

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS  
APPROVING IN PART, DISSENTING IN PART**

Re: *Transforming the 2.5 GHz Band*, WT Docket No. 18-120

“Today our schools and colleges face a crisis of appalling proportions in terms of deficits in dollars, teachers, classrooms and services. American progress and even our national survival is directly dependent on what we as a nation do now....”

Those words were written in 1960 by President Kennedy, and unfortunately, they still ring true today. Our children’s education is one of the most important investments that we as a society can make. President Kennedy saw the potential of television spectrum, calling it “a device which has the potential to teach more things to more people in less time than anything yet devised.” That insight led the FCC to set aside the 2.5 GHz spectrum to support schools and educational programming in 1963. Meanwhile, ARPANET, the precursor to the modern Internet, was just in its embryonic stages. We had no idea what it would someday become or how our world would soon change in dramatic ways. But what we knew then, and what hasn’t changed since, is that we have a duty to ensure that our communications networks serve our students and our schools. As President Kennedy said, our national survival depends on it.

Today’s Report and Order is a missed opportunity. There’s no question that the EBS program has its flaws and that it doesn’t look quite the way it was envisioned all those years ago. But rather than embracing the positive aspects of the program and improving upon it, we instead set up a regulatory framework that may lead to its ultimate demise. This is a regrettable outcome, and one that could have been avoided.

Like television in the 1960s, the internet today has the potential to teach more things to more people than ever before. Similarly, the EBS program has grown from a program for closed-circuit educational television to a nationwide broadband program for schools and other educational institutions. EBS licensees use 2.5 GHz spectrum to teach online classes and provide hotspots to students. They’re using it to keep students connected while they’re in the hospital or when extreme weather events keep them from attending class. They’re using it to build out their own networks, such as Northern Michigan University’s WiMAX network, which provides broadband access to rural students in the Upper Peninsula. It’s not what we imagined in 1963, but only because before the internet these kinds of programs couldn’t be imagined.

Critics of the EBS program suggest that the educational institution licensees should receive little sympathy for today’s decision. These critics point out that, despite several innovative programs, EBS spectrum remains unused in large parts of the country and is usually leased by licensees to commercial entities. But while these facts are indisputable, they don’t tell the whole story. What they fail to account for is the Commission’s role in the lack of EBS licenses in much of the country. As the item grudgingly acknowledges, the Commission suspended the processing of applications for new EBS licenses in 1993. Back then, the Commission claimed that this suspension would be “for a short period of time” and that the agency would “resume accepting applications expeditiously.”<sup>1</sup> The Commission instituted this freeze, not because it believed the spectrum could be put to better use, but to allow it to determine an equitable way to award licenses because the demand for the program was so great. With the exception of a brief window in 1995, however, it has been about a quarter-century since educational institutions could obtain

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<sup>1</sup> See *Amendment of Part 74 of the Commission’s Rules with Regard to the Instructional Television Fixed Service*, Notice of Proposed Rulemaking, 8 FCC Rcd 1275, 1277 para. 9 (1993).

new EBS licenses. And while the Commission has periodically discussed the EBS program, the agency's failure to resume issuance of EBS licenses has created a cloud over the program that is no fault of the licensees.

EBS critics also make a great deal of the fact that most EBS licensees lease their spectrum. But those critics fail to acknowledge that it was the Reagan-era FCC that encouraged licensees to lease their spectrum. Back in 1983, the Commission realized that most EBS licensees – educational institutions with little technical expertise or access to capital – lacked the resources to build out their own facilities, and that they needed additional resources for the service to grow. To quote the agency, “when the amount of money available to public schools is being reduced by taxpayers, expenses for educational technologies ... are usually among the first to be reduced or eliminated.”<sup>2</sup> The Commission therefore approved the leasing of this spectrum to allow licensees to generate revenue that “would widen [the program's] base of support and contribute to the service's ability to withstand a diminution in any one source of funding without being forced to significantly reduce its overall service to the community.”<sup>3</sup>

Indeed, even after the FCC authorized the spectrum for use in wireless broadband, the agency continued to point to the value of lease arrangements in putting the spectrum to use. As the agency stated in its 2004 order: “it is well established that revenue from leasing to commercial interests has, in many instances, effectively funded and financed ... buildout and operations. The Commission has always considered the leasing of excess capacity a legitimate source of funding for the educational mission, and has taken numerous steps over the years to facilitate and encourage these secondary market transactions.”<sup>4</sup>

So it was with the Commission's blessing that most EBS licensees entered into lease arrangements with commercial providers. Nevertheless, a few EBS licensees have built out their own networks and done an outstanding job providing services to their communities. And although most have not built their own networks, many have obtained lease terms that provide benefits for their institutions and communities like those cited earlier.

Thus, the EBS program today may not be what the Commission intended when it first established the program, but it does reflect the broad intent of the agency when it last considered its merits. To quote then-Commissioner Kevin Martin, “Encouraging and supporting education is a crucial value to our society, and that value is reflected in the reservation of spectrum for educational users. While some argue that educational spectrum is currently not being used efficiently, we must remember that this spectrum has been under the cloud of major proposed changes for a number of years.”<sup>5</sup> Given the Commission's

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<sup>2</sup> See *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations*, 94 F.C.C. 2d 1203, 1218 para. 36 (1983).

<sup>3</sup> *Id.* at 1250 para. 117.

<sup>4</sup> See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14225, para. 157 (2004) (*BRS/EBS R&O* or *BRS/EBS FNPRM*). See also *id.* at 14226 para. 53 (“our ... leasing and secondary market rules for spectrum leasing arrangements are sufficiently flexible to allow market forces to push the ... spectrum towards its highest valued use, and educators will continue to enjoy considerable flexibility to lease their excess capacity spectrum. Further, educators can enter into partnerships with commercial interests to improve the capacity and efficiency of their systems, which in turn could free up more spectrum for commercial operators to work towards the development of ubiquitous broadband.”).

<sup>5</sup> *Id.*, Separate Statement of Commissioner Kevin J. Martin.

failure to address the long-standing freeze on new EBS licenses, it's hard to argue that the cloud was ever fully lifted.

Rather than acknowledging this point, however, the current item dismisses it as ancient history and pushes instead for an approach that will not only result in most of the unassigned spectrum going to commercial providers but also establishes a “one-way ratchet” system by which existing licenses are likely to end up with those same providers.

The Report and Order justifies its approach as necessary to establishing American leadership in 5G and providing service to underserved areas. But this item falls far short of these lofty goals. The order appears likely to result in a windfall of spectrum for current lessors that already control much of the 2.5 GHz spectrum. First, while the item has been revised, the spectrum blocks continue to be sized in a manner that will make it difficult for parties – like educational institutions -- to compete at auction. Moreover, even among such parties, current lessors have a huge advantage because of their superior knowledge of the existing leases, which could significantly affect the valuation of any new overlay licenses. Given the advantage held by current lessors with existing substantial spectrum resources in the 2.5 GHz band, I have doubts that these companies will use any new spectrum for services they weren't already planning to offer, particularly in rural areas.

As for existing licenses, the item dismisses the EBS community's concerns about the impact of removing the educational use requirement and allowing non-educational entities to obtain them. The item says that the licensees will retain their licenses and can always reject any unreasonable offers from would-be lessees. But the item ignores the asymmetrical bargaining power of the parties here. For example, as the Commission acknowledged in its 1983 order, educational institutions have limited resources and technological budgets are often the first to be cut. Suggesting that a local school district and a multi-billion-dollar corporation have equal bargaining power, particularly if existing leases restrict a school district's alternatives through first right of refusal clauses, is simply not credible. Moreover, even those licensees who can theoretically turn down a would-be lessee have limited alternatives. Unfortunately, the situation has not changed much since the 1980s -- most school districts lack access to the resources needed to build out their own networks. And given the existence of long-standing lease arrangements, it's unlikely that an alternative provider will be willing to pick up an existing lease and build out its own network. In effect, current commercial lessees can simply tell an EBS licensee to “take it or leave it.”

Instead of sunseting the EBS program, the Commission could have improved it, as the President's Department of Education recently urged.<sup>6</sup> For example, we could have:

- attached conditions to new licensees for the provision of uncapped low-cost service to educational institutions or students;
- created a Priority Filing Window for educational institutions in rural areas to obtain new licenses where competing applications are unlikely; or
- broken the spectrum blocks into small enough segments that smaller carriers or educational institutions could have had a shot at getting some of this spectrum.

These changes could have encouraged development of 5G and rural services while remaining true to President Kennedy's call to action all those years ago. Instead, we have a lost opportunity and a program that has been fundamentally undermined.

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<sup>6</sup> Letter from Jim Blew, Assistant Secretary for Planning, Evaluation and Policy Development, U.S. Department of Education, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket 18-120, dated June 7, 2019 at 4-5.

For now, the EBS program remains in place and I wish the licensees the best. They do incredible work, and they have my support. But this item leaves me with grave concerns about the future of this program.

Finally, while I disagree with much of the approach taken in this item, I support the item's adoption of a Priority Filing Window for Tribes. I think this is a tremendously beneficial result and should lead to increased broadband availability for this community. I look forward to hearing how these licenses will help address this critical need.

Thanks to WTB for their work on this item.