

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

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	
Commission’s Rules to Facilitate the Provision of)	WT Docket No. 03-66
Fixed and Mobile Broadband Access, Educational)	RM-10586
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	

FIFTH MEMORANDUM OPINION AND ORDER AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: September 8, 2009

Released: September 11, 2009

Comment Date: 15 days after publication in the Federal Register
Reply Comment Date: 25 days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. In this *Fifth Memorandum Opinion and Order*, we grant, in part, two petitions for reconsideration¹ of the Broadband Radio Service (BRS)/Educational Broadband Service (EBS) *Fourth Memorandum Opinion and Order* adopted in 2008.² In the *Third Further Notice of Rulemaking* we tentatively conclude to modify the construction deadline for initial BRS licenses granted after the effective date of the revised rules to provide licensees with four years from license grant to demonstrate substantial service.

2. The first issue we address on reconsideration concerns how the Commission should implement the 15-year term limit for grandfathered EBS leases (*i.e.* leases entered into before January 10, 2005) that it established in the *BRS/EBS Fourth MO&O*. The item adopts an unopposed compromise proposal negotiated between the National EBS Association (NEBSA) – which represents educational interests that hold EBS licenses – and the Wireless Communications Association International, Inc. (WCA) – which represents commercial operators that lease spectrum from EBS licensees.³ Our adoption of the NEBSA/WCA Proposal balances the concerns of both educators and commercial lessees.

¹ Petition for Reconsideration of the Wireless Communications Association International, Inc. (filed Jun. 9, 2008) (WCA Petition); Petition for Partial Reconsideration of Gateway Access Solutions, Inc. (filed Jun. 9, 2008) (Gateway Petition).

² Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Docket No. 03-66, 23 FCC Rcd 5992 (2008) (*BRS/EBS Fourth MO&O*).

³ *Ex Parte* Letter from Todd Gray, National EBS Association, and Paul J. Sinderbrand, Wireless Communications Association International, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Oct. 16, 2008) (continued....)

3. Also on reconsideration, we permit BRS 1 and 2/2A licensees to simultaneously operate, *post-transition*, in the 2.1 GHz band and in the 2.5 GHz band until all of their customers have migrated to the 2.5 GHz band. This determination is consistent with the Commission's decision in the *BRS/EBS Fourth Memorandum Opinion and Order* to permit such simultaneous operation *pre-transition* in order to avoid requiring BRS operators to flash cut subscribers to the new band plan. Finally, in light of our decision adopting the WCA /NEBSA Proposal, we dismiss as moot a motion for stay filed by WCA.⁴

4. In the *Third Further Notice of Proposed Rulemaking*, we tentatively conclude to amend Section 27.14(o) of the Commission's Rules to change the substantial service deadline for BRS licenses granted after the effective date of the rule adopted in this proceeding from May 1, 2011 to four years from the date of initial grant in light of the Wireless Telecommunications Bureau's (Bureau) decision to auction BRS licenses in October 2009.⁵ We also propose other minor revisions to that rule.

II. ISSUES ON RECONSIDERATION

A. Grandfathered EBS Leases

5. *Background.* The Commission established the Instructional Television Fixed Service (ITFS) in the 2500-2690 MHz band in 1963 and later adopted rules for the Multipoint Distribution Service (MDS).⁶ ITFS was generally used for one-way video service for students. MDS was generally used to provide wireless cable service to subscribers.⁷ In 1983, noting that the ITFS was being underutilized, the Commission permitted ITFS licensees to lease excess channel capacity to commercial MDS operators.⁸ In 2004, the Commission renamed ITFS as the Educational Broadband Service (EBS) and MDS as the Broadband Radio Service (BRS).

6. The Commission's policy regarding the length of EBS leases has evolved since it first permitted ITFS (now EBS) licensees to lease excess capacity in 1983. Originally, the Commission's policy prohibited an ITFS licensee from executing a lease agreement with commercial operators that extended beyond the 10-year ITFS license term because such provisions were viewed as inconsistent with

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(NEBSA/WCA *Ex Parte*). We will refer to the proposal contained in the WCA *Ex Parte* as the NEBSA/WCA Proposal.

⁴ Petition for Stay of Wireless Communications Association International, Inc. (filed Jun. 9, 2008) (WCA Stay Request).

⁵ Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009 Comment Sought on Competitive Bidding Procedures for Auction 86, *Public Notice*, AU Docket No. 09-56, 24 FCC Rcd 4605 (WTB 2009) (*Auction Public Notice*).

⁶ See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen Docket No. 80-112 and CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203, 1207-1210 ¶¶ 5-14 (1983).

⁷ See Amendment of Parts 21 and 74 to enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22174, 22175 ¶ 3 (1997) (*Two-Way NPRM*).

⁸ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Gen Docket No. 80-112 and CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983).

the terms of the license.⁹ In 1995, however, the Commission changed its policy to permit an ITFS licensee to enter into a 10-year lease agreement without regard to the duration of the licensee's license term, but required the lease to note that such an extension was contingent on the renewal of the license.¹⁰ In 1998, in the *Two-Way Order*, the Commission again changed its policy and permitted an ITFS licensee, as of the effective date of that order, which was January 25, 1999, to enter into 15-year lease agreement, but continued to require that, to the extent the lease extended beyond the current license term, the lease specify that such an extension be subject to the renewal of the underlying license.¹¹ The Commission also grandfathered existing ITFS excess capacity leases entered into before March 31, 1997.¹² In 2000, in the *Two-Way Order on Further Reconsideration*, the Commission further grandfathered ITFS excess capacity leases entered into before March 31, 1997 that contained an automatic renewal clause that would be effective after March 31, 1997, provided that the total term of the lease did not exceed 15 years.¹³

7. In 2004, in the *BRS/EBS R&O*, the Commission adopted a number of revisions to ITFS and MDS, and renamed ITFS as the Educational Broadband Service (EBS) and MDS as the Broadband Radio Service (BRS).¹⁴ Of particular relevance here, the Commission applied the spectrum leasing rules established in the Secondary Markets proceeding to EBS (formerly ITFS) excess capacity leases for new leases entered into after the effective date of that order (which was January 10, 2005), while grandfathering existing leases under the previous ITFS rules, which limited such leases to a term of no more than fifteen years.¹⁵ In 2006, in the *BRS/EBS 3rd MO&O*, the Commission modified the application of the spectrum leasing rules and policies of the Secondary Markets proceeding to EBS leases,¹⁶ while

⁹ Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd. 2907, 2914 ¶ 38 (1995).

¹⁰ *Id.*

¹¹ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19183-18184 ¶¶ 133-134 (1998) (*Two-Way Order*).

¹² *Two-Way Order*, 13 FCC Rcd at 19181 ¶ 130. *See also* Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd. 12764, 12791 ¶ 59 (2000) (*Two-Way Order on Reconsideration*). The Commission originally declined to grandfather leases subject to automatic renewal after March 31, 1997 because grandfathering these leases could have permitted them to continue in perpetuity under the rules adopted prior to the *Two-Way Order*. The Commission reversed this decision when the petitioners assured the Commission that the leases that would be grandfathered could have a total term of ten years. Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 14566, 14569-14570 ¶ 11 (2000) (*Two-Way Order Further Recon.*).

¹³ *Two-Way Order Further Recon.*, 15 FCC Rcd at 14569-14570 ¶ 11.

¹⁴ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14169, ¶ 6 (2004) (*BRS/EBS R&O*).

¹⁵ *Id.*, 19 FCC Rcd 14165, 14233-14234 ¶¶ 179-180.

¹⁶ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5715 ¶ 266 (2006) (*BRS/EBS Third (continued....)*)

reaffirming that excess capacity leases entered into before January 10, 2005 were grandfathered under the previous ITFS leasing framework.¹⁷

8. In the *BRS/EBS Fourth MO&O* adopted in March 2008, the Commission provided additional clarification regarding grandfathered leases, holding that they “are grandfathered after January 10, 2005 if they have an automatic renewal clause effective after January 10, 2005, only to the extent that such leases do not exceed 15 years in total length (including the automatic renewal period(s)).”¹⁸ The Commission stated that leases executed before January 10, 2005 are limited to a term of 15 years “*from the date of execution.*”¹⁹

9. On June 9, 2008, WCA and Gateway asked the Commission to reconsider its decision in the *BRS/EBS Fourth MO&O* that limited grandfathered excess capacity leases entered into before January 10, 2005 to a term of 15 years, starting from the date of execution.²⁰ C&W Enterprises (C&W),²¹ Clarendon,²² and a Commercial Coalition comprised of Sprint Nextel Corp., Clearwire Corp. (Clearwire), Xanadoo, Inc., NextWave, and WCA²³ support WCA’s petition.

10. WCA contends that the Commission has never required that the term of grandfathered excess capacity leases be measured from the date of execution,²⁴ and has repeatedly approved these excess capacity leases that started beginning at a later date (*e.g.*, when the ITFS application was granted by the Commission, when facilities construction was completed, or when service actually began).²⁵ Moreover, WCA argues that the Commission’s decision in the *BRS/EBS Fourth MO&O* violates the Administrative Procedure Act’s (APA) requirement to provide the public with notice that it intends to

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MO&O). Regarding EBS leases, the Commission stated that although the rules and policies of the Secondary Markets proceeding applied to EBS leases, EBS licensees may enter into an excess capacity lease agreement for 30 years as long as the lease agreement ensures that EBS licensees retain the right to review their educational use requirements at year 15 and every 5 years thereafter. *Id.* at 5716 ¶ 268. The Commission sought to balance the needs of commercial lessees, which might have difficulty obtaining financing if the leases were of too short a duration, with those of EBS licensees that needed a mechanism to ensure that their educational, technological, and spectrum needs would be met. *Id.* The Commission also maintained the existing policy of allowing EBS licensees to afford lessees rights of first refusal relating to renewal of leases, but prohibited the use of automatic renewal. *Id.* at 5716 ¶ 270. The Commission then clarified that the length of EBS excess capacity leases entered into between January 10, 2005 (the effective date of BRS/EBS rules adopted in the *BRS/EBS R&O*) and July 18, 2006 (the effective date of the amended rules under the *BRS/EBS Third MO&O*), was not limited because such EBS excess capacity leases were entered into under the Secondary Markets rules and policies. *Id.* at 5716 ¶ 269.

¹⁷ *Id.* at ¶ 266.

¹⁸ *Id.* at ¶ 136.

¹⁹ *Id.* (emphasis added).

²⁰ See WCA Petition, Gateway Petition.

²¹ Support for Petition for Stay and Petition for Reconsideration of Wireless Communications Association International, Inc., C&W Enterprises, Inc. (filed Jun. 16, 2008).

²² *Ex Parte* Letter from Kemp R. Harshman, Clarendon Foundation to Marlene H. Dortch, Federal Communications Commission (dated May 9, 2008) (Clarendon *Ex Parte* Letter).

²³ *Ex Parte* Letter from Paul J. Sinderbrand, Counsel, WCA to Marlene H. Dortch, Federal Communications Commission (dated May 6, 2008) (Commercial Coalition *Ex Parte* Letter).

²⁴ WCA PFR at 2.

²⁵ *Id.* at 10.

adopt a new rule and an opportunity to comment, and is arbitrary and capricious.²⁶ As such, WCA asks the Commission to withdraw the allegedly incorrect statements that appear in paragraphs 136 and 137 of the *BRS/EBS Fourth MO&O*.²⁷

11. Gateway argues that as a commercial lessee of grandfathered excess capacity leases, it is adversely affected by the Commission's decision in the *BRS/EBS Fourth MO&O*.²⁸ Gateway contends that the Commission's decision is contrary to due process because it deprives the parties of the benefits they negotiated, fails to give due consideration to other contract provisions that might bear on the issue at hand, and undermines current business plans.²⁹ Moreover, Gateway asserts that the Commission's decision in the *BRS/EBS Fourth MO&O* contravenes the Commission's longstanding refusal to inject itself into contractual matters and could discourage investment, retard broadband deployment, and encourage speculative activities.³⁰

12. The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance (IMWED),³¹ the Hispanic Information and Telecommunications Network, Inc. (HITN),³² the National EBS Association (NEBSA),³³ and Texas State Technical College – Sweetwater (TSTC)³⁴ opposed the petitions for reconsideration.³⁵ These parties argue that permitting a lease to contain an unknown start date potentially enables lessees to warehouse spectrum; ties up EBS licenses for decades; prevents deployment; limits the ability of EBS licensees to develop a partnership with a commercial operator who can actually construct the system; prevents EBS licensees/lessors from periodically reviewing their leases to determine if their educational needs are being met; and undermines the Commission's goal of promoting the broader use of spectrum in the public interest.³⁶ Moreover, NEBSA reports that in most cases, EBS licensees have yet to receive, under their leases, any educational services or money to support their educational endeavors.³⁷

13. Notwithstanding the disagreements between educational licensees and commercial lessees on this issue, both sides expressed a willingness to work out a compromise on this issue.³⁸

²⁶ *Id.* at 18-19.

²⁷ *Id.* at 3.

²⁸ Gateway PFR at 2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. Consolidated Opposition to Petitions for Reconsideration (filed Jul. 29, 2008) (IMWED Opposition).

³² Opposition to Petitions for Reconsideration of Hispanic Information and Telecommunications Network, Inc. (filed Jul. 29, 2008) (HITN Opposition).

³³ Partial Opposition to Petition for Reconsideration, National EBS Association (filed Jul. 29, 2008) (NEBSA Opposition). NEBSA was formerly the National ITFS Association.

³⁴ Texas State Technical College-Sweetwater, Consolidated Opposition to Petitions for Reconsideration (filed Jul. 29, 2008).

³⁵ Dorothy M. Hartman also filed comments in this proceeding on July 21, 2008. We find that her comments have no bearing on the issues raised in this proceeding and decline to consider them further here.

³⁶ IMWED Opposition at 4-5; HITN Opposition at 5-6; NEBSA Opposition at 3-4.

³⁷ NEBSA Opposition at 3-4.

³⁸ *See, e.g.*, Commercial Coalition *Ex Parte* Letter; NEBSA Opposition at 4-5; HITN Opposition at 9-10; WCA Reply at 8.

Various proposals have been offered to balance the interest and needs of commercial carriers and educators.³⁹ On October 16, 2008, NEBSA and WCA submitted a joint proposal that reflects a compromise agreement between them regarding the maximum permissible lease term for grandfathered leases, which they assert is “fair and reasonable” in addressing their different concerns.⁴⁰ Under that proposal, the Commission would

no longer recognize an EBS lease entered into prior to January 24, 1999⁴¹ as a grandfathered lease lawfully supporting the use of excess capacity for non-EBS purposes beyond the 15th anniversary of the execution date of that lease, except where: (a) such lease in fact commenced prior to March 20, 2008 [the date that the *BRS/EBS Fourth MO&O* was released] and documentary evidence of such commencement exists (including evidence that the lessor has been paid amounts due upon or after commencement); or (b) both parties to the lease have agreed in writing to its continuation as a grandfathered lease through a specified expiration date, which expiration date may be no later than March 20, 2023 [citation omitted].⁴²

In addition, “any agreement entered into between January 24, 1999 and January 9, 2005 that provided for the spectrum leasing to commence at a point following execution of the document will be grandfathered for up to 15 years from the spectrum leasing start date agreed to by the parties in the agreement.”⁴³ C&W supports this proposal.⁴⁴ No other party filed comments on the NEBSA/WCA Proposal.

³⁹ The Commercial Coalition proposed that one-way video EBS leases executed prior to the effective date of the *Two-Way Order* commence on the later of:

(1) the date that the parties executed the lease or an amendment to the lease; (2) the date that the FCC granted any application that was contemplated by the lease prior to lessee’s use of the spectrum; or (3) if the contract specifies that the lease term begins upon an event solely within the control of the lessee, then the date that the event within the lessee’s sole control occurred, provided that that event within the lessee’s sole control occurred prior to the March 20, 2008 adoption date of the *Third Order*.

Commercial Coalition *Ex Parte* Letter at 2.

HITN proposed a variation of the Commercial Coalition proposal under which one-way video EBS leases executed prior to the effective date of the *Two-Way Order* would commence on the later of:

(1) the date that the parties executed the lease or an amendment to the lease, (2) the date that the FCC granted any application that was contemplated by the lease prior to lessee’s use of the spectrum *so long as the lessee has complied with all obligations under such leases, including construction of the channels prior to the March 20, 2008 adoption date of the Third Order*, or (3) if the lease specifies that the lease term begins upon an event solely within the control of the lessee, then the date that the event within the lessee’s sole control occurred, provided that that event within the lessee’s sole control occurred prior to the March 20, 2008 adoption date of the *Third Order*.

⁴⁰ NEBSA had originally offered a different proposal. NEBSA Opposition at 4-5. In light of its new proposal, which reflects an agreement with WCA, we will not consider its original proposal further.

⁴¹ WCA and NEBSA chose January 24, 1999 to coincide with the effective date of the *Two-Way Order*. WCA *Ex Parte* at 2 n.6. *But see infra* n.45.

⁴² WCA *Ex Parte* at 2.

⁴³ *Id.*

⁴⁴ Brief Comment, C&W Enterprises, Inc. (filed Oct. 21, 2008).

14. *Discussion.* We conclude that the public interest would best be served by adopting the NEBSA/WCA Proposal. The NEBSA/WCA Proposal ensures the stability of existing viable relationships between educators and commercial lessees. We therefore adopt the compromise proposal as follows. Every grandfathered lease entered into before January 10, 2005, is limited to a term of 15 years commencing from its start date, which remains the date of execution except under certain circumstances. For earlier leases, *i.e.*, grandfathered excess capacity leases executed before January 25, 1999,⁴⁵ the start date is the date on which it was executed unless the existing lease provided for a later start date, and: (1) the lease actually started before March 20, 2008 – as demonstrated by documentary evidence (including that the EBS licensee/lessor has been paid on or after the commencement of the lease) – in which case the lease will be deemed to have started on the start date contained in the lease; or (2) the lease did not start before March 20, 2008, but the parties have agreed in writing to continue with the existing lease, in which case the start date is deemed to be March 20, 2008.⁴⁶ For later leases, *i.e.*, grandfathered leases executed on or after January 25, 1999, but before January 10, 2005, the start date is the date on which the lease was executed unless the existing lease provided for a later start date.⁴⁷

15. We find that the NEBSA/WCA Proposal addresses the concerns of the other parties that have taken positions on the term of grandfathered leases. As noted, C&W supports the NEBSA/WCA Proposal.⁴⁸ HITN was seeking relief only for one-way video leases entered into prior to 1999.⁴⁹ Under our action today, the class of EBS licensees HITN identifies will receive relief. While the Commercial Coalition and Gateway did not provide specifics concerning their existing leases, they have made arguments similar to those made by WCA, and we find that the NEBSA/WCA Proposal appropriately balances the needs of the commercial lessee – to have a significant length of time in which to build out its service – with the needs of the educational licensee/lessor not to be tied indefinitely to lease agreements that have not provided it with educational services or lease revenues. We also find that the NEBSA/WCA Proposal represents a reasonable balance between TSTC’s interests under its particular lease arrangement and those of its excess capacity lessee.⁵⁰ Finally, IMWED’s primary concern is perpetuating “outmoded

⁴⁵ Although in their compromise proposal, WCA and NEBSA and WCA use January 24, 1999 as the effective date of the *Two-Way Order*, the *Two-Way Order* was in fact effective on January 25, 1999. See 63 FR 65087.

⁴⁶ Because the parties to EBS excess capacity lease agreements may enter into leases lasting fewer than 15 years, this formulation yields the same results as the second exception proposed by the parties for earlier grandfathered lease.

⁴⁷ The NEBSA/WCA Proposal uses the dates “between” January 24, 1999 and January 9, 2005, based on the assumption that the effective date of the *Two-Way Order* was January 24, 1999. Because the effective date instead was January 25, 1999, *see note 45 supra*, we describe the time period as on or after January 25, 1999 and before January 10, 2005. In other words, the starting date varies by one day; the final date for entering into a grandfathered lease is January 9, 2005.

Also, we note that our acceptance of a start date in a grandfathered lease executed on or after January 25, 1999, but before January 10, 2005, other than date of execution, does not relieve EBS licensees of their obligation to demonstrate substantial service on or before May 1, 2011. *BRS/EBS Third MO&O*, 21 FCC Rcd at 5733 ¶ 304. See also 47 C.F.R. § 27.14(o).

⁴⁸ Brief Comment, C&W Enterprises, Inc. (filed Oct. 21, 2008).

⁴⁹ HITN Opposition at 9.

⁵⁰ TSTC represents that its lease commenced on February 4, 1998. TSTC Opposition at 2 n.3. Under the policies we adopt today, the maximum term under Commission rules and policies would be until February 4, 2013. Since TSTC has received the benefits of the bargain it negotiated for over 10 years, we see nothing unreasonable in holding that the lease it negotiated will be in effect for four more years.

There appears to be a dispute as to whether, under the terms of the lease, the actual maximum term is 10 years or 15 years. TSTC Opposition at 3. We offer no opinion on that contractual issue.

one[-]way analog video leases, as well as leases tied to an obsolete band plan and a high-powered site-specific licensing scheme that has been substantially replaced as part of this and previous dockets.”⁵¹ We have granted relief with respect to one-way analog video leases entered into prior to the *Two-Way Order*.⁵² With respect to leases involving broadband services, the rule changes we have made in this proceeding have been designed to facilitate the provision of broadband services.

16. We decline to adopt the alternative proposals offered by the parties to this proceeding. The NEBSA/WCA Proposal supersedes the proposal offered by the Commercial Coalition (of which WCA was a part) on May 6, 2008 and by NEBSA on July 29, 2008. We reject HITN’s proposal because it ties the start date of a grandfathered lease to whether the facilities have been constructed. Because the Commission suspended the former build-out requirements for the ITFS/MDS (now BRS/EBS) service on March 13, 2003⁵³ and replaced it with a substantial service requirement of May 1, 2011,⁵⁴ the lessee is under no obligation under our requirements to have constructed the system before March 20, 2008. Thus, adoption of such a provision would be inconsistent with the Commission’s decision to require demonstration of substantial service by May 1, 2011. Finally, in light of WCA’s status as a proponent of the NEBSA/WCA Proposal that we herein adopt, we dismiss as moot its arguments that the language in the *BRS/EBS Fourth MO&O* violated the APA or constituted inappropriate retroactive rulemaking.⁵⁵

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

17. *Background.* In the *BRS/EBS R&O*, the Commission not only restructured the 2500-2690 MHz band, but also designated the 2495-2500 MHz band for use in connection with the 2500-2690 MHz band.⁵⁶ In the *BRS/EBS R&O*, the Commission proceeded to relocate BRS Channels 1 and 2/2A to new channel locations in the 2495-2690 MHz band.⁵⁷ Specifically, BRS Channel 1 would be relocated from 2150-2156 MHz (which was redesignated for Advanced Wireless Service (AWS)) to 2496-2502 MHz and Channel 2/2A would be relocated from 2156-2160/62 MHz (also redesignated for AWS) to 2618-

⁵¹ IMWED Opposition at ii.

⁵² *See Id.* at 3.

⁵³ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6805 ¶¶ 200-201 (2003) (*BRS/EBS NPRM and MO&O*).

⁵⁴ *BRS/EBS Third MO&O*, 21 FCC Rcd at 5733 ¶ 304.

⁵⁵ *See* WCA Petition at 18-19. In any event, if we had to reach the merits of those arguments, we would reject those arguments. The 15-year maximum term for pre-2005 EBS leases is not a new requirement but was established in the *Two-Way Order* and subsequent reconsideration proceedings. The issue raised now is the proper interpretation of that limitation to leases that have an indefinite future start date. The United States Court of Appeals for the District of Columbia Circuit has recognized that, for purposes of determining whether retroactive treatment is appropriate, there is a “[a] basic distinction ... between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear.” *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993), quoting *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986). The language in the *BRS/EBS 4th MO&O* was not a substitution of new law but interpretation of the pre-existing 15-year lease term limitation. While WCA points to evidence that staff of the former Mass Media Bureau interpreted the limitation consistent with its position (WCA Petition at 9 n.25), it is axiomatic that staff guidance is not binding on the Commission.

⁵⁶ *BRS/EBS R&O*, 19 FCC Rcd at 14169 ¶ 6 (2004).

⁵⁷ *Id.* at 14183-14184 ¶¶ 37-38.

2624 MHz.⁵⁸ In the *BRS/EBS Third MO&O*, the Commission discussed the relationship between the transition within the 2.5 GHz band and the relocation of the BRS Channels No. 1 and No. 2/2A incumbents currently operating at 2150-2156 MHz and 2156-2160/62 MHz.⁵⁹ In that regard, the Commission held that licensees on these channels may operate in either 2150-2156 or 2496-2500 MHz (for BRS Channel 1) or 2156-2160/62 or 2686-2690 MHz band (for BRS Channel 2/2A) pre-transition, but not in both bands.⁶⁰ In the *BRS/EBS Fourth MO&O*, the Commission, in response to a petition for reconsideration filed by WCA, found that BRS Channels 1 and 2/2A licensees may operate simultaneously in their old locations at 2150-2156 MHz and 2156-2160/62 MHz and their temporary, pre-transition locations at 2496-2500 MHz (BRS Channel 1) and 2686-2690 MHz (BRS Channel 2) until every subscriber is relocated to the 2.5 GHz band, at which point the licensees must cease all operations in the 2150-2160/62 MHz band.⁶¹

18. In the WCA Petition, WCA asks the Commission to confirm that even after a Basic Trading Area has been transitioned, BRS Channels 1 and 2/2A licensees may simultaneously operate in both the 2.1 GHz band and the 2.5 GHz band until all of their subscribers have been successfully migrated to the 2.5 GHz band.⁶² Clearwire Corporation,⁶³ SpeedNet, L.L.C.,⁶⁴ Santel Communications Cooperative, Inc.,⁶⁵ Virginia Communications, Inc.,⁶⁶ and Sioux Valley Wireless⁶⁷ support WCA's petition.

19. *Discussion.* We agree with WCA that it is not in the public interest to permit simultaneous operations, pre-transition, but prohibit them post-transition prior to the migration of subscribers. Thus, we conclude that BRS Channels 1 and 2/2A operators may simultaneously operate, post-transition, in their old channel locations at 2150-56 MHz and 2160/62 MHz and their new channel locations at 2496-2502 MHz or 2618-2624 MHz until such time as all of their subscribers have been migrated to the 2.5 GHz band. Advanced Wireless Service (AWS) licensees must relocate existing BRS operations at 2150-56 MHz and 2160/62 MHz if necessary in order to commence AWS operations in the band under circumstances specified in the Commission's Rules.⁶⁸ Since the BRS rules do not explicitly

⁵⁸ *Id.* at 14184 ¶ 38.

⁵⁹ *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5669-5670 ¶¶ 129-132.

⁶⁰ *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5670 n.358. As WCA notes, the footnote does not list the frequencies for BRS Channel 2, although BRS Channel 2 is mentioned.

⁶¹ *BRS/EBS Fourth MO&O*, 23 FCC Rcd at 6024 ¶ 87.

⁶² WCA PFR at 21.

⁶³ *Ex Parte* Letter from Nadja S. Sodos-Wallace, Clearwire to Marlene H. Dortch, Federal Communications Commission (filed Sep. 11, 2008).

⁶⁴ Support for Petition for Reconsideration of Wireless Communications Association International, Inc. regarding Simultaneous Use of 2.1 GHz and 2.5 GHz Bands, SpeedNet, L.L.C. (dated Jun. 30, 2008).

⁶⁵ *Ex Parte* Letter from Ryan Thompson, Santel Communications Cooperative, Inc. to Marlene H. Dortch, Federal Communications Commission (filed Sep. 9, 2008).

⁶⁶ *Ex Parte* Letter from Bruce Merrill, Virginia Communications, Inc. to Marlene H. Dortch, Federal Communications Commission (filed Sep. 26, 2008).

⁶⁷ *Ex Parte* Letter from Joel Brick, Sioux Valley Wireless, to Marlene H. Dortch, Federal Communications Commission (filed Sep. 16, 2008).

⁶⁸ *See generally* 47 C.F.R. §§ 27.1250-27.1255. We note that the rules do not specify a date certain for the relocation of BRS licensees. BRS licensees maintain primary status in the 2150-2160/62 MHz band unless and until an Advanced Wireless Service (AWS) licensee requires use of the spectrum. In addition, the rules do not require (continued....)

allow simultaneous operation, post-transition, on both the old and new channel locations, we amend Sections 27.5(i)(2)(i) and (iii) of the Commission's rules to add such authorization.

III. THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

20. In this Further Notice, we tentatively conclude to modify the BRS buildout rules to allow new BRS licensees four years from license issue to demonstrate substantial service. Under the current rules, all BRS licensees must demonstrate substantial service on or before May 1, 2011.⁶⁹ In April 2009, the Commission announced its intent to auction a number of BRS licenses that have become available as a result of default, cancellation, or termination.⁷⁰ As discussed below, if the May 1, 2011 construction deadline is not changed for new licensees, we are concerned that the extremely short buildout period may reduce competition in the auction.

21. *Background.* The Commission's general practice has been to adopt performance requirements associated with licenses to be met at a deadline measured in some period of time from the issue of the license (*e.g.*, a licensee may have to demonstrate substantial service 5 years from issue of the license). Regarding incumbent BRS licenses, licensees were required to construct within twelve months of the date of license grant.⁷¹ Regarding BTA licenses, the former MDS rules provided that "within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals . . . that are capable of reaching at least two-thirds of the population of the applicable service area."⁷² When the Commission sought comment on the rules for BRS and EBS in 2003, it suspended performance requirements applicable to the band.⁷³ Subsequently, in April 2006, the Commission adopted May 1, 2011 as the uniform date by which all BRS BTA authorization holders and incumbent BRS and EBS licensees must demonstrate substantial service.⁷⁴

22. The Commission adopted May 1, 2011 as the date for BRS licensees to demonstrate substantial service because it is the date that renewal applications for incumbent BRS licenses are due.⁷⁵ Moreover, May 1, 2011 is approximately five years from the date of release of the *BRS/EBS Second Report and Order*, which gave existing BRS licensees five years to build out their systems, while they simultaneously transitioned to the new band plan and technical rules.⁷⁶ Thus, the Commission concluded, requiring BRS licensees to demonstrate substantial service by May 1, 2011 struck the appropriate balance between ensuring that the band is promptly placed in use and giving licensees fair opportunity to

(Continued from previous page) _____

AWS licensees to pay the relocation costs after the relocation rules sunset fifteen years after the first AWS license is issued (*i.e.*, November 29, 2006). *See* 47 C.F.R. § 27.1253(a). *See also* Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, *Public Notice*, 21 FCC Rcd 13883 (WTB/Nov. 29, 2006).

⁶⁹ 47 C.F.R. § 27.14(o).

⁷⁰ *See supra* n.5.

⁷¹ *See* 47 C.F.R. § 21.43(a) (2001).

⁷² 47 C.F.R. § 21.930(c)(1).

⁷³ *BRS/EBS NPRM & MO&O*, 18 FCC Rcd at 6805 ¶ 200-201. Because the existing MDS and ITFS licenses were issued on various dates, consequently the dates on which applicable performance requirements came due also varied.

⁷⁴ *Id.* at 5731-5733 ¶¶ 299-304.

⁷⁵ *Id.* at 5733 ¶ 304.

⁷⁶ *Id.*

transition their facilities.⁷⁷ The Commission then required that BRS incumbent licensees file their demonstration of substantial service with their respective renewal applications.⁷⁸

23. On April 24, 2009, the Bureau announced that it intended to auction 78 BRS BTA licenses, 75 of which will be overlay licenses that were originally offered in Auction 6 and are now available as a result of default, cancellation, or termination.⁷⁹ Three additional licenses were created by the Commission in the *BRS/EBS Fourth MO&O*, when the Commission amended its rules to establish three Gulf of Mexico Service Areas for BRS.⁸⁰ It is anticipated that the auction of these 78 BRS licenses will commence on October 27, 2009.⁸¹ Under the rules adopted by the Commission in 2006, auction winners of these 78 licenses will also be required to demonstrate substantial service on or before May 1, 2011.⁸²

24. In response to the Auction 86 Procedures Public Notice, SAL Spectrum, LLC (SAL Spectrum) has asked the Commission to extend the May 1, 2011 substantial service deadline for applicants that obtain licenses in the auction.⁸³ SAL Spectrum argues that requiring licensees who receive their licenses in Auction 86 to demonstrate substantial service by May 1, 2011 “will discourage participation in Auction 86 and deflate the amount that participants will be willing to bid.”⁸⁴ SAL Spectrum contends that such licensees will have at most 18 months to meet the deadline and that prospective bidders may either decline to participate or not be willing to pay full value.⁸⁵ It notes that licensees in other auctioned services have ten years to demonstrate substantial service and argues that applicants that win BRS licenses in Auction 86 should similarly have ten years in which to demonstrate substantial service.⁸⁶ The Ad Hoc BRS Applicants Association supports giving new licensees ten years to demonstrate substantial service.⁸⁷

25. WCA and Clearwire filed reply comments opposing SAL Spectrum’s proposal.⁸⁸ They contend that it would not be in the public interest to give new licensees ten years to demonstrate substantial service because the spectrum could lie fallow during that period.⁸⁹ WCA recommends that any additional time “be an appropriate balance between the goal of ensuring that the spectrum is put to

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Auction Public Notice.*

⁸⁰ *BRS/EBS Fourth MO&O*, 23 FCC Rcd at 6038-6040 ¶¶ 122-128.

⁸¹ *Auction Public Notice.*

⁸² *See* 47 C.F.R. § 27.14(o).

⁸³ Comments of SAL Spectrum, LLC, AU Docket No. 09-56 (filed May 15, 2009) (SAL Spectrum Comments).

⁸⁴ *Id.* at 2.

⁸⁵ *Id.* at 3.

⁸⁶ *Id.*, *citing* 47 C.F.R. §§ 27.14(a) (Advanced Wireless Services and Wireless Communications Services), 101.17(a) (39 GHz Service), 101.1011(a) (Local Multipoint Distribution Service).

⁸⁷ Reply Comments of Ad Hoc BRS Applicants Association, AU Docket No. 09-56 (filed May 29, 2009) at 2.

⁸⁸ Reply Comments of the Wireless Communications Association International, Inc., AU Docket No. 09-56 (filed May 29, 2009) (WCA Reply); Reply Comments of Clearwire Corporation, AU Docket No. 09-56 (filed May 29, 2009) (Clearwire Reply).

⁸⁹ WCA Reply at 4; Clearwire Reply at 3.

good use and permitting winners a reasonable opportunity to construct.”⁹⁰ Clearwire argues that the existing May 1, 2011 substantial service deadline should apply, while noting that licensees could request an extension of the deadline “if they make a particularized showing justifying an extension under the Commission’s rules.”⁹¹ Clearwire asks that any additional time to demonstrate substantial service be limited to two years from the date that the license is granted.⁹²

26. *Discussion.* As discussed further below, we tentatively conclude that we should require applicants that win BRS licenses in Auction 86, and any subsequent auction of BRS licenses, to demonstrate substantial service on or before four years from the date their respective licenses are granted. We agree with WCA that the substantial service deadline should ensure that spectrum is promptly placed in use while allowing licensees a reasonable opportunity to construct.⁹³ We tentatively conclude that a four-year time period will allow new licensees sufficient time to build out their systems and put the spectrum to use. Although the May 1, 2011 date adopted by the Commission in the *BRS/EBS 2nd Report and Order*⁹⁴ gave BRS licensees five years to build out their systems, during this five-year period licensees had to simultaneously transition to the new band plan and technical rules. Since the adoption of the *BRS/EBS 2nd Report and Order*, however, the transition of the 2500-2690 MHz band has been initiated in virtually the entire United States and has been completed in most of the country.⁹⁵ Given that new BRS licensees will not face issues related to simultaneous transition and construction, we tentatively conclude that requiring new BRS licensees to build out within four years of license grant will ensure that the spectrum is put in use, promote the provision of innovative services, and promote rapid service to the public.

27. The proposal to require substantial service within four years of license grant is consistent with the decision to establish initial buildout requirements within four years of the effective date of the DTV transition or of license grant in the 700 MHz band.⁹⁶ In light of the factors noted above, we tentatively conclude that a four-year deadline is more appropriate than the ten-year deadline proposed by SAL Spectrum and the Ad Hoc BRS Applicants Association. We agree with WCA and Clearwire that a ten-year deadline is excessive and could lead to spectrum being unused for an inordinately long period of time. On the other hand, Clearwire’s proposals to maintain the existing May 1, 2011 date or to grant only two years to demonstrate substantial service may discourage entities that have a legitimate interest in providing service from seeking licenses and could actually hinder the deployment of service, particularly in rural areas.⁹⁷ While Clearwire is correct that licensees could file an extension request, we believe the

⁹⁰ WCA Reply at 4. WCA then states, “Ten years simply does not meet this test.” *Id.*

⁹¹ Clearwire Reply at 3 and n.5.

⁹² *Id.* at 3.

⁹³ WCA Reply at 4.

⁹⁴ 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, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5718-5762 ¶ 304 (2006) (*BRS/EBS 2nd Report and Order*).

⁹⁵ Transition initiation plans have been filed for 441 out of 493 BTAs. In the remaining BTAs, most licensees have filed notices announcing their intention to self-transition. The transition has been completed in 405 BTAs. *See* WT Docket No. 06-136.

⁹⁶ *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *et al.*, WT Docket No. 06-150, *et al.*, *Second Report and Order*, 22 FCC Rcd 15289, 15348-15351 ¶¶ 153-164 (2007).

⁹⁷ Certain rural BTAs for which BRS licenses will be offered in the upcoming auction cover large geographic areas. It could be particularly challenging to meet a substantial service requirement by May 1, 2011 within those large rural BTAs.

better course of action is to provide advance notice to potential bidders regarding their buildout obligations. Thus, we tentatively conclude that we should require new BRS licensees awarded in Auction 86 to demonstrate substantial service on or before four years from the date of license grant. In addition, we note that the same rationale would apply to any BRS licensee whose initial license is granted near the May 1, 2011 substantial service deadline. Therefore, we tentatively conclude that we should adopt a rule that would require any BRS licensee whose initial license is granted after the revised rule becomes effective to demonstrate substantial service on or before a date four years from the date the license was granted.⁹⁸ We seek comment on this proposal and alternatives.

28. We also propose to revise the introductory text to Section 27.14(o) of the Commission's Rules to more clearly state the Commission's intent to allow BRS or EBS licensees to demonstrate substantial service if their respective lessees met one of the safe harbors adopted by the Commission⁹⁹ and to allow licenses to be combined for purposes of demonstrating substantial service under certain circumstances.¹⁰⁰ We seek comment on this proposal.

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

29. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.¹⁰¹

B. Comment Period and Procedures

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

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

⁹⁸ We note that Section 27.14(o) of the Commission's Rules also applies to Educational Broadband Service (EBS) licensees. We will address the performance requirements applicable to EBS licenses granted in the future in the proceeding addressing the licensing of unassigned EBS spectrum.

⁹⁹ *See BRS/EBS Third MO&O*, 21 FCC Rcd at 5727-5728 ¶ 292.

¹⁰⁰ *See BRS/EBS Fourth MO&O*, 23 FCC Rcd at 6047-6048 ¶¶ 144-145.

¹⁰¹ *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

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

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

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

C. Final Regulatory Flexibility Act Certification of *BRS/EBS Fifth MO&O*

35. For the reasons described below, we now certify that the policies and rules adopted in the *BRS/EBS Fifth MO&O* will not have a significant economic impact on a substantial number of small entities. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰³ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA).¹⁰⁴

36. In this *BRS/EBS Fifth MO&O*, the Commission permits BRS Channels 1 and 2/2A licensees to simultaneously operate in their old channels locations at 2150-2160/62 MHz and their new channel locations at 2496-2502 MHz or 2618-2624 MHz, post-transition, until all of their subscribers have been migrated to the 2.5 GHz band. In the *BRS/EBS Fourth MO&O*, the Commission permitted

¹⁰² 5 U.S.C. § 601(6).

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

¹⁰⁴ 15 U.S.C. § 632.

BRS Channels 1 and 2/2A operators to simultaneously operate in their old channel locations and their temporary channel locations at 2496-2500 MHz or 2686-2690 MHz, pre-transition.

37. We find that our actions will not affect a substantial number of small entities because it affects only BRS Channels 1 and 2/2A operators that are actually operating and that will migrate subscribers post-transition to the 2.5 GHz band.¹⁰⁵ Furthermore, our actions provide such entities with additional flexibility to operate simultaneously in their old and new channel positions while transitioning their systems to the new band plan. Therefore, we certify that the requirements of the *BRS/EBS Fifth MO&O* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this *Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A).

D. Initial Regulatory Flexibility Certification

38. The Regulatory Flexibility Act (RFA)¹⁰⁶ requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁰⁷ The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰⁹ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹¹⁰

39. In the *BRS/EBS Third FNPRM*, the Commission has proposed extending the deadline for demonstrating substantial service for those licensees that are granted a BRS license after the adoption date of a rule in this proceeding. The Commission proposes this action in light of its decision to auction 78 available BRS BTA licenses starting on October 27, 2009. The Commission is concerned that these licensees, and any other licensees whose initial license is granted after the effective date of the rules adopted in this proceeding, may not be able to meet the substantial service deadline adopted by the

¹⁰⁵ *See Ex Parte* Letter from Paul J. Sinderbrand, WCA to Marlene H. Dortch, Federal Communications Commission, ET Docket 00-258, (dated May 12, 2008), Attachment. In the attachment, WCA indicates that there are approximately 40 markets where small operators use BRS Channels No. 1 and/or 2 for the provision of upstream communications or downstream video. Some of these systems will transition their subscribers pre-transition and will not be affected by the *BRS/EBS Fifth MO&O*. Others have sought and received a Multichannel Video Programming Distributor (MVPD) opt-out and will not be affected by this provision.

¹⁰⁶ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁰⁷ *See* 5 U.S.C. § 605(b).

¹⁰⁸ 5 U.S.C. § 601(6).

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

¹¹⁰ 15 U.S.C. § 632.

Commission on April 12, 2006. This proposal, if adopted, would not create any additional burdens for BRS licensees. All BRS licensees must demonstrate substantial service. If adopted, however, this decision would relieve certain licensees of the burden of demonstrating substantial service on or before May 1, 2011, which would, in many cases, be just over a year from the date of license grant. Thus the Commission's proposal, if adopted, would relieve licensees granted an initial license after the effective date of the rules adopted in this proceeding, from having to meet the May 1, 2011 deadline, but would require them to demonstrate substantial service four years from the date of license grant.

40. The Commission therefore certifies, pursuant to the RFA, that the proposals in the *BRS/EBS Third FNPRM*, if adopted, will not have a significant economic impact on a substantial number of small entities. If commenters believe that the proposals discussed in the *BRS/EBS Third FNPRM* require additional RFA analysis, they should include a discussion of these issues in their comments and additionally label them as RFA comments. The Commission will send a copy of the *BRS/EBS Third FNPRM*, including a copy of this initial certification, to the Chief Counsel for Advocacy of the SBA. In addition, a copy of the *BRS/EBS Third FNPRM* and this initial certification will be published in the Federal Register.¹¹¹

E. Paperwork Reduction Analysis

41. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

F. Further Information

42. For further information contact Nancy M. Zaczek of the Wireless Telecommunications Bureau, Broadband Division, at 202-418-0274 or by e-mail to Nancy.Zaczek@fcc.gov.

V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that pursuant to Section 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. § 154(i), 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Petitions for Reconsideration filed by the Wireless Communications Association International, Inc. and Gateway Access Solutions, Inc. on June 9, 2008 ARE GRANTED IN PART and are otherwise DENIED.

44. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.44(e) of the Commission's Rules, 47 C.F.R. § 1.44(e), that the Petition for Stay of Wireless Communications Association International, Inc. filed on June 9, 2008 IS DISMISSED AS MOOT.

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

¹¹¹ *See* 5 U.S.C. § 605(b).

46. IT IS FURTHER ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Fifth Memorandum Opinion and Order and Third Further Notice of Proposed Rulemaking, including the Final Regulatory Certification and the Initial Regulatory Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

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

I. PART 27 – MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

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

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

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

§ 27.5 Frequencies.

(i) ***

(2) ***

(i) Lower Band Segment (LBS): The following channels shall constitute the Lower Band Segment:

BRS Channel 1: 2496–2502 MHz or 2150-2156 MHz
EBS Channel A1: 2502–2507.5 MHz
EBS Channel A2: 2507.5–2513 MHz
EBS Channel A3: 2513–2518.5 MHz
EBS Channel B1: 2518.5–2524 MHz
EBS Channel B2: 2524–2529.5 MHz
EBS Channel B3: 2529.5–2535 MHz
EBS Channel C1: 2535–2540.5 MHz
EBS Channel C2: 2540.5–2546 MHz
EBS Channel C3: 2546–2551.5 MHz
EBS Channel D1: 2551.5–2557 MHz
EBS Channel D2: 2557–2562.5 MHz
EBS Channel D3: 2562.5–2568 MHz
EBS Channel JA1: 2568.00000–2568.33333 MHz
EBS Channel JA2: 2568.33333–2568.66666 MHz
EBS Channel JA3: 2568.66666–2569.00000 MHz
EBS Channel JB1: 2569.00000–2569.33333 MHz
EBS Channel JB2: 2569.33333–2569.66666 MHz
EBS Channel JB3: 2569.66666–2570.00000 MHz
EBS Channel JC1: 2570.00000–2570.33333 MHz
EBS Channel JC2: 2570.33333–2570.66666 MHz
EBS Channel JC3: 2570.66666–2571.00000 MHz
EBS Channel JD1: 2571.00000–2571.33333 MHz

EBS Channel JD2: 2571.33333–2571.66666 MHz
EBS Channel JD3: 2571.66666–2572.00000 MHz

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

BRS Channel KH1: 2614.00000–2614.33333 MHz.
BRS Channel KH2: 2614.33333–2614.66666 MHz.
BRS Channel KH3: 2614.66666–2615.00000 MHz.
EBS Channel KG1: 2615.00000–2615.33333 MHz.
EBS Channel KG2: 2615.33333–2615.66666 MHz.
EBS Channel KG3: 2615.66666–2616.00000 MHz.
BRS Channel KF1: 2616.00000–2616.33333 MHz.
BRS Channel KF2: 2616.33333–2616.66666 MHz.
BRS Channel KF3: 2616.66666–2617.00000 MHz.
BRS Channel KE1: 2617.00000–2617.33333 MHz.
BRS Channel KE2: 2617.33333–2617.66666 MHz.
BRS Channel KE3: 2617.66666–2618.00000 MHz.
BRS Channel 2: 2618–2624 MHz or 2156–2162 MHz.
BRS Channel 2A: 2618–2624 MHz or 2156–2160 MHz.
BRS/EBS Channel E1: 2624–2629.5 MHz.
BRS/EBS Channel E2: 2629.5–2635 MHz.
BRS/EBS Channel E3: 2635–2640.5 MHz.
BRS/EBS Channel F1: 2640.5–2646 MHz.
BRS/EBS Channel F2: 2646–2651.5 MHz.
BRS/EBS Channel F3: 2651.5–2657 MHz.
BRS Channel H1: 2657–2662.5 MHz.
BRS Channel H2: 2662.5–2668 MHz.
BRS Channel H3: 2668–2673.5 MHz.
EBS Channel G1: 2673.5–2679 MHz.
EBS Channel G2: 2679–2684.5 MHz.
EBS Channel G3: 2684.5–2690 MHz.

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

APPENDIX B**Proposed Rules**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend Part 27 of Title 47 as follows:

I. PART 27 – MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

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

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

2. Amend § 27.14 by revising paragraph (o) introductory text to read as follows:

§ 27.14 Construction requirements; Criteria for renewal.

(o) BRS and EBS licensees originally issued a BRS or EBS license prior to **[insert effective date of rule]** must make a showing of substantial service no later than May 1, 2011. With respect to initial BRS licenses issued after **[insert effective date of rule]**, the licensee must make a showing of substantial service within four years from the date of issue of the license. Incumbent BRS licensees that are required to demonstrate substantial service by May 1, 2011 must file their substantial service showing with their renewal applications. “Substantial service” is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. Substantial service for BRS and EBS licensees is satisfied if a licensee meets the requirements of paragraph (o)(1), (o)(2), or (o)(3) of this section. If a licensee has not met the requirements of paragraph (o)(1), (o)(2), or (o)(3) of this section, then demonstration of substantial service shall proceed on a case-by-case basis. Except as provided in paragraphs (o)(4) and (o)(5) of this section, all substantial service determinations will be made on a license-by-license basis. Failure by any licensee to demonstrate substantial service will result in forfeiture of the license and the licensee will be ineligible to regain it.

APPENDIX C

List of Petitioners to *BRS/EBS 4th MO&O***Petitions for Reconsideration**

Gateway Access Solutions, Inc (Gateway)
Wireless Communications Association International, Inc. (WCA)

Oppositions to Petitions for Reconsideration

Hispanic Information and Telecommunications Network (HITN)
ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED)
National EBS Association (NEBSA)
Texas State Technical College – Sweetwater (TSTC)

Reply to Oppositions to Petitions for Reconsideration

WCA

Ex Parte

C&W Enterprises, Inc. (C&W)
Clarendon Foundation (Clarendon)
Clearwire Corporation (Clearwire)
National EBS Association
NextWave Broadband Inc.
Santel Communications Cooperative, Inc.
SpeedNet, L.L.C.
Sioux Valley Wireless
Sprint Nextel Corp. (Sprint Nextel)
Virginia Communications, Inc.
Xanadoo Inc.
WCA