

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Amendment of Part 2 of the Commission's)
Rules to Allocate Spectrum Below 3 GHz)
for Mobile and Fixed Services to Support) ET Docket No. 00-258
the Introduction of New Advanced)
Wireless Services, including Third)
Generation Wireless Systems)

COMMENTS OF SIOUX VALLEY WIRELESS

Sioux Valley Wireless ("SVW"), a provider of wireless broadband and multichannel video service to consumers in rural areas in and around Sioux Falls, South Dakota, hereby submits the following comments in support of the Petition for Reconsideration filed by the Wireless Communications Association International, Inc. ("WCA") with regard to the Commission's *Ninth Report and Order* in the proceeding referenced above.¹

At a minimum, grant of the WCA Petition is necessary to remedy a fatal flaw in the Commission's new rules for relocation of operations on Broadband Radio Service ("BRS") channels 1 and 2, *i.e.*, the Commission's failure to provide BRS operators full reimbursement for their relocation costs. Given that we already are being forced to uproot our BRS channel 1 and 2 operations from their current home at 2150-2162

¹ See *Petition for Reconsideration filed by Wireless Communications Ass'n Int'l*, ET Docket No. 00-258 (filed June 23, 2006) ("WCA Petition").

MHz, this is a classic case of adding insult to injury -- with no sensible public interest justification to boot.²

By now the Commission is well aware that the relocation process will impose substantial costs on SVW and other smaller BRS operators who cannot afford to devote their limited financial and personnel resources to the problem.³ Thus it is baffling that the Commission has decided not to require that BRS operators be reimbursed for their internal costs associated with relocation.⁴ No less puzzling is the Commission's rationale for its decision: while on the one hand the Commission acknowledges that BRS operations are "significantly different" than the point-to-point microwave facilities its relocation policies were originally designed for,⁵ it cites

² SVW's interest in this matter is well established. Through the FCC's MDS BTA auction and a series of secondary market transactions, SVW has either licensed or acquired rights to use all available BRS and EBS channels in the Sioux Falls, SD market. In turn, through millions of dollars of investment and sheer perseverance, SVW has developed a fully operational, state-of-the-art BRS/EBS system that uses all 33 BRS/EBS channels (including BRS channels 1 and 2) to provide wireless broadband and multichannel video service to customers in Sioux Falls and surrounding communities in South Dakota, Iowa, Nebraska and Minnesota. The system's expansion has been substantial – we presently have over 5,800 customers, nearly 2,300 of whom subscribe to our wireless broadband service. Importantly, many of our customers live in areas that have little or no broadband service available to them. See Reply Comments of Sioux Valley Wireless, ET Docket No. 00-258, at 2-3 (filed Dec. 12, 2005) ("SVW Reply Comments").

³ See WCA Petition at 17 and at n. 50; SVW Reply Comments at 4 ("The burden of [relocation costs] on a small company like SVW are self-evident, particularly when one considers the financial and logistical difficulties associated with changing out customer premises equipment at thousands of customer locations with limited staff who are already fully occupied with the day-to-day operation of our business.").

⁴ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Ninth Report and Order and Order, 21 FCC Rcd 4473, 4488 (2006) ("*Ninth Report and Order*").

⁵ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services*,

the point-to-point model as its basis for denying SVW and others reimbursement of their internal relocation costs.⁶

The Commission's first instinct was correct: as pointed out repeatedly in WCA's filings throughout this proceeding, BRS relocation *is* fundamentally different than point-to-point microwave relocation and thus warrants different rules for reimbursement of internal relocation costs. Furthermore, the new BRS relocation rules assume (correctly) that BRS operators will have primary responsibility for completing their own relocation.⁷ Indeed, in the *Ninth Report and Order* the Commission states that it expects BRS operators to take "an active role in the actual relocation of [their] facilities, including selecting and deploying comparable facilities . . ."⁸ Of course, a BRS operator really has no choice but to assume control over its own relocation – to do otherwise would leave the operator's customer goodwill in the hands of an AWS licensee who, as a potential competitor, has little incentive to make the BRS operator's customers happy.⁹

including Third Generation Wireless Systems, Eighth Report and Order, Fifth Notice of Proposed Rulemaking and Order, 20 FCC Rcd 15866, 15890 (2005) ("*Fifth NPRM*").

⁶ *Ninth Report and Order*, 21 FCC Rcd at 4488 n. 80.

⁷ For example, under newly-adopted Section 27.1251(a), a BRS licensee is not required to give the relevant AWS licensee access to customer premises. The rule thus properly recognizes the need to fully protect a BRS operator's relationships with its customers, and effectively gives the BRS operator responsibility for completing all relocation-related tasks at the home of each customer.

⁸ *Ninth Report and Order*, 21 FCC Rcd at 4485.

⁹ At the same time, we agree that the Commission must do more to protect BRS operators from potential anticompetitive behavior by the AWS licensees who will be displacing them from the 2150-2162 MHz band. SVW therefore fully supports WCA's call for rules that give BRS channel 1 and 2 licensees a right to self-relocation and, in cases where mandatory relocation negotiations have failed, a right to assume responsibility for taking all steps

That being the case, it hardly seems fair for the Commission to expect BRS operators to effectuate their own relocation without reimbursing them for doing so. Unfortunately, that is precisely what will happen if internal relocation costs remain ineligible for reimbursement. The Commission rationalizes its decision on the incorrect assumption that a BRS operator's internal relocation costs "are difficult to determine and verify."¹⁰ Significantly, the Commission fails to cite any factual support for that proposition – indeed, identification and allocation of labor, overhead and other internal costs is a standard business procedure which SVW and other BRS operators do every day, and there is no reason why it cannot be done for BRS relocation. Notably, the Commission already permits relocated 800 MHz licensees to recover their internal relocation costs, further undercutting the idea that internal BRS relocation costs cannot be properly verified and reimbursed.¹¹

For similar reasons, under no circumstances should a BRS incumbent be required to pay its own relocation costs in advance and then seek reimbursement from an AWS licensee later.¹² If the Commission truly intends to "minimize the economic impact" of relocation on BRS operators,¹³ then there is no reason for any BRS operator to be out of pocket for its own relocation costs at any time. Again, for SVW this is no small matter – any rule that requires us to pay upfront the costs of

necessary to complete their involuntary relocation to their replacement spectrum. See WCA Petition at 12-15, 19-22.

¹⁰ See *Ninth Report and Order*, 21 FCC Rcd at 4488.

¹¹ See WCA Petition at 18.

¹² See *id.* at 18-19.

¹³ *Fifth NPRM*, 20 FCC Rcd at 15875.

relocating thousands of subscribers would seriously compromise our ability to fund our day-to-day operations, which only benefits our competitors and harms our customers. The involuntary relocation procedures recommended by WCA will eliminate this problem in a manner consistent with what the Commission has done before – as WCA points out, 800 MHz licensees are not required to advance the funds for their own relocation, and there is no reason for the Commission to treat BRS incumbents any differently.¹⁴ While the Commission suggests that the difference lies in the fact that the relocated incumbents at 800 MHz are public safety licensees, relocated non-public safety 800 MHz licensees are entitled to prepayment of their relocation costs as well. Again, it is difficult to see why BRS incumbents are not afforded the same treatment.

It also is absolutely essential that the Commission remove any restriction on our ability to increase our system's throughput before we are moved to the relocation spectrum for BRS channels 1 and 2.¹⁵ There cannot be any serious dispute that denying a BRS operator the right to increase throughput in response to customer demand for up to 15 years will make it virtually impossible for that operator to survive in the marketplace, particularly now that consumers want more speed of connectivity, not less.¹⁶ Unfortunately, by excluding upgrades in throughput from the "comparable facilities" that must be provided to BRS licensees upon relocation, the Commission has cornered BRS operators into the proverbial Hobson's choice:

¹⁴ See WCA Petition at 19.

¹⁵ See *id.* at 7-11.

¹⁶ See *id.* at 9-10.

they can either (1) invest in increasing system throughput in the 2150-2162 MHz band, only to see that investment stranded once they are migrated to the BRS relocation spectrum, or (2) do nothing, thus guaranteeing that most if not all of their customers will defect to cable modem and DSL providers who can increase throughput at will. Hence, per WCA's request, the Commission should amend its rules to include increases in throughput within its definition of the "comparable facilities" that must be provided to BRS operators in the BRS replacement spectrum.

Finally, consistent with the sentiments expressed about the *Ninth Report and Order* by Commissioner Adelstein, the Commission should give BRS channel 1 and 2 licensees a right of self-relocation.¹⁷ In addition to promoting expedited clearance of the 2150-2162 MHz band, a right of self-relocation will give BRS operators an opportunity to minimize the risk of stranded investment – instead of investing in increases in throughput that might be left stranded in the 2150-2162 MHz band, a BRS operator could elect to self-relocate to the BRS relocation spectrum and increase throughput there.¹⁸ While in the latter case the BRS operator would be required to bear the cost of the increased throughput, that is a far better alternative than making the same investment at 2150-2162 MHz only to lose it upon relocation.

In sum, Commissioner Adelstein put it best: "[W]ireless solutions are essential for rural America. . . Spectrum is the lifeblood of so many of the new wireless services

¹⁷ See *Ninth Report and Order*, Separate Statement of Commissioner Jonathan S. Adelstein, 21 FCC Rcd at 4560 ("I do have one lingering concern, though, because we were unable to adopt self-relocation procedures that would have allowed BRS operators to initiate involuntary relocation after some type of waiting period. Self-relocation procedures have proven to be a useful tool in promoting timely and prompt spectrum relocation")

¹⁸ See WCA Petition at 12-15.

and innovations that can light up the hardest areas to serve.”¹⁹ In their current form, however, the Commission’s rules for BRS relocation will only make it more difficult for SVW and other BRS operators to realize Commissioner Adelstein’s vision for rural America. That cannot be what the Commission hoped to accomplish in this proceeding. Accordingly, for the reasons set forth above, SVW urges the Commission to put this matter back on the right track and grant the WCA Petition in its entirety.

Respectfully submitted,

SIOUX VALLEY WIRELESS

By: /s/ Joel Brick
Joel Brick
Technical Director
P.O. Box 20
Colman, South Dakota 57017
(605) 256-1648

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¹⁹ Statement of Commissioner Jonathan S. Adelstein re: *Facilitating the Provision of Spectrum-Based Services to Rural America and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services* (July 8, 2004).