Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
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 RM-9718
	)	

REPLY COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

The comments submitted in response to the *Further Notice of Proposed Rulemaking* ("*FNPRM*") sound a consistent theme – the Commission can best promote rapid deployment of innovative new services in the 2496-2600 MHz ("2.5 GHz") band by getting available spectrum to the marketplace and relying on marketplace forces to assure that the spectrum migrates towards its highest and best use. Not surprisingly, the comments thus reflect substantial resistance to proposals in the *FNPRM* that sought to impose artificial deployment schedules on the industry or to otherwise interfere with the ability of licensees to take advantage of the flexibility they have been afforded to judge marketplace needs and respond accordingly.

There is overwhelming support both for application of the Part 27 substantial service at renewal performance test and for affording Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") licensees the same safe harbors afforded other part 27 licensees. In addition, given the unique nature of BRS/EBS, the record establishes that additional safe harbors are necessary to provide for system-wide performance evaluations and for crediting licensees with system deployments that may have been dismantled at the time the evaluation is undertaken. In addition, those commenting in response to the *FNPRM* overwhelmingly support The Wireless Communication Association International, Inc.'s ("WCA") proposal for evaluating a licensee's substantial service at renewal, but no sooner than five years from the completion of its transition to the new bandplan. The sole proposal for more rapid evaluations fails to accommodate the substantial challenges that system operators will face in transitioning markets and deploying services under the new rules.

WCA's proposal that the Commission provide an opportunity for licensees to self-transition before forcing them to accept a reduction in spectrum also drew substantial support from those commenting. The record is clear that immediately following the deadline for submitting Initiation Plans, every licensee should be afforded an opportunity to transition itself.

There also is broad support for structuring future auctions of BRS/EBS spectrum in a manner which promotes smooth transitions and rapid deployment of new services. Not one commenting party supported the proposal to delay all auctions until after the transition process has been completed so as to facilitate a single "big bang" auction. Rather, the commenting parties generally urge that auctions should be timed to bring spectrum to the market as rapidly as reasonably possible. There is virtually unanimous support for conducting all auctions on a Basic Trading Area ("BTA")-by-BTA and on a channel group-by-channel group basis, but with the Lower Band Segment ("LBS") and Upper Band Segment ("UBS") channels auctioned separately from the Middle Band Segment ("MBS") channels. A proposal to bar commercial support for EBS white space auction participation should be rejected once again, as adoption would inevitably skew the auction against the local accredited educators for whom EBS is intended. The Commission should retain its current rules regarding EBS auctions and not award bidding

credits in EBS auctions as some have proposed. To provide the proposed bidding credits would be to undermine the educational objectives the Commission has set for EBS.

The Commission should adopt the treatment of grandfathered E and F group EBS licensees and BRS lottery winners with overlapping protected service areas advocated by WCA, the National ITFS Association ("NIA") and the Catholic Television Network ("CTN"), and others. Specifically, the Commission should use its rules for "splitting the football" to provide each with an exclusive Geographic Service Area ("GSA") and allowing grandfathered E and F Group EBS licensees to take full advantage of geographic licensing within their exclusive GSA.

The record also supports the adoption of new rules proposed by WCA that preserve the rights of existing commercial EBS licensees and pending commercial EBS applicants. In addition, the Commission should provide all BRS BTA authorization holders one last opportunity to secure commercial EBS authorizations before it conducts the EBS white space auction.

The calculation of BRS regulatory fees based on the amount of spectrum covered by a license and the population of the authorized service areas is supported by the record. Such an approach will accommodate the concerns about alleviating undue burdens on rural licensees expressed by the sole party to advance a different proposal.

Finally, the record overwhelmingly supports adoption of WCA's proposals for licensing 2.5 GHz spectrum in the Gulf of Mexico. Once again, there is no support in the record for determining how much spectrum within the Gulf Service Area should be auctioned or for scheduling such an auction. However, to provide regulatory certainty for land-based system operators, the Commission should adopt WCA's proposal for establishing boundaries for the Gulf Service Area and for adjoining geographic service areas and for rules to govern operations in the Gulf Service Area and in adjoining geographic service areas.

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REPLY COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its consolidated reply to the comments submitted in response to the Commission's *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the captioned matter.[1]

[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 Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004)["*Report and Order*" and "*FNPRM*," respectively]. The Commission granted WCA's Motion For Leave to Exceed Page Limits in Section 1.429(f) and 1.429(g) of the Commission's Rules and extended the page limits applicable to oppositions to petitions for reconsideration of the Commission's Report and Order to 50 pages and the page limits applicable to replies to oppositions to petitions for reconsideration to 20 pages. *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 Band*, WT Docket No. 03-66, Order, DA 05-176 (rel. Jan. 25, 2005).

I. INTRODUCTION.

By and large, the comments submitted in response to the *FNPRM* sound a consistent theme – the Commission can best promote rapid deployment of innovative new services in the 2496-2690 MHz band (the "2.5 GHz band") by getting available spectrum to the marketplace and relying on marketplace forces to assure that the spectrum migrates towards its highest and best use. Not surprisingly, the comments thus reflect substantial resistance to proposals in the *FNPRM* that would impose artificial deployment schedules on the industry or otherwise interfere with the ability of licensees to take advantage of the flexibility they have been afforded to judge marketplace needs and respond accordingly. As discussed in more detail below, the Commission can and should adopt rules and policies in response to the *FNRPM* that expedite the availability of spectrum that is currently not licensed, that fairly promote transitions to the new bandplan, and that afford licensees a reasonable opportunity to meet performance tests once they have transitioned to the new bandplan.

II. DISCUSSION.

A. There Is Overwhelming Support For Application Of The Part 27 Substantial Service At Renewal Performance Test And Traditional Safe Harbors To BRS/EBS Licensees, And For Additional Safe Harbors To Address The Unique Circumstances Of BRS/EBS.

1. The Comments In Response To The FNPRM Unanimously Support Applying The Part 27 Substantial Service Test To BRS And EBS Licensees.

The comments filed in response to the *FNPRM* reflect universal support for the Commission's proposal to apply its Part 27 substantial service performance test to Broadband

Radio Service ("BRS") and Educational Broadband Service ("EBS") licensees.[2] Without exception, those commenting on the issue agree that, as the Commission has done consistently in the past, it should define "substantial service" as that "which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."[3] The flexibility inherent in this approach will assure accomplishment of the Commission's overriding objectives – "to provide licensees greater flexibility 'to tailor the use of their spectrum to unique business plans and need,'"[4] to "encourage licensees to provide the best possible service and avoid 'construction . . . solely to meet regulatory requirements rather than market conditions.'"[5]

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[2] *See FNPRM*, 19 FCC Rcd at 14287-88 ¶ 322; Comments of WCA, WT Docket No. 03-66, at 2-3 (filed Jan. 10, 2005)["WCA Comments"]; Comments of BellSouth Corporation *et al.*, WT Docket No. 03-66, at 3-4 (filed Jan. 10, 2005)["BellSouth Comments"]; Comments of C&W Enterprises, Inc., WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["C&W Comments"]; Comments of Cheboygan-Otsego-Presque Isle Educational Service District and PACE Telecommunications Consortium, WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["Cheboygan Comments"]; Joint Comments of the Catholic Television Network and the National ITFS Association, WT Docket No. 03-66, at 7 (filed Jan. 10, 2005)["NIA/CTN Comments"]; Comments of Clearwire Corporation, WT Docket No. 03-66, at 12 (filed Jan. 10, 2005)["Clearwire Comments"]; Comments of Grand Wireless Company, Inc. – Michigan, WT Docket No. 03-66, at 1 (filed Jan. 10, 2005)["GWM Comments"]; Comments of Hispanic Information and Telecommunications Network, WT Docket No. 03-66, at 2-4 (filed Jan. 10, 2005)["HITN Comments"]; Comments of Nextel Communications, WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["Nextel Comments"]; Comments of SpeedNet, L.L.C., WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["SpeedNet Comments"]; Comments of Sprint Corporation, WT Docket No. 03-66, at 5-6 (filed Jan. 10, 2005)["Sprint Comments"]; Comments of Wireless Direct Broadcast System, WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["WDBS Comments"].

[3] WCA Comments at 3 (*quoting* 47 C.F.R. § 27.14(a)).

[4] *FNPRM*, 19 FCC Rcd at 14282-83 ¶ 321 (*quoting Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Notice of Proposed Rulemaking, 18 FCC Rcd 20802, 20819 (2003)).

[5] *FNPRM*, 19 FCC Rcd at 14284-85 ¶ 324 (*quoting* Reply Comments of SBC, WT Docket 03-66, at 11 (filed Oct. 23, 2003)).

2. The Record Overwhelmingly Supports Affording BRS And EBS Licensees The Same Safe Harbors Afforded Other Part 27 Licensees.

Both the commercial and educational communities are virtually unanimous in urging the Commission to afford BRS/EBS licensees the same quantifiable substantial service safe harbors already available to all other Part 27 licensees, including those recently adopted for rural areas.[6] Indeed, the sole opposition to applying the Commission's traditional Part 27 safe harbors comes from Clearwire Corp. ("Clearwire"). Although acknowledging that the Commission routinely considers a licensee to be providing substantial service if it offers a mobile service covering 20%

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[6] *See, e.g.*, WCA Comments at 8-9; BellSouth Comments at 6-7; C&W Comments at 2; Cheboygan Comments at 2; Sprint Comments at 7-8; WDBS Comments at 2.

Oddly, the Independent MMDS Licensee Coalition ("IMLC") suggests that the substantial service standard "apply proportionally to licensees who have not held their licenses for the full ten year license term." Comments of the Independent MMDS Licensee Coalition, WT Docket No. 03-66, at 8 (filed Jan. 10, 2005)["IMLC Comments"]. This of course makes no sense, since a licensee is not evaluated for substantial service until it has been afforded a full license term within which to meet the standard. Gila River Telecommunications, Inc. ("Gila River") has suggested that the Commission revise the rural safe harbor so that substantial service would be found if the licensee serves 50% of the geographic area of at least 20% of the rural counties within its service area, rather than 75% of the geographic area as under the current rule. *See* Comments of Gila River Telecommunications, Inc., WT Docket No. 03-66, at 4 (filed Jan. 10, 2005)["Gila River Comments"]. To the extent that Gila River is proposing that this change apply to rural counties that include tribal lands, WCA has not objection to adoption of this proposal.

Finally, BellSouth has suggested that service to niche markets qualify as a "safe harbor" in determining whether a licensee is providing substantial service to its service area. *See* BellSouth Comments at 8. Certainly WCA believes that service to niche markets is a very significant factor that must be considered by the Commission in evaluating whether a licensee is providing substantial service. *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12660 (1997)("In addition, the Commission may consider such factors as…whether the licensee's operations serve niche markets…")["*LMDS 2nd R&O*"]; *see also Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, 12 FCC Rcd 10785, 10844 (1997)["*Part 27 R&O*"]; *Amendment of Parts 2 and 25 of the Commission's rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9685 (2002). However, safe harbors, by definition, must be capable of quantitative analysis (*i.e.* 20% coverage of the GSA, 4 links per million residents of the GSA) and service to niche markets is not. *See, e.g., LMDS 2nd R&O*, 12 FCC Rcd at 12660-61 ("These safe-harbor examples are intended to provide…licensees a degree of certainty as to how to comply with the substantial service requirement by the end of the initial license term."); *see also Part 27 R&O*, 12 FCC Rcd at 10844.

of the population of its service area or offers a fixed service with four permanent links per one million people, Clearwire asserts that "both of these standards are too lenient" and "there is no justification for different standards for fixed and mobile services offered over BRS and EBS spectrum."[7] What Clearwire does not do, however, is explain why, now that BRS and ERS are being regulated in a manner similar to the other flexible use services governed by Part 27, they should be subject to a different substantial service requirement.

Rather than apply the traditional Part 27 safe harbors, Clearwire would have the Commission establish a single safe harbor that would only be met if a licensee can serve 2/3 of the population of the licensee's service area.[8] The only support that Clearwire can muster for its advocacy of a more than three-fold increase from the traditional Part 27 mobile safe harbor standard is to note that under former Section 21.930 of the Rules, BRS Basic Trading Area ("BTA") authorization holders once were required to build-out to that level, and asks "[i]f coverage to two-thirds of the population was achievable under the former regulatory regime, then it should be achievable under the new regulatory regime."[9] However, even a cursory review of Section 21.930 and its history establishes why it is inapplicable to the new regulatory regime.

Section 21.930 was adopted almost a decade ago, when the predominant use of the 2.5 GHz band was to provide video services from high-power, high-site transmission facilities to high-gain reception antennas mounted sufficiently above ground level as to have an unobstructed

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[7] Clearwire Comments at 15.

[8] *See id.*

[9] *Id.*

path to the transmission antenna.[10] Thus, when the rule was adopted a single transmission facility was able to provide service over huge areas, and often blanketing a circular service areas with a 35 mile or greater. The new regulatory regime, by contrast, is designed to promote the use of the 2.5 GHz band for low-power cellularized, non-line-of-sight operations. Under this new approach, BRS and EBS licensees generally will be required to deploy substantially more base stations than were required under the old paradigm even to achieve the 20% safe harbor applied to every other Part 27 service.

Moreover, Clearwire's proposed 2/3 coverage requirement does not reflect that under the new regulatory paradigm licensees will face substantial challenges in coordinating with other spectrum users in the band, a process that may preclude use of some spectrum in some areas.[11] When the Commission adopted Section 21.930, it made clear that it would credit licensees towards the 2/3 build-out requirement where a lack of line-of-sight or interference considerations precluded service at a particular area.[12] Yet, Clearwire does not propose that the Commission do so here.

Finally, Clearwire fails to acknowledge that under the former regulatory regime, a licensee that was providing service, but failed to meet the Section 21.930 benchmark, did not lose its authorization. Rather, the Commission would merely partition away the area where the

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[10] *See 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, 10 FCC Rcd 9589 (1995)["*BTA Auction Order*"].

[11] *See* Clearwire Comments at 13 ("The Commission has concluded for other flexible use services, as it should for EBS and BRS, that a substantial service showing is reasonable when extensive coordination with other spectrum users is required and incumbents are licensed in the bands.")(footnotes omitted). Curiously, Clearwire cites with favor a variety of prior Commission decisions that adopted the traditional safe harbors it now attacks. *Id*. at 13-14 n. 25.

[12] *See BTA Auction Order*, 10 FCC Rcd at 9613.

benchmark was not met.[13] Under the Part 27 approach Clearwire advocates, however, a licensee that is found not to be providing substantial service forfeits its entire license.[14]

In short, adoption of Clearwire's proposal would prove fundamentally unfair to BRS and EBS licensees. The Commission has consistently found that a 20% coverage requirement is sufficient to justify a finding of substantial service, and the unique challenges facing BRS and EBS licensees certainly militate against subjecting them to any more stringent mandate than other Part 27 licensees face. The 2/3 coverage requirement imposed under former Section 21.930 on which Clearwire depends must be seen for what it is – an interesting historical footnote from the wireless cable era that has no applicability to the Commission's new approach to BRS and EBS.

In addition, Clearwire is patently incorrect in asserting that a safe harbor based on fixed service links would be inappropriate because BRS and EBS spectrum will not be used to provide backbone support.[15] To the contrary, while Clearwire may not be contemplating use of BRS and EBS spectrum to interconnect base stations with each other and with a broader network, other system operators have expressed significant interest in the possibility within a variety of WCA forums and elsewhere.[16] Thus, application to BRS and EBS of the fixed service safe harbor traditionally applied to other Part 27 flexible use services remains appropriate here.

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[13] *Id.*

[14] *See* 47 C.F.R.§ 27.13 ("'Substantial' service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. *Failure by any licensee to meet this requirement will result in forfeiture of the license* and the licensee will be ineligible to regain it.")(emphasis added).

[15] *See* Clearwire Comments at 16 n. 30.

[16] *See, e.g.*, Smith, "Wireless to the Max," *Wireless Week*, at 16-17 (Feb. 1, 2005).

3. Given The Unique Nature Of BRS/EBS, Special Safe Harbor Rules Are Required.

For the reasons noted above, the record confirms that the Commission has correctly identified substantial service as the appropriate performance test for BRS/EBS renewal applicants, and that application of the substantial service model and traditional safe harbors to BRS/EBS will yield all of the benefits the Commission has identified when applying the test to other geographically licensed, flexible use services.[17] As recognized in the *FNPRM*, however, "within a substantial service framework, refined measures may be adopted to suit any challenges that BRS and EBS licensees face in development and deployment."[18] The record confirms that such refinements to the substantial service model are essential for BRS/EBS. As Clearwire has correctly noted, "[i]n adopting a substantial service standard, the Commission should consider

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[17] Significantly, no commenting party evidenced support for the Commission's suggestion that it would depart from past precedent and "[does] not plan to proceed on a case-by-case basis in determining whether substantial service has been met." *FNPRM*, 19 FCC Rcd at 14285 ¶ 325. For the reasons discussed in WCA's comments and those of other commenting parties, individualized review of each licensee's performance is necessary in order to properly evaluate whether a licensee has satisfied the substantial service standard. *See* WCA Comments at 6-7; NIA/CTN Comments at 9-10.

Similarly, there was an overwhelming lack of support for the suggestion in paragraph 323 of the *FNPRM* that a Commission evaluation of "qualitative factors important to end-users and the market such as reliability of service, and the availability of technologically sophisticated premium services" has a place in evaluating whether a licensee is providing substantial service. *FNPRM*, 19 FCC Rcd at 14284 ¶ 323 (footnote omitted). As WCA demonstrated in its Comments, the Commission has emphasized time and again that the substantial service concept is designed to permit economic forces to drive innovation and deployment of wireless services, and "will result in ubiquitous, high-quality service to the public and at the same time encourage investment by increasing the value of licenses." WCA Comments at 8 (*quoting FNPRM*, 19 FCC Rcd at 14283 ¶ 321). The Commission thus should let the marketplace make these evaluations and businesses succeed or fail accordingly. *See* WCA Comments at 7-8. WCA agrees with Clearwire that in connection with any substantial service evaluation, a licensee must demonstrate that it is transmitting a signal of sufficient strength that the service can actually be utilized. *See* Clearwire Comments at 17-18. However, Clearwire's assertion that substantial service can only be found if the licensee "can provide reliable broadband service" is misplaced, since BRS and EBS are flexible use services that can be employed by licensees for a variety of services that may not fall within the "broadband" rubric (including, most importantly, broadcast-like educational, instructional and entertainment video). *Id.* Indeed, Clearwire itself acknowledges that each BRS and EBS licensee "has significant flexibility to offer a wide range of wireless services." *Id.* at 13. Thus, it would be inappropriate for the Commission to impose a litmus test under which renewal would be predicated on the offering of any particular service by a licensee.

[18] *FNPRM*, 19 FCC Rcd at 14283 ¶ 322 (footnote omitted).

the unique challenges faced by EBS and BRS, including incumbent operations in the band, required service to the educational community, transition to a new band plan, and staggered license terms from different licenses that are part of the same wireless system."[19]

As affirmed by WCA and BellSouth Corp. *et al*. ("BellSouth"), for example, the Commission's safe harbors for BRS/EBS must account for the fact that many licensees have already deployed a variety of service offerings in the 2.5 GHz band at tremendous expense, but heretofore have been foreclosed from converting to wireless broadband because of the longstanding regulatory uncertainty surrounding BRS/EBS.[20] Accordingly, the Commission's goals in this proceeding will be compromised if the next BRS/EBS renewals are based solely on a substantial service "snapshot" taken when those renewal applications are filed – licensees will be reluctant to discontinue legacy services and start the process of inaugurating advanced wireless services for fear that they will be unable to demonstrate substantial service at renewal. Although Clearwire opposes affording licensees credit towards a substantial service determination based on prior services that are not being offered at the time of the performance evaluation,[21] Clearwire fails to acknowledge, much less refute, the significant evidence developed in response to the *Notice of Proposed Rulemaking*[22] in support of affording such credit. To cite just one example, Earthlink, Inc. ("Earthlink") demonstrated that:

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[19] Clearwire Comments at 13.

[20] *See* BellSouth Comments at 11 ("Historically, BellSouth and its BRS and EBS lessors have met their respective service obligations by providing commercial video services to subscribers over a wide geographic area."); WCA Comments at 10.

[21] *See* Clearwire Comments at 18.

[22] *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003)["*NPRM*"].

> A substantial service test that encourages licensees to continue their obsolete video services until after current licenses are renewed ultimately serves neither EarthLink's interest nor the public interest. The better approach is that suggested by the Coalition – afford a renewal expectancy to any licensee that has provided substantial service during its license term, and thereby encourage licensees to immediately commence the transition to broadband regardless of whether they will be sufficiently along in the transition process to qualify for license renewal under the traditional substantial service test.[23]

Earthlink and those who expressed similar sentiments in response to the *NPRM* were clearly right – if the Commission adopts an unduly restrictive substantial service requirement in a misguided effort to artificially promote rapid deployment, the unintended consequence may well delay the deployment of new low power, highly-cellularized services until after the substantial service evaluation has been made.

Thus, the record developed in response to *NPRM* and the *FNPRM* supports adoption of the proposal by WCA that with respect to the first application for renewal submitted after the effective date of the rules adopted in response to the *Report and Order*, the Commission should make a finding of substantial service where the licensee demonstrates that it met a safe harbor at any time during the license term, as opposed to just at renewal time.[24] Adoption of this specific approach will encourage those licensees that have already demonstrated that they can be good stewards of the spectrum to respond rapidly to marketplace forces. And that result is what this proceeding should be all about.

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[23] Comments of EarthLink, WT Docket No. 03-66, at 9 (filed Sept. 8, 2003)["EarthLink NPRM Comments"]. *See also* Reply Comments of BellSouth *et al*., WT Docket No. 03-66, at 22 (filed Oct. 23, 2003)["BellSouth NPRM Reply Comments"]; Comments of BellSouth et al., WT Docket No. 03-66, at 31-33 (filed Sept. 8, 2003)["BellSouth NPRM Comments"]; Comments of Independent MMDS License Coalition, WT Docket No. 03-66, at iii (filed Sept. 8, 2003)["IMLC NPRM Comments"]; Comments and Reply Comments of Network for Instructional TV, Inc., WT Docket No. 03-66, at 8 (filed Oct. 16, 2003); Comments of Sprint, WT Docket No. 03-66, at 18 (filed Sept. 8, 2003)["Sprint NPRM Comments"].

[24] *See* WCA Comments at 13.

In addition, the record developed in response to the *FNPRM* continues to support overwhelmingly the proposal, first advanced by WCA, the National ITFS Association ("NIA") and the Catholic Television Network ("CTN") in response to the *NPRM*, that the Commission's approach to substantial service reflect that some channels may not be utilized (at least in the traditional sense of the word) because they are serving as guardband or because they are reserved at the time of renewal for future expansion.[25] Although recognizing the merit behind these arguments, the *FNPRM* expressed concern that such factors would have to be considered on a case-by-case basis.[26] Thus, WCA and others proposed in response to the *FNPRM* that the Commission establish a safe harbor that would deem any call sign to have provided substantial service if the licensee demonstrates that its spectrum is licensed to or leased by the operator of a multichannel system comprising spectrum licensed under multiple call signs and the multichannel system, taken as a whole, satisfies the substantial service test or any safe harbor related thereto.[27]

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[25] *See* "A Proposal For Revising The MDS And ITFS Regulatory Regime," Wireless Communications Ass'n Int'l, Nat'l ITFS Ass'n and Catholic Television Network, RM-10586, at 45-46 (filed Oct. 7, 2002)["Initial Coalition Proposal"]. Subsequent to October 7, 2002, WCA, NIA and CTN submitted two supplements that addressed issues left open in the original white paper and sought to clarify points that apparently had been misunderstood by some parties within the industry. *See* "First Supplement To 'A Proposal For Revising The MDS And ITFS Regulatory Regime,'" RM-10586 (filed Nov. 14, 2002); "Second Supplement To 'A Proposal For Revising The MDS And ITFS Regulatory Regime,'" RM-10586 (filed Feb. 7, 2003). For simplicity's sake, unless the context requires a different meaning, references to the "Initial Coalition Proposal" in these comments should be read to reference all three filings; Comments of WCA, NIA, and CTN, WT Docket No. 03-66, at 85 (filed Sept. 8, 2003)["Coalition NPRM Comments"]; Reply Comments of WCA, NIA, and CTN, WT Docket No. 03-66, at 73-74 (filed Oct. 23, 2003)["Coalition NPRM Reply Comments"].

[26] *See FNPRM*, 19 FCC Rcd at 14285 ¶ 325.

[27] *See* WCA Comments at 11-13. *See also* Sprint Comments at 8-9; Nextel Comments at 5; BellSouth Comments at 14-15. In addition, as discussed *infra*, NIA/CTN and the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED") proposed a similar safe harbor applicable to EBS licensees. However there is no logical basis for distinguishing among EBS and BRS licensees on this point.

In contrast, Clearwire suggests that the Commission require substantial service to be evaluated on a channel group-by-channel group basis. However, Clearwire never addresses the substantial evidence in the record from the *NPRM* that legitimate reasons may exist why a particular component of a larger system is not being used for transmissions at the time of the substantial service evaluation.[28] As explained by Sprint, "in putting their systems together, operators are likely to utilize BRS and EBS channels from various sources within a given market, and may be required in some circumstances to utilize some of this licensed spectrum as guardbands or as reserve to meet future expansion. Assessing performance compliance upon the individual channels that make up the system, thus, may not tell the story of whether the channel is being utilized to provide service."[29] In a similar context, the Commission has recognized that where spectrum lays fallow, there is a significant opportunity cost imposed on the licensee.[30]

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[28] *See* Clearwire Comments at 12. Similarly flawed is the proposal by Digital Broadcasting Corp. ("DBC") for the Commission to require a separate substantial service evaluation for each Middle Band Segment ("MBS") channel. *See* Comments of Digital Broadcast Corp., WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["DBC Comments"]. Under the DBC proposal, any licensee that cannot demonstrate substantial service on its MBS channel by January 10, 2010 would forfeit its authorization for that channel, but could retain its spectrum in the other segments of the 2.5 GHz band. This proposal, however, is particularly draconian because of the substantial challenges that many licensees will face in putting their MBS channels to productive use for cellular technology given that high-power, high-site applications can continue in the MBS. Indeed, those challenges will only magnify if the Commission adopts the proposals advanced by some in petitions for reconsideration of the *Report and Order* – proposals that would impose substantially greater interference protection obligations on MBS licensees. *See* Petition of Catholic Television Network and National ITFS Ass'n for Reconsideration, WT Docket No. 03-66, at 10-15 (filed Jan. 10, 2005)["NIA/CTN Petition"]; Petition of Hispanic Information and Telecommunications Network for Reconsideration, WT Docket No. 03-66, at 6-7 (filed Jan. 10, 2005). Thus, the Commission should be particularly lenient in evaluating licensee performance with respect to MBS channels. DBC makes clear that its objective is to gain access to MBS channels to advance its business plan. *See* DBC Comments at 2. Yet, as the Commission has recognized in refusing to impose channel-by-channel performance requirements in other contexts, licensees will have every economic incentive to make the best use of their MBS channels, whether by using them directly or by leasing them in the secondary market to DBC or others. *See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Memorandum Opinion and Order and Order on Reconsideration, 14 FCC Rcd 17556, 17568 (1999) (*"800 MHz MO&O"*). DBC has not presented any compelling reason why the Commission should depart from its past precedent and impose a channel-specific substantial service test here.

[29] Sprint Comments at 8-9.

[30] *See 800 MHz MO&O*, 14 FCC Rcd at 17568.

Thus, the Commission has recognized that marketplace forces tend to maximize efficient spectrum utilization and has refrained from adopting channel-specific usage or build-out requirements.[31] As it has done in the past, the Commission should focus on the overall service that a system is providing, continue its long-standing view that "market forces, not government regulation, will ensure the provision of services to the public" and retain licensee flexibility rather than force licensees to respond to an artificial channel usage requirement.[32]

For this reason, WCA also supports the safe harbor proposed by NIA/CTN and IMWED in response to the *FNPRM* that where an EBS licensee leases any spectrum to a commercial operator, the licensee should be deemed to be in a safe harbor for all of its spectrum so long as the commercial system is providing substantial service.[33] In addition, WCA supports the proposal by NIA/CTN and IMWED that an EBS licensee should be deemed to be in a safe harbor if it is using its spectrum, or spectrum to which its educational services are shifted, within its Geographic Service Area ("GSA") to serve the educational mission of one or more accredited schools by providing educational and cultural development to enrolled students, provided that the level of educational service satisfies the Commission's EBS minimum usage requirements.[34]

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[31] *Id.*

[32] *Id.*

[33] *See* NIA/CTN Comments at 9; Comments of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, at 7-8 (filed Jan. 10, 2005)["IMWED Comments"]. Of course, for the reasons discussed above, WCA sees no reason to limit the reach of this proposal solely to EBS licensees. The IMLC proposes an additional safe harbor under which a licensee would be entitled to renewal if it has provided service for 20% of its license term, or has leased spectrum for 20% of its license term. *See* IMLC Comments at 7. In addition to appearing excessive (since it presumably would allow one point-to-point link that operated over just 20% of the prior license term to qualify for substantial service), it would render the BRS/EBS substantial service criteria inconsistent with those of other Part 27 flexible use services, and thus would undermine the Commission's attempt to achieve regulatory parity among like services. *See, e.g., Report and Order,* 19 FCC Rcd at 14256-57 ¶ 241 (noting Commission's goal of "fostering regulatory parity and transparency among like services").

[34] *See* NIA/CTN Comments at 9; IMWED Comments at 7-8.

WCA believes these safe harbors properly account for the broad range of educational services that are and will be provided over EBS spectrum, without compromising the Commission's goals for the EBS service or its long-standing policy of encouraging secondary market leasing transactions in the 2.5 GHz band.

4. Those Commenting In Response To The FNPRM Overwhelmingly Support Evaluating A Licensee's Substantial Service At Renewal, But No Sooner Than Five Years From The Completion Of Its Transition To The New Bandplan.

There is significant record support for WCA's request that the Commission evaluate substantial service at renewal, but ensure fairness to those licensees whose first license renewal under the new rules occurs before they have had a fair opportunity to deploy services under the new bandplan. That is, where a BRS/EBS license expires prior to the date that is five years after the filing of the post transition notification applicable to that license pursuant to Section 27.1235 (or the deadline for the filing of a notice of self-transition as discussed in Section II.B of WCA's comments) and the licensee is unable to demonstrate substantial service at that time, the Commission should nonetheless renew the license, conditioned upon a demonstration of substantial service no later than five years after the filing of the post-transition notification.[35]

On this point, both BRS and EBS licensees agree with the Commission that "[the Commission's] market-driven service goals will not be reached if licensees are forced to continue providing obsolete services solely to preserve their operations,"[36] and that a five-year post-transition period is necessary to give adequate time to complete their transitions and do

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[35] *See* WCA Comments at 16.

[36] *Report and Order*, 19 FCC Rcd at 14256 ¶ 239 (footnote omitted). *See also* Nextel Comments at 3-4; Sprint Comments at 9-10; BellSouth Comments at 13; NIA/CTN Comments at 8; IMWED Comments at 8.

what is necessary to demonstrate that they are providing substantial service as required under the Commission's rules. As noted by Nextel:

> Once the lengthy transition plan is complete, the [2.5 GHz] band will offer the promise of allowing carriers to offer innovative broadband services, including both fixed and mobile multimedia communications, to the public. In light of the complicated transition process, however, the Commission should offer BRS and EBS licensees a fair opportunity to demonstrate substantial service under the newly reconfigured band plan. The Commission should not attempt to measure substantial service until licensees receive relief from the impediments that the existing band plan imposes on them. Measuring substantial service during the transition would require licensees to needlessly invest in facilities that do nothing more than preserve their licenses pending completion of the transition….To ensure [that] the market – not regulation, drives facilities-based investment, the Commission should provide that licensees whose license renewal terms expire prior to five years after the conclusion of transition are automatically eligible for renewal, subject to a showing of substantial service no later than five years after the transition plan is complete.[37]

WCA's approach strikes an appropriate middle ground when compared to other alternatives. Clearwire is the only party suggesting that licensees have less time to establish substantial service, advocating that all licensees be required to demonstrate substantial service by January 10, 2010, regardless of when they are transitioned to the new bandplan or when their licenses are up for renewal.[38] Clearwire's approach is, quite frankly, difficult to understand given that Clearwire itself correctly acknowledges that "[BRS and EBS] licensees face unique challenges including the impending three-year transition to the new band plan"[39] and that "implementation of a single construction requirement for all EBS and BRS licensees" would be

[37] Nextel Comments at 3-4.

[38] *See* Clearwire Comments at 20-21.

[39] *Id.* at 20.

inappropriate because each faces "unique challenges . . . including transition to a new band plan."[40]

Thus, it is surprising that Clearwire's proposal ignores those challenges and imposes on every licensee a single, uniform substantial service evaluation date regardless of the unique challenges a given licensee may face in converting to the new bandplan and deploying new services thereunder. Indeed, it is ironic that Clearwire quotes favorably the Commission's recognition that transitions to the new bandplan will be delayed "if BRS and EBS licensees have to focus their resources on preserving legacy services solely because renewal approach and licensees fear losing their authorizations."[41] The same can be said of Clearwire's proposal – deployment of new services will be delayed if BRS and EBS licensees have to focus their resources on preserving legacy services solely because January 10, 2010 approaches and licensees fear losing their authorizations. WCA's approach recognizes that transitions will occur rapidly in some markets, and take longer in others, and assures that no licensee is adversely affected by transition delays that may occur in the ordinary course. As WCA demonstrated in its Comments, WCA's approach is in line with those taken by the Commission in other services where licensees faced unique challenges in clearing their band of legacy operations before deploying new services.[42]

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[40] *Id.* at 13. It should be noted here that the Commission has pending before it petitions for reconsideration of the *Report and Order* proposing that licensees be precluded from any two-way deployments until after a transition has occurred. *See* NIA/CTN Petition at 13; Petition of ITFS 2.5 GHz Mobile Wireless & Development Alliance for Reconsideration, WT Docket No. 03-66, at 6 (filed Jan. 10, 2005). While WCA intends to respond to those filings in detail at the appropriate time, suffice it to say that the draconian nature of Clearwire's proposed approach would be increased exponentially if licensees not only were afforded only five years to demonstrate substantial service, but could not deploy services until after the lengthy transition process has concluded.

[41] *Report and Order*, 19 FCC Rcd at 14254 ¶ 233 (*quoted in* Clearwire Comments at 20).

[42] *See* WCA Comments at 16-17 (discussing the extended substantial service evaluation deadlines established for the Advanced Wireless Service and for 700 MHz licensees).

In contrast to Clearwire, the Hispanic Information and Telecommunications Network ("HITN") proposes that licenses coming up for renewal prior to January 2015 be given a short-term renewal until January 2015, at which time licensees would be required to demonstrate substantial service.[43] WCA fundamentally agrees with the underlying premise behind HITN's proposal, which is that licensees should be given five years from transition to demonstrate substantial service. However, HITN's approach presumes that transitions will take five years from the January 10, 2005 effective date of the rules adopted in the *Report and Order*.[44] WCA's approach starts the five-year "substantial service" period on a licensee-by-licensee basis once that licensee has transitioned to the new bandplan. WCA believes that if the Commission adopts the transition-related proposals advanced in WCA's petition for partial reconsideration of the *Report and Order,* transitions will often occur far sooner than HITN suggests. As such, WCA's approach is more narrowly tailored than granting all licensees a delay in substantial service evaluations until January 2015, regardless of when they are transitioned.

B. The Commission Must Provide An Opportunity For Licensees To Self-Transition Before Forcing Them To Accept A Reduction In Spectrum.

In comments submitted in response to the *FNPRM*, as well as in petitions for reconsideration of the *Report and Order*, there has been an overwhelming outcry against any transition system that will force a licensee to lose its authorization if it is unwilling or unable to fund the transition not only of itself, but of a substantial number of other licensees. The solution, as discussed in detail in WCA's filings in this proceeding and as reflected in a large number of comments by others, is to provide any licensee that is not the subject of a timely filed Initiation

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[43] *See* HITN Comments at 3.

[44] *Id*.

Plan, with one final opportunity to transition itself to the new bandplan before it is stripped of its license.[45]

Although there is substantial support for the self-transition concept, the comments submitted in response to the *FNPRM* and the petitions for reconsideration of the *Report and Order* envision somewhat different procedures for self-transitioning. WCA intends to address all of the issues associated with self-transitioning in detail in its upcoming filings in the reconsideration phase of this proceeding.[46]

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[45] *See* WCA Comments at 17-19; Petition of WCA for Reconsideration, WT Docket No. 03-66, at 37-39 (filed Jan. 10, 2005). *See also* Clearwire Comments at 8; NIA/CTN Comments at 16-18; Nextel Comments at 5-7; Sprint Comments at 4-5; C&W Comments at 3-4; SpeedNet Comments at 3-4; WBDS Comments at 3-4; Cheboygan Comments at 3-4; DBC Comments at 3-4. IMWED and HITN have advanced similar approaches for EBS licensees, but without explanation appear to exclude BRS licensees from the self-transition proposal. WCA sees no reason for such a distinction, and would oppose any rule that only afforded EBS licensees the opportunity to self-transition. Although it is not clear, Consolidated Telecom, The Hinton CATV Company, Inc., North Dakota Network Co., James D. and Lawrence D. Garvey d/b/a Radiofone, and West River Cooperative Telephone Co. and G.W. Wireless, Incorporated Partnership ("Consolidated Telecom") appears to propose an approach to self-transitions that would involve applications for Commission approval of new facilities. *See* Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergrast, WT Docket No. 03-66, at 3-4 (filed Jan. 10, 2005)["Consolidated Telecom Comments"]. WCA respectfully submits that this is not necessary. So long as the Commission requires licensees to operate following their self-transition in accordance with the technical rules applicable to the LBS/UBS and MBS, as appropriate, there is no need to abandon geographic licensing and return to a site-licensing model for self-transitions.

[46] WCA must, however, here oppose the "heads I win, tails I win" proposal by IMLC that in lieu of basing bidding credits on the auction results itself, licensees that turn their authorizations in for reauction should receive a specific pre-auction bidding credit to be calculated in some manner similar to the way the Commission calculated the minimum bids for the most recent PCS auction (Auction No. 58). *See* IMLC Comments at 5-6. However, fearful that under this proposal licensees might not have sufficient bidding credits to reclaim their spectrum should BRS spectrum prove to be more valuable than PCS spectrum, IMLC proposes that if bidding credits are not enough to allow a licensee who was in a non-transitioned market to secure its authorization again, the licensee would be given extra bidding credits. Moreover, IMLC proposes that those licensees that are in transitioned markets but return their authorizations for bidding credits would receive the difference between their bidding credit and the high bid in cash, should they not be the high bidder. Suffice it to say that IMLC's proposal appears rather one-sided, and does not address the potential legal issues that would arise from permitting former licensees to receive benefits by virtue of a Commission auction, and such issues would in any case impose unnecessary delay and complexity into the auction process. It is worth noting that, to the extent IMLC is driven by a desire to assure that its members (none of whom have ever been identified) can retain their authorizations, WCA's self-transition proposal minimizes the possibility of giving untransitioned BRS/EBS licensees one final opportunity to retain their spectrum by transitioning themselves to the new bandplan.

C. There Is Broad Support For Structuring Future Auctions Of BRS/EBS Spectrum In A Manner Which Promotes Smooth Transitions and Rapid Deployment of New BRS/EBS Service.

Not surprising, commenting parties have supported the use of auctions to award new licenses for BRS BTA authorizations that have been forfeited, existing EBS white space, BRS/EBS spectrum that has not been included in a timely-filed Initiation Plan or self-transitioned, and BRS/EBS licenses that have been relinquished by their licensees in exchange for bidding credits or assistance in migrating to the MBS.[47] However, the comments evidence a resistance to a single "big bang" auction after the transition process has run its course in favor of auctioning spectrum in a manner that may be piecemeal, but also gets the most spectrum to the market the most quickly. At the same time, the parties agree that the Commission must take certain steps to ensure that any such auctions promote the rapid deployment of service and do not interfere with a proponent's ability to effectuate orderly transitions.

1. Auctions Should Be Timed To Bring Spectrum To The Market As Rapidly As Reasonably Possible.

At the outset, it is significant that the *FNPRM*'s concept of delaying all auctions in the 2.5 GHz band until after the transition process has run its course so the Commission could hold a single "big bang" auction received no discernable support from those participating in this proceeding. Rather, the record evidences substantial support for the proposition that the first 2.5 GHz auction under the new regulatory regime should offer bidders the opportunity to acquire forfeited BRS BTA authorizations, and that this auction occur as soon as possible.[48] Because

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[47] *FNPRM*, 19 FCC Rcd at 14265-14272 ¶¶ 266-288.

[48] *See* WCA Comments at 20-21; Clearwire Comments at 4-5; Nextel Comments at 7-8. Several small commercial entities suggest that "since it is unlikely an auction will be conducted until 2009 at the earliest, [they] would prefer the Commission hold one auction that includes all available spectrum . . .." C&W Comments at 3; SpeedNet

BRS BTA authorization holders are among the most likely entities to serve as proponents, re-auctioning the handful of licenses that have been forfeited or cancelled now will promote transitions and the funding of EBS's migration to the new bandplan. Consistent with a recommendation by Clearwire, WCA urges that prior to any such auction, the Wireless Telecommunications Bureau complete the database correction process commenced in 2002 and update ULS to reflect those BTA and BRS authorizations that have been forfeited and thus cancelled.[49]

WCA and others have called for the rapid auctioning of EBS white space.[50] Others have proposed delaying the EBS white space auction, most notably NIA/CTN, which proposes that the EBS white space auction be postponed until after the period for filing initiation plans has run.[51] Although NIA/CTN acknowledge that it has been nine years since the Commission last accepted applications for new EBS authorizations and there is a substantial demand for spectrum, NIA/CTN suggests that a delay in the EBS white space auction would be appropriate because prospective bidders will be preoccupied with other EBS-related matters.[52] While WCA

Comments at 3; WBDS Comments at 3; Cheboygan Comments at 3; DBC Comments at 3. WCA takes issue with the predicate for that line of reasoning – there is no reason why the Commission cannot conduct auctions well before 2009 – indeed, it could conduct the reauction of the forfeited BRS BTA authorizations now, without even awaiting resolution of this proceeding. Certainly, none of these commenting parties have provided any substantive explanation as to why auctions for forfeited BRS BTA authorization and for EBS white space should not happen sooner.

[49] *See* Clearwire Comments at 6. However, to the extent that there may be a handful of adversarial proceedings pending that could lead to the cancellation of BRS authorizations, WCA does not suggest the Commission delay the auction pending final resolution of those proceedings. To do so would inevitably delay the BRS BTA authorization reauction for years as the parties to adversarial proceedings exercise their procedural rights to Commission and judicial review. Potential bidders can be made aware of these disputes through the FCC's Universal Licensing System ("ULS"), and bid accordingly.

[50] *See* WCA Comments at 20; HITN Comments at 4-6; Clearwire Comments at 4-7.

[51] *See* NIA/CTN Comments at 11; Nextel Comments at 8.

[52] *See* NIA/CTN Comments at 11.

appreciates that EBS licenses generally have limited resources available to address regulatory and licensing issues, WCA does not believe that such a substantial delay is necessary.

To afford EBS licensees some breathing room, while still getting the EBS white space into the marketplace relatively quickly, WCA suggests the Commission announce that it will conduct the EBS white space auction approximately one year after adoption of the report and order addressing the issues raised in the *FNPRM*. That one year advance notice should afford EBS licensees ample time to prepare for the auction process, as well as addressing the other regulatory and licensing issues before them.

In supporting the concept of an EBS white space auction that will take place before some areas of the country are transitioned to the new bandplan, WCA must reemphasize that those participating in the EBS white space auction will be fully aware of the upcoming transition to the new bandplan, and thus should not be entitled to replacement downconverters at receive sites within the auctioned EBS white space or migration to the MBS of program tracks transmitted from white space facilities as part of the transition or self-transition process.[53]

2. All Auctions Should Be Conducted On A BTA-By-BTA Basis And On A Channel Group-By-Channel Group Basis.

To minimize confusion and retain consistency with how BRS spectrum has been geographically licensed for nearly ten years, all auctions of available BRS/EBS spectrum should be conducted according to BTAs based on the same boundary definitions used for BRS.[54] Both

[53] *See* WCA Comments at 21; Nextel Comments at 8 n. 14.

[54] *See* WCA Comments at 20-21.

commercial and educational BRS/EBS licensees support this approach.[55] Indeed, only one party, HITN, has recommended that future auctions be conducted on a MEA basis. HITN contends that auctioning outsized geographical areas will promote service into rural areas via enforcement of build-out requirements applicable to BTAs.[56] However, as pointed out by the large number of other EBS licensees participating in this proceeding, MEA wide auctions would be inappropriate given the localized nature of EBS service.[57] Indeed, the point system that the Commission had used heretofore to choose from among mutually-exclusive applications was heavily weighted in favor of truly local entities.[58] The comments of the School Board of Miami Dade County Florida ("Miami-Dade") are instructive on the reasons why a smaller geographic area than MEAs is called for:

> Few, if any, educational licensees have any interest in MEA-wide EBS services. Education is most often a local matter delegated to local school districts and local educational institutions. No school boards in Pensacola, Florida needs an EBS station serving Mobile, Alabama or Biloxi, Mississippi or New Orleans, Louisiana. Yet all of these communities are located in MEA Number 27 and all would be subject to forced transition through an MEA-wide EBS auction if no

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[55] *See* Clearwire Comments at 10; Nextel Comments at 8; SpeedNet Comments at 4-5; WDBS Comments at 4-5; GWM Comments at 1-2; NIA/CTN Comments at 11; IMWED Comments at 9; Comments of National Telecommunications Cooperative Association, WT Docket No. 03-66, at 5 (filed Jan. 10, 2005)(discussing why holding auctions according to Major Economic Areas would be counterproductive). Consolidated Telecom opposes auctions based on Major Economic Areas ("MEAs"), and recommends that auctions be based on existing BTA/PSA/GSA definitions so that licensees who lose their licenses in a non-transition situation can reclaim them at auction. *See* Consolidated Telecom Comments at 4-5. As discussed *supra*, WCA's self-transition proposal renders GSA auctions unnecessary because it gives licensees a means of retaining their licenses (and thus their GSAs) without having to re-acquire them at auction. A licensee would be required to participate in a BTA-wide auction only if it chose not to avail itself of the opportunity to self-transition.

[56] *See* HITN Comments at 4-5.

[57] *See* NIA/CTN Comments at 12; IMWED Comments at 9.

[58] *See Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, Third Report and Order, 4 FCC Rcd 4830 (1989); *Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, Second Report and Order, 101 FCC 2d 50 (1985).

timely "Initiation Plan is developed for the large and diverse area that is MEA Number 27.[59]

Commercial and educational interests also agree that the Commission should conduct any auctions of EBS spectrum on a channel group-by-channel group basis, but auction the first three channels in each existing channel group as a package (*e.g.* channels A1, A2 and A3 as one package, channels B1, B2 and B3 as another, etc.), and auction the fourth channel (*e.g.* A4, B4, etc.) separately.[60] By separating auctions for the future Lower Band Segment ("LBS"), Upper Band Segment ("UBS") and Middle Band Segment ("MBS") channels, the Commission will minimize the possibility that auction participants will be forced to bid on channels in which they have no interest and, conversely, will maximize the likelihood that the LBS/UBS and MBS channels will be awarded to the bidders to whom they have the highest value.[61] While a few parties suggested that the Commission not split channel groups by LBS/UBS and MBS, and instead simply auction all channels in a group together, none explain why auction participants would be better served by a process that forces them to bid on LBS/UBS or MBS spectrum they do not need or want.[62] And, while HITN proposes that the Commission auction EBS spectrum

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[59] Further Comments of School Board of Miami Dade County Florida, WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["Miami-Dade Comments"]. Miami-Dade recommends that the Commission address the problem by holding EBS white space auctions on a county-by-county basis. *Id.* at 3. While WCA does not disagree with the underlying premise of Miami-Dade's proposal, use of BTAs remains a reasonable compromise between auctioning MEAs versus much smaller areas, and has the additional advantage of preserving consistency with how the 2.5 GHz band has been geographically licensed in the past. For the same reason, the Commission should reject Gila River's request that the Commission auction EBS white space according to telephone service areas. *See* Gila River Comments at 3-4.

[60] *See* WCA Comments at 25; BellSouth Comments at 15-16; NIA/CTN Comments at 10-11; Clearwire Comments at 11-12; IMWED Comments at 9; Nextel Comments at 9-10.

[61] *See FNPRM,* 19 FCC Rcd at 14280 ¶ 313 ("Existing licensees that only want to continue current high-power operations solely in their limited PSA/GSA may not find new licenses suitable for such uses.").

[62] *See, e.g.*, HITN Comments at 6; DBC Comments at 3; WDBS Comments at 4; SpeedNet Comments at 3. Indeed, DBC's support for the concept is peculiar in view of its parallel suggestion that the Commission impose a separate

according to the new BRS/EBS bandplan, nowhere does it explain how the Commission can do this prior to the completion of the transition process, since other licenses in the market at issue will not have been transitioned to the new bandplan and thus will not have vacated the very spectrum that will be available under the new bandplan.[63]

The record clearly reflects that the *FNPRM* is wrong in suggesting that auction participants might be indifferent to the specific frequencies they receive.[64] As noted by NIA/CTN and others, bidders will frequently be seeking to expand existing service areas on their existing channels, and thus will be most interested in bidding on those specific frequencies at auction.[65] Moreover, because incumbency issues will vary from channel group to channel group, bidders are likely to be very particular about which channels are best suited for their individual circumstances – a given channel group will not necessarily be optimal for all bidders in all situations.

Consistent with its proposal for auctioning of EBS white space, WCA supports the suggestion by Clearwire that future auctions of BRS spectrum be conducted on a group-by-group basis in the same manner as EBS auctions.[66] WCA believes that, as with EBS spectrum, the first three channels in an E or F group (those that will be in the LBS/UBS after transition) should be auctioned separately from the fourth channel (which will be in the MBS). For purposes of BRS

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substantial service test on MBS channels. *See* DBC Comments at 2. If DBC is truly concerned that licensees in the MBS will not utilize their channels, it would make no sense to force auction bidders to take those channels if they are interested only in LBS/UBS channels.

[63] *See* HITN Comments at 6.

[64] *See FNPRM*, 19 FCC Rcd at 14269 ¶ 280.

[65] *See* NIA/CTN Comments at 13; WCA Comments at 25-26; BellSouth Comments at 15-16; Nextel Comments at 9-10.

[66] *See* Clearwire Comments at 10-11.

auctions, WCA suggests that the Commission auction the three H channels as a group and BRS channels 1 and 2 as a group. Although the three H channels and BRS channels 1 and 2 historically had been licensed singly, licensees have frequently consolidated ownership of the H channels and of BRS channels 1 and 2 in a given market, suggesting that grouping them for purposes of future auctions is responsive to marketplace demands.

3. IMWED's Proposal To Bar Commercial Support For EBS White Space Auction Participation Will Inevitably Skew The Auction Against The Local Accredited Educators For Whom EBS Is Intended.

Although not proposed in the *FNPRM*, the non-accredited entities behind IMWED suggest for the third time in this proceeding that the Commission adopt a rule under which EBS licensees would be required to pay for any authorizations secured at auction with their own funds and would be precluded from relying upon funding from third parties, including excess capacity lessees.[67] However, no matter how many times IMWED floats its proposal, the public interest will never be advanced by its adoption.

At the outset, it should be clear that the IMWED proposal cannot be adopted in response to the *FNPRM* as the Commission has failed to provide the public with the advance notice and opportunity to comment required by Section 553 of the Administrative Procedures Act. Indeed, the fact that the Commission did not deem this proposal worthy of being advanced in the *NPRM*, did not adopt it in the *Report and Order*, and then did not advanced it in the subsequent *FNPRM*

[67] See IMWED Comments at 10-11. In response to the *Public Notice* that sought comment on the Initial Coalition Proposal, *see Wireless Telecommunications Bureau Seeks Comment On Proposal to Revise Multichannel Multipoint Distribution Service and the Instructional Television Fixed Service*, RM-10586, Public Notice, DA 02-2732 (rel. Oct. 17, 2002)["*WTB Public Notice*"], an entity called the ITFS Spectrum Development Alliance ("SDA") advanced the same proposal to ban participants in auctions of ITFS spectrum from utilizing funds provided by third parties to purchase spectrum at auction. *See* Comments of the ITFS Spectrum Development Alliance, RM-10586, at 14 (filed Nov. 14, 2002)["SDA WTB PN Comments"]. In response to the *NPRM*, IMWED made the same arguments it makes here. *See* Comments of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, at 7 (filed Sept. 8, 2003)["IMWED NPRM Comments"]. The members of SDA are almost identical to the members of IMWED. *Compare* SDA WTB PN Comments at 1 n. 1 *with* IMWED Comments at 2 n. 2. The only major difference is that the HITN was a member of SDA, but is not a member of IMWED.

certainly would have led the reasonable participant to believe that it was not under consideration by the Commission.[68]

But more importantly, IMWED's proposal should be rejected as totally inconsistent with the Commission's goals for EBS. It may be that the unaccredited, national EBS licensees that are behind IMWED have been able to develop substantial financial reserves from their excess capacity leasing or other activities and believe they can participate in auctions without securing additional funding from other sources. But the record before the Commission clearly establishes that in most cases internally generated funding for educators to participate in auctions will be scarce, and that many educators eligible to participate in future EBS auctions may be hard-pressed to use educational resources to purchase spectrum without assistance from third parties such as supporting foundations, substantial charitable donors, grant-making agencies, and, of course, excess capacity lessees.[69]

Although wrapped in pro-education rhetoric, IMWED's proposal clearly appears to favor the handful of non-profit entities (such as its members) that have amassed substantial financial gains from the leasing of excess capacity on EBS facilities licensed two decades ago. WCA, along with the leading EBS representatives, NIA and CTN, have consistently made clear in this proceeding that there is no reasoned policy basis to suggest that non-profit entities with spare

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[68] Indeed, it is worth noting that IMWED did not petition for reconsideration of the Commission's refusal in the *Report and Order* to adopt its proposal.

[69] *See* Coalition NPRM Reply Comments at 88; Comments of the Archdiocese of Los Angeles, WT Docket No. 03-66, at 2 (filed Sept. 8, 2003)("Without [lease] revenues and technical assistance from our commercial partner, the Archdiocese would not be able to implement its technology plans and would be forced to eliminate wireless instructional technology from its schools."); Comments of the Archdiocese New York, WT Docket No. 03-66, at 2 (filed Sept. 8, 2003)(increased usage of ITFS "will be possible only if the Archdiocese can develop the commercial partnerships that will produce both needed revenue and access to new technologies that otherwise would be too expensive for the Archdiocese to acquire on its own."); Reply Comments of WCA, NIA, and CTN, RM-10586, at 39 (filed Nov. 29, 2002)["Coalition PN Reply Comments"].

funding available for bidding should generally prevail in auctions over all others.[70] IMWED has articulated no basis to suggest that educators relying on funding from third parties would operate their EBS stations in a less educationally-useful manner than entities that have bid using solely their own funds.[71] Indeed, one could argue that an EBS licensee that has squirreled away excess capacity lease revenues to create auction "war chests" of available funds, rather than spending those revenues in support of its educational activities, is a less qualified entity when compared to universities, colleges or local school districts that have utilized excess capacity leasing revenue to support ongoing educational activities. As NIA and CTN have previously noted:

> from an educational perspective, it may well be that bidders on ITFS spectrum who are able to work with others to assemble third-party funds – whether they be from a foundation or other major donor through a grant or contribution, or an investment by a commercial operator interested in future collaboration under an excess capacity lease -- will be able to preserve their operating funds and be in a stronger position to provide valuable educational services on the channels they successfully obtain at auction.[72]

Similarly, allowing an EBS bidder to use third party funds from prospective excess capacity users should not skew the bidding process in such a way as to result in a winning bidder that is any less likely to utilize the spectrum effectively. Indeed, logically, the existence of a pre-arranged excess capacity lease probably would ensure a more timely and efficient activation of

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[70] *See* Coalition NPRM Reply Comments at 87-90; Coalition PN Reply Comments at 39.

[71] IMWED suggests that its proposal will avoid situations in which an entity proposing to utilize the spectrum for purely educational purposes is at an auction disadvantage against an applicant that proposes to lease excess capacity to a commercial operator and receives funding of its auction bid from that operator. *See* IMWED Comments at Sec. IV. D. Yet, IMWED's proposal does nothing to address that possibility. IMWED's approach does not advantage those that propose to use the spectrum solely for education. Rather, it advantages only, those that have the internal funding to bid, regardless of how they intend to use the spectrum. Thus, under IMWED's proposal, a national EBS licensee with years of leasing revenue in the bank could readily outbid a local educator and then turn around and lease the excess capacity to a commercial operator.

[72] Coalition NPRM Reply Comments at 88-89.

both commercial and educational service on the channels. Such effective utilization is, after all, one of the Commission's major goals for the auction process and should be encouraged.[73]

Moreover, a rule prohibiting certain types of funding for auction bidders would be difficult to articulate and enforce. In previously addressing IMWED's proposal, the Coalition asked:

> Where is the line drawn between what is "internal" funding and what is "third party" funding? For most educators, funding comes from a variety of sources, some of which may be clearly "internal" (such as appropriated tax proceeds going to a school district), but some of which are not so clearly "internal" or "third party" (such as revenues from vending machines in school cafeterias, or revenues from leasing rooftop space to cellular companies, or revenues from the PTA). Further, at what point does funding that might have been paid to an ITFS licensee at an earlier time under an already existing ITFS capacity agreement lose its "third party" status and become available for supporting an auction bid? What about funds earned previously from or donated by some other source? Can a charitable contribution, or a government grant, or a foundation grant, given recently but without regard to auction participation, become the bidder's internal funds for the purpose of the auction? If so, given that dollars are fungible, what happens if money coming from a "third party" source is used for traditional instruction (such as buying textbooks or paying teachers' salaries), thus freeing other "internal" funding for auction participation?[74]

That IMWED has not even attempted to answer those pertinent questions speaks volumes about the difficulties the Commission will face if it attempts to implement IMWED's proposal.

The Commission need not, and should not, go down this road. There is no basis related to any valid regulatory goal for the EBS service to regulate what funds are used for bidding

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[73] It is for this reason that WCA must take issue with the proposal by several smaller industry participants that EBS licensees be given bidding credits of at lease 50% if they have not leased excess capacity. *See* SpeedNet Comments at 3; DBC Comments at 3. Given the Commission's long-standing acknowledgement in the secondary markets proceedings generally, and in EBS-related proceedings going back to 1983 specifically, that the most efficient spectrum utilization occurs when excess capacity of spectrum is leased, it makes little sense for the Commission to afford an auction benefit to those not engaged in leasing (and, presumably, bar such entities from leasing in the future absent payment of an unjust enrichment penalty).

[74] Coalition NPRM Reply Comments at 89-90.

purposes. And there is no reason for the Commission to favor one potential licensee over another, based on the sources of its auction bid funding.

4. The Commission Must Move Carefully In Implementing Its Proposal To Permit Licensees To Return Their Licenses Prior To Auction In Exchange For Bidding Credits Or Other Benefits.

As WCA explained in its Comments, it generally is not opposed to the Commission's proposal that licensees be permitted either to return all of their spectrum for reauction in exchange for bidding credits or to return their LBS/UBS authorizations in exchange for reimbursements by the LBS/UBS auction winners of the licensees costs in migrating its present operations to the MBS.[75] However, care must be taken to assure that these proposals are implemented in a manner that does not undermine the Commission's regulatory goals in this proceeding. Thus, for example, there is no disagreement in this proceeding that under no circumstances should BRS/EBS licensees be permitted to use the availability of bidding credits to avoid their obligations under any spectrum leases they have with lessees.[76]

Unfortunately, WCA must oppose Consolidated Telecom's suggestion that the Commission award 12-18 MHz of MBS spectrum to any licensee that turns in its LBS/UBS spectrum in exchange for financial assistance when migrating to the MBS.[77] The problem here is obvious – since the MBS is fixed at a total of 42 MHz in every market and each of the A, B, C, D, E and F channel groups is entitled to one MBC channel, it is impossible to award varying amounts of MBS spectrum to individual licensees, and it is equally impossible to accommodate

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[75] *See* WCA Comments at 18. In its comments, Clearwire proposed that a licensee that is stripped of its license for failure to demonstrate substantial service would be entitled to bidding credits. *See* Clearwire Comments at 9. WCA understands, however, that Clearwire does not intend to pursue this proposal, and thus WCA will not address it here.

[76] *See* WCA Comments at 22; Nextel Comments at 7; Sprint Comments at 5.

[77] *See* Consolidated Telecom Comments at 6.

all migrating licensees with 12-18 MHz of spectrum each without depleting the spectrum in the spectrum in the MBS. It therefore is hardly surprising that Consolidated Telecom offers no explanation as to how its proposal can possibly work. Moreover, the relief requested is totally unnecessary. The financial assistance proposed in the *FNPRM* includes support for conversion of analog BRS/EBS facilities to digital technology, so that any licensee currently using analog technology on its four channels will be at least as well off with a 6 MHz channel in the UBS transmitting digitally compressed video programming.[78] Significantly, not one party to this proceeding has opposed the Commission's proposal to provide for reimbursement of the costs of digitization under these circumstances, and it clearly should be adopted. Accordingly, it is neither prudent nor necessary to award those licensees that choose to migrate to the MBS any more than the single channel they are entitled to under the current bandplan.

5. The Commission Should Retain Its Current Rules Denying Bidding Credits In EBS Auctions.

WCA agrees with NIA and CTN that "traditional auction concepts supporting the bids of so-called designated entities have no proper application in this context" and thus joins with them in opposing the issuance of bidding credits to any EBS auction participants.[79] The Commission clearly has substantial discretion under Section 309(j) in developing approaches to assisting designated entities and is under no obligation to issue bidding credits here. Indeed, when the Commission first established rules to govern EBS auctions barely five years ago, the Commission expressly recognized that it would be inappropriate to issue bidding credits to any

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[78] *See FNPRM*, 19 FCC Rcd at 14273, 14280, and 14281 ¶¶ 290, 314 and 316.

[79] NIA/CTN Comments at 15 (opposing award of bidding credits for designated entities). As noted *supra* note 60, WCA must take issue with the proposal by several smaller industry participants that EBS licensees be given bidding credits of at lease 50% if they have not leased excess capacity because such approach would necessarily yield less efficient use of the spectrum.

EBS auction participants[80] and Section 73.5007 of the Commission's Rules, which formerly governed EBS auctions, did not provide for either small business or new entrant bidding credits in EBS auctions.[81]

Those who advocate the use of small business bidding credits fail to acknowledge the special nature of EBS. When the Commission decided not to apply traditional wireless small business bidding credits or the new "new entrant" broadcast bidding credits to EBS auctions, the Commission announced that "we believe that any bidding credit or other special measures adopted for [EBS] auctions should reflect the nature and purpose of this instructional service" and cited to the then-existing point system utilized to select from amongst mutually-exclusive EBS applicants as the type of factors that would be relevant.[82] Under that system, it was accredited educators, local educational entities, applicants seeking no more than four channels in a market, applicants proposing to maximize educational programming and applicants proposing to serve the most students that received additional points.[83] Although WCA agrees with NIA/CTN that no bidding credits should be adopted here, if the Commission is disposed to giving bidding credits, then it should adopt a system that promotes educational objectives.

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[80] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings*, Memorandum Opinion and Order, 14 FCC Rcd 8724, 8767 (1999)["*ITFS Auction MO&O*"].

[81] *See* 47 C.F.R. § 73.5007 (2003).

[82] *See ITFS Auction MO&O*, 14 FCC Rcd at 8767. It is surprising that the discussion of bidding credits in Paragraphs 282-88 of the *FNRPM* does not even acknowledge that the Commission has previously rejected the use of bidding credits in EBS auctions. In any event, the record developed in response to the *FNPRM* is clear that bidding credits have no place in any EBS auction structure.

[83] *See Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, Third Report and Order, 4 FCC Rcd 4830 (1989); *Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service*, Second Report and Order, 101 FCC 2d 50 (1985).

The fundamental flaw in the proposal advanced by IMWED that the Commission give bidding credits to small businesses is that it in no way advances the educational nature of EBS.[84] Under IMWED's proposal, for example, a small not-for-profit corporation that is not accredited by any educational organization and that has no connection whatsoever to the Washington, DC area would be entitled to an auction advantage over any of the major universities located in the Washington, DC metropolitan area. While that result may be good for those associated with the not-for-profit corporation, one would be hard pressed to say that the public interest in education will be advanced by handicapping local universities and other large educational institutions during the bidding process.

D. The Commission Should Adopt The Proposed Treatment Of Grandfathered E And F Group EBS Licensees And BRS Lottery Winners With Overlapping Protected Service Areas Advocated By WCA, NIA/CTN And Others.

In response to the *FNPRM*'s call for comment on the future treatment of grandfathered E and F Group EBS licensees and those BRS lottery winners that have overlapping cochannel protected service areas, WCA urged the Commission to adopt the proposal that WCA, NIA and CTN had advanced in response to the *NPRM*.[85] Specifically, WCA proposed that in those cases where the former protected service area of a grandfathered E or F group EBS licensee overlaps that of a cochannel BRS station and the parties are unable to agree to a voluntary designation of service area boundaries, the Commission should grant the grandfathered EBS station and

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[84] IMWED Comments at 12 (proposing that current bidding credit systems for designated entities be used in future BRS/EBS auctions); SpeedNet Comments at 2 (recommending use of existing bidding credits be used, but that instead of measuring the revenues of the applicant, the Commission "look to the revenues of any entity with which the school or non-profit organization holds any agreement to use spectrum won in the auction," using the attribution rules currently in place in Part 1 of the Commission's rules).

[85] *See* WCA Comments at 26-28.

cochannel BRS station exclusive GSAs in accordance with the new rules designed for "splitting the football" and that the Commission eliminate its current policy of restricting technical changes by grandfathered E and F group EBS stations.

The vast majority of those addressing the issue, including NIA/CTN, all have proposed solutions similar to that advanced by WCA.[86] Indeed, the only opposition comes, not surprisingly, from NY3G Partnership.[87] WCA can certainly appreciate that this winner of a 1980s vintage lottery wants to garner a GSA covering as much of the New York City metropolitan area as it possibly can. However, it is worth noting that under the Commission rules applicable at the time, NY3G's predecessor in interest could only secure a BRS license by designing its station to face west from the Empire State Building, that application of the new rules for creating GSAs would yield NY3G a GSA that is almost identical in size and shape to its currently authorized service area, and that this GSA would cover a population in excess of 8 million residents in New York and New Jersey.[88] Yet, the comments submitted by the E group BRS licensee in New York, illustrate that, even with a much more constrained GSA than NY3G would have, advanced wireless communications services can be successfully provided under the new BRS/EBS rules.[89] As such, the record overwhelmingly supports the adoption of the proposals advanced by WCA and NIA/CTN, among others, for addressing the licensing of

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[86] *See* NIA/CTN Comments at 5, Comments of Trans Video Communications, WT Docket No. 03-66, at 17 (filed Jan. 10, 2005); Miami-Dade Comments at 3-5; Comments of Red New York E Partnership, WT Docket No. 03-66 at 5-6 (filed Jan. 10, 2005)["Red NY Comments"].

[87] *See* NY3G Partnership Comments at 17-20.

[88] *See* NIA/CTN Comments at Ex. A Fig. 3.

[89] *See* Red NY Comments at 2-6.

grandfathered EBS E and F Group licensees and those BRS lottery winners with overlapping protected service areas.

E. The Commission Must Preserve the Rights Of Existing Commercial EBS Licensees And Pending Commercial EBS Applicants.

In response to the *FNPRM*'s solicitation of proposals regarding the future of Section 27.1201(a) of the Rules governing commercial licensing of EBS channels, WCA proposed that the Commission preserve the rights of commercial entities who either have already licensed EBS channels or have applications pending for EBS channels filed prior to the adoption of new rules in response to the *FNPRM* and that thereafter commercial EBS stations grandfathered under this proposal be reclassified as BRS stations.[90] Similar proposals were advanced by several other commenting parties.[91]

One party has suggested that the Commission confirm that modifications to the facilities authorized under these grandfathered licenses will be permitted.[92] WCA agrees indeed, the Commission should make clear that grandfathered commercial EBS licensees will be governed under the same geographic licensing regulatory regime as any other licensee under the new BRS/EBS rules. The Commission has never subjected these licensees to any technical rules different from other licensees, and there is certainly no reason to start now.

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[90] *See* WCA Comments at 30-31.

[91] *See* HITN Comments at 10; Consolidated Telecom Comments at 7; NIA/CTN Comments at 7.

[92] *See* Consolidated Telecom Comments at 7. Consolidated Telecom also urges the Commission to confirm that transfers of control over grandfathered commercial EBS licensees will be permitted. While WCA believes that would be implicit, certainly WCA would not object to any such clarification.

Two participants have suggested that the Commission resume accepting applications for new commercial EBS facilities.[93] Clearwire advances a compelling argument that the exclusive right to apply for vacant EBS spectrum was among the bundle of rights awarded to BRS BTA auction winners and cannot be lightly eliminated.[94] Thus, while Choice limits its proposal for retention of commercial EBS licensing to "opt-out markets" (presumably referring to markets where a multichannel video programming distributor is exempted from the transition), the argument advanced by Clearwire suggests that there is no rational basis for distinguishing among BRS BTA authorization holders.

However, while WCA is sympathetic to Clearwire's position, Clearwire's proposal for full retention of the right of BRS BTA holders to secure vacant EBS spectrum is difficult to square with the Commission's proposal to auction EBS white space. Simply put, in the post-white space auction, Clearwire's proposal begs the question of which auction winner would have the right to use vacant EBS spectrum – the white space auction winner or the BRS BTA authorization holder? WCA submits that there is a way to avoid this dilemma in a manner that is fundamentally fair to BRS BTA authorization holders and will not undermine the EBS white space auction. Simply put, the solution is to afford BRS BTA authorization holders one last opportunity to apply for vacant EBS spectrum under the circumstances set forth in Section 27.1201(c) before the Commission conducts the EBS white space auction.[95] In this manner,

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[93] *See* Clearwire Comments at 21-23; Comments of Choice Communications, WT Docket No. 03-66, at 2 (filed Jan. 10, 2005)["Choice Comments"].

[94] *See* Clearwire Comments at 21-23.

[95] Clearwire contends that it "cannot determine whether commercial ITFS opportunities exist in its BTAs until the Commission evaluates its inventory and publicly announces the vacant EBS spectrum. *Id.* at 22. Quite frankly, WCA does not believe that such a delay is necessary. ULS contains all of the information necessary for a BTA BRS authorization holder to identify opportunities to apply for commercial EBS authorizations. The Commission has

BRS BTA authorization holders will have a fair opportunity to take advantage of the rights purchased at auction, while those who participate in the subsequent EBS white space auction will know exactly what EBS spectrum is licensed to commercial interests.

F. The Record Supports Calculating BRS Regulatory Fees Based On The Amount Of Spectrum Covered By A License And The Population Of The Authorized Service Areas.

In its Comments, WCA urged the Commission to adopt the proposal advanced in the *FNPRM* to allocating the regulatory fee burden among BRS licensees based on MHz/pops.[96] That approach was supported by several others.[97]

Indeed, the only participant to advocate another mechanism for allocating the regulatory burden among BRS licensees was the Grand Wireless Company, Inc. - Michigan ("Grand Wireless"). Grand Wireless is concerned that under the current system, regulatory fees unduly burden rural licensees.[98] Grand Wireless proposes to address the problem through the adoption of a sliding scale of fees based on population similar to that used for broadcast television

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never before conducted an inventory along the lines proposed by Clearwire, and yet eligibles have been able to readily secure commercial EBS authorizations.

[96] *See* WCA Comments at 31-33. WCA also expressed support for the Commission's decision not to subject EBS licensees to regulatory fees, a view that was shared by all of those commenting on the subject. *See id.* at 31; HITN Comments at 11-12; NIA/CTN Comments at 19-20. However, WCA must stress that, consistent with precedent, the Commission must recover its costs of regulating EBS licensees by allocating such costs on a proportional basis across all fee categories, so as to not unduly impact BRS licensees or any other specific category of fee payers. *See* WCA Comments at 31.

[97] *See* Choice Comments at 2; Nextel Comments at 10-12. WCA noted that the Commission's intent to impose regulatory fees based on the population within a given licensee's GSA reinforces WCA's arguments in its pending Petition for Partial Reconsideration of the *Report and Order* that it is essential for the rules to allow a licensee and the Commission to readily and unambiguously ascertain the licensee's GSA boundaries. *See* WCA Comments at 33. Nextel expressed a similar concern, and proposed that "[u]nless better GSA definitions exist, the Commission should retain the call-sign based regulatory fee assessment." Nextel Comments at 12.

[98] *See* GWM Comments at 2.

stations.[99] While WCA agrees with Grand Wireless's objective, it submits that using a MHz/pop formula is a superior approach. First, it is more narrowly tailored than the broadcast television approach, which creates just five categories and fits all stations into one of those rather broad ranges. In contrast, WCA's approach is based on the exact population within the service area, not a range. Second, unlike WCA's approach, Grand Wireless does not address that different licensees are authorized to utilize different amounts of spectrum. Indeed, one of the greatest inequities of the current system is that a licensee of a single 6 MHz usually pays the same regulatory fees as the licensee of a 24 MHz channel group, since both are generally covered by a single call sign.

G. The Record Overwhelmingly Supports Adopting WCA's Proposals For Licensing BRS/EBS Spectrum In The Gulf Of Mexico.

In its Comments in response to the *FNRPM* regarding licensing of BRS/EBS spectrum in the Gulf of Mexico, WCA advanced two fundamental proposals. The record clearly supports adoption of both.

1. There Is No Support In The Record For Determining How Much Spectrum Within The Gulf Service Area Should Be Auctioned Or For Scheduling Such An Auction.

First, consistent with the approach it had advocated in response to the *NPRM*, WCA urged the Commission to refrain from determining how much spectrum should be licensed within the Gulf Service Area and to refrain from scheduling any auction unless and until there was a demonstrable interest in utilizing Gulf of Mexico-based facilities.[100] The *NPRM* itself recognized that the Commission has insufficient data "to resolve issues concerning the amount of

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[99] *Id.*

[100] *See* WCA Comments at 34.

spectrum to license in the Gulf Service Area," and absolutely nothing was submitted in response to the *NPRM* or the *FNPRM* that addresses the issue.[101] Indeed, *since not one person came forward in response to the FNPRM claiming any interest in deploying new facilities within the Gulf Service Area*, the record does not support any licensing at this time.

Refraining from determining how much spectrum to license in the Gulf and when to do so would be fully consistent with the Commission's decision to defer any auction of broadband PCS spectrum in the Gulf. In considering when to auction PCS spectrum in the Gulf under similar circumstances, the Commission concluded that there was no basis in the record for actually licensing PCS in the Gulf despite the adoption of applicable rules.[102] There is no reason to proceed differently here.

2. The Record Overwhelmingly Supports Adoption Of WCA's Proposal For Establishing Boundaries For The Gulf Service Area And For Adjoining Geographic Service Areas.

In its Comments, WCA reiterated a comprehensive proposal first advanced by the Coalition in response to the *NPRM* for establishing the boundaries for operations in the Gulf. That proposal had four essential prongs:

- as proposed in the *Gulf NPRM*, the service area of any Gulf auction winner should exclude the circular 35 mile radius GSAs of any incumbent BRS or EBS licensees, just as the service area awarded to any land-based BRS BTA

[101] *See NPRM*, 18 FCC Rcd at 6762.

[102] *See Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Order on Reconsideration, 18 FCC Rcd 13169, 13183 (2003)["*Gulf CMRS Reconsideration Order*"]("We also reiterate that we find no basis in the record to create a separate PCS Gulf licensee with primary rights in this proceeding. The *Gulf Report and Order* sought only to provide flexibility in cases where carriers in a particular service seek to establish a separate Gulf market. In those cases, we would commence a proceeding to determine whether, based on a service's specific rules, a new Gulf market should be established. In the *Gulf Report and Order*, however, we did not find that a new PCS market should be created. To the contrary, we stated that the lack of support in the record suggests that there is limited interest among PCS carriers in serving offshore facilities in the Gulf.")(footnotes omitted).

auction winner excluded the protected service area of an incumbent pursuant to Section 27.1206(a)(2)) of the Commission's Rules;[103]

- as it has done with respect to BTA-based PCS licenses, the Commission should reaffirm that BRS BTA authorizations for areas bordering the Gulf extend to the boundaries of the counties that comprise the BTA to the full extent of the county boundaries under applicable state law, including areas that are within counties but beyond the coastline;[104]

- as proposed by the Commission in the *Gulf NPRM* and as it has consistently done for other Part 27 flexible use services, the Commission should draw the innermost boundary of a new Gulf Service Area at the limit of the territorial waters of the United States in the Gulf, which is approximately 12 nautical miles from the coastline;[105] and

- the Commission should follow the approach taken regarding cellular service in the Gulf and establish a "Gulf Coastal Zone" that would extend from the boundaries of the GSAs bordering the Gulf to the limit of the territorial waters of the United States (i.e., the inner boundary of the new Gulf Service Area). Within the Gulf Coastal Zone, the holder of either the adjacent GSA authorization or the Gulf Service Area authorization could provide service, so long as it meets the new cochannel interference protection requirements at the other's service area boundary.[106]

WCA's proposed approach was specifically endorsed by BellSouth and Sprint, while Nextel urged both that the Gulf Service Area exclude areas within twelve miles of the shoreline at high mean tide and exclude BRS/EBS GSAs.[107]

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[103] See WCA Comments at 39 (*citing 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, 17 FCC Rcd 8446, 8448-49 (2002)["Gulf NPRM"]).

[104] *See* WCA Comments at 40.

[105] *Id.* at 40-41.

[106] *Id.* at 41. WCA focused its discussion on BTA holders, because it believes in most situations the GSAs of incumbent BRS/EBS licensees will extent beyond the territorial waters and thus there will be no Gulf Coastal Zone. Of course, to the extent that an incumbent BRS/EBS licensee's GSA extends into the Gulf, but not to the boundary of the territorial waters, there is no reason no to apply WCA's proposal.

[107] *See* BellSouth Comments at 16-18; Nextel Comments at 12-13; Sprint Comments at 10-11.

Indeed, the only party to propose an approach not consistent with WCA's was HITN. HITN appears to be proposing that the Gulf Service Area commence 35 miles from the shoreline, that incumbent EBS licensees retain their GSAs extending into the Gulf Coast, and that any area between the existing GSAs and the new Gulf Service Area boundary be considered EBS white space and auctioned.[108] This proposal is ill-conceived, would unnecessarily complicate an already complex interference mitigation problem, and should be rejected.

What is notably missing from HITN's proposal is any suggestion that there is a need for educational operations in any portion of the Gulf of Mexico that might be within 35 miles of the Gulf coastline but which is not within the GSA of an incumbent land-based EBS licensee. It is difficult to envision how an EBS licensee of this white space that would be entirely over water would provide an educational service, and to whom that service would be provided. While WCA certainly believes that there will be valuable communications services that can be provided by land-based BRS/EBS licensees well into the Gulf, the lack of any specific proposals for water-based commercial or educational services is telling.

Moreover, HITN does not address the thorny problems of interference protection raised by operations in the Gulf. While WCA's proposal establishes a clear priority for land-based operations over the new Gulf Service Area, HITN does not address the potential for interference from its proposed water-based operations to cochannel EBS operations on land. It will be difficult enough to mitigate interference between any new Gulf Service Area operations and those that are land-based. Adoption of HITN's proposal and the introduction of new EBS white space licensees within the Gulf of Mexico will only complicate that task, and will do so

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[108] *See* HITN Comments at 11.

unnecessarily.[109] The record before the Commission illustrates that the last thing the Commission should do is auction off EBS white space within the Gulf in a manner that subjects land-based operations to interference.

3. WCA's Proposed Rules For Governing Operations In The Gulf Service Area And In Adjoining Geographic Service Areas Were Once Again Unopposed.

Just as it did in response to the *NPRM*, in response to the *FNPRM* WCA proposed a comprehensive set of rules for governing operations both within the Gulf Service Area and in adjoining land-based GSAs.[110] As WCA explained, although WCA does not believe it is appropriate to license any operations in the Gulf of Mexico:

> [t]he Commission should proceed with adoption of rules to govern operations in the Gulf and the land areas near the Gulf. Now that the Commission has created a Gulf BTA-like service area, such rules are essential to provide land-based licensees with the certainty they need to design and implement wireless broadband systems. As the Commission crafts a regulatory regime to govern the operation of facilities in the Gulf, it is essential that the Commission both fully protect land-based operations and not hamper the deployment of land-based systems designed to serve the significant population centers that are within either the GSAs afforded incumbent BRS/EBS licensees or holders of the BRS BTA authorizations auctioned in 1996.[111]

WCA was not alone in expressing that sentiment. BellSouth also advised the Commission that it "should adopt rules that provide incumbent land-based BRS licensees with assurances they need to plan future build-out."[112] The rules proposed by WCA are designed to assure that land-based operations are protected from interference caused by Gulf operations. The

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[109] If the Commission does entertain HITN's proposal, then its rules should treat any water-based EBS white space operations the same as it treats those of the Gulf Service Area licensee under WCA's proposal.

[110] *See* WCA Comments at 38-43.

[111] *Id.* at 35.

[112] BellSouth Comments at 16.

specifics need not be repeated here, as no other participant in this proceeding has advanced any alternatives. Thus, WCA urges the Commission to adopt WCA's proposed approach to governing operations in and near the Gulf.

III. CONCLUSION.

The comments submitted in response to the *FNPRM* illustrate that, if the Commission proceeds with appropriate care and respect for marketplace forces, the Commission can build on the successful components of the *Report and Order* and move the 2.5 GHz band towards widespread utilization. To advance that objective, WCA urges the Commission to adopt promptly the proposals advanced in its Comments and herein.

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