTG 6-8-9) by a number of administrations to assist in the development of Conference Preparatory Meeting (CPM) text that was prepared for WRC-07 within the ITU-R. The U.S. study indicated that a pfd limit about 10 dB lower than the codified MSS/BRS-1 pfd limits for 2496-2500 MHz would be required to protect the terrestrial systems from the satellite systems that were studied. This study, however, involves the adjacent band beginning at 2500 MHz, not Globalstar's band below 2500 MHz; there is no international proposal to change the pfd limits in Globalstar's band. Furthermore, this study only addresses sharing with geostationary and highly elliptical satellites and does not consider a low-orbit satellite constellation such as Globalstar's. The study also assumes that the satellite system operates across the full terrestrial band instead of the situation at 2496-2500 MHz, which is a partial-band overlap.[253] Additionally, the CPM text outlines a number of potential mitigation measures that terrestrial systems could use to compensate for possible increase in noise levels from satellite systems, if it should occur.[254] Specific pfd limits or coordination thresholds were not determined at the CPM and were selected at the WRC-07.[255] Finally, because the Commission rejected a request to allocate portions of the 2500-2690 MHz band for MSS,[256] there is no reason for the United States to consider the impact of more stringent pfd limits on the operation of MSS systems in the 2500-2690 MHz band at the CPM or WRC.

94. The WRC-07 adopted pfd limits for MSS systems operating in the 2500-2535 MHz that are close to those put forth in the U.S. CPM contribution, mentioned above, and in the U.S. proposals to the WRC-07.[257] In doing so, the ITU stated that for MSS systems that were operational prior to the end of WRC-07, the existing coordination thresholds pfd values applied.[258] These are the same pfd values that the Commission codified for the protection of terrestrial systems in 2495-2500 MHz in the *Big LEO Order on Reconsideration and AWS 5th*

[252] *See* ITU-R Document 6-8-9/77, dated 27 January 2006, Entitled "Results of Interference Studies from Satellite Services on Fixed Services in the USA Using Methodology Developed by JTG 6-8-9."

[253] The MSS allocation 2483.5-2500 MHz only overlaps 4 megahertz of the 6 megahertz 2496-2502 MHz BRS Channel 1.

[254] *See* ITU-R CPM Report (Geneva 2007) Table 1.9-2.

[255] *See* ITU-R CPM Report (Geneva 2007) Chapter 3, Agenda Item 1.9 Executive Summary: "For each of the [the three possible] methods above, it was not possible to agree within the ITU-R on one suitable PFD mask (limits or coordination thresholds) that would to [*sic*] be applied to space services in the band 2500-2690 MHz to facilitate sharing with current and future terrestrial services without placing undue constraints on the services to which the band is allocated on a co-primary basis. However, a range of PFD values are provided in this section of the CPM text for further consideration by WRC-07."

[256] *See* Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service, RM-9911, *Order*, 16 FCC Rcd 596 (2001), *recon. denied*, *Memorandum Opinion and Order*, 16 FCC Rcd 17222 (2001).

[257] See ITU-R Document 5, 9 February 2007, United States of America Proposals for the Work of the Conference, Agendum Item 1.9 starting on page 37. *See also Ex Parte* Letter from Paul J. Sinderbrand, Counsel WCA to Chairman Martin, Federal Communications Commission (filed Dec. 10, 2007).

[258] See ITU-R Provisional Final Acts, Article 5, Footnote 5.4A01. Specifically Footnote 5.A01 states, in part, that "the coordination thresholds in Table 5-2 of Annex 1 to Appendix 5 of the Radio Regulations (edition of 2004), in conjunction with the applicable provisions of Articles 9 and 11 associated with No. 9.11A, shall apply to [MSS] systems for which complete notification information has been received by the Radiocommunication Bureau by 14 November 2007 and that have been brought into use by that date."

MO&O, in which the Commission anticipated that both BRS and MSS entities would be able to develop and operate systems on a shared basis using the specified pfd, and employ engineering solutions as necessary to accommodate sharing with the other service. We believe that this is still the proper approach, and therefore, we deny BellSouth's Petition. The use of a study that addresses different satellite systems operating in an adjacent band is an insufficient basis to make changes to the pfd limits, changes that would undermine the shared nature of operations in the band. We continue to believe that the currently codified pfd limits will permit a shared solution if proper engineering techniques are applied to the MSS and BRS systems.

H. BRS 2/2A Channel Issues

95. *Background*. In the *BRS/EBS 3rd MO&O*, the Commission affirmed that the splitting the football methodology it adopted in the *BRS/EBS R&O* should be applied to GSA overlaps of all BRS and EBS licensees, including BRS Channels 1 and 2/2A licensees.[259] Ad Hoc MDS Alliance[260] requests that the Commission modify its rules so that primary BRS Channel 2 licensees are not required to "split the football" with either BRS Channel 2A or secondary BRS Channel 2 incumbent licensees when they transition to the 2.5 GHz band.[261]

96. Ad Hoc MDS Alliance argues that under the current rules, BRS Channel 2A licensees will uniquely and unilaterally benefit from a license upgrade, a significant part of which will be taken directly out of the BRS Channel 2 licensed areas at the expense of the BRS Channel 2 licensees.[262] Specifically, Ad Hoc MDS Alliance claims that, in this situation, an incumbent BRS Channel 2A licensee receives a licensing increase of 50% during the transition/relocation process by being upgraded from a four-megahertz license at 2156-2160 MHz to a six-megahertz license at 2618-2624 MHz, and that a secondary MDS Channel 2 incumbent licensee is getting a similar windfall by being upgraded from a four-megahertz primary license at 2156-2160 MHz to a six-megahertz primary license at 2618-2624 MHz.[263]

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[259] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5695 ¶ 208, 47 C.F.R. § 27.1206(a)(1).

[260] The Ad Hoc MDS Alliance describes itself as being comprised of minority and small business enterprises holding licenses for BRS Channels 1 and 2 in the following sixteen major markets: Atlanta, GA; Chicago, IL; Columbus, OH; Detroit, MI; Houston, TX; Indianapolis, IN; Los Angeles, CA; Milwaukee, WI; Minneapolis, MN; New York, NY; Oklahoma City, OK; Phoenix, AZ; Sacramento, CA; San Francisco, CA; St. Louis, MO; and Washington, DC. Ad Hoc MDS Alliance PFR at 2 and n.3.

[261] Ad Hoc MDS Alliance Comments at 3. In its Petition for Reconsideration, the Ad Hoc MDS Alliance requested that the Commission clarify or modify Section 27.1206 of the Rules to provide that provisions requiring adjacent licensees to split the football do not apply to either (a) overlapping areas between primary BRS Channel 2 licensees and secondary BRS Channel 2/2A licensees, or (b) in the 2622-2624 MHz band, where a primary BRS Channel 2 licensee overlaps with a primary BRS Channel 2A licensee. Ad Hoc MDS Alliance PFR at 3. Sprint Nextel, WiMAX, and WCA Opposed Ad Hoc MDS Alliance's request. *See* Sprint Nextel Opposition at 10-11, WiMAX Opposition at 11, WCA Opposition at 20-21. Ad Hoc MDS Alliance changed its request during the opposition stage of the proceeding. *See* Ad Hoc MDS Alliance Comments. Nevertheless, WCA filed a Reply in opposition to Ad Hoc MDS Alliance's modified request. *See* WCA Reply at 17-20.

[262] Ad Hoc MDS Alliance Reply at 3.

[263] Ad Hoc MDS Alliance Comments at 4. Ad Hoc MDS Alliance believes that this feature of the Commission's plan is of questionable legality because the Commission has never discussed why Channel 2A licensees should receive such an upgrade or made a determination that affording a windfall uniquely to Channel 2A licensees is in the public interest. Ad Hoc MDS Alliance PFR at 3.

97. Ad Hoc MDS Alliance recommends that this situation be corrected by not requiring primary BRS Channel 2 licensees to "split the football" with either BRS Channel 2A or secondary BRS Channel 2 incumbent licensees.[264] Ad Hoc MDS Alliance notes that it knows of no situation – and believes there is none – in which an incumbent BRS Channel 2A licensee overlaps with a primary BRS Channel 2 incumbent licensee by as much as 50%.[265] Therefore, Ad Hoc MDS Alliance argues that, even if the primary BRS Channel 2 incumbent licensee in an overlap situation is afforded the full 35-mile geographic service area normally contemplated by Section 27.1206(a)(1) of the Rules[266] – that is, the licensee obtains the entire football rather than splitting it – the incumbent BRS Channel 2A will receive a substantial gain in the transition to 2618-2624 MHz because the increase in channel capacity from 4 megahertz to 6 megahertz is greater than the relative loss of overlapped territory to the primary BRS Channel 2 incumbent.[267] Ad Hoc MDS Alliance explains that because the 2-megahertz increase in licensed area by itself is greater than the area the Channel 2A licensee would obtain by splitting the football, the Channel 2A licensee still would net a substantial increase in licensed area at 2.5 GHz even when the adjacent BRS Channel 2 (former Channel 2 primary licensee) is awarded all of the territory within the football.[268]

98. WCA opposes Ad Hoc MDS Alliance's proposal.[269] WCA states that any material departure from the standard splitting the football rules at this late date will frustrate ongoing efforts to make productive use of the 2.5 GHz band.[270] WCA notes that Sprint Nextel and other licensees are already in the midst of the network design implementation process, and argues that Ad Hoc MDS Alliance's failure to raise its concerns in a timely manner is critical.[271] Ad Hoc MDS Alliance denies that it raised this issue too late.[272]

99. WCA further argues that grant of Ad Hoc MDS Alliance's approach will yield a windfall for Ad Hoc MDS Alliance's members as it relates to the 4 megahertz that is shared between BRS Channels 2 and 2A licensees.[273] WCA states that where there is an overlap between the PSA of a BRS Channel 2 licensee and the PSA of a BRS Channel 2A licensee, both stations had been co-primary, but the overlap area was effectively unused by either licensee because of the applicable interference protection rules.[274] Thus, notes WCA, when that 4

[264] Ad Hoc MDS Alliance Comments at 3.

[265] Ad Hoc MDS Alliance Comments at 4.

[266] 47 C.F.R. § 27.1206(a)(1).

[267] Ad Hoc MDS Alliance Opposition at 4.

[268] Ad Hoc MDS Alliance Opposition at 4.

[269] WCA Reply at 17-20.

[270] WCA Reply at 18.

[271] WCA Reply at 18-19, citing Sprint Nextel Opposition at 11.

[272] Ad Hoc MDS Alliance Reply at 3.

[273] WCA Reply at 19.

[274] WCA Reply at 19, citing *BRS/EBS R&O*, 19 FCC Rcd at 14194 ¶ 65.

megahertz is allocated to exclusive GSAs using the splitting the football approach, the effect is to give each party access to territory that it could not previously serve.[275]

100. *Discussion*. We agree with WCA that Ad Hoc MDS Alliance has not justified a change in Section 27.1206(a)(1) of the Rules that would exempt primary BRS Channel 2 licensees from splitting the football with either BRS Channel 2A or secondary BRS Channel 2 incumbent licensees. Initially, we note that Ad Hoc MDS Alliance ignores the fact that secondary BRS Channel 2 and 2A licensees were secondary to AWS, not to other BRS licensees. Moreover, maintaining the rule as adopted will provide clarity to all licensees, and will not overturn any of the planning which has been ongoing over the years since Section 27.1206(a)(1) of the Rules was adopted. The rule gives all Channel 2 licensees an area in which they have exclusive use of all 6 megahertz of Channel 2, and does not affect the rights of primary BRS Channel 2 licensees that are to be relocated by AWS auction winners. Accordingly, we reject Ad Hoc MDS Alliance's proposal and affirm the use of our regular splitting the football rule for BRS Channel 2 and 2A licensees.

I. Grandfathered E and F Group Channel EBS Stations

101. *Background.* In 1983, the Commission redesignated the E and F Group Instructional ITFS channels from the ITFS service to the MDS.[276] The Commission took this action in an effort to spur the development of MDS to promote effective and intense utilization of the spectrum leading to its highest valued use.[277] As part of its decision, the Commission grandfathered ITFS licensees operating on the E Group and F Group channels subject to the following limitations:

> Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.[278]

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[275] WCA Reply at 19.

[276] *See* In the Matter of 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, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*E and F Group Reallocation Order*). As stated previously, the Commission renamed the ITFS service as the "Educational Broadband Service" (EBS) and MDS service the "Broadband Radio Service" (BRS). *BRS/EBS R&O*, 19 FCC Rcd at 14169 ¶ 6.

[277] *E and F Group Reallocation Order*, 94 FCC 2d at 1228-29 ¶¶ 61-63.

[278] *See* In the Matter of 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, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*). *See also* 47 C.F.R. § 74.902(c).

The Commission stated that "there may be instances where the natural evolution of an ITFS station may reasonably require the addition of receive stations without changing the nature or the scope of the ITFS operation" that would justify the addition of additional receive sites.[279] In those instances, the Commission stated that the grandfathered ITFS licensee could request a waiver of Section 74.902(c).[280] The Commission's Rules provided that "in those areas where Multipoint Distribution Service use of these channels is allowed, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful co-channel and adjacent channel interference from Multipoint Distribution Service stations."[281]

102. In the *BRS/EBS FNPRM*, the Commission sought comment on how to modify its rules concerning grandfathered E and F Group channel ITFS stations to equitably allow both MDS and ITFS stations to provide advanced broadband wireless services.[282] The Commission envisaged three scenarios: (1) the PSA of the grandfathered E and F Group EBS licensee almost entirely overlaps the PSA of the co-channel MDS licensee; (2) the PSA of the grandfathered E and F Group EBS licensee overlaps to some extent, but not as much as in the first scenario, and (3) the grandfathered E and F Group EBS licensee remains frozen, unable to modify its system, and there is no co-channel MDS licensee.[283]

103. In the *BRS/EBS 2nd R&O*, the Commission concluded that where there is no overlap between the EBS and BRS licensees, the Commission would free up the grandfathered E and F Group channel EBS licensees, grant these licensees a GSA, and allow them to modify or assign their license.[284] In cases where the GSAs of grandfathered EBS and BRS licensees overlap, but that overlap is less than 50%, the Commission would divide the GSAs by splitting the football, as is done with other overlapping GSAs.[285] Both the BRS and EBS licensees would be free to add, modify, and remove facilities within their GSAs, consistent with the Commission's new technical rules. In addition, the grandfathered EBS facility would be free to assign its license.[286] In cases where the GSAs overlap 50% or greater, the Commission concluded that different treatment was warranted because splitting the football might no longer be the best solution for accommodating the needs of both licensees. In those cases, the Commission established a 90-day mandatory negotiation period during which both the BRS and EBS licensees would have an explicit duty to work to accommodate each other's communications requirements. If, at the end of 90 days, the parties could not reach a mutual agreement, the Commission would then split the football on its own accord.[287]

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[279] *E and F Group Reallocation Reconsideration Order,* 98 FCC 2d 129, 132-33 ¶ 12 n.8.

[280] *E and F Group Reallocation Reconsideration Order,* 98 FCC 2d 129, 132-33 ¶ 12 n.8.

[281] 47 C.F.R. § 74.902(c) (2004).

[282] *BRS/EBS FNPRM*, 19 FCC Rcd at 14290 ¶ 337.

[283] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5744-45 ¶¶ 336-338.

[284] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5749 ¶ 348.

[285] 47 C.F.R. § 27.1206.

[286] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5749 ¶ 349.

[287] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5750 ¶ 350.

104. In their petitions for reconsideration, NY3G, Line of Site, Inc. (LOSI), and BellSouth argue the Commission should address significant overlap situations by dividing channels rather than dividing the geographic overlap itself, which would ensure that each party involved could provide full coverage of its service area on at least some channels.[288] They recommend that the EBS licensee receive the high-power channel (E4 or F4) and one low-power channel and the BRS licensee receive two low-power channels.[289] Specifically, BellSouth recommends that BRS licensees be assigned the E1/F1 and E2/F2 channels and the EBS licensees assigned the E3/F3 and E4/F4 channels.[290]

105. CTN, NIA, and Miami-Dade maintain that the Commission has already considered and rejected NY3G's proposal to mandate a division of channels between the licensees.[291] CTN and NIA contend that NY3G is still attempting to divide the channels for all grandfathered EBS and BRS licensees with GSA overlaps of more than 50% in a way that will benefit NY3G.[292]

106. NextWave recommends that if the parties cannot reach an agreement within the mandatory 90-day negotiation period, the Commission should adopt a formula for splitting the football rather than the Commission randomly splitting the football on its own accord.[293] Specifically, NextWave recommends that the Commission require licensees to split the spectrum between them, within 30 days following the end of 90-day mandatory negotiation period according to the following procedure.[294] First, the licensees would determine the total population in the overlap area based upon the most recent official United States Census numbers.[295] Licensees can privately agree whether or not they will use population growth factors in this calculation.[296] Any discrepancy between the population numbers of the licensees will be averaged for purposes of all calculations.[297] Then the overlap area would be split using the traditional splitting the football methodology.[298] The population contained in each licensee's half or slice of the overlap area would then be calculated and each licensee's corresponding relative percentage of the total population would be calculated.[299] This percentage would then be used to split the spectrum among the licensees in relative proportion to the percentage of population each licensee commands in the

[288] NY3G PFR at 3, BellSouth Reply at 6-7, LOSI Opposition at 2-5.

[289] NY3G PFR at 3, BellSouth Reply at 7, LOSI Opposition at 4.

[290] BellSouth Reply at 7.

[291] CTN and NIA Reply at 3, citing *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5750-51 ¶ 352, Miami-Dade Opposition at 2.

[292] CTN and NIA Reply at 3.

[293] NextWave PFR at 13.

[294] NextWave PFR at 13.

[295] NextWave PFR at 13.

[296] NextWave PFR at 13.

[297] NextWave PFR at 13.

[298] NextWave PFR at 13.

[299] NextWave PFR at 13-14.

overlap area.[300] The percentage would be rounded to the percentile closest to 0%, 25%, 50%, 75% or 100%.[301] A licensee with a population ratio closest to 25%, for example, would retain one of the four channels.[302] Finally, the licensees would decide among themselves, according to their individual educational or business needs, the channels each would retain and provide a joint notice to the Commission.[303] The grandfathered EBS licensee would have a right of first refusal to access the MBS channel.[304]

107. By way of example, NextWave offers two scenarios. First, where the geographic service areas of each licensee completely overlap, and thus the licensees have command of the same population number, each licensee would be accorded half of the channels to serve the entire overlapping area (for a four channel group, each licensee would receive two channels).[305] In this scenario, the licensees would only need to determine which channels each will retain, and provide the Commission with joint notice.[306] Second, where the overlapping geographic service area contains a population of 400,000, and where one licensee's sliver or half of the overlapping area includes a population of 100,000, and the other licensee's sliver or half of the overlapping area includes a population of 300,000, the licensee with the greatest population would receive three channels to serve the entire overlapping area (300,000 / 400,000 = 75% = 3 channels), and the other licensee would receive one channel (100,000 / 400,000=25% = 1 channel).[307] NextWave argues that this approach serves the public interest by avoiding the random partitioning of the geographic service area by the Commission under the presently adopted approach.[308] The resolution would provide each licensee with the ability to preserve its entire geographic service area and the flexibility to serve the entire overlap area with a lesser amount of spectrum.[309]

108. LOSI, CTN, and NIA oppose NextWave's methodology.[310] LOSI states that under NextWave's approach only the overlap is assessed, divided, and its spectrum apportioned.[311] LOSI contends that, under this method, a licensee might have all four channels in its non-overlapping area but only a fractional channel within the overlap area.[312] LOSI argues

[300] NextWave PFR at 14.

[301] NextWave PFR at 14.

[302] NextWave PFR at 14.

[303] NextWave PFR at 14.

[304] NextWave PFR at 14.

[305] NextWave PFR at 14.

[306] NextWave PFR at 14.

[307] NextWave PFR at 14.

[308] NextWave PFR at 14.

[309] NextWave PFR at 14-15.

[310] LOSI Opposition at 4, CTN NIA Opposition at 2-3.

[311] LOSI Opposition at 4.

[312] LOSI Opposition at 4-5.

that such a solution would necessitate the licensing of apportioned overlap areas under new separate call signs, and could ultimately lead to confusion.[313]

109. If after considering the petitions on this matter, the Commission retains the mandatory 90-day negotiation period, LOSI requests that the Commission provide parties with some guidance as to what is expected from them during and following the negotiation period.[314] LOSI suggests that the Commission establish: (1) a reporting requirement on the results of such negotiations; (2) a mechanism for Commission approval of negotiated settlements; (3) a timeframe and mechanism for the filing of applications needed to implement a negotiated settlement; (4) a mechanism for Commission intervention should a party refuse to negotiate; (5) penalties for parties refusing to negotiate; and (6) dispute resolution procedures.[315]

110. CTN, NIA, and BellSouth oppose LOSI on this matter.[316] CTN and NIA state that certain of the proposed requirements, such as Commission intervention where a party refuses to negotiate and penalties for parties refusing to negotiate could lead to disputes as to when a party determines the other party is refusing to negotiate.[317] With respect to proposals such as reporting on the negotiation results and mechanisms for filing applications, CTN and NIA describe these as unnecessary, as the parties reaching a negotiated solution will out of necessity file applications with the Commission if required to implement the solution.[318] BellSouth states that it is not necessary for the Commission to police private negotiations, which will either succeed because the parties can achieve a better result than the Commission's default solution, or will fail because at least one party believes that the Commission's solution better suits the party's communications requirements.[319]

111. *Discussion*. We conclude that we should retain the existing Section 27.1206 of the Rules[320] to eliminate overlaps of 50 percent or greater between grandfathered E and F Group channel EBS stations and co-channel incumbent BRS stations by splitting the football, as opposed to adopting the petitioners' request to split the channels. Splitting the football would permit grandfathered E and F Group EBS licensees, which have been providing service for 20 years, to modernize their systems to better serve the public, including allowing EBS licensees to transition to low-power cellularized operations, which increases spectrum utilization. Granting the flexibility that negotiations between affected parties allows is consistent with the *BRS/EBS R&O's* approach of utilizing geographic area licensing and promoting greater flexibility, and encourages negotiations and market-based solutions to overlap problems. In addition, this procedure tailors resolutions of overlap situations to the circumstances of each class of licensee.

[313] LOSI Opposition at 5.

[314] LOSI Opposition at 5.

[315] LOSI Opposition at 5.

[316] CTN and NIA Reply at 4, BellSouth Reply at 8.

[317] CTN and NIA Reply at 4.

[318] CTN and NIA Reply at 4.

[319] BellSouth Reply at 8.

[320] 47 C.F.R. § 27.1206.

112. Resolving significant overlap situations by dividing channels rather than dividing the geographic overlap itself is an approach we have already considered and rejected.[321] We note that under this approach, one licensee would receive only 5.5 megahertz of UBS spectrum,[322] which may be insufficient to provide any service. While certain commercial commenters support this approach, it has not received support from any educational commenter. In addition, this approach assumes that educational licensees would not be interested in providing broadband-type services. We have seen no support for this assumption. We also find that the record does not support NextWave's population based proposal which is founded on the premise that population should be the primary basis for assessing a licensee's channel requirements. Under NextWave's proposal, for example, in areas where there is a large discrepancy in population, a licensee may be relegated to one channel, which may be insufficient to meet its needs. Furthermore, NextWave's proposal is complicated and difficult to administer, and no other commenter supports it. Accordingly, we deny NY3G's, NextWave's, and BellSouth's petitions on this issue.

113. We next address LOSI's proposal that, having retained the mandatory 90-day negotiation period, we provide parties with some guidance as to what is expected from them during and following the negotiation period. We find that LOSI has not shown that its proposed requirements, which are supported by no other commenter, are necessary or appropriate.

114. We note that NY3G filed a supplement to its petition for reconsideration,[323] which was opposed by Sprint Nextel.[324] Although this supplement was not timely filed, we will address the substance of the petition to clarify a misunderstanding. NY3G asks the Commission to adopt a rule to enable co-channel BRS and EBS licensees to exchange or transfer service area territory between one another to facilitate intersystem coordination of co-channel operations or to reduce or mitigate the harmful effects of interference.[325] We do not adopt a rule because it is unnecessary to do so. All BRS and EBS licensees, including grandfathered E and F Group channel EBS licensees and incumbent BRS licenses that "split the football" with such licensees, may partition, disaggregate, assign, or transfer their spectrum.[326] The use of the splitting the football mechanism to divide overlapping service areas does not preclude subsequent agreements to partition, disaggregate, assign, or transfer spectrum. NY3G argues that because of the eligibility restrictions on EBS spectrum, EBS licensees cannot partition their service areas or disaggregate their spectrum to reach a resolution with their co-channel BRS licensees.[327] The E and F channels, however, are classified as both EBS and BRS spectrum.[328] We have granted waivers to allow assignments or transfers of grandfathered EBS stations to BRS licensees upon a

[321] *See BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5750-5751 ¶ 352.

[322] A single UBS post-transition channel in the E and F channel groups is 5.5 megahertz wide. *See* 47 C.F.R. § 27.5(i)(2)(iii).

[323] NY3G Supplement to Petition for Reconsideration (filed Dec. 11, 2006).

[324] *Ex Parte* Letter from Trey Hanbury, Director, Government Affairs, Sprint Nextel Corporation to Marlene H. Dortch, Federal Communications Commission (filed Jan. 8, 2007).

[325] NY3G Supplement to Petition for Reconsideration (filed Dec. 11, 2006).

[326] *See BRS/EBS R&O and FNPRM*, 19 FCC Rcd at 14244-14246 ¶¶ 207-210. *See* 47 C.F.R. § 1.948(f).

[327] NY3G Reply to Opposition to Supplement (filed Jan. 25, 2007).

[328] *See* 47 C.F.R. § 27.5(i)(2)(ii), (iii).

suitable public interest showing.[329] Upon a similar showing, an EBS licensee could partition part of its service area or disaggregate its spectrum to its co-channel BRS licensee.

J. Gulf of Mexico Proceeding and Related Issues

115. *Background*. On May 21, 1996, the Gulf Coast MDS Service Company (Gulf Coast) filed a Petition for Rulemaking requesting that the Commission amend its rules to permit licensing of MDS and ITFS spectrum in the Gulf of Mexico.[330] On May 3, 2002, the Commission issued the *Gulf NPRM* seeking comments on whether to authorize two licenses in the Gulf of Mexico and whether to adopt eligibility restrictions to avoid excessive concentration of licenses.[331] In the *Gulf NPRM*, the Commission proposed to establish a GSA in the Gulf of Mexico ("Gulf Service Area"), extending approximately 12 nautical miles from the United States coastline.[332]

116. On April 2, 2003, in the *BRS/EBS NPRM*, the Commission incorporated the Gulf of Mexico proceeding into the BRS/EBS proceeding and established a Gulf Service Area.[333] The Commission noted that it did not receive any comments on its proposal to exclude ITFS channels, sought further comment on whether to reallocate ITFS channels in the Gulf Service area for other uses, and sought comment on whether it should consider unlicensed uses in the Gulf Service Area.[334]

117. In the *BRS/EBS FNPRM*, the Commission noted that WCA and PetroCom (the successor in interest to Gulf Coast MDS Service Company) disagreed on the boundary for the Gulf Service Area.[335] PetroCom preferred establishing the boundary at the land water-line while WCA preferred a boundary twelve nautical miles from shore.[336] The Commission sought comment on the boundaries for the Gulf Service Area.[337] The Commission expressed concern that the record was not sufficiently developed to resolve issues concerning the amount of spectrum to license in the Gulf Service Area, competitive bidding, partitioning and disaggregation, interference protection requirements, construction periods, and the length of the license term, and the Commission asked for additional comment on these issues.[338]

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[329] *See*, *e.g.*, Alliance for Higher Education, *Memorandum Opinion and Order*, 19 FCC Rcd 23967 (WTB BD 2004), Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Wayne D. Johnsen, Esq. and Robin J. Cohen (WTB BD Jan. 29, 2007).

[330] Petition for Rulemaking of Gulf Coast MDS Service Company (Gulf Coast Petition) (May 21, 1996).

[331] Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking*, WT Docket No. 02-68, 17 FCC Rcd 8446 (2002) (*Gulf NPRM*).

[332] *See Gulf NPRM*, 17 FCC Rcd at 8447, 8453 ¶¶ 2, 18.

[333] *BRS/EBS NPRM*, 18 FCC Rcd at 6722, 6761 ¶¶ 5, 93.

[334] *BRS/EBS NPRM*, 18 FCC Rcd at 6761 ¶ 94.

[335] *BRS/EBS FNPRM*, 19 FCC Rcd at 14298-14299 ¶¶ 364-365.

[336] *BRS/EBS FNPRM*, 19 FCC Rcd at 14298-14299 ¶¶ 364-365.

[337] *BRS/EBS FNPRM*, 19 FCC Rcd at 14299 ¶ 365.

[338] *BRS/EBS FNPRM*, 19 FCC Rcd at 14300 ¶ 367.

118. In the *BRS/EBS 2nd R&O*, the Commission found that the record did not demonstrate a demand for BRS or EBS operations in the Gulf of Mexico, that the record was not sufficiently developed to resolve issues concerning the amount of spectrum to license in the Gulf Service Area, and that no parties demonstrated an interest in providing BRS or EBS in the Gulf of Mexico.[339] In light of these findings, the Commission decided to reverse its decision to create a Gulf Service Area for BRS or EBS.[340] The Commission then terminated the Gulf Service proceeding, but reserved the right to revisit the Gulf Service Area issue for BRS and EBS should future circumstances warrant.[341]

119. Now, the American Petroleum Institute (API) asks the Commission to reconsider its decision to terminate the Gulf Service proceeding.[342] To further the nation's energy policies, API states that its members require access to the 2.5 GHz spectrum either directly as private licensees or through customer relationships with Sprint Nextel or other carriers.[343] API recommends that the Commission establish a Gulf Service Area,[344] adopt essentially the same rules in the Gulf as are used for BTA licensees elsewhere,[345] make available the full range of BRS spectrum to potential Gulf Service Area licensees,[346] permit Gulf Service Area licensees to negotiate interference rights with other BTA authorization holders and incumbents,[347] divide the Gulf Service Area into three zones for licensing purposes,[348] and consider rules authorizing BRS service in the offshore areas of the Atlantic and Pacific Oceans.[349]

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[339] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[340] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[341] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[342] API PFR at 2. The American Petroleum Institute (API) is a national trade association representing more than 400 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products, and natural gas. API PFR at 5. API's members utilize a wide variety of telecommunications systems, including point-to-point, point-to-multipoint microwave, and two-way mobile radio systems in the Gulf of Mexico to serve a variety of telecommunications requirements, including communications between remote oil and gas exploration and production sites, for supervisory control and data acquisition (SCADA) systems used to operate production facilities remotely, and to communicate with onshore operations. API PFR at 6. *See also Ex Parte* Letter from Jack Richards, Counsel for API, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Aug. 3, 2006).

[343] API Reply at 5.

[344] API PFR at 2.

[345] API PFR at 9.

[346] API PFR at 9.

[347] API PFR at 14.

[348] API PFR at 15. These zones would be as follows: Zone A: The boundaries of Zone A should be from the shoreline at high mean tide on Florida's Gulf Coast on the east to longitude 91º00′ on the west; Zone B: The boundaries of Zone B should be from longitude 91º00′ on the east to longitude 94º00′ on the west; and Zone C: The boundaries of Zone C should be from longitude 94º00′ on the east, the shoreline at mean high tide on the north and west, a 280 km (175 mile) radius from the reference point at Linares, N.L., Mexico. API PFR at 15-16.

[349] API PFR at 17.

120. WCA and Sprint Nextel oppose API's petition on procedural grounds.[350] They argue that the petition is procedurally defective because API relied on information not previously presented to the Commission.[351] In addition, WCA argues that because the Commission has never sought comment on whether to license BRS spectrum off the outer continental shelves in the Atlantic and Pacific Oceans, to do so here would be beyond the scope of this proceeding, and consequently, a violation of the Administrative Procedure Act.[352] Aside from their procedural concerns, Sprint Nextel and WCA emphasize that they are concerned about interference between land-based facilities and Gulf facilities, caused, in part, by "ducting."[353] WCA recommends that the Commission draw the innermost boundary of a new "Gulf Service Area" at the limit of the territorial waters of the United States in the Gulf, approximately twelve nautical miles from the coastline.[354] Sprint Nextel recommends that any Gulf Service Area boundary should begin at the greater distance of either: (1) the edge of the land-based BRS-EBS licensee's GSA boundary; or (2) approximately 12 nautical miles from the shoreline at mean high tide.[355]

121. In addition, WCA submits the following proposals if the Commission decides to establish a Gulf Service Area. WCA asks that the Commission adopt the licensing and technical rules WCA proposed for the Gulf of Mexico in WCA's earlier filings in this proceeding.[356] Second, WCA asks that any auction winner's Gulf Service Area exclude the circular 35-mile radius GSAs of any incumbent BRS or EBS licensee, just as the service area awarded to any land-based BRS BTA auction winner excluded the protected service area of an incumbent pursuant to the Commission's Rules.[357] Third, WCA argues that the BRS BTA authorizations for areas bordering the Gulf should extend at least to the boundaries of the counties that comprise the BTA, including areas that are within counties but beyond the coastline.[358] Fourth, WCA states that the Commission should follow the approach taken in its recent proceedings regulating cellular service in the Gulf and establish a "Gulf Coastal Zone" that would extend from the boundaries of the BTAs bordering the Gulf to the limit of the territorial waters of the United States. Within the Gulf Coastal Zone, the holder of either the adjacent BTA authorization or the Gulf Service Area authorization could provide service, provided the one holder meets the new co-channel interference protection requirements at the other's service area boundary.[359] Fifth,

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[350] WCA Opposition at 28, Sprint Nextel Opposition at 2-3.

[351] WCA Opposition at 31, Sprint Nextel Opposition at 2-3.

[352] Sprint Nextel Opposition at 6, citing 5 U.S.C. § 553(b); WCA Opposition at 29.

[353] WCA Opposition at 35-36, Sprint Nextel Opposition at 8. *See Gulf NPRM*, 17 FCC Rcd at 8464 ¶ 39. ("[D]ucting is a phenomenon whereby a radio signal is trapped within and between stratified layers of the atmosphere which have non-uniform refractivity indexes. This layering is caused by climatological processes such as subsidence, advection, surface heating and radiative cooling and the ducts created due to these factors can extend for distances of tens to hundreds of miles.") *See also* Letter from Paul J. Sindebrand, Esq., counsel for WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 06-136 (Apr. 9, 2007) (*WCA April 9 Ex Parte*).

[354] WCA Opposition at 38, citing *Gulf NPRM*, 17 FCC Rcd at 8452-53 ¶¶ 17-18.

[355] Sprint Nextel Opposition at 8.

[356] WCA Opposition at 33, citing WCA *FNPRM* Comments at 39-43 and WCA *FNPRM* Reply Comments at 38-42.

[357] WCA Opposition at 37, *citing* 47 C.F.R. § 27.1206(a)(2), *formerly* 47 C.F.R. § 21.933(a)(2003).

[358] WCA Opposition at 37.

[359] WCA Opposition at 39-40.

subject to WCA's proposals set forth above, operations in any new Gulf Service Area should generally be subject to the rules applicable to the LBS/UBS or MBS, as appropriate, and, specifically, Gulf operations should be required to comply with the signal strength limit at the boundary of the GSAs of incumbent BRS/EBS licensees and BTA authorization holders, and should not be excused even if non-compliance is caused by ducting.[360]

122. *Discussion.* Although in the *BRS/EBS 2nd R&O* the Commission declined to create a Gulf Service Area for BRS or EBS and terminated the Gulf Service proceeding,[361] it reserved the right to revisit the Gulf Service Area issue for BRS and EBS should future circumstances warrant.[362] We now agree with API and PetroCom that we should re-establish service areas in the Gulf of Mexico for BRS. It is clear that establishing BRS service areas in the Gulf could provide a means for meeting an important communications need in a critical area, as well as enhance emergency communications in the region. Accordingly, we shall grant API's petition and re-establish Gulf of Mexico Service Areas for BRS.

123. Over the course of the past two years, circumstances have significantly changed. In addition to the unprecedented devastation caused by Hurricanes Katrina and Rita in 2005,[363] including the impact on the oil industry, we note the major Gulf of Mexico deepwater oil discovery in 2006.[364] We further note the recent enactment of the Gulf of Mexico Energy Security Act of 2006,[365] which has opened up 8.3 million acres of the Gulf of Mexico 125 miles or more from the Florida panhandle to offshore drilling. We believe that these circumstances warrant revisiting the issue of Gulf of Mexico Service Areas, as contemplated by the Commission's decision in the *BRS/EBS 2nd R&O*.[366] Thus, we reject the arguments of WCA and Sprint Nextel that API's petition should be dismissed as procedurally defective, and, in light of the information presented by API, find under 1.429(b)(3) of our Rules that it is in the public interest to reconsider the Commission's decision to terminate the Gulf Service proceeding.[367]

124. Specifically, we are persuaded by API's two interrelated reasons for seeking reconsideration of the Commission's decision. First, in light of the devastation caused by Hurricanes Rita and Katrina, API's members have re-evaluated their communications needs in the Gulf of Mexico. In particular, the oil and natural gas industry has placed increased importance on the use of rapidly deployable IP-enabled broadband services to support both permanent facilities and disaster recovery efforts.[368] Although a number of commercial entities

[360] WCA Opposition at 40. WCA states that for purposes of the co-channel height benchmarking rule, the distance to the border used in the formula $D^2/17$ should be the distance to the border of the BTA in issue.

[361] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[362] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[363] *See, e.g.*, Senate Committee on Homeland Security and Governmental Affairs, Hurricane Katrina: A Nation Still Unprepared, 109th Cong., 2d Sess. (2006).

[364] *See, e.g.*, Chevron Announces Record Setting Well Test at Jack (Sep. 5, 2006), http://www.chevron.com/news/press/2006/2006-09-05.asp .

[365] Gulf of Mexico Energy Security Act of 2006, Pub.L. No. 109-432, Division C, Title I.

[366] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5762 ¶ 383.

[367] 47 C.F.R. § 1.429(b)(3). *See* WCA Opposition at 32-33, Sprint Nextel Opposition at 2-3.

[368] API Reply at 5.

currently provide telecommunications service in the Gulf of Mexico through wireless, wireline, or satellite systems, we are concerned that currently the Gulf of Mexico may be an underserved area where spectrum licenses generally are not available.[369] Moreover, some oil and gas facilities are too far from shore to receive wireless services from land-based providers.[370] We agree with API that licensing BRS spectrum in the Gulf will encourage service providers to explore and offer new services in the underserved Gulf region.[371]

125. Second, API persuasively argues that the 2495-2690 MHz band is one of the few bands available and adequate for operations in support of off-shore oil and gas facilities.[372] With respect to Industrial/Business licensees, the 1850-1990 MHz band, the 2130-2150/2180-2200 MHz band, and much of the spectrum previously available in the 2.4 GHz band, have been allocated for other purposes.[373] Although spectrum in the 900 MHz band supports relatively short distance, narrow band point-to-point and point-to-multipoint systems, API notes that, above 900 MHz, the next band with a substantial amount of available spectrum is found at 6 GHz, which API contends is not adequately suited for use in marine environments such as the Gulf.[374] Moreover, production platforms are often separated by too much distance to support use of 6 GHz spectrum for point-to-point systems.[375] While many energy companies and service providers have deployed systems in the Part 15 bands, according to API, these frequencies are quickly becoming saturated and unsuitable for critical applications.[376] Because of the critical role

[369] API PFR at 8.

[370] API PFR at 7. API cites data from the Minerals Management Service of the United States Department of the Interior that indicates that there are approximately 4000 oil and natural gas platforms in the Gulf, 954 of which are manned. About 152 companies conduct business in the Gulf related to oil and natural gas production, and 23% of U.S. natural gas production and approximately 30% of U.S. oil production occurs in the Federal portion of the Gulf of Mexico. API states that this activity is expanding, especially in the deepwater regions of the Gulf; as of April 2006, there were reportedly 94 wells being drilled in Gulf waters for exploration purposes, and several parties have sought to establish a regassification plant in the waters of the Gulf by which liquefied natural gas could be imported into the U.S. Some 45 of these wells were located in areas with water depths upwards of 1000 feet, while 11 were in water depths of 5000 feet or greater, and exploration wells have been drilled in record water depths of over 11,000 feet. API states that the distances these facilities are located from shore eliminate the possibility of receiving service from land-based providers. *Id*.

[371] API PFR at 8.

[372] We note that the Commission has established service areas in the Gulf of Mexico in the AWS band (1710-1755 and 2110-2155 MHz) which was auctioned in 2006, and the 700 MHz band (698-746, 747-762 and 777-792 MHz), auctioned in 2008. *See* In re Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order,* WT Docket No. 02-353, 18 FCC Rcd 25162, 25177 ¶ 40 (2003) (*AWS R&O*); In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz bands, *Report and Order and Further Notice of Proposed Rulemaking,* WT Docket No. 06-150, 22 FCC Rcd 8064, 8085 ¶ 49 (2007) (*700 MHz R&O & FNPRM*). Nonetheless, we believe that the potential availability of Gulf of Mexico service areas in these bands does not reduce the public interest benefit of establishing a Gulf of Mexico service area in this band.

[373] API PFR at 8.

[374] API PFR at 8.

[375] API PFR at 7-8.

[376] API Reply at 5.

that communications plays in ensuring the safe, effective production of oil and natural gas in the Gulf, we find granting API's petition is in the public interest.[377]

126. With respect to setting the boundary of the Gulf Service Area, we agree with WCA and establish the boundary at twelve nautical miles from the shoreline, as we proposed in the *Gulf NPRM*.[378] Establishing the boundary of a Gulf Service Area at this point will ensure that land-based providers can provide service to land-based areas near the shore, which would not be the case were we to establish the boundary at the shoreline, as providers would need to limit their signal level at the boundary. We believe that this approach is a balanced resolution of the matter and also is consistent with the rules for other Part 27 services.[379] While API originally recommended that we establish the boundary at the shoreline, we note that API "no longer opposes establishing the boundary of the Gulf Service Area at 12 nautical miles from the shoreline to the extent that doing so would allow the Commission to move towards the greater objective of licensing the 2.5 GHz band in the Gulf."[380]

127. We accept API's proposal,[381] unchallenged by other commenters, that the Gulf Service Area be divided into three zones for purposes of licensing. In response to WCA's concerns, we clarify that the Gulf Service areas will exclude any area currently occupied by an incumbent BRS station. This approach is consistent with other areas, where BTA authorization holders may not operate in areas occupied by incumbent BRS stations.[382] Finally, in light of our decision to set the boundary of the Gulf Service Areas twelve nautical miles from the shoreline, we find no basis for considering WCA's proposal to establish a Gulf Coastal Zone where both the land-based BTA licensee and the Gulf of Mexico licensee may operate. We note that when land-based licensees previously had overlapping service areas, such overlap often made it more difficult for both licensees to provide service.

128. We agree with API that the Commission's existing technical rules should be applied to the Gulf Service Areas, and can easily be utilized to resolve any interference problems that may arise on a case-by-case basis. Ducting is not a phenomenon that is limited to the Gulf of Mexico, and the record does not support separate or special rules only for the Gulf. Using our existing rules has the benefit of treating all service providers equally: while land-based licensees will have to protect the service areas of Gulf-based licensees, Gulf-based licensees will still have to meet signal strength limits at the borders of their service areas, protecting land-based licensees. WCA has not shown that Gulf licensees are incapable or unwilling to work out interference problems in the same manner as other licensees. In addition, utilizing our existing rules will provide Gulf licensees with the flexibility necessary to provide service, which would not be the case were we to adopt WCA's proposed rule provisions. Gulf licensees will still have to meet signal strength limits at the borders of their service areas.

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[377] API Reply at 4-5.

[378] *See Gulf NPRM*, 17 FCC Rcd at 8453 ¶ 18.

[379] *See* 47 C.F.R. §§ 27.6(a)(2), 27.6(c)(2)(i)-(ii), 27.6(h)(1)(i)-(ii).

[380] Ex Parte Letter from Jack Richards, Counsel for API, to John J. Schauble, Federal Communications Commission (dated Jan. 10, 2007).

[381] API PFR at 15.

[382] *See* 47 C.F.R. § 27.1206(a)(2).

129. Finally, with respect to API's proposal that we also consider whether rules authorizing BRS service in the offshore areas of the Atlantic and Pacific Oceans may be warranted,[383] we see no reason to address this issue at this time. API concedes that there is currently little need for licensing in these areas.[384] Should circumstances change, API and other interested parties are welcome to return to the Commission with a more fully developed proposal.

K. Leasing

1. Automatic Renewal Provisions in EBS leases executed before January 10, 2005

130. *Background.* Clarendon and HITN ask the Commission to reconsider certain issues regarding EBS excess capacity leases. Clarendon asks the Commission to clarify whether automatic renewal clauses in leases entered into before January 10, 2005 may be interpreted to extend the length of the lease indefinitely.[385] This situation arises because of the effect of the Commission's decision in the *BRS/EBS R&O* (applying the rules and policies of the Secondary Markets proceeding to EBS excess capacity leases entered into from January 10, 2005 until July 18, 2006) on the interpretation of a boilerplate clause frequently used in EBS excess capacity leases.[386] The boilerplate clause can be interpreted to permit automatic one-year extensions indefinitely, if the Commission revises its rules to permit leases to be longer than 15 years.[387] According to Clarendon, some lessees argue that because the length of leases entered into from January 10, 2005 to July 18, 2006 was unlimited, leases entered into before January 10, 2005 may be extended indefinitely by operation of the boilerplate clause.[388] Clarendon, however, states that it is unsure that this interpretation of the boilerplate clause is an accurate reflection of the Commission's decision in the *BRS/EBS R&O* because of inconsistent statements made by the Commission in the *BRS/EBS 3rd MO&O* concerning the length of EBS leases entered into before January 10, 2005.[389] Thus, to determine the lease term for EBS leases entered into before January 10, 2005, Clarendon asks that the Commission reconcile its statement in paragraph 266 that "the length of the EBS leases entered into between January 10, 2005 and [July 18, 2006] was

[383] API PFR at 17.

[384] API PFR at 17.

[385] Clarendon PFR at 2-8. Clarendon provides the following example of such a provision from an EBS excess capacity lease agreement:

Subject to the provisions for earlier termination contained in Section 10 hereof, this Amended Agreement will extend for: (a) an initial term of five (5) years from the Effective Date (the "Initial Term"); (b) two additional terms of five (5) years each (each a "Renewal Term" and collectively, the "Renewal Terms") unless [lessee] notifies [lessor] at lease ninety (90) days before the end of the Initial Term or the First Renewal Term, as the case may be, that [lessee] elects not to extend this Amended Agreement for the upcoming Renewal Term; and (c) **should the FCC during the Initial Term or any Renewal Term revise its rules and policies to allow the length of leases of ITFS excess capacity to extend beyond fifteen (15) years, such number of additional terms of one (1) year each *as are permitted by the FCC…***(emphasis in original). Clarendon PFR at 3-4.

[386] Clarendon PFR at 4-5.

[387] Clarendon PFR at 4-5.

[388] Clarendon PFR at 4-5.

[389] Clarendon PFR at 4-5.

not limited under the Commission's Rules" with its statement in paragraph 269 that leases entered into before January 10, 2005 "would be grandfathered under the then-existing EBS leasing framework, thus, such leases would be subject to the existing 15-year lease limitation."[390] Clarendon notes that a state court has found that an EBS lease could not be interpreted to give a lessee a perpetual lease.[391]

131. HITN asks the Commission to void EBS leases for one-way only video services entered into prior to the release of the *Two-Way Order* in 1998.[392] In addition to the boilerplate clause described above, HITN contends that these leases also contain an unknown start date; thus, not only has the lease term been extended in perpetuity, it has not yet begun.[393] As a result of the operation of these two clauses, HITN argues, many operators have warehoused spectrum for more than ten years without providing service to the public or lease payments to the licensees/lessors.[394] And, HITN surmises, lessees intend to continue warehousing spectrum to pressure licensees/lessors who want to take advantage of the new rules into unfavorable lease negotiations or costly litigation.[395] HITN further surmises that lessees are using the May 1, 2011 substantial service deadline to further pressure licensee/lessors to renegotiate their leases within the next few years.[396] HITN requests that, given the present inability of operators to launch and operate new wireless cable video systems on the majority of this spectrum band, the Commission should declare void all legacy video-only leases entered into under pre-1998 rules, the terms of which have never commenced.[397]

132. Clearwire, CTN, NIA, and IMWED support the petitions of Clarendon and HITN and ask that the Commission clarify its position on whether EBS excess capacity leases entered into before January 10, 2005, can be interpreted to run in perpetuity.[398] Clearwire states that although it believes that the Commission should not become involved in the interpretation of terms of commercial agreements such as EBS leases, it strongly agrees with Clarendon that the

[390] Clarendon PFR at 2-4. *See also BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5715-5716 ¶¶ 266, 269.

[391] *See Nextwave Broadband, Inc. v. Saint Rose Church Schools*, Order, Superior Court of New Jersey, Mercer County, Chancery Division, Docket No. C-53-06 (June 16, 2006); Clarendon PFR at 7 n.5; HITN PFR at 7 n.12.

[392] HITN PFR at 6 and 7 n.12.

[393] HITN PFR at 7. HITN states that as perhaps the largest licensee of EBS spectrum, it is duty-bound to bring this situation to the attention of the Commission. Furthermore, HITN states that it is not asking the Commission to extricate it from spectrum leases that it executed. HITN states that it has no leases for any of its 70 stations that contain these one-sided lease clauses. HITN Reply at 8-9.

[394] HITN PFR at 7 n.12. HITN states that these leases have an unknown start date because the initiation of the term is triggered by commencement of wireless cable video services, construction of the wireless cable video system, or service provision of the first wireless cable video subscriber – none of which, in the vast majority of cases, ever occurred, and which now cannot occur. HITN PFR at 7 n.12.

[395] HITN Reply at 9.

[396] HITN Reply at 9.

[397] HITN PFR at 7 n.12.

[398] Clearwire Opposition at 9, CTN/NIA Opposition at 5-6, IMWED Opposition at 6.

Commission should declare such an interpretation a violation of public policy.[399] IMWED also supports Clarendon's and HITN's petitions concerning lease limitations.[400]

133. WiMAX, WCA, Sprint Nextel, and BellSouth oppose the petitions and argue that the Commission should not become involved in the interpretation of private contractual agreements.[401] They argue that individualized agreements need individualized scrutiny.[402] BellSouth further argues, as does Sprint Nextel, that one-way video leases may not be obsolete as HITN describes because if there is sufficient demand for these services, the Commission's Rules provide BRS/EBS licensees with the flexibility to provide these applications.[403]

134. *Discussion.* The Commission's policy regarding the length of EBS leases has evolved since it first permitted EBS licensees to lease excess capacity in 1983. Originally, the Commission's policy prohibited an EBS licensee from executing a lease agreement that extended beyond the 10-year license term because such provisions were viewed as inconsistent with the terms of the license.[404] In 1995, however, the Commission changed its policy to permit an EBS licensee to enter into a 10-year lease agreement without regard to the duration of the licensee's license term, but required the lease to note that such an extension was contingent on the renewal of the license.[405] In 1998, in the *Two-Way Order*, the Commission again changed its policy and permitted an EBS licensee to enter into 15-year lease agreement, and again required that the lease specify that such an extension be subject to the renewal of the underlying license.[406] The Commission also grandfathered existing EBS excess capacity leases entered into before March 31, 1997.[407] In 2000, in the *Two-Way Order on Further Reconsideration*, the Commission further grandfathered EBS excess capacity leases entered into before March 31, 1997 that

[399] Clearwire Opposition at 9.

[400] IMWED Opposition at 6.

[401] WiMAX Opposition at 6-7, WCA Opposition at 24-25, Sprint Nextel Opposition at 18, BellSouth Reply at 4-5.

[402] WCA Opposition at 27, BellSouth Reply at 5, Sprint Nextel Reply at 4.

[403] BellSouth Reply at 5-6, *citing* Sprint Nextel Opposition at 19.

[404] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd. 2907,2914 ¶ 38 (1995).

[405] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd. 2907,2914 ¶ 38 (1995).

[406] Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19183-18184 ¶¶ 133-134 (1998) (*Two-Way Order*).

[407] *Two-Way Order,* 13 FCC Rcd at 19181 ¶ 130. *See also* Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Reconsideration,* 14 FCC Rcd. 12764, 12791 ¶ 59 (2000) (*Two-Way Order on Reconsideration*). The Commission originally declined to grandfather leases subject to automatic renewal after March 31, 1997 because grandfathering these leases could have permitted them to continue in perpetuity under the rules adopted prior to the *Two-Way Order*. The Commission reversed this decision when the petitioners assured the Commission that the leases that would be grandfathered could have a total term of ten years. Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 14566, 14569-14570 ¶ 11 (2000) (*Two-Way Order Further Recon*).

contained an automatic renewal clause that would be effective after March 31, 1997, provided that the total term of the lease did not exceed 15 years.[408]

135. In 2004, in the *BRS/EBS R&O*, the Commission applied the Secondary Markets rules to EBS excess capacity leases executed between January 10, 2005 and July 18, 2006. In 2006, in the *BRS/EBS 3rd MO&O*, the Commission modified the application of the rules and policies of the Secondary Markets proceeding to EBS leases.[409] With regard to EBS leases, the Commission stated that although the rules and policies of the Secondary Markets proceeding applied to EBS leases, EBS licensees may enter into an excess capacity lease agreement for 30 years so long as the lease agreement ensures that EBS licensees retain the right to review their educational use requirements at year 15 and every 5 years thereafter.[410] Moreover, the Commission permitted the use of "rights of first refusal" clauses, but prohibited the use of automatic renewal clauses.[411] The Commission then clarified that the length of EBS excess capacity leases entered into between January 10, 2005 and July 18, 2006, was not limited because such EBS excess capacity leases were entered into under the Secondary Markets rules and policies.[412] The Commission reaffirmed that EBS excess capacity leases entered into before January 10, 2005 are grandfathered under the "then-existing EBS leasing framework, thus, such leases would be subject to the existing 15-year lease limitation."[413]

136. We first turn to the question of whether EBS excess capacity leases entered into before January 10, 2005 may be interpreted consistent with the Commission's Rules to last indefinitely. We agree with Sprint Nextel, WCA, BellSouth, and WiMAX that we should not resolve this issue by interpreting private contractual agreements. The interpretation of private contractual agreements is best left to the individual state courts and, therefore, we reject the recommendations of Clearwire, IMWED, and Clarendon to find such an interpretation to be a violation of public policy. The resolution of this issue, however, does not depend on the application of that particular principle of administrative law. This issue is resolved by clarifying the rules and policies adopted by the Commission in the *Two-Way Order*, the *BRS/EBS R&O*, and the *BRS/EBS 3rd MO&O*. The Commission stated in the *BRS/EBS R&O*, and reiterated in the *BRS/EBS 3rd MO&O,* that EBS leases executed before January 10, 2005 are limited to a term of 15 years from the date of execution. To the extent that these leases contain an automatic renewal clause, such leases are grandfathered after January 10, 2005 if they have an automatic renewal clause effective after January 10, 2005, only to the extent that such leases do not exceed 15 years in total length (including the automatic renewal period(s)). This decision is consistent with the Commission's decision in the *Two-Way Order on Reconsideration*. Thus, these leases cannot be extended in perpetuity. To further clarify, lease terms for EBS leases entered under the rules and policies of the *BRS/EBS R&O* (those entered into between January 10, 2005 and July 18, 2006) are not limited by the Commission's rules (but are subject to relevant state laws limiting the length of contracts). Leases entered into under the rules and policies of the *BRS/EBS*

[408] *Two-Way Order Further Recon*., 15 FCC Rcd at 14569-14570 ¶ 11.

[409] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5715 ¶ 266.

[410] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 268.

[411] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 270.

[412] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 269.

[413] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5715 ¶ 266.

3rd MO&O (on or after July 19, 2006) may be up to 30 years in length, so long as the EBS licensee retains the right at year 15 and every 5 years thereafter to review its educational needs.

137. We next turn to the question of whether the Commission should void EBS leases for one-way only video services entered into prior to the release of the *Two-Way Order*. While we are concerned by the situation described by HITN, we do not have the authority to void contracts executed by two private parties under the laws of individual states. We also agree with Sprint Nextel, WCA, WiMAX, and BellSouth, that even if we could void private contracts, such an action would deter private parties from entering into spectrum leasing agreements not only in the 2.5 GHz band (60 percent of which is licensed to EBS entities), but also in other bands as well, thus creating uncertainty among all parties that have entered into or are contemplating agreements under our Secondary Markets rules and policies.[414] We find, however, that the alleged unknown start date is contrary to the rules and policies adopted by the Commission in the *Two-Way Order*, which limited the term of EBS leases to 15 years from the date they are executed between the parties. Any other interpretation of the *Two-Way Order* would permit the warehousing of valuable spectrum for decades and is contrary to the underlying purpose of the rule. Therefore, we conclude that video-only leases executed more than 15 years ago have expired under the terms of the *Two-Way Order*. Aggrieved EBS licensees subject to these one-way only video lease agreements that have not yet expired must renegotiate them or pursue contractual remedies through the State courts or through an alternative dispute resolution process.

2. Equipment on Lease Termination

138. *Background.* In the *BRS/EBS 3rd MO&O*, the Commission amended Section 27.1214(c) to clarify that the EBS licensee/lessor could "purchase or lease dedicated common equipment used for educational purposes in the event that the spectrum leasing arrangement" was terminated by either the EBS licensee/lessor or the lessee.[415] WCA asks that the Commission amend Section 27.1214(c) of the Rules to further clarify that a lessee of EBS spectrum has the option of offering the EBS licensee/lessor either the actual equipment used on its own channels or comparable equipment on termination of the lease.[416] WCA maintains that it appears that the rules adopted in the *BRS/EBS 3rd MO&O* require the lessee to offer the EBS licensee/lessor the actual equipment deployed by the lessee, including equipment shared among multiple licensees within a single system, which is inconsistent with Commission policy.[417] WCA maintains that Commission policy has recognized that lessees of EBS spectrum, by necessity, must cobble together spectrum from multiple licensees and therefore the equipment used in the system will not be devoted to a single licensee.[418] Therefore, WCA asks that the Commission amend Section 27.1214(c) to permit the lessee the option of offering the EBS licensee/lessor either the equipment actually used in the system or comparable equipment on

[414] WiMAX Opposition at 7, WCA Opposition at 27, Sprint Nextel Opposition at 22-23.

[415] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5717 ¶ 272.

[416] WCA PFR at 13-15.

[417] WCA PFR at 13-14.

[418] WCA PFR at 13-14.

termination of the lease by the EBS licensee/lessor or the lessee.[419] WiMAX, CTN, and NIA support WCA's petition on this issue.[420]

139. *Discussion.* We agree with WCA and the other parties that the proposed rule change is an appropriate modification that reflects the fact that equipment is often shared among multiple licensees. We therefore amend Section 27.1214(c) of our Rules accordingly.

L. Substantial Service

1. Credit for Discontinued Service

140. *Background.* BellSouth asks the Commission to permit a licensee to demonstrate substantial service by showing that it met a safe harbor at anytime during the license term – that is, that licensees be permitted to use past-discontinued service to meet the substantial service standard.[421] BellSouth argues that the Commission's decision in the *BRS/EBS 2nd R&O* to permit past-discontinued service to be considered as just a factor in meeting the substantial service standard is inconsistent with the Commission's decision in the *BRS/EBS R&O* to eliminate the discontinuance of service rules and permit licensees to go dark during the transition.[422] BellSouth also argues that the record supports its position because commenters favored a rule that would acknowledge past-discontinued service as substantial service rather than a rule that looked only at a snapshot taken at a particular point in the term.[423] BellSouth also cites as support a WTB decision where a microwave licensee met the substantial service standard because it satisfied a safe harbor during its license term.[424] BellSouth argues that it relied on the Commission's decision in the *BRS/EBS R&O* by curtailing its legacy wireless cable video services and investing in pioneering technology testing and market trials.[425] BellSouth argues that the Commission cannot achieve its goal of radically changing the services offered in the 2.5 GHz band if licensees are forced to continue legacy operations solely to preserve their authorizations.[426] In supporting BellSouth, Ad Hoc MDS Alliance explains that using prior service as just a factor in a substantial service showing particularly disadvantages BRS Channels 1 and 2/2A licensees because those licensees were in limbo for more than a decade when the Commission announced plans to relocate them from the 2.1 GHz band in favor of AWS.[427] In opposing BellSouth, Clearwire argues that the Commission struck the appropriate balance in the

[419] WCA PFR at 13-14.

[420] WiMAX Opposition at 14, CTN/NIA Opposition at 4.

[421] BellSouth PFR at 1-2.

[422] BellSouth PFR at 3, 5.

[423] BellSouth PFR at 5.

[424] BellSouth Reply at 3, *citing* Biztel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 3308 (WTB/PSPWD 2003).

[425] BellSouth PFR at 4.

[426] BellSouth PFR at 3.

[427] Ad Hoc MDS Alliance Opposition at 6.

BRS/EBS 2nd R&O between spurring broadband deployment at 2.5 GHz and considering prior operations and other factors in adopting substantial service requirements.[428]

141. *Discussion*. In the *BRS/EBS 2nd R&O*, the Commission adopted a substantial service standard, with safe harbors, as the performance requirement for BRS and EBS licensees in the 2495-2690 MHz band and required BRS and EBS licensees to demonstrate substantial service no later than May 1, 2011.[429] In addition, the Commission stated that it would consider prior service, even if discontinued, as a factor in determining whether a licensee met the substantial service standard, but stressed that the most significant consideration in evaluating substantial service demonstrations is the licensee's current service.[430]

142. We decline to grant BellSouth's request to permit past-discontinued service to be used as the sole factor to demonstrate substantial service. The Commission adopted a substantial service standard to ensure the prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, to promote investment in and rapid deployment of new technologies and services, and to facilitate the availability of broadband to all Americans.[431] Permitting licensees to demonstrate substantial service by using past-discontinued service alone would not achieve any of these goals. Nevertheless, the Commission, by permitting the use of past-discontinued service as a factor in the substantial service determination, struck the appropriate balance between encouraging broadband development in the 2.5 GHz band and recognizing that licensees were permitted to discontinue service in anticipation of the transition to the new band plan and technical rules. If we were to adopt BellSouth's recommendation, we would permit licensees to forego providing any service in the 2.5 GHz band from January 10, 2005 (the date licensees were permitted to discontinue service) until beyond May 1, 2011 (the date licensees must demonstrate substantial service under the new rules). Moreover, we note that the Commission gave licensees additional flexibility to meet the substantial service standard by adopting five safe harbors applicable to BRS and EBS licensees (one safe harbor applicable solely to EBS licensees) and a rule that a licensee would be deemed to be providing substantial service if its lessee was providing substantial service.[432]

2. Safe Harbors -- heavily encumbered or highly truncated GSAs and BTAs

143. *Background*. WCA asks that the Commission adopt a special safe harbor to address situations in which a licensee's GSA is either heavily encumbered by incumbent licensees or truncated through the splitting the football process to the point that the licensee cannot be expected to meet current safe harbors and comply with the restrictions on signal level at the GSA border and the height benchmarking requirements.[433] With regard to heavily encumbered BTAs, WCA recommends that the Commission consider deployments within the

[428] Clearwire Opposition at 8.

[429] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5720, 5733 ¶¶ 278, 304.

[430] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5735 ¶ 307.

[431] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5720 ¶ 278.

[432] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5726-5729 ¶¶ 288, 292, 294.

[433] WCA PFR at ii.

BTA on all spectrum owned or leased by the BTA authorization holder or its lessee.[434] Specifically, WCA recommends that where a BRS BTA authorization holder's GSA is less than one-half the size of the BTA on every BRS channel included in its BTA license, it should be permitted to invoke a special safe harbor under which all of its lessee's deployments on BRS channels within the BTA will be considered.[435] With regard to highly truncated GSAs, WCA recommends that an incumbent BRS or EBS licensee be deemed to have provided substantial service when the GSA for all of its channels is less than 1924 square miles in size (*i.e.*, is less than one-half of a 35-mile radius circle) and the licensee satisfies one of the safe harbors in Section 27.14(e) of the Commission's Rules (adopted by the Commission in the *BRS/EBS 2nd R&O*)[436] in its former PSA (including areas that are within overlapping co-channel incumbent GSAs licensed to or released by the licensee or its lessee).[437] WiMAX supports WCA's position, and CTN and NIA support WCA's position with regard to EBS licensees.[438]

144. *Discussion*. We agree with WCA that it is appropriate to give some relief to licensees whose GSAs are heavily truncated to remedy a situation created by several factors. First, for BRS BTA licensees, this situation arises because the Commission auctioned a substantial number of BTAs that were so heavily encumbered that it is difficult for the BRS BTA authorization holder to locate a station anywhere in the BTA and provide interference-free service and the necessary interference protection to incumbents' areas.[439] Second, for BRS and EBS site-based licensees, this situation arises in a limited number of situations (particularly among EBS stations that tend to be more closely spaced than BRS stations) when splitting the football results in a GSA so highly truncated that a licensee cannot be reasonably expected to comply with the restrictions on signal level at the GSA boundary and the height benchmarking

[434] WCA PFR at 17.

[435] WCA PFR at 17.

[436] We note that subsequent to the adoption of the BRS/EBS substantial service rule, the rule was deleted in another proceeding unrelated to BRS/EBS. *See* Service Rules for the 698-806 MHz Band, Revision of the Commission's Rules Regarding Public Safety Spectrum Requirements, and a Declaratory Ruling on Reporting Requirement under the Commission's Anti-Collusion Rule, 72 Fed. Reg. 48814-01 (Aug. 24, 2007). This deletion was an error. We conclude that the best means of correcting this error is to readopt the original rule, together with the changes we adopt today, as Section 27.14(o) of the Commission's Rules.

[437] WCA PFR at 18.

[438] WiMAX Opposition at 14, CTN/NIA Opposition at 4-5.

[439] WCA PFR at 15. In auctioning the BRS frequencies the Commission stated:

[W]e realize that a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities. The winning bidder's objective in bidding on such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within that BTA, and the bidder's goal in obtaining the authorization for the BTA in which it already had MDS stations would similarly be to preserve full flexibility to make modifications.

Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Report and Order*, MM Docket No. 94-131, 10 FCC Rcd 9589, 9656 ¶ 152 (1995). WCA PFR at 16.

rule, and still be able to meet a quantitative safe harbor.[440] According to WCA, in most cases, the neighboring co-channel facilities are likely under common ownership or lease.[441] Third, the Commission's decision in the *BRS/EBS 2nd R&O* to require a licensee to demonstrate substantial service on a per license basis, rather than on a per system basis, makes it impossible in the situations described above for these licensees to meet a substantial service standard without a special safe harbor applicable solely to them.

145. Under those circumstances, we will adopt a rule allowing licensees whose GSA is less than 1924 square miles in size to demonstrate substantial service by combining its GSA with an overlapping co-channel station licensed or leased by the licensee or its affiliate. The licensees would need to demonstrate substantial service with respect to the combined GSAs of both stations. As an example, assume that a licensee offering fixed service intended to meet the six links per million safe harbor, and that licensee had two overlapping co-channel licenses, one of which had a GSA less than 1924 square miles in size. If the combined population within the GSAs was two million people, the licensee could meet the safe harbor by demonstrating that it had 12 active links within the combined GSAs of both stations. For BRS BTA authorization holders, we will adopt a similar rule if the GSA of a BTA authorization holder is less than one-half of the area within the BTA for every BRS channel. While the rule text is different from what WCA proposed, we believe the adopted rule provides the relief that WCA seeks.

M. EBS Eligibility

1. Nonprofit Educational Organizations

146. *Background.* HITN asks the Commission to make minor changes to conform Section 27.1201(a)(3) of the Commission's Rules to the changes made by the Commission in the *BRS/EBS 3rd MO&O*.[442] Section 27.1201(a)(3) permits the following entities to be eligible for EBS licenses: accredited educational institutions; governmental organizations engaged in the formal education of enrolled students; and nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited educational institutions or governmental organizations.[443] Nonprofit organizations must establish eligibility through the provision of services to the enrolled students of another accredited educational institution or governmental entity.[444] Section 27.1201(a)(3) requires these non-profit applicants to provide documentation from proposed receive sites demonstrating they will receive and use the non-profit applicants' educational usage.[445] Section 27.1201(a)(3) also

[440] WCA PFR at 18.

[441] WCA PFR at 18.

[442] On September 1, 2005, in a separate proceeding, Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. § 610 in response to Public Notice DA-05-1524, HITN submitted comments seeking the same revisions to the EBS eligibility requirements of Section 27.1201(a)(3). HITN notes that these comments are directly related to changes recently made by the Commission in this WT Docket No. 03-66 and requests that the Commission address those comments here. HITN PFR at 9-10. *See also* Letter from Joel D. Taubenblatt, Chief, Broadband Division, WTB, to Rudolph J. Geist, Esquire, RJGLaw LLC (dated Aug. 21, 2006).

[443] 47 C.F.R. § 27.1201(a).

[444] 47 C.F.R. § 27.1201(a).

[445] 47 C.F.R. § 27.1201(a)(3).

states that "[n]o receive site more than 35 miles from the transmitter site shall be used to establish basic eligibility."[446]

147. HITN asks that the rule be modified in two respects. First, HITN recommends that the Commission amend Section 27.1201(a)(3) of the Commission's Rules to clarify that an educational institution may receive education-enhancing broadband services, which it intends to use in furtherance of its educational mission.[447] HITN notes that Section 27.1201(a)(3) of the Commission's Rules, as originally crafted, anticipated the provision of letters from accredited schools regarding their intent to receive and use educational video programming.[448] HITN argues that many entities qualifying to operate EBS stations will be contemplating the provision of educational content or education facilitating services that may not include instructional video programming created by, or packaged for delivery by, the EBS licensee.[449] HITN states that in the case of broadband services, an educational institution may be interested in receiving and using any of the following types of services at fixed, temporary fixed, or mobile sites: voice over IP; one or two-way streamed video content; teleconferencing and remote classroom hookups; high speed Internet or data services; and wireless local or wide area networks.[450] Therefore, HITN notes that the requirement letter would recognize the reality that educational content available over the World Wide Web and downloaded at any specific site is essentially user-directed.[451] HITN argues that neither the service provider nor the site's school administrator can preview or make specific advance statements regarding the content that will be accessed.[452] According to HITN, the most that can be said is that the services will be used in the furtherance of the receiving institution's educational mission and will be made available to enrolled students, faculty and staff in a manner and in a setting conducive to such usage.[453]

148. Second, HITN asks that Section 27.1201(a)(3) be changed to reflect the transition of the EBS service from a site-based to a geographic licensing structure.[454] Thus, HITN asks that restrictive language in Section 27.1201(a)(3) regarding the absolute distance from the transmit site for qualified schools supplying letters should be based on distance from the proposed center reference point, and should be further qualified to ensure that such school will be within the proposed geographic service area.[455] Clearwire, CTN, and NIA also support a re-examination and revision of those EBS eligibility and substantive use rules to better reflect the current permitted uses of this spectrum.[456]

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[446] 47 C.F.R. § 27.1201(a)(3).

[447] HITN PFR at 11.

[448] HITN PFR at 10.

[449] HITN PFR at 10.

[450] HITN PFR at 10-11.

[451] HITN PFR at 11.

[452] HITN PFR at 11.

[453] HITN PFR at 11.

[454] HITN PFR at 11.

[455] HITN PFR at 11.

[456] Clearwire Opposition at 9, CTN/NIA Opposition at 5-6.

149. *Discussion.* We agree with HITN that it is appropriate to update the EBS eligibility rules to reflect the wider variety of services EBS licensees will use and offer. In particular, as written, the rules contemplate video programming where the licensee will know the specific content being offered in advance. With the provision of broadband services, HITN is correct that it will be impossible for the licensee to know in advance what content is being accessed. We will adopt the rule changes proposed by HITN, and supported by commenters, in order to reflect the wider variety of services being used by EBS licensees. Furthermore, we agree with HITN that it is appropriate to make its proposed changes to the rule to reflect the advent of geographic area licensing. We will amend our rules accordingly.

2. Commercial EBS Licensees

150. *Background.* WCA asks that the Commission amend paragraph (d) of Section 27.1201 of the Commission's Rules to clarify that commercial EBS licensees are not subject to the educational programming requirements in Section 27.1203(b)-(d) of the Commission's Rules or the special EBS leasing requirement under Section 27.1214 of the Commission's Rules.[457] WCA notes that these changes are necessary to clarify that, although the Commission continues to regulate commercial EBS licensees under the EBS rules, neither the instructional programming requirements nor the special EBS leasing rules apply to commercial EBS licensees.[458]

151. *Discussion.* We agree with WCA that the proposed change accurately reflects our intentions and is consistent with the nature of commercial EBS stations. We therefore amend our rules accordingly.

N. Mutually Exclusive Applications

152. *Background.* HITN asks the Commission to reconsider its decision dismissing six HITN applications to construct new stations as mutually exclusive with other pending new station applications.[459] First, HITN argues that, although it previously sought reconsideration of the dismissal of these applications, the Commission failed to provide a reasoned decision in the *BRS/EBS 3rd MO&O* to HITN's numerous arguments and thus, should again reconsider this issue.[460] Second, HITN claims that the decision to dismiss the mutually exclusive applications was arbitrary and capricious because the Commission failed to give a reasoned explanation of how the dismissals would further the Commission's stated goals, why the Commission is deviating from stated policy, and how the goal achieved justifies the effects of dismissing the applications.[461] Third, HITN argues, the Commission made inconsistent statements regarding the dismissal of the applications, and argues that the Commission should auction these discrete geographic areas to resolve these mutually exclusive applications.[462] HITN also states that it is

[457] WCA PFR at ii and 22-23. *See also* WiMAX Opposition at 14 in support of WCA's PFR.

[458] WCA PFR at ii and 23.

[459] HITN PFR at ii and 3.

[460] HITN PFR at 3.

[461] HITN PFR at 5.

[462] HITN PFR at 3-4.

ready and willing to construct and transition stations in order to provide wireless broadband services immediately.[463] Clearwire seconds HITN's position that the proposed plan to auction the white space after the adoption of auction rules will limit the development of wireless broadband and educational services in the geographic areas where the pending mutually exclusive licenses were dismissed.[464] Clearwire argues that reinstating the applications would facilitate the transition by identifying an operator that would serve as a proponent for that specific geographic area.[465] Clearwire also suggests that if the mutually exclusive pending applications are granted, the licensees should be denied transition rights.[466]

153. Clearwire argues that the public interest would be better served if EBS licensees were given one more chance to demonstrate their intention to provide educational services and to facilitate broadband deployment.[467] Clearwire states that the spectrum would be able to be utilized immediately by educators and commercial broadband operators.[468] Finally, Clearwire argues that reinstating the dismissed mutually exclusive licenses would allow the Commission to fulfill its policy objectives in a more timely fashion.[469]

154. WCA argues that the decision to dismiss mutually exclusive applications "represents a reasonable determination that the most efficient mechanism for moving to EBS geographic licensing and the auctioning of unlicensed EBS white space is to wipe the slate as clean as possible."[470] WCA accuses HITN of ignoring the Commission's discretion to manage the Commission's processes through doctrines of general applicability.[471]

155. *Discussion*. In the *BRS/EBS 3rd MO&O,* the Commission affirmed its decision not to reconsider the dismissal of pending mutually exclusive applications for new EBS stations.[472] The Commission stated that its decision was supported by well-established Commission precedent (to dismiss pending mutually exclusive applications when converting from a site-based to a geographic area licensing scheme), was in the public interest (to facilitate the transition of the 2.5 GHz band), and resolved long-standing apparently intractable issues.[473]

156. We deny WCA's request that we dismiss HITN's petition as repetitious under Section 1.429(i) of the Commission's Rules.[474] HITN argues that the Commission neither

[463] HITN PFR at 4.

[464] Clearwire Opposition at 5. See also *Ex Parte* Letter from Terri B. Natoli, Clearwire to Marlene H. Dortch, Federal Communications Commission (filed Nov. 7, 2006) at 1.

[465] Clearwire Opposition at 6.

[466] Clearwire Opposition at 6.

[467] Clearwire Opposition at 6.

[468] Clearwire Opposition at 6.

[469] Clearwire Opposition at 7.

[470] WCA Opposition at 18.

[471] WCA Opposition at 18.

[472] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5703-5704 ¶ 236.

[473] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5703-5704 ¶ 236.

[474] 47 C.F.R. § 1.429(i).

adequately explained why it dismissed the mutually exclusive applications nor responded to the numerous arguments HITN raised in its petition for reconsideration of the *BRS/EBS R&O*.[475] We disagree with HITN's contention and note that this issue has twice been discussed and resolved by the Commission. In the interests of developing a full and complete record on this issue, however, we will not dismiss HITN's petition on procedural grounds, but will instead address HITN's arguments here.

157. We reject HITN's argument that the Commission's dismissal of the mutually exclusive applications was inconsistent with precedent. Specifically, HITN argues that the Commission's decision in the *BRS/EBS 3rd MO&O* was based on the *Maritime Services Order*,[476] (where the Commission froze the acceptance of new applications while changing service rules from site-based licensing to geographic area licensing).[477] HITN argues that the *Maritime Services Order* misconstrued the D.C. Circuit's holding in *Kessler v. FCC*.[478] According to HITN, *Kessler* holds that while the Commission does have procedural rights under the APA to institute application filing freezes in the name of administrative efficiency and convenience, it may not take away substantive rights of which parties are entitled to have applications processed that have been accepted for filing.[479]

158. We disagree with HITN's analysis of *Kessler* and agree with WCA's analysis.[480] In *Kessler*, the D.C. Circuit found that *Ashbacker*[481] procedural rights apply to potential applicants whose applications would have been mutually exclusive but for an application filing freeze.[482] Here, however, the implementation of the filing freeze on April 2, 2003 (the release date of the *BRS/EBS NPRM*) had no effect on the mutual exclusivity of HITN's applications.[483] Those applications had been pending for years, unable to be processed, because the parties could not privately reach a settlement to resolve mutual exclusivity. When the Commission initiated a rulemaking to develop a new, more efficient licensing scheme, it dismissed all mutually exclusive applications that did not have a settlement agreement on file with the Commission by April 2, 2003.[484] The Commission's decision was not only consistent with past Commission decisions -- such as the dismissal of pending mutually exclusive applications when transitioning

[475] HITN PFR at 3.

[476] Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order*, PR Docket No. 97-257, 12 FCC Rcd 16949 (1997) (*Maritime Services Order*).

[477] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 1.

[478] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 1, *citing Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[479] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 2.

[480] *Ex Parte* Letter from Paul J. Sinderbrand, Counsel, WCA to Marlene H. Dortch, Federal Communications Commission (filed Oct. 30, 2006) at 4-5.

[481] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[482] *Kessler v. FCC*, 326 F.2d at 687-688.

[483] *BRS/EBS NPRM*, 18 FCC Rcd at 6813 ¶ 226.

[484] *BRS/EBS R&O*, 19 FCC Rcd at 14264-14265 ¶ 263.

the paging industry, the maritime industry, and the 39 GHz band to geographic area licensing[485] -- but also was consistent with the D.C. Circuit's decision to uphold the Commission's decision to dismiss pending mutual exclusive applications when the Commission adopted a new licensing scheme for the 39 GHz band.[486]

159. Second, we disagree with HITN's assertion that the Commission's decision was arbitrary and capricious. As detailed above, the Commission's decision was consistent with our policies and with case law. The dismissal of the mutually exclusive applications was necessary because neither the Commission nor the parties could resolve this mutual exclusivity under the then applicable site-based licensing scheme. The dismissal of those applications, therefore, furthers the Commission's goal of developing a licensing scheme that not only resolves issues of mutual exclusivity, but also ensures the efficient use of EBS spectrum by educators. The Commission's decision to license EBS stations on a geographic basis is the first step toward achieving that goal. Today, we take the second step, by releasing a *Second Further Notice of Proposed Rulemaking* in which we seek comment on various options to license EBS spectrum. Permitting mutually exclusive applications to stay in pending status for years does not advance our goal of promoting the efficient use of EBS spectrum by educators, and thus, the Commission dismissed them.

160. Third, we disagree with HITN's assertion that the Commission has made inconsistent statements with regard to dismissing the mutually exclusive applications. Specifically, HITN faults the Commission for concluding that dismissing mutually exclusive applications would allow for a more efficient transition while stating in the *BRS/EBS 3rd MO&O* that, "it may be possible to make new licenses available in a way that does not interfere with potential transitions to the new band plan."[487] We disagree that any inconsistency exists. One reason dismissal of mutually exclusive applications served the public interest is that allowing the mutually exclusive applications to remain on file would create considerable uncertainty for potential proponents who would be uncertain of the ultimate licensee in a market. Resolving that uncertainty would have required the Commission to hold a special auction between applicants that filed their applications over ten years ago that did not reflect the radical changes in technology and rules that had occurred since the filings. In contrast, the statement HITN refers to involves establishing a new process for future applications that could be granted pursuant to the new band plan. The two situations are quite different, and there is no inconsistency. We therefore deny HITN's petition on this issue and affirm the Commission's decision to dismiss the mutually exclusive applications.

V. DECLARATORY RULING – LATE-FILED APPLICATIONS

161. The Wireless Telecommunications Bureau has pending a number of late-filed EBS renewal applications and applications for extensions of construction deadlines. Although

[485] *See Maritime Services Order*. *See also* Amendment of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997), Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 14 FCC Rcd 12428 (1999).

[486] *See Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

[487] HITN PFR at 3-4, *citing BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5740 ¶ 321.

these matters have not been considered by the Commission in this proceeding, a number of pleadings before the agency indicate that there is considerable confusion concerning the splitting the football methodology used to divide overlapping protected service areas, as it related to late-filed renewal applications. In particular, Clearwire, CTN/NIA, WCA, NextWave, Sprint Nextel, and Xanadoo (the Joint Commenters) filed a letter proposing clarifications of our splitting the football treatment of reinstated licenses.[488] In addition, four licensees -- Instructional Telecommunications Foundation, Inc. (ITF), New Trier Township, High School District 203 (New Trier), Shekinah Network (Shekinah), Boston Catholic Television Center, Inc. (BCTC) – have asked the Commission to issue a declaratory ruling that their Stations do not have to split the football with overlapping stations whose licenses have been reinstated *nunc pro tunc*.[489] Also, in Clearwire's opposition to petitions for reconsideration in the instant proceeding, it asks the Commission to give leniency to late-filed EBS applicants.[490] As discussed below, we believe the proper vehicle for considering these issues is to adopt a declaratory ruling clarifying our treatment of the splitting the football policy as applied to late-filed renewal applications.

162. *Background.* Clearwire asks the Commission to give these applicants one last opportunity to demonstrate an intent to use their previously licensed spectrum and to cure any defects that may exist with respect to their licenses.[491] Clearwire recommends that, if no such showing is made, those licenses should be cancelled and the resulting white space made available for auction.[492] Clearwire argues that these applications demonstrate that many EBS licensees were left in a difficult situation because of the uncertainties of operating in the 2.5 GHz band, including the following: operators/lessees that went bankrupt or breached their leases; leases that were bought and sold; the Commission's consideration of reallocating the 2.5 GHz band for other uses; and the lengthy development and release of the final rules.[493] If the Commission were to grant these applications, Clearwire argues, educators and commercial broadband operators would be able to immediately use this spectrum and the public interest would be served.[494] Although Clearwire notes that it understands the need for the Commission to clean up its ULS database by resolving these applications so that the EBS white space can be

[488] Letter from Edwin N. Lavergne, Catholic Television Network, Todd D. Gray, National ITFS Association, Paul J. Sinderbrand, Wireless Communications Association, Inc., Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Government Affairs, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Sep. 28, 2007) (Ex Parte Letter).

[489] Petition for Declaratory Ruling, filed by Instructional Telecommunications Foundation, Inc. (filed Mar. 13, 2007) (ITF Petition); Petition of New Trier Township, High School District 203 for an Expedited Declaratory Ruling (dated Jul. 26, 2007) (New Trier Petition); Request for Declaratory Ruling filed by Shekinah Network (filed Nov. 27, 2007); Boston Catholic Television Center, Inc. Petition for Declaratory Ruling (filed Dec. 14, 2007) (BCTC Petition).

[490] Clearwire Opposition at 6.

[491] Clearwire Opposition at 6.

[492] Clearwire Opposition at 6.

[493] Clearwire Opposition at 6.

[494] Clearwire Opposition at 6.

auctioned, it argues that the public interest is better served by giving these EBS applicants this one last opportunity.[495]

163. WCA and Sprint Nextel oppose Clearwire's request.[496] WCA argues that the Commission's adoption of Clearwire's proposal would be counterproductive to the goal of expediting the EBS white space auction.[497] Instead of granting Clearwire's request, WCA recommends that the Commission quickly resolve the pending cases.[498] Sprint Nextel argues that Clearwire has not explained how its proposed "one final opportunity" would be administered or how long the process would take (including resolution of any subsequent requests for reconsideration or what kind of showing former EBS licensees would be required to make in order to reinstate their authorizations).[499] Sprint Nextel further argues that the Commission cannot clarify which EBS spectrum will be available at auction if the former EBS licenses are not removed from the ULS database.[500]

164. An issue related to Clearwire's request involves overlaps between expired licenses and active licenses. The Commission generally uses the splitting the football methodology to divide overlapping protected service areas.[501] Upon the effective date of this new policy, January 10, 2005, all overlapping PSAs would be split, and new geographic service areas would be established for all EBS licensees who had previously experienced an overlap issue. The Commission clarified its split the football policy in the *BRS/EBS 3rd MO&O*. Specifically, in response to an unopposed petition from WCA, the Commission ruled as follows:

> Where an incumbent station license was in existence as of January 10, 2005 and caused a splitting of the football, and that incumbent station license is later forfeited, the reclaimed territory reverts to the BRS BTA holder (if BRS spectrum) or to EBS white space (if EBS spectrum) regardless of whether the action/inaction that caused the forfeiture occurred prior to January 10, 2005.[502]

No party sought reconsideration of this specific issue or otherwise opposed it.

165. On January 25, 2007, the Broadband Division of the Wireless Telecommunications Bureau granted waivers *nunc pro tunc* to 41 late-filed EBS renewal applications.[503] One of the licensees granted a waiver pursuant to that order was Eudora Unified School District (Eudora), licensee of EBS Station WLX327. Instructional Telecommunications

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[495] Clearwire Opposition at 6.

[496] WCA Reply at 16, Sprint Nextel Reply at 9-10.

[497] WCA Reply at 16.

[498] WCA Reply at 16.

[499] Sprint Nextel Reply at 9.

[500] Sprint Nextel Reply at 9.

[501] *See* 47 C.F.R. § 27.1206(a)(1); *BRS/EBS R&O,* 19 FCC Rcd 14192 at ¶ 59.

[502] *3rd MO&O & 2nd R&O*, 21 FCC Rcd at 5694-5 ¶ 206.

[503] Forty-one Late-Filed Applications for Renewal of Educational Broadband Service, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB 2007), *recon. pending* (*Order of 41*).

Foundation, Inc. (ITF), licensee of EBS Station WHR511, whose PSA overlaps with Station WLX327, has requested that the Commission issue a declaratory ruling that Station WHR511 does not have to split the football with Eudora.[504] ITF did not challenge Eudora's late-filed request for reinstatement of its EBS license, but nonetheless argues that it does not have to split the football with Eudora because Eudora's license was expired on January 10, 2005, the date that the footballs were split, notwithstanding the Bureau's later decision to reinstate such license *nunc pro tunc*.[505] ITF argues that if it splits the football with Eudora, it would lose a significant portion of its GSA to Eudora.[506] ITF has leased the excess capacity of WHR511 to a subsidiary of Clearwire which intends to use that capacity for educational purposes as well as for telecommunications services that will benefit the general public.[507]

166. New Trier, which held a license for Station KGZ66, has also filed a request for a declaratory ruling asking the Commission to declare that New Trier does not have to split the football with Station WHR850, licensed to Waubonsee Community College (Waubonsee).[508] New Trier asserts that it has operated on EBS channels since 1967, and now serves approximately 12,000 students.[509] New Trier argues that because Waubonsee's license expired in July, 1997, its license was not "in existence" on January 10, 2005 when the football was split.[510] Therefore, New Trier urges that we declare that it does not have to split the football with Waubonsee in the event Waubonsee's license for WHR850 is reinstated.[511]

167. In a similar case, Shekinah has asked that we declare that EBS Stations WLX259 (licensed to Western Nevada Community College), WMX642 (licensed to Spectrum Alliance Harrison F Partnership), and WLX260 (licensed to Chippewa Valley Technical College), all of which expired more than 6 years ago, have not and will not be considered in determining the GSAs of Shekinah's EBS stations.[512] Despite the fact that the Commission sent termination letters to WLX259, WMX642, and WLX260 on October 19, 2007, Shekinah feels that a broader

[504] ITF Petition.

[505] *Id*. at 3-4.

[506] *Id.* at 2.

[507] *Id.* at 2.

[508] New Trier Petition. At the time New Trier filed its request for declaratory ruling, the license for Station WHR850 was expired, and Waubonsee did not have a renewal application on file. Subsequently, Waubonsee filed a late-filed renewal application with a request for waiver. *See* File No. 0003186718 (filed Oct. 1, 2007). Also, New Trier withdrew its application for renewal of Station KGZ66 after it failed to respond to a return letter and its license expired. *See* File No. 0003065293 (filed Jun. 11, 2007). New Trier was forced to file a late-filed renewal application with a waiver request. *See* File No. 0003188417 (filed Oct. 3, 2007).

[509] *Id.* at 1-2.

[510] *Id*. at 3-4.

[511] *Id*. at 6-7.

[512] Shekinah Petition at 1-2. Shekinah hold the licenses for EBS Stations WLX919, WLX950, WLX975, WLX978, WLX994, WNC373, WNC407, WNC426, WNC533, WNC552, WNC661, WNC732, WNC767, WNC773, WNC787, WNC798, WNC810, WNC868, WNC892, WNC893, WNC904, WNC956, WND210, WND321, WND329, WND348, WND401, WND465, WND476, WND515, WND581, WND627, and WQFG870. Shekinah Petition at 2.

declaratory ruling is necessary to clarify the "significant uncertainty concerning the Commission's GSA-formulation rules."[513]

168. Finally, BCTC requests a declaratory ruling that it is not required to "split the football" with EBS Stations WHR888 and WLX771, formerly licensed to Connecticut Public Broadcasting, Inc. (CPB) and which expired in 1998.[514] BCTC asserts that although the Commission sent termination letters to these licenses on October 19, 2007 and they are not the subject of reinstatement applications, it is nonetheless concerned about the uncertainty of the status of its GSA for its stations WND259 and KLC85.[515]

169. On September 28, 2007, Clearwire, CTN/NIA, WCA, NextWave, Sprint Nextel, and Xanadoo (the Joint Commenters) filed a letter proposing clarifications that they believe represent a consensus position of a majority of the 2.5 GHz industry and that, on balance, most effectively and fairly advance the Commission's 2.5 GHz band goals and objectives.[516] The Joint Commenters ask that we clarify our splitting the football treatment of expired licenses to add the following new rules:

> If an EBS license term expired before January 10, 2005, it was not considered "in existence" and thus was not accorded a protected service area ("PSA") used to split overlapping footballs (i.e., other stations on the same channel(s) that had PSAs which would have overlapped the expired license would not take the expired license into account in determining their GSAs) unless it has been renewed nunc pro tunc to date.
>
> If the FCC grants additional late-filed EBS license-renewal applications that expired before January 10, 2005, the renewed license will be accorded a GSA that does not include any overlapping PSA areas (i.e., the license will be reinstated but not nunc pro tunc for purposes of making it "in existence" as of January 10, 2005) except in cases of manifest Commission error where reinstatement is in the public interest.[517]

170. West Central Illinois Educational Telecommunications Corp.[518] and Waubonsee[519] do not object to the Joint Commenters' proposal. Hempstead Independent School District argues that the Joint Commenters lack standing to request the relief they seek, that the "clarifications"

[513] Shekinah Petition at 3.

[514] BCTC Petition at 1.

[515] BCTC Petition at 3.

[516] Letter from Edwin N. Lavergne, Catholic Television Network, Todd D. Gray, National ITFS Association, Paul J. Sinderbrand, Wireless Communications Association, Inc., Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Government Affairs, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Sep. 28, 2007) (Ex Parte Letter).

[517] Ex Parte Letter at 3-4.

[518] *See* Motion for Extension of Time, File Nos. 0003014539 and 0003138474 (filed Oct. 4, 2007).

[519] Response to Petition for Declaratory Ruling (filed Oct. 1, 2007).

they seek are not consistent with Commission policy, and that it would be impermissible to reinstate licenses without reinstating them *nunc pro tunc*.[520] Texas State Technical College objects to losing over half of its formerly anticipated service area and argues that the proposal is inconsistent with the relief granted to the 41 reinstated licensees.[521] JRZ Associates, Liberty University, and Lois Hubbard argue that the Joint Commenters lack standing, that their request is an untimely petition for reconsideration of the *BRS/EBS 3rd MO&O*, and that adopting a policy under which a license would not exist for a period of time "would seriously and chaotically destabilize" the regulatory regime applicable to BRS and EBS.[522] Burlington College, Champlain College, Norwich University, and Saint Michael's College (collectively, the Vermont Licensees) assert that the proposal would redraw the GSAs of their licenses in a manner that would generally exclude each Vermont Licensee's campus from the resulting license coverage areas.[523]

171. *Discussion.* We deny Clearwire's original request to establish a blanket leniency for late-filed renewal applications. We believe it is appropriate to continue to consider such requests on a case-by-case basis based on all pertinent circumstances.

172. It is apparent, however, that, further clarification and review of our policy of addressing overlaps between active licenses and expired licenses is appropriate. The pleadings before us show that there is considerable confusion concerning our policies and how they apply to expired licenses that are subsequently reinstated *nunc pro tunc*. We believe the proper vehicle for considering these issues is to issue a declaratory ruling clarifying our treatment of such licenses. Section 1.2 of the Commission's Rules allows us to issue a declaratory ruling, either by request or on our own motion, to terminate a controversy or remove uncertainty.[524] We agree with the Joint Commenters that additional certainty surrounding GSAs is imperative, especially given the activity surrounding transition planning and implementation, and buildout of broadband services in this band.[525] We note that several opponents of the Joint Commenters' filing argue that the Joint Commenters have no legitimate interest in opposing their renewal applications.[526] Although we do not decide today whether Sprint Nextel or any other party has standing to file a petition to deny a late-filed EBS renewal application, we do believe that the Joint Commenters have a legitimate interest in ensuring certainty in the rules for establishing

[520] Response of Hempstead Independent School District to Written *Ex Parte* Presentation (Oct. 5, 2007) (Hempstead Response).

[521] Letter from Paul Woodfin, Vice President, Financial and Administrative Services, Texas State Technical College West Texas, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 19, 2007) (TSTC Opposition).

[522] Opposition to *Ex Parte* Proposal (filed Oct. 5, 2007) (JRZ Opposition).

[523] Letter from Dr. Jane O'Meara Sanders, President, Burlington College, Dr. David F. Finney, President, Champlain College, Dr. Richard W. Schneider, President, Norwich University, Dr. John J. Neuhauser, President, Saint Michael's College, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 15, 2008) (Vermont Licensees' Opposition).

[524] 47 C.F.R. § 1.2.

[525] Ex Parte Letter at 2.

[526] *See* Hempstead Response at 2, TSTC Opposition at 1-2, JRZ Opposition at 5.

geographic service areas. Accordingly, we will consider their filings, as well as all other relevant filings, including the petitions for declaratory ruling filed by ITF and New Trier.

173. Initially, we agree with New Trier, Shekinah, and BCTC that there is no public interest benefit in requiring an active EBS licensee to "split the football" with a license that was expired as of January 10, 2005, especially where no attempt has been made to resurrect such license by filing a late-filed renewal application.[527] Accordingly, we issue a ruling that an active licensee whose former PSA overlapped with a license that was expired as of January 10, 2005 need not split the football with such expired license if the expired licensee has not had its license reinstated prior to adoption of this order.

174. Second, we deny ITF's request for a declaratory ruling with respect to late-filed renewal applications granted prior to the adoption of this order. While we are sympathetic to ITF's policy arguments, the late-filed renewal applications that have been granted to this point have been granted *nunc pro tunc*.[528] Consistent with established Commission policy,[529] a *nunc pro tunc* reinstatement has the effect of reinstating the license such that there was no interruption in the existence of the license.[530] Thus, when a license that expired prior to January 10, 2005 was subsequently reinstated *nunc pro tunc*, there would be no lapse in the authorization of the license, and such reinstated license was entitled to split the football with any neighboring authorizations with overlapping service areas. We believe it would be inequitable to retroactively change the rules for renewal applications that have already been granted pursuant to an existing Commission policy, especially when most of the late-filed applications that were granted to date were unopposed at the time of grant. We note that the Joint Commenters do not challenge the right of renewal applicants that have been previously granted to split the football.[531] Accordingly, ITF is required to split the football with Eudora because Eudora's license must be considered in existence as of January 10, 2005.

175. With respect to future grants of late-filed renewal applications, however, we agree with ITF and the Joint Commenters that it is appropriate to modify our treatment of overlapping service areas involving licenses that are reinstated *nunc pro tunc*. When a licensee allows its license to expire, the remaining active licensees may reasonably take action based on their expectation that their neighbors had no further interest in maintaining their expired licenses. For this reason, we believe that, even in cases where it is appropriate to grant late-filed renewal applications, it is also appropriate to require licensees who allowed their licenses to lapse to forfeit their rights to areas that overlap with other licensees. Although applicants seeking to

[527] We recognize that New Trier is not currently in this situation because its license has expired and Waubonsee has now filed a late-filed renewal application. We believe it is appropriate to issue this ruling to provide certainty and relief to other licensees in this situation.

[528] *See*, *e.g.*, *Order of 41*.

[529] *See* Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11486 ¶ 22 (1999) (*ULS MO&O*).

[530] The term *nunc pro tunc*, meaning "now for then," refers to acts allowed to be done after the time when they should be done, with a retroactive effect. *See* BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).

[531] Ex Parte Letter at 3.

reinstate their licenses *nunc pro tunc* have an interest in reacquiring their entire GSA, that interest should not outweigh the interest of licensees who maintained their licenses and may have made plans based on the availability of the entire overlap area. In the future, absent agency error or other unique circumstances, applicants seeking to reinstate their licenses *nunc pro tunc* who receive a waiver will not be allowed to split the football with licensees whose licenses were active on January 10, 2005 and on the date the applicant's late-filed renewal applications is granted.

176. The Vermont Licensees argue that adoption of the Joint Commenters' proposal will have strange and adverse consequences in Vermont as it will prevent these licensees from serving their campuses.[532] As the Joint Commenters recognize, we agree (without evaluating the merits of the arguments made by the Vermont Licensees) that there may be unusual or unique circumstances where it would be unfair to hold that a licensee had forfeited its right to the overlap area.[533] For example, there may be cases where a licensee timely filed a renewal application that was erroneously dismissed. In cases of agency error or other unique circumstances, we direct the Wireless Telecommunications Bureau to rule that the reinstated licensee is entitled to split the football with other active licensees. The Bureau will need to determine in each case whether such circumstances exist. Therefore, notwithstanding our implementation of this proposal, the Vermont Licensees and other affected licensees who believe their circumstances are sufficiently unique to warrant a departure from this new policy will nonetheless retain the ability to have their circumstances evaluated on a case-by-case basis.

177. We note that commenters opposing this approach argue that modifying the policy would be inconsistent with relief granted to previously granted renewal applications.[534] While the opponents are correct that they would be treated differently from previously granted renewal applications, that difference is a result of our analysis and decision that a clarification and modification in policy is appropriate. For the reasons discussed above, we believe the difference in treatment is warranted.

178. Lastly, we note that Hempstead and JRZ *et al* argue that that it would be unfair and contrary to precedent to grant their renewal applications in any way other than *nunc pro tunc*. We agree with Hempstead[535] and JRZ *et al.*[536] that granting renewal applications on a non-*nunc pro tunc* basis would be inconsistent with the policy established in the *ULS MO&O*[537] and would be problematic with respect to any licensees that may have been operating. We also agree that, to the extent we grant waivers in the future to when considering late-filed renewal applications, any future grants of late-filed renewal applications should continue to be on a *nunc pro tunc* basis, subject to our guidance in this order regarding their ability to split the football with other licensees.

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[532] Vermont Licensees' Opposition at 2.

[533] Ex Parte Letter at 3.

[534] *See* TSTC Opposition at 2, JRZ Opposition at 6.

[535] Hempstead Response at 3.

[536] JRZ Opposition at 8-9.

[537] *ULS MO&O*, 14 FCC Rcd at 11486 ¶ 22.

179. Accordingly, in response to the petitions for declaratory ruling and other filings we have considered, we issue the following clarifications of our splitting the football policy:

- An active BRS or EBS licensee whose former protected service area overlapped with a co-channel license that was expired on January 10, 2005 need not split the football with such expired license if the licensee has not had its license reinstated.

- If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and Order*, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances.

VI. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Licensing EBS spectrum in the Gulf of Mexico

180. In the *BRS/EBS 4th MO&O*, we created a Gulf of Mexico Service Area, in part, because API persuasively argued for BRS licensing in the Gulf of Mexico because the Gulf is an underserved area and that the 2496-2690 MHz band is one of the few bands available and adequate for operations in support of off-shore oil and gas facilities. We note that of the 194 megahertz of spectrum available in the 2496-2690 MHz band, 112.5 megahertz is assigned to the EBS, leaving 73.5 megahertz (excluding the 2-four-megahertz guard bands) for commercial licensing in the Gulf of Mexico. Therefore, we seek comment on whether we should license EBS spectrum in the Gulf of Mexico. Commenters should address the issue of whether there is a need in the Gulf of Mexico for the type of educational services that EBS is designed to meet. Because there are no schools or universities in the Gulf of Mexico, we seek comment on whether any changes to our educational use requirements are appropriate for the Gulf of Mexico. In light of the questions we ask below on how to license vacant and available EBS spectrum generally, should we use the same assignment mechanism for EBS spectrum in the Gulf of Mexico? Alternatively, should we use a different assignment mechanism to account for the difference between EBS spectrum in the Gulf and EBS spectrum in the rest of the country? We seek comment on these questions and any other questions relating to licensing EBS spectrum in the Gulf of Mexico.

B. Licensing available and unassigned EBS spectrum

1. Introduction

181. As explained in the *BRS/EBS 4th MO&O*, while the Commission had previously decided to wait for the transition of the 2.5 GHz band to develop rules to auction BRS spectrum, we now believe that the need for commercial spectrum is such that we should promptly auction

available and unassigned BRS spectrum.[538] Hence, today we have adopted rules for competitive bidding, designated entities, and small business size standards to enable an auction of BRS spectrum.[539]

182. As also noted in the *BRS/EBS 4th MO&O*, we are seeking further comment on the appropriate licensing scheme for new EBS licenses. We note that the opportunities presented by the new technical rules and band plan create additional demand for EBS spectrum, and that EBS eligible entities have not been able to file applications for new stations since 1995.[540] In 1993, the Commission suspended the processing of EBS applications,[541] except for major change proposals for EBS applications to accommodate settlement agreements among mutually exclusive applicants.[542] Since 1993, the Commission has twice opened filing windows for EBS applications but those windows have been of short duration and applicable only to certain types of applications. For instance, in 1995, the Commission provided a five-day window for the filing of applications for new construction permits and for major changes to existing EBS facilities.[543] In 1996, the Mass Media Bureau announced a sixty-day filing window for a limited class of applications, permitting the filing of EBS modification applications and amendments to pending EBS applications proposing to co-locate with an authorized wireless cable facility, in order to facilitate market wide settlements.[544]

183. The Balanced Budget Act of 1997 (Budget Act) expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act by adding, among other things, provisions governing auctions for broadcast and other previously exempt services.[545] In a subsequent order, the Commission concluded that the legislation required that mutually exclusive applications for new ITFS stations be subject to auction.[546] The Commission

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[538] *See supra* ¶ 14.

[539] *See supra* ¶¶ 26-28.

[540] *See* Notice of Instructional Television Fixed Service Filing Window From October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995).

[541] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Notice of Proposed Rulemaking,* MM Docket No. 93-24, 8 FCC Rcd 1275 (1993).

[542] *Id.* at 1277 n.13. *See also* Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Order and Further Notice of Proposed Rulemaking,* MM Docket No. 93-24, 9 FCC Rcd 3348, 3354 (1994). The Commission reiterated this policy in the *Report and Order* in MM Docket No. 93-24, 10 FCC Rcd 2907, 2911 (1995).

[543] *See* Notice of Instructional Television Fixed Service Filing Window From October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995).

[544] Mass Media Bureau Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities with Wireless Cable Operations, *Public Notice*, 11 FCC Rcd 22422 (1996).

[545] 47 U.S.C. § 309(j).

[546] Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, Reexaminiation of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, *First Report and Order,* MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, 13 FCC Rcd 15920, 15999-16001 ¶¶ 197-204 (1998) (*Balanced Budget Act Order*), *recon. denied*, 14 FCC

(continued....)

concluded that ITFS did not fall within the exemption from competitive bidding for noncommercial educational broadcast stations.[547] The Commission expressed concern that Section 309(j), as adopted, might not reflect Congress' intent with regard to the treatment of competing ITFS applications.[548] Given the instructional nature of the service and the reservation of ITFS spectrum for noncommercial educational use, the Commission thought it possible that Congress did not intend its expansion of our auction authority in the Budget Act to include that service. Accordingly, the Commission did not proceed immediately with an auction of ITFS applications[549] but sought Congressional guidance with regard to assigning licenses for ITFS by competitive bidding and proposed that Congress exempt ITFS applications from competitive bidding.[550] In 2000, the Commission opened a settlement window to resolve mutual exclusivity between applications by allowing payments to applicants in return for dismissing their applications and permitting agreements providing for the authorization to be awarded to a non-applicant third party.[551]

184. In 2003, the Commission reiterated its prior conclusion that mutually exclusive applications for new ITFS stations would be subject to competitive bidding and noted the Commission's attempt to seek Congressional guidance on this issue.[552] It also held that there would be no opportunity to file new ITFS applications, amendments, or modifications of any kind of station (except for applications that involved minor modifications, assignment of licenses, or transfer of control) while the Commission undertook a major restructuring of the 2.5 GHz band plan and technical rules.[553] The Commission also sought comment on potential options for assigning licenses for unassigned ITFS spectrum by competitive bidding.[554] While the Commission later lifted the freeze on modification applications, the freeze on applications for new EBS stations remained in place.[555]

185. In the 2004 *BRS FNPRM*, the Commission proposed to assign new EBS spectrum licenses using competitive bidding.[556] The Commission also sought comment on geographic areas for new licenses, frequency blocks for new licenses, rules for auctions, bidding credits for

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(...continued from previous page)
Rcd 8724, *modified*, 14 FCC Rcd 12,541 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

[547] *Balanced Budget Act Order*, 13 FCC Rcd 16000-16001 ¶¶ 200-202. *See* 47 U.S.C. §§ 309(j)(2)(C), 397(6).

[548] *Id.*, 13 FCC Rcd at 16002 ¶ 204.

[549] *Id.*

[550] Section 257 Report to Congress, *Report*, 15 FCC Rcd 15376, 15445 ¶ 183 (2000).

[551] ITFS Mutually Exclusive Applications – Settlement Period, *Public Notice*, 15 FCC Rcd 5916 (2000).

[552] *BRS/EBS NPRM*, 18 FCC Rcd at 6734 ¶ 22.

[553] *BRS/EBS NPRM*, 18 FCC Rcd at 6813 ¶ 226.

[554] *BRS/EBS NPRM*, 18 FCC Rcd at 6814-6816 ¶¶ 230-232.

[555] 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, *Second Memorandum Opinion and Order*, 18 FCC Rcd 16848, 16852-16853 ¶¶10-11 (2003).

[556] *BRS/EBS FNPRM*, 19 FCC Rcd at 14265 ¶ 266.

small businesses and designated entities, and auctioning spectrum as a means of transitioning areas where a proponent has not come forward within the deadline established by the Commission.[557]

186. Although the Commission has attempted to develop an efficient licensing scheme in the *BRS/EBS NPRM* and *BRS/EBS FNPRM*, the record developed to date is insufficient for us to adequately weigh the various options for licensing EBS spectrum, including options that might avoid mutually exclusive applications. In the *BRS/EBS 3rd MO&O & 2nd R&O*, the Commission decided not to adopt auction rules, and instead adopted rules to encourage the transition of the 2.5 GHz band by modifying the transition area size (changing the transition area size from Major Economic Area (MEA) to Basic Trading Area (BTA)) and permitting licensees to self-transition if a proponent had not filed an Initiation Plan for a particular BTA on or before January 21, 2009.[558] The adoption of BTAs as the transition area has apparently been successful as 375 Initiation Plans have been filed with the Commission and 222 Post-transition Notifications have been filed to date. In light of these decisions, we now seek to develop a record on a range of options to license EBS spectrum in the near future, including competitive bidding and other assignment mechanisms, as discussed in the two sections below.

187. Notwithstanding the Commission's prior determinations that applications for initial EBS spectrum licenses are not exempt from competitive bidding under the Communications Act,[559] today, we seek comment on a mechanism for assigning EBS licenses by competitive bidding among applicants, as well as through other means that would avoid mutual exclusivity among applications, obviating any need for competitive bidding. In considering the range of options for licensing unassigned EBS spectrum, we note that many educators otherwise eligible for EBS licenses may not be able to participate in competitive bidding for licenses, which the Communications Act would require before the Commission could grant one of multiple pending mutually exclusive applications for an EBS license. For example, public and educational institutions may be constrained from participating in competitive bidding by statutory or institutional constraints, such as mandates regarding budget processes. Indeed, past debate regarding how to correctly assess the relative attributable revenues of potential EBS licensees reflects the fact that such resources may be difficult to quantify.[560] Even if there is no absolute bar to an educational institution or non-profit educational organization participating in a spectrum license auction, educators may be reluctant or unable to devote time, personnel and money to such an auction. Given the benefits that EBS can provide to educators, we believe it is appropriate to evaluate potential alternatives to a licensing scheme based upon competitive bidding.

188. We find that our prior decisions to set aside this spectrum for educators and educational uses makes it appropriate to consider how to license this spectrum in a manner that provides all potential eligible licensees with a full opportunity to access the spectrum. As noted above, given various characteristics of eligible EBS licensees that are unique among potential

[557] In the *BRS/EBS FNPRM*, the Commission sought further comment on auctioning available and unassigned EBS spectrum. *See BRS/EBS FNPRM*, 19 FCC Rcd at 14265-14280 ¶¶ 264-312.

[558] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5737 ¶ 313.

[559] *Balanced Budget Act Order*, 13 FCC Rcd at 15999 ¶ 197.

[560] *BRS/EBS 2d R&O,* 21 FCC Rcd at 5740-41 ¶ 325 and n.797 (citing comments).

Commission licensees, a licensing mechanism that depends on competitive bidding to assign licenses may not provide many otherwise eligible EBS licensees with a full opportunity to participate. Accordingly, we seek further comment on the appropriate licensing mechanism for new EBS licenses. We do so without prejudging the appropriate time for issuing new EBS licenses, whether pursuant to competitive bidding or an alternative assignment mechanism.

2. Competitive Bidding

189. We seek comment on several threshold questions involving the possibility of adopting a licensing scheme that provides for mutually exclusive applications and competitive bidding. First, do EBS eligible entities, in general, have the authority to bid for spectrum licenses? Typically, institutions, whether public or private, are limited by charters, constitutions, by-laws, ordinances, or other laws, and we are concerned that large numbers of EBS eligible entities might not be able to effectively participate in a spectrum auction. Second, if EBS eligible entities have the authority to bid for spectrum, do they have the authority to bid for spectrum outside of their respective jurisdictions? Would they have the authority to bid for spectrum in the Gulf of Mexico? In particular, we note that several commenters recommend that we license available and unassigned EBS spectrum by BTA,[561] in order to correspond to the licensing areas for BRS spectrum. We seek comment on whether educational institutions would be able to competitively bid for BTAs, given that school districts are usually smaller than counties, while BTAs can be very large and frequently bisect state boundaries. If EBS eligible entities cannot bid for spectrum outside of their respective jurisdictions, but are otherwise authorized to bid for spectrum, we seek comment on whether educational institutions could form a consortium or some other joint entity to bid for spectrum in areas larger than their respective jurisdictions and as large as a BTA. We note that small rural carriers formed consortia to successfully bid in the AWS-1 auction. We further note that under this option, if viable, members of the consortium could not only pool their financial resources, but also could disaggregate and partition the spectrum to satisfy the spectrum needs of individual members. After the spectrum needs of its members are met, the consortium could also disaggregate and partition any unclaimed spectrum to other EBS eligible entities that are not participating in the consortium. Finally, if the Secondary Markets leasing rules are adopted here, *see discussion infra*, the consortium might be able to lease any unused portions of their license to EBS eligible entities or to commercial entities.

190. Moreover, we seek comment on how we should structure the auction to ensure that licenses are disseminated among a wide variety of applicants. EBS eligible entities are either public or private educational institutions or non-profit organizations that provide educational and instructional material to educational institutions. Frequently, these non-profit organizations operate throughout the nation. In this connection, we seek comment on whether we should prohibit non-profit educational organizations from participating in an auction and limiting eligible bidders to EBS eligible entities that are publicly supported or privately controlled educational institutions accredited by the appropriate State department of education or the recognized regional and national accrediting organization. Should we permit national non-profit organizations to bid for spectrum in the Gulf of Mexico?

[561] CTN NIA Comments (filed Jan. 10, 2005) at 11, IMWED Comments (filed Jan. 10, 2005) at 9, WCA Comments (filed Jan. 10, 2005) at 24.

191. In the event that we adopt a licensing framework that results in mutually exclusive applications for licenses, we note that in the *BRS/EBS NPRM,* the Commission proposed to use Part 1, Subpart Q rules to auction geographic area licenses to use spectrum in the 2500-2690 MHz band.[562] We further note that today we adopted the rules set forth in Part 1, Subpart Q to apply to the auction of the available and unassigned BRS spectrum.[563] Therefore, we propose to conduct any auction of the EBS spectrum in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules, consistent with many of the bidding procedures that have been employed in previous auctions.[564] Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[565] Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.[566] In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[567] We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band.

192. Additionally, we seek comment on whether we should adopt bidding credits and small business size standards in the auction of EBS spectrum. Because entities eligible to hold EBS licenses must be schools, universities, and other non-profit organizations, we seek comment

[562] *BRS/EBS NPRM*, 18 FCC Rcd at 6816 ¶ 233.

[563] *See supra* ¶ 26.

[564] *See, e.g.,* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making,* 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order)*; *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part 1 Recon Order/ Fifth Report and Order* and *Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order,* 17 FCC Rcd 2962 (2002).

[565] *See* 47 C.F.R. § 1.2101 *et seq.*

[566] *See, e.g.,* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005) (*Part 1 Competitive Bidding Second Order on Reconsideration of the Fifth Report and Order*) (adopting modifications to the competitive bidding rules); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, 21 FCC Rcd 891 (2006) (*CSEA/Part 1 Report and Order*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753 (2006) (*Designated Entity Second Report and Order and Designated Entity Second FNPRM*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd 6703 (2006) (*Designated Entity Order on Reconsideration of the Second Report and Order*), *petitions for reconsideration pending*.

[567] *See* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55 ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part 1 Third Report and Order*).

on whether the adoption of bidding credits and small business size standards is applicable. We note, however, that in the *BRS/EBS FNPRM* the Commission proposed to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding $15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding $3 million for the same period as an "entrepreneur."[568] The Commission further proposed to provide qualifying "small businesses" with a bidding credit of 15%; qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).[569] We seek comment on these proposals. In addition, we seek comment on whether we should modify our rules on tribal lands bidding credits, as applied to EBS licenses.

193. We also seek comment on the size of the spectrum blocks to be auctioned. Channels A, B, C, D, and G are assigned to the EBS service in a geographic area licensing scheme. Channels A1-A3, B1-B3, C1-C3, and D1-D3 are assigned to the Lower Band Segment (LBS), and channels G1-G3 are assigned to the Upper Band Segment (UBS). The LBS and the UBS are low-power segments of the 2.5 GHz band. Channels A4, B4, C4, D4, and G4 are assigned to the Middle Band Segment (MBS), the high-power segment of the 2.5 GHz band.[570] Some commenters suggest that the EBS spectrum should be licensed by channel group so that the winning bidder would receive both the three low-power channels and the one high-power channel assigned to the group.[571] Other commenters recommend that we auction the high-power channels in the group separately from the low-power channels in the group.[572] Another alternative would be to license all of the available spectrum in the LBS and UBS as one frequency block and all of the available MBS spectrum as a separate frequency block. We note that in auctioning the BRS spectrum, the Commission auctioned all of the available BRS spectrum in the BTA so that the winning bidder won all of the available BRS channel groups in the BTA. Should we adopt the same policy here and license all of the available channel groups in the geographic area to be licensed? We seek comment on these options.

194. With respect to a geographic area licensing scheme, we seek comment on the size of the area to be licensed. As noted above, several commenters recommend that we license available and unassigned EBS spectrum by BTA to correspond to the BRS licensing area. We could, however, assign licenses differently than we did for BRS. For instance, we could assign licenses by State. Because BTAs and States are large, they would overlay incumbent licenses. If we were to license unassigned and available EBS spectrum by BTA or State, the overlay licenses would not provide any rights with respect to areas covered by other licenses, but would simply clarify that any area within the BTA or State not covered by other licensees was subject to the BTA or State license. We also seek comment on whether we should license smaller areas such as cellular market areas. For example, the Commission could divide the United States and its possessions, into cellular market areas ("CMAs"), including 305 Metropolitan Statistical Areas

[568] *BRS/EBS FNPRM*, 19 FCC Rcd at 14271-14272 ¶ 286. *See* 47 C.F.R. § 1.2110(f)(2).

[569] *BRS/EBS FNPRM*, 19 FCC Rcd at 14271-14272 ¶ 286. 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[570] 47 C.F.R. § 27.5(i)(2).

[571] CTN NIA Comments (filed Jan. 10, 2005) at 13, HITN Comments (filed Jan. 10, 2005) at 6.

[572] WCA Comments (filed Jan. 10, 2005) at 24, Clearwire Comments (filed Jan. 10, 2005) at 11-12.

("MSAs"), 428 Rural Statistical Areas ("RSAs"), and the three licensing areas that we have adopted for the Gulf of Mexico in these bands. If we decide to license the low-power channels separately from the high-power channels, we seek comment on whether we should adopt a different geographic area for the MBS channels. For instance, we could auction the MBS channels by GSA or by county. We seek comment on this option.

195. We also seek comment on whether special eligibility or spectrum aggregation limits would be appropriate or necessary to provide significant opportunities for public and private educational institutions to bid for spectrum. For instance, we could limit the amount of spectrum for which a single licensee could bid in a given market in order to allow a variety of educational institutions to obtain spectrum. We could also limit eligible bidders to EBS eligible entities physically located in the geographic area to be licensed. We seek comment on these proposals and other possible eligibility or spectrum aggregation limits.

3. Other Assignment Mechanisms

196. If, as a result of the record developed in response to this *BRS/EBS 2nd FNPRM*, we learn that many EBS eligible entities would be precluded from bidding for spectrum, we may find that the public interest in making this spectrum available will lead us to adopt a licensing scheme that does not require competitive bidding. In this connection, we seek comment on all available options for granting geographic area licenses without providing for mutually exclusive applications. Commenters proposing such options should provide a detailed description of how their proposed option would work, describe what they believe the proper geographic area and channel blocks should be for proposed licenses, and explain why they believe their proposed licensing scheme would allow vacant EBS spectrum to be rapidly placed into use by EBS-eligible licensees and meet the educational, spectrum policy, and broadband goals underlying EBS.

197. One option would be to issue one license per state to a State agency designated by the Governor to be the spectrum manager for the entire State.[573] These State licenses would have similarities to the 700 MHz public safety State license.[574] We seek comment from the individual States on whether they would be willing to be an EBS licensee. We note that if we were to apply our Secondary Markets rules and policies and Section 27.1214 of our rules to leases entered into by a State agency, the State could generate revenue by leasing up to 95 percent of its capacity to commercial entities. Thus, we seek comment on whether this option would be an unfunded mandate under the Unfunded Mandate Reform Act of 1995.[575]

198. In connection with this state licensing option, we seek comment on whether any modifications to our Secondary Markets leasing rules would be appropriate for these state licenses. Our Secondary Markets leasing rules authorize two kinds of spectrum leasing arrangements, spectrum manager leasing arrangements[576] and *de facto* transfer leasing

[573] *See* 47 C.F.R. §§ 1.9001-1.980.

[574] *See* 47 C.F.R. § 90.529.

[575] 1995, Pub. L. No. 104-4, 109 Stat. 66. That Act is designed "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding." *Id.*

[576] 47 C.F.R. § 1.9020.

arrangements.[577] Under spectrum manager leasing arrangements, the licensee retains *de jure* control of its license and *de facto* control of the leased spectrum that it leases to a spectrum lessee.[578] Under *de facto* transfer leasing arrangements, the licensee retains *de jure* control of its license while transferring *de facto* control of the leased spectrum to a spectrum lessee.[579]

199. Under spectrum manager leasing arrangements and *de facto* transfer leasing arrangements, the licensee must meet the eligibility requirements in the Commission's Rules.[580] Thus, the State agency designated by the Governor would have to meet the eligibility requirements of Section 27.1201 of our Rules. Under both spectrum manager leasing and *de facto* transfer leasing arrangements, the EBS spectrum lessee is not required to meet the eligibility requirements of Section 27.1201 of our Rules.[581] Therefore, under both our existing spectrum manager leasing and *de facto* transfer leasing rules, the State agency could lease spectrum to EBS eligible entities or to commercial entities, so long as our minimum educational use requirements are met. In turn, under both *de facto* transfer leasing arrangements and spectrum manager leasing arrangements, the EBS spectrum lessee could sublease to a commercial entity, so long as it meets our educational usage requirements. Normally, a licensee has full discretion as to whether to lease its spectrum to a third party and to whom it should lease its spectrum. We seek comment on whether any restrictions on a state's leasing discretion would be necessary to ensure that the full range of educational entities have access to EBS spectrum.

200. We also seek comment on whether any modifications to our special leasing rules for EBS stations would be appropriate for state licenses. Under Section 27.1214 of our Rules, a licensee must comply with certain educational programming requirements and retain the opportunity to purchase or to lease dedicated or common EBS equipment used for educational purposes or comparable equipment if the lease terminates. In addition, the lease term cannot exceed thirty years and must permit the EBS licensee to review, at year 15 and every 5 years thereafter, its educational use requirements in light of changes in educational needs, technology, and other relevant factors and to obtain access to such additional services, capacity, support, and/or equipment as the parties shall agree upon in the spectrum leasing arrangement to advance the EBS licensee's educational mission.

201. In seeking comment on a State license option, we ask commenters whether a State license could be designed to ensure that the full range of EBS-eligible entities, including educational institutions and non-profit educational organizations unaffiliated with a State, would have sufficient access to EBS spectrum. We also ask whether any special rules would need to be applied to State licensees. We ask whether the application procedures applicable to the 700 MHz public safety state license could be applied to an EBS State license.[582] Finally, we seek comment on alternatives for licensing spectrum in any jurisdiction in which a State fails to apply for a

[577] 47 C.F.R. § 1.9030.

[578] 47 C.F.R. § 1.9003.

[579] 47 C.F.R. § 1.9003.

[580] 47 C.F.R. § 1.9020(b)(2), 47 C.F.R. § 1.9030(d)(2). *See* 47 C.F.R. § 27.1201 for EBS eligibility requirements.

[581] 47 C.F.R. § 1.9020(d)(2), 1.9030(d)(2).

[582] *See* 47 C.F.R. 90.529(a)(1); Public Safety 700 MHz Band-State License Option to Apply Runs Through December 31, 2001, *Public Notice*, 16 FCC Rcd 3547 (2001).

State license or for which the State loses the license by failing to demonstrate substantial service.[583]

202. Another option would adopt a licensing scheme similar to the one we use to license private land mobile radio spectrum. Under this approach, applicants could submit applications for new EBS stations at any time to certified frequency coordinators. The frequency coordinators would review the applications and, in case of conflict, certify the earlier filed application that complies with the Commission's Rules for submission to the Commission. Although frequency coordinators typically coordinate site-based applications, we believe we could adopt rules adapting the use of frequency coordinators to 35-mile GSAs.

203. Using frequency coordination to award licenses for new EBS stations raises a variety of issues. First, we seek comment on whether there are entities that could be qualified to serve as an EBS frequency coordinator and the process by which the Commission should select one or more frequency coordinators. Second, we seek comment on the processes that a frequency coordinator would use to handle requests for EBS frequencies and to determine whether an application complies with the Commission's Rules. One possibility would be for a potential applicant to request a specific channel group and service area. Alternatively, a potential applicant could request a given number of channels in a specific area of operation, and the frequency coordinator could pick channels based on the available inventory. We also seek comment on the appropriate geographic area for new licenses. Specifically, we seek comment on whether new licenses should be issued using 35-mile radius geographic service areas of current, incumbent licensees, or whether some other size would be appropriate. We also seek comment on the appropriate size of the frequency block for EBS licenses awarded through the frequency coordination process. Available alternatives include: (1) issuing a separate license for each channel group; (2) licensing MBS channels separately and licensing LBS and UBS channels together; (3) issuing one UBS license, one MBS license, and one LBS license in a given geographic area. Finally, we ask whether it is appropriate or necessary to place limitations on the number of applications that a licensee or its affiliates could file for new EBS stations in a given time period in order to ensure that a wide variety of EBS licensees can access spectrum. We seek comment on these and any other issues relating to the use of frequency coordination to assign new EBS licenses.

204. Our discussion of specific proposals and questions is not meant to preclude commenters from offering other proposals or raising other questions relating to the assignment of new EBS licenses. We seek comment on all questions and issues relating to the assignment of new EBS licenses.

VII. PROCEDURAL MATTERS

A. Ex Parte Rules – Permit-But-Disclose

205. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.[584]

[583] 47 C.F.R. § 27.14(e) (all EBS licensees must demonstrate substantial service by May 1, 2011).

[584] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Comment Period and Procedures

206. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

207. *Electronic Filers*: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

208. *Paper Filers*: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

209. *People with Disabilities*: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

210. The public may view the documents filed in this proceeding during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D. C. 20554, and on the Commission's Internet Home Page: <http://www.fcc.gov>. Copies of comments and reply comments are also available through the Commission's duplicating contractor: Best Copy and Printing, Inc., 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, 1-800-378-3160.

C. Final Regulatory Flexibility Analysis of BRS/EBS 4th MO&O

211. The Regulatory Flexibility Act (RFA)[585] requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[586] Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the rule changes contained in this *BRS/EBS 4th MO&O* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

D. Initial Regulatory Flexibility Analysis

212. As required by the Regulatory Flexibility Act of 1980 (RFA),[587] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in the *BRS/EBS 2nd FNPRM*. The analysis is found in Appendix C. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the *BRS/EBS 2nd FNRPM*, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *BRS/EBS 2nd FNPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

E. Paperwork Reduction Analysis

213. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

214. In this present document, we have assessed the effects of requiring licensees to provide information concerning their base stations to any nearby licensee upon request, and find that this requirement will benefit companies with fewer than 25 employees because it will help them to enjoy interference-free operations. We anticipate that the information exchange will consist of a limited number of technical parameters of a licensee's operations that licensees will have already established and recorded for their own operational purposes. Because licensees will already have such information at their disposal, it will not be burdensome to convey such information when requested. Additionally, because licensees will only be required to submit such information upon request from a neighboring licensee, this significantly limits the amount of potential requests for information. Therefore, we conclude that this information exchange will not burden companies with fewer than 25 employees.

[585] *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[586] 5 U.S.C. § 605(b).

[587] *See* 5 U.S.C. § 603.

215. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judith Boley Herman, Federal Communications Commission, 445 12th Street, S.W., Room 1-B441, Washington, D.C. 20554, or via the Internet to <Judith-B.Herman@fcc.gov>, and to Nicholas Fraser, Office of Management and Budget (OMB), via email to Nicholas_A._Fraser@ omb.eop.gov or via fax at 202-395-5167.

F. Further Information

216. For further information regarding the *Big LEO Third Order on Reconsideration and Sixth Memorandum Opinion and Order*, please contact Howard Griboff, Policy Division, International Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, at 202-418-0657 or via the Internet at Howard.Griboff@fcc.gov or Jamison Prime, Policy and Rules Division, Office of Engineering and Technology, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, at 202-418-7474 or via the Internet at Jamison.Prime@fcc.gov. For further information concerning the *BRS/EBS Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking*, contact John Schauble, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, at (202) 418-0797 or via the Internet to John.Schauble@fcc.gov.

VIII. ORDERING CLAUSES

217. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Third Order on Reconsideration, Sixth Memorandum Opinion and Order, and Fourth Memorandum Opinion and Order* is hereby ADOPTED.

218. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed in these proceedings ARE GRANTED to the extent indicated and are otherwise DENIED.

219. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, that the petitions for declaratory ruling filed by Instructional Telecommunications Foundation, Inc. on March 13, 2007, New Trier High School District #203 on July 26, 2007, Shekinah Network on November 27, 2007, and Boston Catholic Television Center, Inc. on December 14, 2007 ARE GRANTED to the extent indicated herein and are otherwise DENIED.

220. IT IS FURTHER ORDERED that the proceeding entitled Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, WT Docket No. 02-68 IS REINSTATED.

221. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in this *Second Further Notice of Proposed Rulemaking*, and that comment is sought on these proposals.

222. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Analysis IS ADOPTED.

223. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Order on Reconsideration, Sixth Memorandum Opinion and Order, and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Part 27 of Title 47 of the Code of Federal Regulations is amended as follows:

I. PART 27 – MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

1. The authority citation for Part 27 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

2. Amend § 27.5 by revising paragraphs (i)(2)(iii) to read as follows:

§ 27.5 Frequencies.

*****

(i) ***

(2) ***

(iii) Upper Band Segment (UBS): The following channels shall constitute the Upper Band Segment:

BRS Channel KH1: 2614.00000–2614.33333 MHz
BRS Channel KH2: 2614.33333–2614.66666 MHz
BRS Channel KH3: 2614.66666–2615.00000 MHz
EBS Channel KG1: 2615.00000–2615.33333 MHz
EBS Channel KG2: 2615.33333–2615.66666 MHz
EBS Channel KG3: 2615.66666–2616.00000 MHz
BRS Channel KF1: 2616.00000–2616.33333 MHz
BRS Channel KF2: 2616.33333–2616.66666 MHz
BRS Channel KF3: 2616.66666–2617.00000 MHz
BRS Channel KE1: 2617.00000–2617.33333 MHz
BRS Channel KE2: 2617.33333–2617.66666 MHz
BRS Channel KE3: 2617.66666–2618.00000 MHz
BRS Channel 2: 2618–2624 MHz
BRS/EBS Channel E1: 2624–2629.5 MHz
BRS/EBS Channel E2: 2629.5–2635 MHz
BRS/EBS Channel E3: 2635–2640.5 MHz
BRS/EBS Channel F1: 2640.5–2646 MHz
BRS/EBS Channel F2: 2646–2651.5 MHz
BRS/EBS Channel F3: 2651.5–2657 MHz
BRS Channel H1: 2657–2662.5 MHz
BRS Channel H2: 2662.5–2668 MHz
BRS Channel H3: 2668–2673.5 MHz

EBS Channel G1: 2673.5–2679 MHz
EBS Channel G2: 2679–2684.5 MHz
EBS Channel G3: 2684.5–2690 MHz

Note to paragraph (i)(2): No 125 kHz channels are provided for channels in operation in this service. The 125 kHz channels previously associated with these channels have been reallocated to Channel G3 in the upper band segment.

*****

3. Amend § 27.13 by adding new paragraph (h) to read as follows:

§ 27.13 License Period.

*****

(h) *BRS and EBS.* BRS and EBS authorizations shall have a term not to exceed ten years from the date of original issuance or renewal. Unless otherwise specified by the Commission, incumbent BRS authorizations shall expire on May 1 in the year of expiration.

4. Amend § 27.14 by adding new paragraph (o) to read as follows:

§ 27.14 Construction requirements; Criteria for renewal.

*****

(o) BRS and EBS licensees must make a showing of "substantial service" no later than May 1, 2011. Incumbent BRS licensees must file their "substantial service" showing with their renewal application. "Substantial service" is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. Substantial service for BRS and EBS licensees is satisfied if a licensee meets the requirements of paragraph (o)(1) or (o)(2) of this section. If a licensee has not met the requirements of paragraph (o)(1) or (o)(2) of this section, then demonstration of "substantial service" shall proceed on a case-by-case basis. All substantial service determinations will be made on a license-by-license basis. Except for BTA licenses, BRS licensees must file their "substantial service" showing with their renewal applications. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(1) A BRS or EBS licensee has provided "substantial service" by:

(i) Constructing six permanent links per one million people for licensees providing fixed point-to-point services;

(ii) Providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;

(iii) Providing service to "rural areas" (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services:

(A) for mobile service, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or

(B) for fixed service, where the BRS or EBS licensee has constructed at least one end of a permanent link in at least 30% of the rural areas within its licensed area.

(iv) Providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or

(v) Providing service to niche markets or areas outside the areas served by other licensees.

(2) An EBS licensee has provided "substantial service" when:

(i) the EBS licensee is using its spectrum (or spectrum to which the EBS licensee's educational services are shifted) to provide educational services within the EBS licensee's GSA;

(ii) the EBS licensee's license is actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; or

(iii) the level of service provided by the EBS licensee meets or exceeds the minimum usage requirements specified in § 27.1214.

(3) An EBS or BRS licensee may be deemed to provide substantial service through a leasing arrangement if the lessee is providing substantial service under paragraph (o)(1) of this section. The EBS licensee must also be otherwise in compliance with this Chapter (including the programming requirements in § 27.1203 of this subpart).

(4) If the GSA of a licensee is less than 1924 square miles in size, and there is an overlapping co-channel station licensed or leased by the licensee or its affiliate, substantial service may be demonstrated by meeting the requirements of paragraph (o)(1) or (o)(2) of this section with respect to the combined GSAs of both stations.

(5) If the GSA of a BTA authorization holder, is less than one-half of the area within the BTA for every BRS channel, substantial service may be demonstrated for the licenses in question by meeting the requirements of paragraph (o)(1) or (o)(2) of this section with respect to the combined GSAs of the BTA authorization holder, together with any incumbent authorizations licensed or leased by the licensee or its affiliates.

5. Amend § 27.53(m) by revising the introductory text and paragraphs (2) and paragraph (4) and adding a new paragraph (5) to read as follows:

§ 27.53 Emission limits.

*****

(m) For BRS and EBS stations, the power of any emissions outside the licensee's frequency bands of operation shall be attenuated below the transmitter power (P) measured in watts in accordance with the standards below. If a licensee has multiple contiguous channels, out-of-band emissions shall be measured from the upper and lower edges of the contiguous channels.

*****

(2) For digital base stations, the attenuation shall be not less than 43 + 10 log (P) dB, unless a documented interference complaint is received from an adjacent channel licensee with an overlapping Geographic Service Area. Mobile Satellite Service licensees operating on frequencies below 2495 MHz may also submit a documented interference compliant against BRS licensees operating on channel BRS No. 1 on the same terms and conditions as adjacent channel BRS or EBS licensees. Provided that a documented interference complaint cannot be mutually resolved between the parties prior to the applicable deadline, then the following additional attenuation requirements shall apply:

(i) If a pre-existing base station suffers harmful interference from emissions caused by a new or modified base station located 1.5 km or more away, within 24 hours of the receipt of a documented interference complaint the licensee of the new or modified base station must attenuate its emissions by at least 67 + 10 log (P) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block and shall immediately notify the complaining licensee upon implementation of the additional attenuation. No later than 60 days after the implementation of such additional attenuation, the licensee of the complaining base station must attenuate its base station emissions by at least 67 + 10 log (P) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block of the new or modified base station.

(ii) If a pre-existing base station suffers harmful interference from emissions caused by a new or modified base station located less than 1.5 km away, within 24 hours of receipt of a documented interference complaint the licensee of the new or modified base station must attenuate its emissions by at least 67 + 10 log (P) – 20 log(Dkm/1.5) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block of the complaining licensee, or if both base stations are co-located, limit its undesired signal level at the pre-existing base station receiver(s) to no more than -107 dBm measured in a 5.5 megahertz bandwidth and shall immediately notify the complaining licensee upon such reduction in the undesired signal level. No later than 60 days after such reduction in the undesired signal level, the complaining licensee must attenuate its base station emissions by at least 67 + 10 log (P) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block of the new or modified base station.

(iii) If a new or modified base station suffers harmful interference from emissions caused by a pre-existing base station located 1.5 km or more away, within 60 days of receipt of a documented interference complaint the licensee of each base station must attenuate its base station emissions by at least 67 + 10 log (P) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block of the other licensee.

(iv) If a new or modified base station suffers harmful interference from emissions caused by a pre-existing base station located less than 1.5 km away, within 60 days of receipt of a documented interference complaint: (a) the licensee of the new or modified base station must attenuate its OOBE by at least 67 + 10 log (P) – 20 log(Dkm/1.5) measured 3 megahertz above or below, from the channel edge of its frequency block of the other licensee, or if the base stations are co-located, limit its undesired signal level at the other base station receiver(s) to no more than -107 dBm measured in a 5.5-megahertz bandwidth; and (b) the licensee causing the interference must attenuate its emissions by at least 67 + 10 log (P) dB measured at 3 megahertz, above or below, from the channel edge of its frequency block of the new or modified base station.

(v) For all fixed digital user stations, the attenuation factor shall not be less than 43 + 10 log (P) dB at the channel edge.

*****

(4) For mobile digital stations, the attenuation factor shall be not less than 43 + 10 log (P) dB at the channel edge and 55 + 10 log (P) dB at 5.5 megahertz from the channel edges. Mobile Satellite Service licensees operating on frequencies below 2495 MHz may also submit a documented interference complaint against BRS licensees operating on BRS Channel 1 on the same terms and conditions as adjacent channel BRS or EBS licensees.

(5) For all fixed digital user stations, the attenuation factor shall be not less than 43 + 10 log (P) dB at the channel edge.

*****

6. Amend § 27.55(a)(4) by revising paragraphs (i), (ii), and (iii) to read as follows:

§ 27.55 Power strength limits.

(a) ***

(4) ***

(i) Prior to transition, the signal strength at any point along the licensee's GSA boundary does not exceed the greater of that permitted under the licensee's Commission authorizations as of January 10, 2005 or 47 dBμV/m.

(ii) Following transition, for stations in the LBS and UBS, the signal strength at any point along the licensee's GSA boundary must not exceed 47 dBμV/m. This field strength is to be measured at 1.5 meters above the ground over the channel bandwidth (*i.e.*, each 5.5 MHz channel for licensees that hold a full channel block, and for the 5.5 MHz channel for licensees that hold individual channels).

(iii) Following transition, for stations in the MBS, the signal strength at any point along the licensee's GSA boundary must not exceed the greater of -73.0 + 10 log(X/6) dBW/m², where X is the bandwidth in megahertz of the channel, or for facilities that are substantially similar to the licensee's pre-transition facilities (including modifications that do not alter the fundamental nature or use of the transmissions), the signal strength at such point that resulted from the

station's operations immediately prior to the transition, provided that such operations complied with paragraph (a)(4)(i) of this section.

*****

7. Amend § 27.1201 by revising paragraphs(a)(3) and (d) to read as follows:

§ 27.1201 EBS eligibility.

(a) ***

(3) Those applicant organizations whose eligibility is established by service to accredited institutional or governmental organizations must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage. In place of this documentation, a State educational television (ETV) commission may demonstrate that the public schools it proposes to serve are required to use its proposed educational usage. Documentation from proposed receive sites which are to establish the eligibility of an entity not serving its own enrolled students for credit should be in letter form, written and signed by an administrator or authority who is responsible for the receive site's curriculum planning. No receive site more than 35 miles from the proposed station's central reference point, or outside the applicants' proposed GSA, shall be used to establish basic eligibility. Where broadband or data services are proposed, the letter should indicate that the data services will be used in furtherance of the institution's educational mission and will be provided to enrolled students, faculty and staff in a manner and in a setting conducive to educational usage. Where traditional educational or instructional video services are proposed, the letter should indicate that the applicant's program offerings have been viewed and that such programming will be incorporated in the site's curriculum. Where educational or instructional video services are proposed, the letter should discuss the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming. If other levels of authority must be obtained before a firm commitment to utilize the service can be made, the nature and extent of such additional authorization(s) must be provided.

*****

(d) This paragraph applies to EBS licensees and applications licensed or filed pursuant to the provisions of §27.1201(c) contained in the edition of 47 CFR parts 20 through 39, revised as of October 1, 2005, or §§74.990 through 74.992 contained in the edition of 47 CFR parts 70 to 79, revised as of October 1, 2004, and that do not meet the eligibility requirements of paragraph (a) of this section. Such licensees may continue to operate pursuant to the terms of their existing licenses, and their licenses may be renewed, assigned, or transferred, so long as the licensee is otherwise in compliance with this chapter. Applications filed pursuant to the provisions of § 27.1201(c) contained in the edition of 47 CFR parts 20 through 39, revised as of October 1, 2005 or §§ 74.990 through 74.992 contained in the edition of 47 CFR parts 70 through 79, revised as of October 1, 2004 may be processed and granted, so long as such applications were filed prior to July 19, 2006. The provisions of §§ 27.1203(b)-(d) and 27.1214 of this subpart do not apply to licenses governed by this paragraph.

8. Amend § 27.1207 by revising paragraph (a) and the introductory text of paragraph (b) to read as follows:

§ 27.1207 BTA license authorization.

(a) Winning bidders must file an application (FCC Form 601) for an initial authorization.

(b) Initial authorizations for BRS granted after January 1, 2008, shall be blanket licenses for all BRS frequencies identified in 27.5(i)(2) and based on the geographic areas identified in 27.1208. Blanket licenses cover all mobile and response stations.

*****

9. Amend § 27.1208 by revising the section heading and the undesignated text to read as follows:

§ 27.1208 BTA Service areas.

Except for incumbent BRS licenses, BRS service areas are Basic Trading Areas (BTAs) or additional service areas similar to BTAs adopted by the Commission. BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39. The following are additional BRS service areas in places where Rand McNally has not defined BTAs: American Samoa; Guam; Gulf of Mexico Zone A; Gulf of Mexico Zone B; Gulf of Mexico Zone C; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The boundaries of Gulf of Mexico Zone A are from an area twelve nautical miles from the shoreline at mean high tide on the north and east, to the limit of the Outer Continental Shelf to the south, and to longitude 91º00' to the west. The boundaries of Gulf of Mexico Zone B are from an area twelve nautical miles from the shoreline at mean high tide on the north, to the limit of the Outer Continental Shelf to the south, to longitude 91º00' to the east, and to longitude 94º00' to the west. The boundaries of Gulf of Mexico Zone C are from an area twelve nautical miles from the shoreline at mean high tide on the north and west, to longitude 94º00' to the east, and to a line 281 kilometers from the reference point at Linares, N.L., Mexico on the southwest. The Mayaguez/Aguadilla-Ponce, PR, service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincón, Sabana Grande, Salinas, San German, Santa Isabel, Villalba and Yauco. The San Juan service area consists of all other municipios in Puerto Rico.

10. Amend § 27.1214 by revising paragraph (c) to read as follows:

§ 27.1214 EBS spectrum leasing arrangements and grandfathered leases.

*****

(c) All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease the dedicated or common EBS equipment used for educational purposes, or comparable equipment in the event that the spectrum leasing arrangement is terminated.

*****

11. Add § 27.1217 to read as follows:

§ 27.1217 Competitive Bidding Procedures for the Broadband Radio Service.

Mutually exclusive initial applications for BRS licenses in the 2500-2690 MHz band are subject to competitive bidding. The general competitive bidding procedures set forth in part 1, subpart Q of this chapter will apply unless otherwise provided in this subpart.

12. Add § 27.1218 to read as follows:

§ 27.1218 Designated Entities.

(a) Eligibility for small business provisions. (1) A small business is an entity that, together with all attributed parties, has average gross revenues that are not more than $40 million for the preceding three years.

(2) A very small business is an entity that, together with all attributed parties, has average gross revenues that are not more than $15 million for the preceding three years.

(3) An entrepreneur is an entity that, together with all attributed parties, has average gross revenues that are not more than $3 million for the preceding three years.

(b) Bidding credits. (1) A winning bidder that qualifies as a small business, as defined in this section, or a consortium of small businesses, may use a bidding credit of 15 percent, as specified in §1.2110(f)(2)(iii) of this chapter, to lower the cost of its winning bid on any of the licenses in this subpart.

(2) A winning bidder that qualifies as a very small business, as defined in this section, or a consortium of very small businesses, may use a bidding credit of 25 percent, as specified in §1.2110(f)(2)(ii) of this chapter, to lower the cost of its winning bid on any of the licenses in this subpart.

(3) A winning bidder that qualifies as an entrepreneur, as defined in this section, or a consortium of entrepreneurs, may use a bidding credit of 15 percent, as specified in §1.2110(f)(2)(i) of this chapter, to lower the cost of its winning bid on any of the licenses in this subpart.

13. Amend § 27.1221 by revising paragraphs (b) through (e) and adding a new paragraph (f) to read as follows:

§ 27.1221 Interference protection.

*****

(b) Height Benchmarking. Height benchmarking is defined for pairs of base stations, one in each of two proximate geographic service areas (GSAs). The height benchmark, which is defined

in meters (hb_m) for a particular base station relative to a base station in another GSA, is equal to the distance, in kilometers, from the base station along a radial to the nearest point on the GSA boundary of the other base station squared (D_{km}^2) and then divided by 17. That is, $hb_{(m)} = D_{km}^2/17$. A base station antenna will be considered to be within its applicable height benchmark relative to another base station if the height in meters of its centerline of radiation above average elevation (HAAE) calculated along the straight line between the two base stations in accordance with §§ 24.53(b) and (c) of this chapter does not exceed the height benchmark (hb_m). A base station antenna will be considered to exceed its applicable height benchmark relative to another base station if the HAAE of its centerline of radiation calculated along the straight line between the two base stations in accordance with §§ 24.53(b) and (c) of this chapter exceeds the height benchmark (hb_m).

(c) Protection for Receiving Antennas Not Exceeding the Height Benchmark. Absent agreement between the two licensees to the contrary, if a transmitting antenna of one BRS/EBS licensee's base station exceeds its applicable height benchmark and such licensee is notified by another BRS/EBS licensee that it is generating an undesired signal level in excess of -107 dBm/5.5 megahertz at the receiver of a co-channel base station that is within its applicable height benchmark, then the licensee of the base station that exceeds its applicable height benchmark shall either limit the undesired signal at the receiver of the protected base station to -107dBm/5.5 megahertz or less or reduce the height of its transmission antenna to no more than the height benchmark. If the interfering base station has been modified to increase the EIRP transmitted in the direction of the protected base station, it shall be deemed to have commenced operations on the date of such modification. Such corrective action shall be completed no later than:

(i) 24 hours after receiving such notification, if the base station that exceeds its height benchmark commenced operations after the station that is within its applicable height benchmark; or

(ii) 90 days after receiving such notification, if the base station that exceeds its height commenced operations prior to the station that is within its applicable height benchmark. For purposes of this section, if the interfering base station has been modified to increase the EIRP transmitted in the direction of the victim base station, it shall be deemed to have commenced operations on the date of such modification.

(d) No Protection from a Transmitting Antenna not Exceeding the Height Benchmark. The licensee of a base station transmitting antenna less than or equal to its applicable height benchmark shall not be required pursuant to paragraph (c) of this section to limit that antennas undesired signal level to -107dBm/5.5 megahertz or less at the receiver of any co-channel base station.

(e) No Protection for a Receiving-Antenna Exceeding the Height Benchmark. The licensee of a base station receive antenna that exceeds its applicable height benchmark shall not be entitled pursuant to paragraph (c) of this section to insist that any co-channel base station limit its undesired signal level to -107dBm/5.5 megahertz or less at the receiver.

(f) Information Exchange. A BRS/EBS licensee shall provide the geographic coordinates, the height above ground level of the center of radiation for each transmit and receive antenna, and the date transmissions commenced for each of the base stations in its GSA within

30 days of receipt of a request from a co-channel BRS/EBS licensee with an operational base station located in a proximate GSA. Information shared pursuant to this section shall not be disclosed to other parties except as required to ensure compliance with this section.

14. Amend § 27.1231 by revising paragraph (f) introductory text to read as follows:

§ 27.1231 Initiating the transition.

*****

(f) Initiation Plan. To initiate a transition, a potential proponent(s) must submit an Initiation Plan to the Commission at the Office of the Secretary in Washington, DC on or before January 21, 2009.

*****

15. Amend § 27.1236 by revising paragraphs (a), (b)(1), and (b)(6) to read as follows:

§ 27.1236 Self-transitions.

(a) If an Initiation Plan is not filed on or before January 21, 2009 for a BTA, BRS and EBS licensees in that BTA may self-transition by relocating to their default channel locations specified in §27.5(i)(2) and complying with §§27.50(h), 27.53, 27.55 and 27.1221.

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(b) ***

(1) Notify the Secretary of the Commission on or before April 21, 2009 that it will self-transition (see paragraph (a) of this section);

*****

(6) Complete the self-transition on or before October 20, 2010.

*****

APPENDIX B

Final Regulatory Flexibility Analysis

(For Fourth Memorandum Opinion and Order)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] we incorporated an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further Notice of Proposed Rule Making (FNPRM)*. Because we amend the rules in this *Fourth Memorandum Opinion and Order*, we have included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.[2]

Need for, and Objectives of the Rules:

In the *Fourth Memorandum Opinion and Order*, we continue to modify our rules to enable the transition of the 2.5 GHz band and the provision of new and innovative wireless services. Today, we adopt Part I, Subpart Q as the competitive bidding rules for available and unassigned Broadband Radio Service (BRS) spectrum; designated entity rules to provide bidding credits for small businesses, very small businesses, and entrepreneurs; modify technical rules concerning emission limits, signal strength limits, and height benchmarking; special safe harbors for licensees whose Geographic Service Area (GSA) is heavily encumbered or highly truncated; and create three Gulf of Mexico Service Area zones.

We believe the rules we adopt today will both encourage the enhancement of existing services using this band and promote the development of new innovative services to the public, such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our new rules will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than to government regulation, in determining how this band can best be used.

Summary of Significant Issues Raised by Public Comments in Response to the FRFA:

No comments were submitted specifically in response to the IRFA.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[3] The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 604.

[3] 5 U.S.C. § 603(b)(3).

organization," and "small governmental jurisdiction."[4] In addition, the term "small business" has the same meaning as the term
"small business concern" under the Small Business Act.[5] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[6] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[7] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[8] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[9] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[10] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[11] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[12] Thus, we estimate that most governmental jurisdictions are small. Below, we discuss the total estimated numbers of small businesses that might be affected by our actions.

Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[13] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more

[4] 5 U.S.C. § 601(6).

[5] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act 15 U.S.C. § 632. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[6] 15 U.S.C. § 632.

[7] 5 U.S.C. § 601(4).

[8] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[9] 5 U.S.C. § 601(5).

[10] 5 U.S.C. § 601(5).

[11] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[12] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[13] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O)*.

than $40 million in the previous three calendar years.[14] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[15] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's Rules. Some of those 440 small business licensees may be affected by the decisions in this *Fourth Memorandum Opinion and Order*.

In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in annual receipts.[16] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[17] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[18] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[19] Thus, we estimate that at least 1,932 licensees are small businesses.

There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.[20] EBS is a non-profit non-broadcast service. We do not collect, nor are we aware of other collections of, annual revenue data for EBS licensees. We find that up to 1,932 of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to EBS.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

[14] 47 C.F.R. § 21.961(b)(1).

[15] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard.

[16] 13 C.F.R. § 121.201, NAICS code 517510.

[17] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[18] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[19] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

[20] *See* 5 U.S.C. §§ 601 (3)-(5).

This *Fourth Memorandum Opinion and Order* modifies the reporting, recordkeeping, or other compliance requirements previously adopted in this proceeding. We are adopting competitive bidding procedures for available and unassigned BRS spectrum, including small business size standards and bidding credits for a "small business" (an entity with attributed average annual gross revenues not exceeding $40 million for the preceding three years), a "very small business"(an entity with attributed average gross revenues not exceeding $15 million for the preceding three years), and an "entrepreneur"(an entity with attributed average gross revenues not exceeding $3 million the preceding three years).[21] We are also adopting two new safe harbors to enable BRS and EBS licensees whose GSA is heavily encumbered or highly truncated to meet the performance requirements for the 2.5 GHz band.[22] We are also creating three new Gulf of Mexico GSAs, which will enable the provision of 2.5 GHz band wireless services in the Gulf of Mexico in the future.[23] We are changing the technical rules concerning emission limits, signal strength limits, and antenna height benchmarking, including requiring licensees to exchange information.[24]

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[25]

Regarding our decision to adopt competitive bidding rules, we anticipate that our decision to adopt small business size standards and bidding credits for entities that meet the definition of small business, very small business, or entrepreneur will not have a significant economic impact on small entities. Because the BRS spectrum in the 2.5 GHz band was auctioned in 1996, only 70 BTA licenses (of the 493 licenses originally available in 1996) are available for reassignment by competitive bidding.

Regarding our decision to adopt two new safe harbors for the demonstration of substantial service compliance, we do not anticipate any significant economic impact on small entities. These two safe harbors apply only to licensees that have heavily encumbered or highly truncated GSAs. Although the applicability of these two safe harbors is limited, they will enable licensees to meet both our performance requirements and our interference protection rules.

[21] *See supra* ¶¶ 26-28.

[22] *See supra* ¶¶ 144-145.

[23] *See supra* ¶¶ 122-129.

[24] *See supra* ¶¶ 48-84.

[25] *See* 5 U.S.C. § 603(c).

Regarding our decision to adopt three new Gulf of Mexico Service Area Zones, we do not anticipate any significant impact on small entities. We anticipate that spectrum in these GSAs will be used on oil platforms in the Gulf of Mexico.

Regarding our decision to modify various technical rules, we do not anticipate any significant impact on small entities. These modifications are minor.

The rules set forth in the *Fourth Memorandum Opinion Order* will affect all entities that intend to provide BRS or EBS service in the 2.5 GHz band.

Report to Congress:

The Commission will send a copy of this *Fourth Memorandum Opinion Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[26] In addition, the Commission will send a copy of this *Fourth Memorandum Opinion Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Fourth Memorandum Opinion Order* and FRFA (or summaries thereof) will also be published in the *Federal Register*.[27]

[26] *See generally,* 5 U.S.C. § 801 (a)(1)(A).

[27] *See* 5 U.S.C. § 604(b).

APPENDIX C

Initial Regulatory Flexibility Analysis

(For Second Further Notice of Proposed Rulemaking)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Second Further Notice of Proposed Rule Making (2nd FNPRM)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines specified in the *2nd FNPRM* for comments. The Commission will send a copy of this *2nd FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the *2nd FNPRM* and IRFA (or summaries thereof) will be published in the Federal Register.[3]

Need for, and Objectives of, the Proposed Rules:

The *2nd FNPRM* seeks comment on various alternatives to license unassigned and available EBS spectrum throughout the United States and the Gulf of Mexico. Specifically, the *2nd FNPRM* seeks comments on the following options:

1) Using competitive bidding to license unassigned and available spectrum.[4] If this option is adopted the Commission proposes to use the competitive bidding rules in Part 1, Subpart Q of the Commission's Rules. The Commission also seeks comment on whether to adopt bidding credits and small business size standard, the size of the spectrum blocks to be auctioned, and the size of geographic areas to be licensed.

2) Issuing one license per State to a State agency designated by the Governor to act as a spectrum manager for the State.[5] The State agency would be required to meet the eligibility restrictions in Section 27.1201 of the Commission's Rules. The State agency would be able use spectrum manager leasing arrangements or *de facto* transfer leasing arrangements.

3) Using a leasing scheme similar to the one used to license private land mobile radio spectrum.[6] Under this approach, applicants could submit applications for new EBS stations at any time to frequency coordinators.

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See* 5 U.S.C. § 603(a).

[4] *See supra* ¶¶ 191-196.

[5] *See supra* ¶¶ 197-201.

[6] *See supra* ¶ 203.

We believe our proposals will encourage utilization of this band and the development of new innovative services to the public such as providing wireless broadband services, including high-speed Internet access and mobile services while encouraging educators to use the band for educational services.

Legal Basis:

The proposed action is authorized under Sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.[7] The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small organization," and "small governmental jurisdiction."[8] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[9] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[10] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[11] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[12] The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[13] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[14] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[15] We estimate that,

[7] 5 U.S.C. § 603(b)(3).

[8] 5 U.S.C. § 601(6).

[9] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act 15 U.S.C. § 632. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[10] 15 U.S.C. § 632.

[11] 5 U.S.C. § 601(4).

[12] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[13] 5 U.S.C. § 601(5).

[14] 5 U.S.C. § 601(5).

[15] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

of this total, 84,377 entities were "small governmental jurisdictions."[16] Thus, we estimate that most governmental jurisdictions are small. Below, we discuss the total estimated numbers of small businesses that might be affected by our actions.

The Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)) is used to provide educational services to students.[17] The SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in annual receipts.[18] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[19] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[20] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[21] Thus, we estimate that at least 1,932 licensees are small businesses.

There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.[22] EBS is a non-profit non-broadcast service. We do not collect, nor are we aware of other collections of, annual revenue data for EBS licensees. We find that up to 1,932 of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to EBS.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

There are no new reporting, recordkeeping or other compliance requirements proposed in the *2nd FNPRM.*

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[16] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[17] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O)*.

[18] 13 C.F.R. § 121.201, NAICS code 517510.

[19] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[20] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[21] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

[22] *See* 5 U.S.C. §§ 601 (3)-(5).

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[23]

The Commission has not proposed an approach for licensing EBS spectrum. Instead, the Commission seeks comment on three distinct approaches for licensing EBS spectrum to determine which approach would best suit the needs of schools and universities and other non-profit educational institutions.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

None.

[23] *See* 5 U.S.C. § 603(c).

APPENDIX D

List of Petitioners to *BRS/EBS 3rd MO&O*

Petitions for Reconsideration
Ad Hoc MDS Alliance
American Petroleum Institute (API)
BellSouth Corporation, BellSouth Wireless Cable, Inc., and South Florida Television, Inc. (joint) (Bell South)
Clarendon Foundation (Clarendon)
Hispanic Information and Telecommunications Network (HITN)
NextWave Broadband Inc. (NextWave)
NY3G Partnership (NY3G)
School Board of Broward County, Florida (Broward County)
Society of Broadcast Engineers (SBE)
Wireless Communications Association International, Inc. (WCA)

Oppositions to Petitions for Reconsideration
Ad Hoc MDS Alliance
BRS Rural Advocacy Group
Catholic Television Network/National ITFS Association (joint) (CTN NIA)
Clearwire Corporation (Clearwire)
Globalstar, Inc. (Globalstar)
Hispanic Information and Telecommunications Network
ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED)
Line of Site, Inc. (LOSI)
School Board of Miami-Dade County, Florida (Miami-Dade)
Sprint Nextel Corporation (Sprint Nextel)
WiMAX Forum (WiMAX)
Wireless Communications Association International, Inc.

Reply to Oppositions to Petitions for Reconsideration
Ad Hoc MDS Alliance
American Petroleum Institute
BellSouth Corporation, BellSouth Wireless Cable, Inc., and South Florida Television, Inc. (joint)
Catholic Television Network/National ITFS Association (joint)
Hispanic Information and Telecommunications Network
ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.
NextWave Broadband Inc.
PetroCom License Corporation (PetroCom)
School Board of Broward County, Florida
Sprint Nextel Corporation
Wireless Communications Association International, Inc.

Ex Parte
American Petroleum Institute
Cantor Fitzgerald/eSpeed Inc.
Clearwire
CTN/NIA
Globalstar, Inc.
Hispanic Information and Telecommunications Network
Sprint Nextel
T-Mobile USA
Wireless Communications Association International, Inc.