proposed instead to require the licensees involved to treat channel exchanges like any other set of license transfers, i.e., to file two or more applications showing the transferor and transferee for each channel or set of channels being transferred.[449]

205. *Discussion.* We conclude that there are substantial benefits to revising our MDS and ITFS transaction requirements to conform to and merge with the ULS requirements in Section 1.948 of our rules for BRS/EBS licensees. AMLC and IMLC point out that many transactions cannot be consummated in the 45 days presently allowed.[450] The Rural Commenters believe the Section 21.38 requirement for prior Commission approval of pro forma assignments of license and transfers of control can be eliminated. [451]

206. We generally agree with these commenters and conclude that we will adopt our proposals regarding BRS and EBS transaction requirements as discussed above. Although there are some differences in the information requirements for transfers and assignments, we believe there is a sufficient degree of overlap in the information that both types of applicants supply that both BRS and EBS applicants can use the FCC Form 603 for transfers and assignments. Furthermore, the Commission designed Form 603 so that applicants only have to answer the questions pertinent to the type of transaction involved.[452] Consequently, at the end of the transition period to ULS implementation, BRS and EBS licensees will use FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers.[453] Accordingly, we adopt transaction rules for BRS and EBS that conform to and merge with the ULS requirements in Section 1.948 of our rules. Streamlining the filing requirements for transaction requirements for BRS and EBS is another milestone in reaching the goal of simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

6. Partitioning and Disaggregation

207. Background. In the *NPRM* we proposed allowing partitioning and disaggregation of spectrum for ITFS auction winners.[454] We noted that in other services where we have implemented

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[449] *See NPRM,* 18 FCC Rcd at 6791 ¶ 170.

[450] AHMLC Comments at 7; IMLC Comments at 10. We do note, however, that the ITFS Parties are fundamentally opposed to changing the eligibility standards for ITFS station licenses, either for parties applying for new licenses, or for parties seeking to acquire existing licenses. While the ITFS Parties support the Coalition Proposal, they also believe that allowing for-profit, commercial entities to become licensees would likely result in the ultimate destruction of the ITFS service as an educational asset. For this reason, the ITFS Parties also support the Joint Comments of CTN and NIA on this issue as well. *See* ITFS Parties Comments at 3-4.

[451] *See* Rural Commenters Comments at 6.

[452] *Id.*

[453] *See* 47 C.F.R. § 1.948; *see also* discussion of FCC forms at ¶¶ 254-258 *infra.*

[454] *See NPRM,* 18 FCC Rcd at 6791-92 ¶¶ 171, 172. Additionally, we also sought comment in the *NPRM* on factors other than geography or frequency that licensees might reasonably use when disaggregating their licenses. For example, the *Spectrum Policy Report* discusses the possibility that licensees might also be willing to sell off parts of their license rights on the basis of time slots and power levels. That report suggests that frequency-agile transceivers are already capable of sensing if a given channel is in use at a particular moment in time, by switching channels, reducing power, or remaining silent until a channel becomes available. *See Spectrum Policy Report* at 19.

geographic area licensing,[455] we have allowed licensees to partition their service areas and to disaggregate their spectrum.[456] For example, our current rules allow MDS BTA licensees to partition their spectrum.[457]

208. In the *NPRM*, we explained that if we allowed partitioning and disaggregation of geographic area licenses of current ITFS channels, licensees could file for partial assignment of a license, and licensees could apply to partition their licensed GSAs or disaggregate their licensed spectrum at any time following grant of their geographic area license.[458] We proposed that the area to be partitioned would be defined by the partitioner and partitionee. We also proposed that the partitionee or disaggregate would be authorized to hold its license for the remainder of the partitioner's or disaggregator's license term, and would be eligible for renewal expectancy on the same basis as other licensees. There would be no restriction on the amount of spectrum disaggregated and we would permit combined partitioning and disaggregation. Licensees that partition and disaggregate would be subject to provisions against unjust enrichment. We also proposed to eliminate any separate provisions relating to "channel swapping" and rely upon the ability of licensees to partition and disaggregate their spectrum.[459]

209. *Discussion.* After reviewing the comments, we conclude that partitioning and disaggregation should be permitted for both ITFS and MDS licensees. The Coalition and BellSouth support this proposal.[460] Similarly, Ericsson supports the proposal because it allows the market to devise spectrum configurations that meet the needs of industry. Ericsson further asserts that freely operating market forces would ensure the diversity of services offered to consumers, the adequacy of spectrum for flexible uses, and the ability of small business to provide niche services. In particular, Ericsson encourages the Commission to permit aggregation of rural and urban service areas, which would lead to service areas that permit nationwide coverage. Ericsson believes that aggregation of service areas is especially important for ensuring that development of AWS in this band is not hampered, especially in rural areas. Ericsson asserts that the ability to aggregate licenses or disaggregate service areas (i.e., to permit spectrum trading) would allow for a tailored service area without sacrificing less populated ones.[461] OWTC, believes the Commission should develop a minimal GSA and allow licensees to aggregate multiple service areas on a regional and/or a national basis. OWTC states that under this approach, smaller entities with local or regional business plans and little interest in providing large-area service would not be discriminated against.[462]

210. We agree with these commenters and believe the same logic applies to allowing partitioning and disaggregation for EBS licensees as presently applies to partitioning of MDS BTA spectrum under our current rules. Allowing partitioning and disaggregation of BRS/EBS licenses will

[455] *See, e.g.*, 47 C.F.R. §§ 27.15, 101.535, 101.1111, 101.1323.

[456] "Partitioning" is the assignment of geographic portions of a license along geopolitical or other boundaries. "Disaggregation" is the assignment of discrete portions of "blocks" of spectrum licensed to a geographic area licensee or qualifying entity.

[457] 47 C.F.R. § 21.931.

[458] *See NPRM*, 18 FCC Rcd at 6791-2 ¶ 171.

[459] *See, e.g.*, 47 C.F.R. §§ 21.901, 74.902.

[460] *See* Coalition Proposal at 13; BellSouth Comments at 13-14 n.21.

[461] *See* Ericsson Comments at 6-7.

[462] *See* OWTC Comments at 4.

provide flexibility to licensees, promote efficient spectrum use, and facilitate market entry by small businesses, educational, telemedicine or medical institutions, or other parties who may lack the financial resources for participation in BRS/EBS auctions. Accordingly, we permit partitioning and disaggregation of licenses for all services in the band.

7. License Renewal

211. *Background.* In the *NPRM* we sought comment on our proposal to eliminate reinstatement procedures and adopt the late-filed renewal policy for wireless radio services for MDS and ITFS.[463] Additionally, we sought comment on whether we should impose any special requirements or limitations on the renewal of ITFS licenses.

212. Pursuant to the Commission's Rules, MDS licensees must file FCC Form 405 to renew their licenses thirty and sixty days before the expiration of such license.[464] If the renewal application is not timely filed, a licensee shall automatically forfeits its license without *Further Notice* to the licensee upon the expiration of the license period specified therein.[465] An MDS licensee may seek reinstatement of its licenses by filing a petition within 30 days of the license's expiration explaining the failure to timely file the required notification or application and setting out with specificity the procedures that the petitioner has established to ensure that such filings will be submitted on time in the future.[466] Generally, a license period is ten years. The terms of MDS station licenses granted on the basis of underlying BTA service area authorizations obtained by competitive bidding extend until the end of the ten-year BTA authorization.[467]

213. In contrast, ITFS licensees must file FCC Form 330-R to renew a license.[468] Unless otherwise directed by the FCC, ITFS licensees must file their renewal applications no later than the first day of the fourth full month prior to the expiration date of the license to be renewed.[469] The Commission will reinstate expired ITFS licensees if the former licensee files a timely petition with adequate justification.[470]

214. In further contrast, licensees in auctionable services file FCC Form 601 no later than the expiration date of the authorization for which renewal is sought, and no sooner than ninety days prior to expiration. The Commission designed ULS to provide wireless licensees with a pre-expiration notification approximately ninety days before their licenses expire and thereby avoid situations in which

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[463] *See NPRM*, 18 FCC Rcd at 6792-93 ¶¶ 173-177.

[464] *See* 47 C.F.R. § 21.11(c).

[465] *See* 47 C.F.R. § 21.44(a)(2).

[466] *See* 47 C.F.R. § 21.43(b).

[467] *See* 47 C.F.R. § 21.929(b).

[468] *See* Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 7 FCC Rcd 18365 (2002).

[469] *See* 47 C.F.R. § 73.3539.

[470] *See, e.g* Renewal Applications of Jonsson Communications Corp., DA 02-3099, *Memorandum Opinion and Order*, 17 FCC Rcd 22697, 22698 (2002). There is no codified rule specifically addressing reinstatement of ITFS licenses.

licensees allow their licenses to expire inadvertently and subsequently seek reinstatement.[471] We note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license.

215. In 1999, the Commission adopted a new policy regarding treatment of late-filed renewal applications in the Wireless Radio Services.[472] Renewal applications that are filed up to thirty days after the expiration date of the license are granted nunc pro tunc if the application is otherwise sufficient under our Rules.[473] However, the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.[474] Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license nunc pro tunc, but such requests are not routinely granted, and are subject to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures.[475] In determining whether to grant a late-filed renewal application, the Commission takes into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[476] After the license expiration, the previous licensee may file a new application for use of those frequencies subject to any service specific rules. Once that thirty-day period has elapsed, or the prior holder of the license files a new application for that spectrum, the license then becomes available for the Commission to reassign by competitive bidding or other means according to the rules of the particular service.[477]

216. *Discussion.* After reviewing the comments we received on this issue, we conclude that we will adopt the late-filed renewal policy utilized for wireless radio services for the BRS/EBS band. The Commission's policy regarding treatment of late-filed renewal applications in the Wireless Radio Services is as follows: Renewal applications that are filed up to thirty days after the expiration date of the license will be granted nunc pro tunc[478] if the application is otherwise sufficient under our rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.[479] Applicants who file renewal applications more than thirty days after the license expiration date may also request that the license be renewed nunc pro tunc, but such requests will not be routinely granted, will be subject to stricter review,

[471] *ULS R&O*, 13 FCC Rcd at 21071 ¶ 96.

[472] *See* Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11476, 11485 ¶ 22 (1999) (*ULS MO&O*).

[473] *See id.* at 11485 ¶ 22.

[474] *Id.*

[475] *Id.*

[476] *Id.* at 11485-6 ¶ 22.

[477] *See* Rules and Regulations to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, 63 Fed. Reg. 68904, 68908 (1998).

[478] *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.

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

and also may be accompanied by enforcement action, including more significant fines or forfeitures.[480] In determining whether to grant a late-filed application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.[481]

217. As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application.[482] Even when a licensee asserts that no renewal notification regarding the license expiration was received, this reason provides no basis for the relief requested, because a licensee's obligation to file a timely renewal is not dependent on the Commission sending a renewal notice.[483]

218. We have previously held that an inadvertent failure to renew a license in a timely manner is not so unique or unusual to warrant a waiver of the rules.[484] The Commission will grant a waiver if (a) it is in the public interest and the underlying purpose of the rule would be frustrated or not served by application to the present case, or (b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.[485] Even in the case of public safety licensees, the Commission has determined that a licensee will not be afforded special consideration when the licensee fails to file a timely renewal application simply because it engages in activities relating to public health or safety.[486]

219. Bell South supports the proposed new rules regarding license renewal policies.[487] The Coalition asserts that the Commission should apply this policy to MDS and ITFS on a prospective basis

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[480] *See id.*

[481] *See id.* at 11485 ¶ 22.

[482] *See ULS MO&O*, 14 FCC Rcd at 11485 ¶ 21. *See also* Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188, 191 ¶ 6 (WTB PSPWD 2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, 15 FCC Rcd 24547, 24551 ¶ 10 (WTB PSPWD 2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of license application in a timely manner"); World Learning, *Order*, 15 FCC Rcd 23871, 23872 ¶ 4 (WTB PSPWD 2000) (holding that licensee "is solely responsible for filing a timely renewal application"); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693, 19696 ¶ 8 (WTB PSPWD 2000) (*Berryville*) (holding that "it is the responsibility of each licensee to renew its application prior to the expiration date of the license"); Montana Power Company, *Order*, 14 FCC Rcd 21114, 21115 ¶ 7 (WTB PSPWD 1999) (holding that "it is the responsibility of each licensee to apply to renew its license prior to the license's expiration date").

[483] *See Berryville*, 15 FCC Rcd at 19693 ¶ 8 (citing *ULS R&O*, 13 FCC Rcd 21027, (1998) (holding that a "licensee's obligation to timely file a renewal application is not dependent upon the Commission sending a renewal notice to the licensee, rather it is the responsibility of each licensee to renew its application prior to the expiration date of the license")).

[484] *See* Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000) (citing Plumas-Sierra Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572, 5575 ¶ 9 (2000)).

[485] *See* 47 C.F.R. § 1.925(b)(3).

[486] *See* Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Report and Order*, 6 FCC Rcd 7297, 7301 ¶ 20 (1991).

[487] BellSouth Comments at 13-14 n.21.

only, and note that until recently, the Commission has consistently applied a lenient standard to late-filed Part 74 renewals. The Coalition further asserts that the new renewal policy should not be applied retroactively to late-filed renewal applications for licenses that expire prior to the effective date of the new rules.[488] OWTC supports the Commission's proposal to provide MDS licensees with a 90-day pre-expiration notice for renewal applications in order to avoid an inadvertent lapse of a license and the subsequent reinstatement effort. OWTC believes the pre-expiration notice is essential because the Commission proposes to eliminate the process of applying for reinstatement of the license if the expiration date passes without a proper renewal being filed.[489] Finally, Grand Wireless argues for a distinction between licensee/operators servicing the public and those who are not.[490]

220. We conclude that elimination of the reinstatement period will benefit all licensees in the band and other entities interested in acquiring abandoned spectrum.[491] Pursuant to the Commission's ULS procedures, failure to file for renewal of the license before the end of the license term results in automatic cancellation of the license.[492] We believe that eliminating reinstatement of expired licenses is prudent because ULS will send licensees a notification that their licenses are about to expire and, therefore, should be responsible for submitting timely renewal applications. Additionally, interactive electronic filing will make it easier for all licensees to timely file renewal applications. Moreover, we believe elimination of the reinstatement procedures will facilitate our ability to efficiently, and quickly perform our licensing responsibilities by reducing the amount of late-filed renewal applications that must be manually processed and by eliminating the processing of reinstatement applications. Accordingly, we eliminate our current reinstatement procedures and adopt the late-filed renewal policy for BRS and EBS on a prospective basis. We acknowledge that our previous handling of these matters was considerably lenient. We emphasize, however, that these new procedures will be strictly enforced, and licensees should take note accordingly.

8. Special Temporary Authority

221. *Background.* In the *NPRM*, we sought comment on our proposal to include MDS and ITFS special temporary authority (STA) requests under the same ULS regulatory regime as other Wireless Services.[493] Currently, for MDS, in circumstances requiring immediate or temporary use of facilities, entities may request special temporary authority to install and/or operate new or modified equipment.[494] Requests may be submitted as informal applications, at least ten days prior to the date of the proposed construction or operation (however, in practice an FCC Form 304 is attached to the informal request).[495] We may grant STAs without regard to the thirty-day public notice requirement in certain instances. First, we may grant an STA when the STA period is not to exceed thirty days and the filing of an application to

[488] WCA Comments at 137-139.

[489] OWTC Comments at 6. As discussed in ¶ 214, *supra* , we note that while we generally provide renewal notices to licensees, the pre-expiration notice is not a prerequisite to cancellation should a licensee fail to renew its license.

[490] Grand Wireless Comments at 13.

[491] *ULS R&O,* 13 FCC Rcd at 21071 ¶ 96. The Commission excluded Commercial Radio Operators Licenses and Amateur licenses from this policy. *Id.*

[492] *Id.*

[493] *See NPRM,* 18 FCC Rcd at 6794-95 ¶¶ 178-180.

[494] *See* 47 C.F.R. § 21.25.

[495] 47 C.F.R. § 21.5.

change the STA into a permanent situation is not contemplated. Second, we may grant an STA when the STA period is not to exceed sixty days, pending the filing of an application to change the special situation into a regular operation. Third, we may grant an STA to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized. Fourth, we may grant an STA when there are extraordinary circumstances requiring operation in the public interest. We may grant STAs and extensions of STAs up to 180 days pursuant to Section 309(f) of the Communications Act[496] where extraordinary circumstances so require, but the licensee has a heavy burden to show it warrants such action. Finally, in times of national emergency or war, we may grant special temporary licenses (in place of construction permits, station licenses, modifications or renewals) for the period of the emergency.[497]

222. Under our existing rules, we may grant ITFS STAs in extraordinary circumstances requiring emergency operation to serve the public interest.[498] As in MDS, only an informal application is required. However, ITFS STA applicants must submit the request at least ten days before the date of the proposed operation. Pursuant to Section 309(f) of the Act,[499] We may grant ITFS STAs for a period not to exceed 180 days with a limited number of extensions also granted for up to 180 days.

223. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that we will adopt our proposal to include BRS and EBS STA requests under the same ULS regulatory regime as other Wireless Services. Bell South supports the proposed new rules regarding special temporary authority and there were no commenters opposed to adopting this approach.[500] Under the streamlined consolidated ULS approach, applicants must file STA requests electronically on an FCC Form 601 within ten days before the date of the proposed operation (although we may grant requests received less than ten days prior to operation) for compelling reasons).[501] Furthermore, because MDS STA requests are informal applications, but in practice have an FCC Form 304 attached, adoption of the Form 601 for BRS and EBS STA requests as currently used in WTB makes good sense. Inasmuch as STAs are an emergency measure, mandatory electronic filing as now required in WTB, would provide BRS and EBS licensees with quick, responsive service.[502] Accordingly, for the foregoing reasons, we adopt rules that include BRS and EBS STA requests under the same ULS regulatory regime as the Wireless Services. This action furthers our goals of simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

9. Ownership Information

224. *Background.* Currently MDS and ITFS licensees file FCC Form 430 to submit ownership information to the Commission. The Communications Act mandates the ownership

[496] 47 U.S.C. § 309(f).

[497] *Id.*

[498] *See* 47 C.F.R. § 73.3542; *see also* 47 C.F.R. §§ 73.1635, 74.910.

[499] 47 U.S.C. § 309(f).

[500] BellSouth Comments at 13-14 n.21. We also note that SCETV is concerned about the loss of Special Temporary Authority (STA) in several key geographical locations. *See* SCETV Comments at 7.

[501] *See* 47 C.F.R. § 1.931; *see also* Section IV.D.16, *infra* (discussion of FCC Forms).

[502] *See* 47 C.F.R. § 1.931.

information requested in Form 430.[503] The Form 430 requires the licensee to list its MDS and/or ITFS licenses or conditional licenses. Submission of ownership information enables the Commission to review whether applicants and licensees comply with our real-party-in-interest rules, eligibility for treatment as a small business at auction and foreign ownership restrictions.[504] In the *NPRM* we sought comment on whether MDS and/or ITFS licenses or conditional licenses should be required to submit ownership information on FCC Form 430. Noting that other wireless licensees use Form 602 to file ownership information electronically in ULS,[505] and that FCC Forms 602 and 430 request the same ownership information,[506] we proposed to require MDS and ITFS licensees to file Form 602, instead of Form 430, to submit ownership information.[507]

225. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that we will adopt our proposal to require BRS and EBS licensees to file Form 602, in lieu of Form 430, to submit ownership information as is done by our other wireless licensees under our Part 1 ULS Rules. We received no comments opposed to our proposal. Bell South supports the proposed new rules regarding ownership information.[508] Currently, wireless licensees use Form 602 to file ownership information electronically in ULS.[509] FCC Form 602 and FCC Form 430 request the same ownership information.[510] We note that on June 14, 2002, the WTB stopped accepting electronically filed Forms 430 temporarily.[511] Therefore, during the transition period, BRS and EBS licensees may continue to file the Form 430 manually. We believe that requiring BRS and EBS licensees to file Form 602 is one more step in reducing the number of forms that BRS and EBS licensees have to deal with and will also bring these services under the same licensing requirements as our other wireless services. Accordingly, we adopt our

[503] *See* 47 U.S.C. § 310.

[504] *See ULS NPRM*, 13 FCC Rcd 9672, 9691 ¶ 43 (1998).

[505] ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information, and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of another licensee (Party B), Party A's FCC-regulated businesses may be automatically copied to Party B's filing. Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, *Public Notice*, 17 FCC Rcd 16779 (2002).

[506] *See* Wireless Telecommunications Bureau Answers Frequently Asked Questions Concerning Reporting of Ownership Information on FCC Form 602, DA 99-1001, *Public Notice*, 14 FCC Rcd 8261 (May 25, 1999) (*WTB Frequently Asked Questions*).

[507] *See NPRM*, 18 FCC Rcd at 6795-96 ¶ 181.

[508] *See* BellSouth Comments at 13-14 n.21.

[509] ULS will pre-fill information that the licensee has previously submitted on a Form 602, enabling the licensee to limit new submissions to changed information, and ULS can also fill in certain parts of a Form 602 by reference to other previously filed information. For example, if Party A has previously submitted its own ownership filing and is subsequently listed as a disclosable interest holder on the ownership filing of another licensee (Party B), Party A's FCC-regulated businesses may be automatically copied to Party B's filing. Wireless Telecommunications Bureau Announces Availability of Electronic Filing of FCC Form 602, *Public Notice*, 17 FCC Rcd 16779 (2002).

[510] *See WTB Frequently Asked Questions, supra*, n.506.

[511] Wireless Telecommunications Bureau to Temporarily Suspend Electronic Filing of FCC Form 430 via the Broadband Licensing System, *Public Notice*, 17 FCC Rcd 11131 (2002).

proposal to require BRS and EBS licensees to file Form 602, in lieu of Form 430.[512]

10. Regulatory Status

226. *Background.* Consistent with our goal to maximize flexibility, we tentatively concluded in the *NPRM* that MDS and ITFS applicants may request more than one regulatory status for authorization in a single license.[513] Under this approach, MDS and ITFS applicants could authorize a combination of common carrier and non-common carrier services in a single license and licensees in the band could render any kind of communications service (e.g., fixed, mobile, point-to-multi-point) consistent with that regulatory status and the existing rules. This proposal is consistent with the approach we have used for other services licensed on a geographic area basis.[514] Applicants would not be required to describe the services they seek to provide but would be required to designate the regulatory status of services they intend to provide using Form 601.[515] We sought comment on what procedures to adopt for licensees to change their regulatory status (i.e., notify the Commission within a certain timeframe or seek prior approval).[516]

227. *Discussion.* We conclude that we will permit BRS and EBS applicants to request more than one regulatory status for authorization in a single license. We also conclude that BRS and EBS applicants must follow the notification procedures set forth in Section 27.10(c) of the Commission's Rules.[517] Bell South supports our proposal.[518] Similarly, EarthLink supports discarding the Commission's broadcast-style regulatory model for MDS and ITFS and urges Commission reliance instead on a Part 27-like regulatory scheme for the LBS and UBS.[519] Likewise, the Coalition agrees, and in response to the *NPRM's* inquiry regarding the appropriate procedures for an MDS or ITFS licensee to change its regulatory status, the Coalition submits that Section 27.10(c) should serve as the model.[520] CTIA contends the MDS and ITFS Bands should be configured to optimize their usability for CMRS services.[521] Likewise, AHMLC and IMLC observe that under the new flexible use rules proposed in the *NPRM* for the MDS and ITFS bands, licensees could conceivably use the spectrum that falls within the statutory definition of a commercial mobile radio service.[522] We agree with AHMLC and IMLC that to the extent MDS and ITFS licensees elect common carrier status, they should be exempt from tariff obligations under

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[512] *See infra* ¶¶ 252-256 (discussion of FCC Forms).

[513] *See NPRM,* 18 FCC Rcd at 6796 ¶ 182.

[514] *See e.g.,* 47 C.F.R. §§ 27.10, 101.511, 101.133.

[515] *See ULS R &O,* 13 FCC Rcd at 21027 Appendix C.

[516] *See NPRM,* 18 FCC Rcd at 6796 ¶ 182.

[517] Section 27.10(c)(2) of the Commission's Rules provides that [a]mendments to change, or add to, the carrier regulatory status in a pending application are minor amendments filed under § 1.927 of this chapter." 47 C.F.R. § 27.10(c)(2). *See* Section IV.D.3, *supra* (discussion of major and minor amendments).

[518] *See* BellSouth Comments at 13-14 n.21.

[519] *See* EarthLink Comments at 7. We note that we plan on relying on a Part 27 type regulatory scheme for the MBS, as well as the LBS and UBS. *See* Section IV.A.4, *supra* (discussion of geographic area licensing).

[520] *See* Coalition Comments at 142.

[521] *See* CTIA Comments at 3.

[522] *See* AHMLC Comments at 8, 24; IMLC Comments at 11.

Title II of the Communications Act.[523]

228. Accordingly, licensees in the band will be permitted to request more than one regulatory status for authorization in a single license pursuant to the notification procedures set forth in Section 27.10(c) of the Commission's Rules.[524] Allowing licensees in BRS and EBS to choose from among several regulatory status categories furthers our policy goals of: promoting innovation by maximizing flexibility in the service rules, and simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

11. Discontinuance, Reduction or Impairment of Service

229. *Background.* In the *NPRM*,[525] we sought comment on consolidating forfeitures, cancellation and discontinuance of service rules for MDS and ITFS licensees. These service rules are currently contained in five separate rule sections for MDS licensees, and three separate rule sections for ITFS licensees.[526] Because a system can have both ITFS and MDS channels, we believe that consolidating these rules will be advantageous to both the industry and the Commission staff. Thus, we tentatively concluded in the *NPRM* that consolidating these rules would reduce the confusion of the industry as to the appropriate rules and increase the efficiency of the Commission staff in processing these actions.

230. The Commission implemented its license forfeiture rules to ensure station operation and alleviate concerns about spectrum warehousing.[527] We note that presently MDS licensees may alternate between providing service as a common carrier or a non-common carrier.[528] However, before alternating, the licensee must notify the Commission of the change at least thirty days before the change.[529] Additionally, common carriers who seek to alternate or who otherwise intend to reduce or impair service must notify all affected customers of the planned discontinuance, reduction, or impairment on or before providing notice to the Commission.[530] These provisions concerning licensees alternating between common carrier and non-common carrier status are in our Part 27 Rules, which we have concluded will contain the BRS and EBS rules henceforth.[531]

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[523] *See* Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1418; *see also* 47 CFR § 20.15 (2003).

[524] *See* 47 C.F.R. § 27.10(c).

[525] *See NPRM*, 18 FCC Rcd at 6798 ¶¶ 186 -188.

[526] *See* 47 C.F.R. §§ 21.44, 21.303, 21.910, 21.932, 21.936, 73.3534, 73.3598, 74.932.

[527] *See* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, *Report and Order*, 11 FCC Rcd 13,449, 13,465 (1996).

[528] *See* 47 C.F.R. §§ 21.903(d), 21.910.

[529] *See* 47 C.F.R. § 21.903(d), which provides that the notification must state whether there is any affiliation or relationship to any intended or likely subscriber or program originator.

[530] *See* 47 C.F.R. § 21.910, which provides that the notice shall be in writing and shall include the name and address of the carrier, the date of the event, the area(s) affected and the channels that are affected by the event. *Id.* at § 21.910(b).

[531] *See* Section IV.D.2, *supra* (discussion of service specific rules).

231. *Discussion.* After reviewing the comments and taking into consideration the fundamental restructuring of the BRS and EBS bands, we conclude that we will eliminate our forfeiture, cancellation and discontinuance of service rules for certain licensees.[532] We note, however, that BRS and EBS Licensees that choose to act as fixed common carriers or fixed carriers will be subject to Section 27.66 of the Commission's Rules.[533]

232. We believe that eliminating our forfeiture, cancellation and discontinuance of service rules for certain licensees provides both existing EBS and BRS licensees and potential new entrants with greatly enhanced flexibility in order to encourage the highest and best use of spectrum to provide for the rapid deployment of innovative and efficient communications technologies and services.[534] By these actions, we make significant progress towards the goal of providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.[535]

233. As part of the fundamental changes to the BRS and EBS band, we seek to encourage BRS and EBS licensees to respond to market demands for next generation ubiquitous broadband wireless services and make investments in the future of such services. We believe this goal cannot be readily accomplished if BRS and EBS licensees have to focus their resources on preserving legacy services solely because renewal approaches and licensees fear losing their authorizations if the discontinuance of service and forfeiture rules are not eliminated. Furthermore, the move to next generation services for BRS and EBS providers also entails a transition period where licensees will be forced to go dark and discontinue service during the actual transition.[536] Accordingly, we conclude that it would be inappropriate to penalize BRS and EBS licensees while they migrate to the new band plan.

234. Finally, we also note that as part of the fundamental restructuring of the BRS and EBS band to provide for a more flexible, market-based approach, we are replacing the existing site-based

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[532] We note, however, that our cancellation and forfeiture rules will remain in effect for instances where there is a failure to make installment payments.

[533] Section 27.66, 47 C.F.R. § 27.66, of the Commission's Rules provides in pertinent part:

§ 27.66 Discontinuance, reduction, or impairment of service.
(a) Involuntary act. If the service provided by a fixed common carrier licensee, or a fixed common carrier operating on spectrum licensed to a Guard Band Manager, is involuntarily discontinued, reduced, or impaired for a period exceeding 48 hours, the licensee must promptly notify the Commission, in writing, as to the reasons for discontinuance, reduction, or impairment of service, including a statement when normal service is to be resumed. When normal service is resumed, the licensee must promptly notify the Commission.
(b) Voluntary act by common carrier. If a fixed common carrier licensee, or a fixed common carrier operating on spectrum licensed to a Guard Band Manager, voluntarily discontinues, reduces, or impairs service to a community or part of a community, it must obtain prior authorization as provided under § 63.71 of this chapter. An application will be granted within 31 days after filing if no objections have been received.
(c) Voluntary act by non-common carrier. If a fixed non-common carrier licensee, or a fixed non-common carrier operating on spectrum licensed to a Guard Band Manager, voluntarily discontinues, reduces, or impairs service to a community or part of a community, it must give written notice to the Commission within seven days.

[534] Federal Communications Commission, Strategic Plan FY 2003-FY 2008 at 5 (2002) (*Strategic Plan*).

[535] *Id.* at 14.

[536] See discussion of transition at Section IV.A.5, *supra*.

licensing scheme for the BRS and EBS with geographic area licensing for these services.[537] This is consistent with Commission actions over the past decade shifting away from site-based licensing for wireless licensees toward more flexible, geographic-area based allocations that provide licensees with greater freedom to provide different types of services. In making this shift, the Commission has adopted performance benchmarks that increase licensees' flexibility to offer a variety of services, including service that may not require ubiquitous geographic coverage. In a related matter, we believe that adopting specific safe harbors and performance requirements for the BRS and EBS bands will ensure service to customers, while at the same time speeding the provision of next generation wireless broadband services. Consequently, in the *FNPRM* portion of this document, we seek comment on what performance requirements and safe harbors to adopt for the BRS and EBS services.[538]

235. The Coalition argues that consistent with other Part 27 flexible use services, the Commission should eliminate the existing MDS and ITFS rules subjecting licenses to cancellation if spectrum is not used for brief periods of time or if licensed facilities are temporarily dismantled.[539] Specifically, the Coalition explains that some licensees will be required to cease their current operations pursuant to the transitional process it proposes.[540] The Coalition further asserts that many licensees retain a strong interest in discontinuing the provision of wireless cable services or first generation broadband service so that they can migrate to second generation broadband services once the Commission revises its rules and such action should be encouraged. The Coalition states that there is no public interest benefit to preserving non-viable services solely because renewal approaches. Nonetheless, the Coalition asserts, this will be the end result if we take a snapshot approach pursuant to our rules.[541] We concur with the Coalition.

236. Bell South supports the proposed new rules regarding discontinuance, reduction or impairment of service.[542] Sprint argues the discontinuance provisions set forth at Section 21.303 of the Commission's rules should be deleted or modified to account for the technology and spectrum transitions contemplated by this proceeding. Sprint further asserts the market-driven service goals of the Commission will be thwarted if licensees are effectively forced to continue the provision of obsolete services merely to preserve their authorizations.[543] Similarly, Nextel agrees that these discontinuance rules should be eliminated.[544]

237. AHMLC and IMLC argue the Commission should simply abolish Section 21.303,[545] which requires licensees to offer service to customers at least once a year. AHMLC and IMLC note that a licensee wanting to deploy an advanced system under the rules now under consideration would

[537] See discussion of geographic area licensing at IV.A.4, *supra*.

[538] See discussion of substantial service and performance requirements at Section V.B, *infra*.

[539] *See* Coalition Comments at 84, 92-93. *See also* Coalition Proposal, Appendix B at n.9.

[540] *See* Coalition Comments at 84, 92-93. *See also* Coalition Proposal, Appendix B at n.9.

[541] *See* Coalition Comments at 84, 92-93. *See also* Coalition Proposal, Appendix B at n.9.

[542] *See* BellSouth Comments at 13-14 n.21.

[543] *See* Sprint Comments at 18.

[544] *See* Nextel Reply Comments at 16.

[545] *See* 47 C.F.R. § 21.303.

nonetheless have to continue providing service to at least some legacy subscribers or risk forfeiture under Section 21.303. Therefore, AHMLC and IMLC assert that it makes no sense to compel the provision of uneconomical and inefficient service to simply meet Commission rules.[546] We agree with AHMLC and IMLC.

238. Grand Wireless argues providing service to the public should be the primary consideration that allows for preservation of licenses and spectrum. Grand Wireless and Pace further assert that different geographical service areas will grow at different rates with additional channels put into service as the operation warrants. They note that the transition to advanced wireless services whose offerings are still in their infancy will result in a staggered usage of spectrum over time particularly in rural areas. Thus Grand Wireless and Pace state that as time goes by, additional channels will be placed into service as demand grows, and the speed with which additional channels are placed into service depends in large part on the service area with rural areas being slower than urban areas.[547] We agree that this is yet another reason to eliminate our forfeitures, cancellation and discontinuance of service rules for BRS and EBS licensees.

239. In sum, we conclude that our decision to eliminate our forfeiture, cancellation and discontinuance of service rules for certain classes of BRS and EBS licensees is supported by comments in the record, as well by consideration for the fact that BRS and EBS licensees will be transitioning to new innovative next-generation technologies, and may be forced to go dark during transition. Our market-driven service goals will not be reached if licensees are forced to continue providing obsolete services solely to preserve their authorizations. We see no public interest benefit to preserving non-viable services solely because renewal approaches. We believe that eliminating these rules allows for innovative, flexible use of the spectrum.

12. Foreign Ownership Restrictions

240. *Background.* In the *NPRM* we sought comment on establishing regulatory parity for applicants requesting authorization solely for non-common carrier services and applicants requesting authorization for common carrier services.[548] We note that Sections 310(a) and 310(b) of the Communications Act, as modified, impose foreign ownership and citizenship requirements that restrict the issuance of licenses to certain applicants.[549] An applicant requesting authorization only for non-common carrier services would be subject to Section 310(a), but not to the additional prohibitions of section 310(b). In contrast, an applicant requesting authorization for common carrier services would be subject to both Sections 310(a) and 310(b). By establishing parity in reporting obligations, however, we did not propose a single, substantive standard for compliance.[550]

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[546] AHMLC Comments at 22; IMLC Comments at 22.

[547] Grand Wireless Comments at 13; Pace Comments at 8.

[548] *See NPRM*, 18 FCC Rcd at 6796 ¶ 189. We are aware that in the *NPRM* we sought comment on implementing this requirement pursuant to Part 101 of the Commission's Rules; however, as noted in ¶¶ 184-190 *supra*, we have decided to regulate the MDS and ITFS pursuant to Part 27 of the Commission's Rules.

[549] *47 U.S.C. § 310(a), (b).*

[550] For example, we do not and would not deny a license to an applicant requesting authorization exclusively to provide services not enumerated in Section 310(b), solely because its foreign ownership would disqualify it from receiving a license if the applicant had applied for a license to provide the services enumerated in Section 310(b).

241. *Discussion.* We conclude that common carriers and non-common carriers seeking to operate in BRS and EBS should not be subject to varied reporting obligations.[551] Consistent with our determination to regulate services in the band pursuant to Part 27 of the Commission's Rules, we agree with the Coalition that Sections 27.12, 1.913, and 1.919 of the Commission's Rules should be utilized to implement this policy.[552] Accordingly, we adopt rules for applicants requesting authorization for either common carrier or non-common carrier status to file changes in foreign ownership information pursuant to those sections.[553] This action furthers our goal of fostering regulatory parity and transparency between like services. We also believe this is yet another step in simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

13. Annual Reports

242. *Background.* The Commission's rules require MDS operators to file annual reports even if they are in full compliance with all of our rules.[554] Inasmuch as these rules appear to be unnecessary, in the *NPRM*, we sought comment on eliminating these requirements.[555]

243. *Discussion.* After reviewing the comments we received on this issue, we conclude that we will eliminate the requirement that BRS operators file annual reports with the Commission. BellSouth, AHMLC and IMLC support the planned elimination of the Section 21.911 Report.[556] Similarly, the Rural Commenters believe that the Section 21.911 Annual Report can be eliminated at no loss to the effectiveness of the Commission's mission.[557] Likewise, the Coalition agrees that the Commission has correctly concluded that "these reports do not appear to serve any purpose."[558] IMLC states the annual filing of this report no longer serves a useful purpose and notes that as MDS and ITFS usage moves into a digital mode, it will become difficult, if not impossible, to report what content is being transmitted over "channels" of fluctuating definition. Additionally, IMLC believes there is no need for an additional EEO

[551] As was observed in the *LMDS 2d R&O*, requiring submission of ownership information that may not be immediately necessary to assess the qualifications of a licensee (*i.e.*, one who currently operates as a non-common carrier) is an efficient and reasonable measure to facilitate the flexibility accorded licensees to change status with a minimum of regulatory interference. With this approach, updated information can be used whenever the licensee changes to common carrier status without imposing an additional filing requirement when the licensee makes the change. Moreover, having access to this ownership information allows the Commission to monitor all of the licensed providers more effectively, in light of their ability to provide both common and non-common carrier services. We stress that our decision to regulate MDS and ITFS pursuant to Part 27 rather than pursuant to Part 101, which regulates LMDS, does not make this line of reasoning inapplicable. 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, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) (*LMDS 2d R&O*).

[552] *See* 47 C.F.R. §§ 27.12, 1.913, 1.919. *See also* Coalition Comments at 142.

[553] *See* 47 C.F.R. §§ 27.12, 1.913, 1.919.

[554] *See* 47 C.F.R. § 21.911.

[555] *See NPRM*, 18 FCC Rcd at 6806 ¶ 203.

[556] *See* AHMLC Comments at 6; IMLC Comments at 9-10; *See* BellSouth Comments at 13-14 n.21.

[557] *See* Rural Commenters Comments at 6.

[558] *See* Coalition Comments at 142.

Report required by Section 21.920 of the Commission's rules,[559] and this report should either be eliminated or made a question on the annual EEO outreach reporting form due on September 30 of each year.[560] Consistent with our tentative conclusion in the *NPRM* to eliminate annual reports,[561] as well as our determination today to place the BRS and EBS in Part 27 of our rules, we eliminate the EEO annual report. Accordingly, we eliminate the requirement that BRS operators file annual reports with the Commission. Doing so simplifies the licensing process and deletes obsolete or unnecessary regulatory burdens.

14. Application Processing

244. *Background.* In the *NPRM* we sought comment on streamlining our application procedures. We tentatively concluded that the interactive nature of ULS will enhance the on-line capabilities of MDS and ITFS users, and therefore proposed to integrate the Services into ULS.[562] Currently, our MDS and ITFS application processing is cumbersome, time-consuming, and resource intensive. As noted above,[563] we are adopting rules herein that replace the requirement to separately license individual transmitters with a geographic area licensing scheme in which most operations would be authorized pursuant to the geographic area license. This change will substantially reduce burdens on licensees, expedite the initiation of service, and provide greater flexibility. Nonetheless, we note that there will continue to be limited instances in which transmitters will have to be licensed individually. Thus, we believe it is appropriate to review and streamline our application procedures.

245. With respect to the processing of ITFS applications, our rules currently require several burdensome steps that result in delays to the public and hinder the efficient processing of ITFS applications.[564] Although our MDS application processing procedures appear quicker then the ITFS procedures, we believe MDS application filing procedures should also be stream-lined and consolidated.[565]

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[559] *See* 47 C.F.R. § 21.920.

[560] *See* IMLC Comments at 10. AHMLC, however, supports retaining the EEO Report required by Section 21.903 of our rules. *See* AHMLC Comments at 7.

[561] *See NPRM*, 18 FCC Rcd at 6806 ¶ 203.

[562] *See NPRM*, 18 FCC Rcd at 6806-8 ¶¶ 204-211.

[563] *See* Section *IV.A.4.a supra* (discussion of geographic licensing).

[564] With respect to the processing of ITFS, our existing rules require the opening of a filing window before we will accept applications. *See* 47 C.F.R. § 74.911(c)(1) and (d). Then we must announce a one-week filing period for applications for major changes, high-power signal booster station, response station hub and R channels point-to-multipoint transmissions licenses. At the conclusion of the one-week filing period, we announce the tendering for filing of applications submitted during the filing window and provide a sixty-day filing window for applicants to amend their applications. *See* 47 C.F.R. § 74.911(d). At the conclusion of the sixty-day filing window, we announce the acceptance for filing of all applications submitted during the initial window, as amended by the applicants. Opposing parties receive sixty days from the release of the public notice announcing the acceptance for filing of the applications to file a petition to deny against an application. *See* 47 C.F.R. § 74.911(d). On the sixty-first day, we grant the unopposed applications unless we notified the applicant that we were not granting the application.

[565] Generally, upon receipt of an MDS application, we give the application a file number. *See* 47 C.F.R. § 21.26. After preliminary review, we place those applications that appeared complete on public notice as accepted for filing. *See id.* However, with regard to MDS two-way application filings, we currently use a rolling one-day filing window. *See* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed (continued....)

246. Previously, applicants could file and view their applications on-line using the Broadband Licensing System (BLS).[566] On October 11, 2002, the Wireless Bureau suspended the electronic filing capabilities of the BLS in order to improve the integrity of data in the BLS, prepare for converting the ITFS and MDS services to the ULS, and facilitate future enhancements to electronic filing.[567]

247. *Discussion.* We did not receive any comments opposing streamlining our ITFS and MDS application procedures. Thus, we conclude that conversion of the data from BLS to ULS will improve the efficiency of filing applications, as well as searching for data on these services. In this vein, we note that we require the majority of the wireless applicants to file their applications electronically using ULS. ULS has eliminated the need for wireless carriers to file duplicative applications and has increased the accuracy and reliability of licensing information for wireless services. Additionally, ULS has increased the speed and efficiency of the application process because wireless licensees and applicants can file all licensing-related applications and other filings electronically. Since the implementation of ULS, the public may access all publicly available wireless licensing information on-line.[568]

248. We conclude that the interactive nature of ULS will streamline the BRS and EBS licensing process,[569] as well as reduce the present lengthy licensing process. For instance, generally, upon filing of an application in ULS we place the application on public notice as accepted for filing.[570] The extra step of allowing applicants to amend their applications to make corrections is not necessary with ULS.

249. By consolidating the BRS and EBS application processing procedural rules in Part 1 of the Commission's Rules, we improve the consistency of the Commission's rules across wireless services and provide a single point of reference for applicants, licensees, and the public seeking information regarding our licensing procedures. We conclude this consolidation will reduce confusion among applicants or licensees, increase the probability that filings will be done correctly, accelerate the

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Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19150 (1998); 47 C.F.R. § 21.27(d). We announce the "tendering for filing" of applications submitted during the filing window. *See* Commission Announces Initial Filing Window for Two-Way Multipoint Distribution Service and Instructional Television Fixed Service, *Public Notice*, 15 FCC Rcd 5850 (MMB 2000). Then, after a sixty-day period, we released a second public notice announcing those applications that we accepted for filing.[565] *See* 47 C.F.R. § 21.27(d).

[566] Mass Media Bureau Implements, *Public Notice*, 2000 WL 684792 (2000) (*BLS Implementation PN*).

[567] Wireless Telecommunications Bureau Suspends Electronic Filing for the Broadband Licensing System on October 11, 2002, *Public Notice*, 17 FCC Rcd 18365 (2002). We note that effective March 25, 2002, the Commission transferred the regulatory functions for the Services from the former Mass Media Bureau to the Wireless Telecommunications Bureau. Radio Services are Transferred from Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002).

[568] *ULS R&O*, 13 FCC Rcd at 21031 ¶ 4.

[569] Because ULS is interactive, ULS prompts the applicant to input the required information for the type of action that the applicant seeks. As a result, applicants must submit all the appropriate information before they may file their applications electronically in ULS. *See* Phase I Mandatory Electronic Filing Deadline Extended for PCIA and ITA, *Public Notice*, 16 FCC Rcd 13,681 (2001) (the Commission extended the deadline for mandatory electronic filing to July 25, 2001). Notably, ULS will automatically "pre-fill" licensee information already in the system and will display only the portions of the form and schedules that require completion for the applicant's or licensee's indicated purpose.

[570] *See* 47 C.F.R. § 1.933(1).

application process, and speed wireless service to the public. Accordingly, we adopt rules that streamline our application procedures for BRS and EBS by integrating the Services into ULS.[571]

15. Returns and Dismissals of Incomplete or Defective Applications

250. *Background.* In the *NPRM*, we proposed to extend our uniform rule for dismissal or return of defective applications in the Wireless Services to ITFS and MDS applications and adopt the Wireless Bureau's procedures for complying with the Commission's uniform policy.[572] As noted above,[573] in some instances ITFS and MDS applicants submitted applications that were incomplete or required the submission of additional information before they could be placed on public notice as accepted for filing, which resulted in inefficient processing of applications.

251. The Commission in the *ULS Report and Order* adopted a uniform application dismissal and return rule for all the Wireless Services.[574] Pursuant to the uniform rule articulated therein, the Commission has the discretion to return applications for correction on minor filing errors, but is also authorized to dismiss any incomplete or defective application without prejudice.[575] In this connection, regardless of the manner in which applicants submit their applications, ULS will automatically dismiss applications that are unsigned, untimely, or not fee-compliant.[576] The Commission explained in the ULS *R&O* that in contrast to minor filing errors, such defects were "fatal to the consideration of the application."[577]

252. WTB, however, has announced specific procedures for complying with the Commission's uniform policy.[578] WTB has concluded that, "[g]enerally, timely filed renewal applications and construction notifications that are otherwise defective will be returned to the applicants for correction, rather than dismissed by the Bureau."[579] Nonetheless, the Bureau clarified "that renewal applications and construction notifications that fail to comply with the applicable fee and signature requirements will be dismissed by the Bureau as defective, rather than returned to the applicants for correction, even if timely

[571] In most instances, applicants will not be required to file applications in order to relocate or add transmitters within their GSA. *See* discussion on Geographic Area Licensing, Section IV.A.4, *supra*.

[572] *See NPRM,* 18 FCC Rcd at 6808-9 ¶¶ 212-215.

[573] *See* ¶ 245, *supra*.

[574] *See ULS R&O,* 13 FCC Rcd at 21027; *See also* 47 C.F.R. § 1.934.

[575] *ULS R&O*, 13 FCC Rcd at 21068 ¶ 90.

[576] *See, e.g., id.*

[577] *Id.*

[578] *See* Wireless Telecommunications Bureau Clarifies Unified Policy for Dismissing and Returning Applications, *Public Notice*, 17 FCC Rcd 30 (WTB 2001) (*Unified Dismissal and Return PN*); Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, *Public Notice*, 14 FCC Rcd 11182, 11185 (WTB 1999); Wireless Telecommunications Bureau Announces Unified Policy for Dismissing and Returning Applications and Dismissing Pleadings Associated with Applications, *Public Notice*, 14 FCC Rcd 5499 (WTB 1999).

[579] *Unified Dismissal and Return PN*, 17 FCC Rcd at 30.

filed."[580]

253. *Discussion:* We received no comments opposing our proposal. Accordingly, we adopt the Commission's uniform rule for dismissal or return of defective applications in the Wireless Services to EBS and BRS applications along with the Bureau's procedures for complying with the Commission's uniform policy. These steps will ensure efficient processing and equal treatment of all applications, while simplifying the licensing process and deleting obsolete or unnecessary regulatory burdens.

16. ULS Forms

254. *Background.* In the *NPRM*,[581] we noted that currently our rules require MDS and ITFS applicants to use eleven different forms to request licensing actions.[582] We tentatively concluded that we would streamline these procedures by replacing the eleven forms that MDS and ITFS applicants presently use with the four forms that we use to license other wireless services in ULS and sought comment on this proposal. The Commission consolidated the ULS application forms for wireless services to replace approximately forty-one application forms.[583] The consolidation streamlined the processing of applications and reduced the filing burden for wireless applicants and licensees.[584] We use four forms in ULS – Form 601 (Long-Form or FCC Application for Wireless Telecommunications Bureau Radio Service Authorization), Form 602 (FCC Ownership Disclosure Information for the Wireless Telecommunications Bureau), Form 603 (FCC Wireless Telecommunications Bureau Application for Assignment of Authorization or Transfer of Control) and Form 605 (Quick-Form Applications for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services.[585]

255. *FCC Form 601.* Under our proposal, this form will replace FCC Forms 304, 304A, 330, 330A, 330R, 331, 405, 701 and most informal application filings. The FCC Form 601 and associated schedules will be used to apply for initial authorizations, modifications (major and minor) to existing authorizations, amendments to pending applications, renewals of station authorizations, developmental authorizations, special temporary authorities (STAs), certifications of construction, requests for extension of time, cancellations, and administrative updates. The required schedules are:

- New/Modification/Amendment (Regular Authorizations, Developmental Authority and
Special Temporary Authority) – FCC Form 601 Main Form with required technical schedule.
- Renewals/Cancellation/Administrative Updates – FCC Form 601 Main Form and Schedule A (if requesting multiple call signs).[586]

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[580] *Id.* at 32.

[581] *See NPRM*, 18 FCC Rcd at 6809-11 ¶¶ 215-219.

[582] The MDS and ITFS application forms are FCC Forms 304, 304A, 305, 306, 330, 330A, 330R, 331, 405, 430, and 701.

[583] *ULS R&O*, 13 FCC Rcd at 21033-34 ¶ 10.

[584] *Id.*

[585] *Id.*

[586] *See* 47 C.F.R. § 1.949 for the rules governing renewals.

- Certifications of Construction – FCC Form 601 Main Form and Schedule K.
- Extension of Time to Construct – FCC Form 601 and Schedule L.

256. *FCC Form 602.* This form will replace the FCC Form 430 for the submission of initial and updated ownership information for those wireless radio services that require the submission of such information.[587]

257. *FCC Form 603.* This form will replace FCC Forms 305, 306 and 330. Applicants use the FCC Form 603 and associated schedules to apply for consent to assignment of existing authorizations (including channel swaps), to apply for Commission consent to the transfer of control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. Additionally, applicants use the form to apply for partial assignments of authorization, including partitioning and disaggregation. The required schedules are:

- Assignment/Transfer of Control – FCC Form 603 Main Form and Schedule A for auctionable services.[588]
- Partitioning & Disaggregation – FCC Form 603 Main Form and Schedule B or Schedule D as required.
- Consummation Notifications – FCC Form 603 and Schedule D.
- Extension of Time for Consummation – FCC Form 603 and Schedule E.

258. *Discussion.* After reviewing the limited comments we received on this issue, we conclude that eliminating the current MDS and ITFS forms and replacing them with the ULS forms will streamline the processing of applications and reduce the filing burden for MDS and ITFS applicants and licensees. We received no comments opposing the replacement of the forms that MDS and ITFS licenses currently use the four ULS forms. AHMLC and IMLC support the planned elimination of Form 430 in favor of Form 602.[589] The Rural Commenters believe that the Section 21.11(a) requirement for annual updates of the FCC Form 430 Licensee Qualification Report can be eliminated at no loss to the effectiveness of the Commission's mission. We find this a curious comment in that we are now requiring BRS and EBS applicants to update their ownership information pursuant to FCC Form 602.[590]

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[587] *See* n.477, *supra*; 47 C.F.R. § 0.408.

[588] *See* 47 C.F.R. § 1.948.

[589] *See* AHMLC Comments at 6; IMLC Comments at 8-9. AHMLC, however, observes that certain legal qualifications information called for by Form 430 (status of criminal and antitrust litigation) is not called for by Form 602. *See id.* We agree with AHMLC's observations, however, we believe that MDS and ITFS applicants should only have the same Form 602 requirements as all our other wireless services, which is consistent with the streamlining goals of this proceeding.

[590] *See* Rural Commenters Comments at 6. We note that FCC Form 602 must be filed or updated under the following circumstances:

- Applicants filing to obtain a new license or authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. § 1.919(b)(1).

- Applicants filing to renew an existing license or authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. § 1.919(b) (2).

- Applicants requesting approval for a transfer of control of a license or assignment of an authorization who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. §§ 1.919(b) (3), 1.948(c).

(continued....)

Accordingly, we adopt rules to use the ULS forms for BRS and EBS, thereby eliminating the current MDS and ITFS forms. We note that by using the ULS Forms, we will eliminate a number of obsolete MDS and ITFS forms from our rules.[591]

17. Transition Periods

259. *Background.* In the *NPRM*, we proposed to allow continued use of the current ITFS and MDS forms for a transition period of six months after the effective date of the release of an *R&O* in this proceeding.[592] This period is consistent with the transition period the Commission used with the initial implementation of ULS.[593] At the conclusion of this period, only ULS forms would be accepted for these services. We noted that in the ULS *R&O*, the Commission provided a transition period for applicants and licensees to use ULS voluntarily before implementing mandatory electronic filing using the ULS forms.[594] Generally, the Commission determined that permitting a six-month transition period was appropriate.[595] Further, we noted that the six-month transition period has worked reasonably well for the other services that have transitioned to ULS.[596]

260. *Discussion.* We conclude that the proposed six month period for transitioning to mandatory electronic filing is appropriate. We note that we received no comments opposing our proposal. AHMLC and IMLC believe establishing a 180-day period for assignments of authorization and transfers is consistent with the general ULS rule.[597] Similarly, OWTC believes the 6-month transition period will help licensees understand any new or consolidated forms. In light of the significant changes proposed to the EBS and BRS forms and rules, we agree with OWTC and believe applicants and licensees should receive a transition period to familiarize themselves with ULS and begin using ULS forms. This period will provide EBS and BRS applicants and licensees with sufficient time to familiarize themselves with ULS and to plan an orderly transition from using existing forms to using the ULS forms. Accordingly, we adopt a six-month transition period after the effective date of the rules we have adopted today before requiring mandatory electronic filing by BRS and EBS applicants and licensees in ULS. Consistent with prior actions, WTB will release a public notice announcing the relevant commencement date for the processing of applications in the Services via ULS.[598]

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- Applicants filing a notification of consummation of a *pro forma* transfer of control of a license or assignment of authorization under the Commission's forbearance procedures who do not have a current FCC Form 602 on file with the FCC. *See* 47 C.F.R. §§ 1.919(b)(4), 1.948(c)(1)(iii), 1.948(d).

[591] *See e.g.* 47 C.F.R §§ 73.3500, 73.3536 (elimination of all references to FCC Form 330-L, "Application for Instructional Television Fixed Station License); 47 C.F.R. §§ 21.11(b), 73.3500, 73.3533(b) (elimination of all references to FCC Form 307). In addition, we propose to delete references to obsolete MDS forms mentioned in Part 74. *See* 47 C.F.R. § 74.991.

[592] *See NPRM,* 18 FCC Rcd at 6811-13 ¶¶ 220-225.

[593] *See ULS R&O*, 13 FCC Rcd at 21027, 21038-39 ¶ 16.

[594] *See id.* at 21042-43 ¶ 24.

[595] *See id.*

[596] *See ULS R&O,* 13 FCC Rcd at 21042-43 ¶ 22-4.

[597] *See* AHMLC Comments at 7; IMLC Comments at 10.

[598] *See, e.g., Public Notice:* Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) for Microwave Services (DA 99-154, rel. Aug. 30, 1999).

18. Suspension of Acceptance and Processing of Applications:

261. *Background.* In the *NPRM*, we concluded that we would process pending ITFS applications filed prior to release of the *NPRM* provided that they were not mutually exclusive with other applications as of the release date of the *NPRM*.[599] We stated that this approach gives due deference to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications. We also stated that we would not accept settlement agreements relating to mutually exclusive ITFS applications filed after the release date of the *NPRM*, but that we would act on settlement agreements filed prior to release of the *NPRM* that are compliant with our rules.[600] We noted that the Commission has used this approach in other services where it proposed a transition to geographic area licensing.[601]

262. We tentatively concluded that upon adoption of this *R&O*, we would dismiss, without prejudice, applications for ITFS stations filed prior to the adoption of the *NPRM* that do not meet the above criteria.[602] We sought comment from any parties proposing that we retain such applications and asked these parties to address how such applications should be processed, particularly in the event of any auction for spectrum covered by the application.[603]

263. *Discussion.* After reviewing the comments we received, we conclude that we will adopt our tentative conclusion. HITN asserts that "only entities whose applications are currently mutually exclusive and that have been accepted for filing by the Commission should be permitted to participate in

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[599] *See NPRM,* 18 FCC Rcd at 6813-14 ¶ 228. In the interest of completeness, we note that in the *NPRM* we stated that effective as of its *release* date, we would suspend acceptance of applications for ITFS channels for new licenses, amendments or modifications for any kind of station temporarily, except for ITFS channels that involve minor modifications, assignment of license or transfer of control. We explained the suspension is effective until further notice and applies to applications received on or after the date of release of the *NPRM*. *See NPRM,* 18 FCC Rcd at 6813 ¶¶ 226-227. On August 8, 2003, however, we modified the freeze by allowing the filing of applications for new licenses and major modifications of MDS stations adopted in the *MO&O*. With respect to ITFS stations, we accepted major change applications, subject to the existing requirement that a licensee may not modify its protected service area (PSA). As modified, the freeze on MDS and ITFS applications will revert to the *status quo ante* that applied before the *MO&O* was adopted. *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, Part 1 of the Commission's Rules - Further Competitive Bidding Procedures, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, 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. 03-66 RM-10586, WT Docket No. 03-67, MM Docket No. 97-217, WT Docket No. 02-68 RM-9718, *Second Memorandum Opinion and Order*18 FC Rcd 16848 (2003).

[600] *See NPRM,* 18 FCC Rcd at 6813-14 ¶ 228. If we approve such a settlement agreement, we will allow the processing and grant of the remaining non-mutually exclusive applications. *Id.*

[601] *See, e.g.,* Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-257, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-17016 (1997).

[602] *See NPRM,* 18 FCC Rcd at 6813-14 ¶ 228.

[603] *Id.*

an auction against each other for the channels that are subject to those applications."[604] We disagree with HITN, and note that with regard to pending applications in other services that have been converted to geographic area licensing, the Commission has dismissed the pending mutually exclusive applications at bar.[605] Thus, we dismiss all applications for ITFS stations that were filed prior to adoption of the *NPRM* where: the applications are mutually exclusive, and the applicants filed settlement agreements subsequent to the release of the *NPRM*, and/or applicants filed settlement agreements prior to the release of the *NPRM*, but the settlement agreement did not comply with our rules.[606]

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Licensing All Available Spectrum Pursuant to the New Band Plan

264. We now consider what further actions, if any, may be necessary to achieve potential benefits of the new band plan and service rules, such as deployment of new broadband services, throughout the entire band. In the foregoing *Report and Order*, we adopted a new band plan for the 2496-2690 MHz band, *i.e.*, for EBS and BRS spectrum, to further various public interest objectives, including the public interest in efficient and intensive use of the spectrum. To facilitate transition of EBS and BRS incumbents to the new band plan, we have established a three-year period during which a "proponent," either unilaterally or in combination with other proponents, can develop and file an Initiation Plan for moving all EBS and BRS licensees within the proponent's MEA to new spectrum assignments under the new band plan, subject to certain requirements and safeguards. The three-year limit on filing Initiation Plans provides an incentive for existing users to develop transition proposals in a timely manner. However, proponents' Initiation Plans may not be sufficient, without additional action, to achieve throughout the entire band all the benefits made possible by the *Report and Order*. For example, Initiation Plans cannot put to use spectrum currently unassigned to any incumbent. Moreover, the filing of Initiation Plans is purely voluntary and consequently Initiation Plans may not be filed covering all MEAs.

265. Accordingly, in this *Further Notice*, we seek comment on how best to license EBS and BRS spectrum that timely-filed Initiation Plans would leave either unassigned or un-transitioned. In addition, we seek comment on whether an alternative process for transitioning areas not governed by Initiation Plans proposed in this *Further Notice* should be open to individual licensees that are subject to timely-filed Initiation Plans and subsequently would prefer to participate in the alternative process. We seek comment on all aspects of the proposals set forth below, as well as any comment on alternatives that commenters may suggest to address the relevant policy objectives.

1. New Licenses to Be Assigned by Auction

266. As a general matter, we propose to assign by auction any new licenses for spectrum in the band, with any auction being open to all parties, both incumbents and new entrants, potentially eligible to hold the licenses offered. Accordingly, licenses with restricted eligibility, such as EBS licenses, could be bid on only by parties potentially meeting all the restrictions on licensees. An auction is most likely to assign the license to the qualified licensee that most highly values it if the auction is open to all potentially

[604] *See* HITN Comments at 9-10.

[605] *See* n.601, *supra*.

[606] *See* Appendix E for list of dismissed applications. *See* Appendix F for a list of dismissed pleadings relating to the dismissed applications.

qualified licensees.[607] The new band plan and service rules, together with geographic area licensing, will give licensees greater operational flexibility to modify, move, and add to their facilities, which may improve spectrum utilization. In addition, this greater operational flexibility may result in new and competing proposals for utilizing the public spectrum resource from new parties. Applicants intending very different uses of the new licenses can express the respective values a particular license has for their intended use in easy to compare competitive bids. This enables the Commission rapidly to assign licenses to parties most likely to put them to their highest value use.

267. We previously sought comment on potential auctions in this band in the initial *Notice of Proposed Rulemaking*. We now seek comment on potential auctions in light of the Commission's decisions in the *Report and Order* regarding the new band plan, the new service rules, and the process for proponents to prepare Initiation Plans to transition MEAs to the new band plan. To the extent that commenters believe that previously filed comments remain relevant in this new context, we ask that they file new comments explaining why their prior positions continue to apply. In order to assure that all potential parties have an opportunity to address issues relating to potential auctions in this new context, we reiterate our requests for comment on some particular details of the auction process in this new context. In addition to seeking comment on the proposals discussed herein, we seek comment on alternative approaches.

268. In MEAs where proponents timely file Initiation Plans, we propose to assign by auction new licenses for unassigned spectrum, *i.e.,* for spectrum in any unassigned frequency blocks and in geographic areas outside incumbent licensees' GSAs. Such unassigned spectrum will be composed primarily, if not exclusively, of EBS spectrum, given that the Commission exhaustively licensed MDS spectrum by assigning overlay MDS licenses following Commission Auction No. 6.[608] As discussed below, we seek comment on whether we should make licenses for this spectrum available in a particular MEA in response to the filing of an Initiation Plan or hold the spectrum for a general auction of all potentially available spectrum in the band.

269. In MEAs where no proponent timely files an Initiation Plan, we seek comment on a proposed process for transitioning to the new band plan. As detailed below, we propose to make all spectrum in such MEAs available by clearing existing spectrum assignments, issuing incumbent EBS and BRS licensees modified licenses to continue current operations until new licensees give notice of intent to offer incompatible new services and transferable bidding offset credits to preserve their ability to access spectrum of comparable value. We then would assign by auction new licenses in such MEAs pursuant to the new band plan. We seek comment on all aspects of this proposal, as well as alternatives.

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[607] *See generally* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2360-2361, ¶¶ 70-71 (1994). Citing prior Commission proceedings, the Coalition proposed that participation in an auction of ITFS white space should be limited solely to parties with pending applications for licenses associated with unassigned ITFS spectrum. White Paper at 41 and n.111 (quoting 13 FCC Rcd at 16,002). Previously, the Commission observed that "it would not serve the public interest to accept additional competing ITFS applications despite our authority to do so under Section 309(j)(1)," and therefore the only "eligible bidders in any auction of the pending ITFS applications" ought to be "those with applications already on file." *Id.* However, this prior observation applied solely with respect to "any auction of the *pending ITFS applications*[.]" Those applications have been otherwise resolved. We propose that the auction for clear spectrum discussed herein will be open to all qualified applicants for the reasons set forth above.

[608] In the event that particular overlay licenses were returned or otherwise cancelled, there may be unassigned MDS spectrum available for licensing.

270. In addition, we also seek comment on whether, in MEAs where proponents timely file Initiation Plans, individual licensees subject to the Initiation Plan should be given the option of participating in the proposed process for transitioning other areas to the new band plan. In brief, individual licensees that for any reason did not want to accept the new spectrum assignment resulting from the Initiation Plan could relinquish their new assignment in exchange for a modified license and a transferable bidding offset credit. Such action might place all potentially available licenses in the band in a single auction. As discussed further below in connection with new license areas, this process also may facilitate the creation of larger, more functional geographic areas than the new licenses created pursuant to the Initiation Plan. We seek comment on whether such an option might serve the public interest in use of the spectrum generally, and particularly whether such an option might facilitate implementation of Initiation Plans by giving opponents subject to Initiation Plans a viable alternative.

a. When to Assign New Licenses

271. As an initial matter, we seek comment on whether the timely filing of an Initiation Plan should result in licenses for unassigned spectrum in the relevant MEA being made available for assignment within a specified time period after the filing. Generally, one option would be to conduct a single auction of licenses for all available spectrum in the band after the close of the three-year period for filing Initiation Plans, whether the spectrum was unassigned, cleared for purposes of transitioning MEAs to the new band plan, or relinquished by incumbents voluntarily clearing already transitioned spectrum. This would enable all potentially interested parties to participate in a single, simultaneous auction offering transparent price information regarding substitutable or complementary licenses in the band. However, previously unassigned spectrum might be primarily, or even exclusively, of interest to incumbent licensees in an area subject to a proponent's timely-filed Initiation Plan. In such a case, the benefit of making that spectrum available to enhance the Initiation Plan's transition to the new band plan might outweigh the benefit of offering that spectrum in a potential future auction of all available spectrum in the band. Alternatively, however, making unassigned spectrum available as a result of the filing of an Initiation Plan could delay the development or implementation of Initiation Plans by posing unanticipated variables for the proponent.

272. To assist in determining whether one of these or some other scenario is likely to occur, we seek comment on when to assign new licenses by auction for unassigned spectrum in MEAs subject to timely-filed Initiation Plans. Should we wait until the time for filing Initiation Plans expires, so that all spectrum potentially available for new licenses can be identified? Or should we assign licenses for unassigned spectrum in an MEA as soon as possible after the timely filing of an Initiation Plan? How quickly should auctions for such licenses be held after the timely filing of the Initiation Plan? Should there be a minimum amount of time following the filing of an Initiation Plan before such an auction should be held? Should there be a maximum amount of time? We note that it appears impractical to conduct auctions for each MEA as Initiation Plans are filed. Is the unassigned spectrum likely to be of interest to parties other than incumbent EBS and, to the extent such spectrum is available, BRS licensees in the relevant MEA? Should we give any consideration to any claims by incumbents that assigning such licenses prior to implementation of the Initiation Plan may interfere with the transition to the new band plan?

273. We also welcome comment on when to hold an auction of licenses for spectrum that is not transitioned pursuant to an Initiation Plan. In light of the potential for filing Initiation Plans any time within three years of the date of the foregoing *Report and Order*, we could not hold any such auction any earlier than three years after that date. We seek comment, however, on whether there would be any reason, other than the practical considerations of preparing to conduct an auction, for the Wireless Telecommunications Bureau to refrain from considering such an auction beginning three years after the

Report and Order.

b. Geographic Areas for New Licenses

274. In contrast to new spectrum assignments resulting from proponents' Initiation Plans, the Commission will have the flexibility to use new geographic area licensing definitions for new licenses. We propose to use Major Economic Areas as the basis for new licensing in the LBS and Upper Band Segment, and to use Economic Areas as the basis for new licensing in the MBS. We believe these proposed area definitions provide a better framework for new licensing than GSAs derived from the PSA of existing EBS and BRS licensees. The geographic limits of existing site-based licenses may limit new low or high-power services the new service rules otherwise make possible. For example, a licensee seeking to re-site a high-power transmitter and make use of the flexibility of geographic area licensing may be unable to do so if the new licensing area is closely hemmed in by other licenses. Furthermore, licensees seeking to deploy new mobile low-power service may be unable to do so if they cannot aggregate existing licenses to create a sufficient area to satisfy consumer demand for coverage.

275. *License areas for LBS and UBS spectrum.* While useable for many purposes, licenses in the Lower and Upper Band Segments authorizing low-power use offer particularly significant opportunities for providing ubiquitous mobile service. The larger the service area is, the more likely the licensee would be able to offer service anywhere that a potential customer may need it. Furthermore, licensees that choose not to serve the entire geographic area covered by the license could, subject to Commission rules, partition the license or lease spectrum rights to other parties interested in serving those areas. Finally, because the transition process adopted in the *Report and Order* is organized by MEA, using MEAs to license spectrum in the LBS and UBS may facilitate coordination with incumbents who develop MEA-based transition plans. We therefore seek comment on using MEAs for new licensing in the Upper and Lower Band Segments. We also seek comment on alternative proposals for LBS and UBS area definitions.

276. *License areas for MBS spectrum.* Licenses in the MBS authorizing high-power uses may be well suited to fixed broadcasting services, similar to existing ITFS and MDS services. Furthermore, these licenses may be of greatest interest to licensees seeking to expand services without discontinuing current service. In light of these factors, we believe that potential MBS licensees would be interested in areas larger than the PSA of an EBS or BRS license, but not necessarily much larger. Given these circumstances, license areas smaller than MEAs may meet the needs of potential MBS licensees. We therefore propose to use Economic Areas as the basis for new licensing in the MBS. We note that EAs can be aggregated into MEAs, which may facilitate coordination with incumbents who transition into MBS frequency assignments in accordance with MEA-based transition plans. We seek comment on this proposal and on alternative proposals.

277. *License areas for new licenses for previously unassigned spectrum.* Licenses for previously unassigned spectrum could be licensed based on the defined frequencies and geographic area that previously were unassigned. In addition, we could consider whether the public interest would be better served by assigning a single new license for multiple areas. Alternatively, we could make available new MEA and EA licenses, for low and high-power channels respectively, that would overlay existing licenses in MEAs subject to an Initiation Plan. These overlay licenses would encompass all previously unassigned spectrum in particular frequency blocks in the relevant geographic area. The overlay licenses would not provide any rights with respect to areas covered by other licenses but would simply clarify that any area within the MEA or EA not covered by the other licenses was the subject to the MEA or EA license. We seek comment on these alternatives, in particular on whether issuing overlay licenses as described could inadvertently create any uncertainty regarding the rights of other incumbents?

278. *License areas for relinquished spectrum.* As discussed further below, we seek comment on whether to offer incumbent licensees subject to Initiation Plans the option of relinquishing spectrum assignments pursuant to the Initiation Plan in order to participate in an alternative transition to the new band plan. Licenses for spectrum made available by any incumbents exercising this option could be licensed based on the defined geographic area of the relinquished license. In the event that incumbents relinquish multiple licenses in a single MEA subject to an Initiation Plan, we could consider whether the public interest would be better served by assigning a single new license for multiple areas. Alternatively, we could make available new MEA and EA licenses, for low and high-power channels respectively, that would overlay existing licenses in MEAs subject to an Initiation Plan. These overlay licenses would encompass all spectrum previously subject to relinquished licenses in the relevant geographic area. The overlay licenses would not provide any rights with respect to areas covered by other licenses but would simply clarify that any area within the MEA or EA not covered by the other licenses was the subject to the MEA or EA license. We seek comment on these alternatives, in particular on whether either alternative creates different incentives for incumbent licensees that might opt to participate in the alternative transition, as well as the different effects, if any, each would have on other incumbent licensees in the relevant MEA or EA. For example, would defined geographic areas or overlay licenses enhance or decrease the value of new licenses made available by opt-in licensees, thereby giving those licensees a greater incentive to relinquish licenses? Could issuing overlay licenses as described inadvertently create any uncertainty regarding the rights of other incumbents?

c. Frequency Blocks for New Licenses

279. We seek comment on the proper grouping of frequency blocks in an auction of new LBS, MBS, and UBS licenses. One option would be to license each block in each band segment separately. Alternatively, we could maintain consistency with current channel groupings by licensing three LBS or UBS blocks with an MBS block in the same groups incumbents are entitled to receive pursuant to a proponent initiated transition, *i.e.*, license an "A block" of three LBS blocks and one MBS block at the lower end of the respective segments. Should we consider grouping any EBS LBS blocks with any BRS UBS blocks? We also could group all LBS and UBS spectrum within a service as one segment, with a separate segment for all MBS spectrum within a service. We seek comment on these and other alternatives.

280. We also seek comment on whether parties seeking new licenses may be indifferent to the specific frequencies they receive, so long as they are authorized to use frequencies with particular characteristics, e.g., in particular band segments or on uniform frequencies across multiple license areas. If such indifference exists, it may be possible to allow bidders to bid within or across markets on a non-frequency specific basis. Accepting bids for new licenses based on characteristics bidders consider relevant without requiring them to specify particular frequencies could make coordination of auction bids easier and increase the likelihood of assigning the new licenses to parties that value them the most. Accordingly, we seek comment on whether potential bidders would place different values on different frequencies in the same area within the same band segment. We note that the Bureau could exercise its delegated authority regarding auction design so that bidders could be assigned uniform frequencies across markets by taking that constraint into account when the Commission assigns licenses, rather than by having the bidders bid on particular frequencies. Under this approach, if a bidder is indifferent between frequencies in the same area within the same band segment but values having the same frequency in adjacent markets, the Commission's process of assigning specific frequencies could take that into account, perhaps simply by assigning frequencies first to bidders winning across adjacent markets. We seek comment on this approach.

d. Rules for Auctions with New Licenses

281. We request comment on a number of issues relating to competitive bidding procedures that could be used to assign new licenses in this band by auction. We propose to conduct any such auction in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and substantially consistent with many of the bidding procedures that have been employed in previous auctions.[609] Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[610] Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.[611] In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[612] We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band.

e. Bidding Credits for Small Businesses and Designated Entities

282. In 1997, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[613] In addition, section 309(j)(3)(B) of the Act provides that in establishing eligibility criteria and bidding methodologies, the Commission shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[614]

283. The Commission's existing designated entity provisions apply based on an entity's qualification as a small business.[615] We note that minority and women-owned businesses and rural

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

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

[611] *See Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293; *see also Part 1 Recon Order/Fifth Report and Order*, 15 FCC Rcd 15293 (*recon. pending*) [cite check – recon pending?].

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

[613] *See* 47 U.S.C. § 309(j)(4)(D).

[614] *See* 47 U.S.C. § 309(j)(3)(B).

[615] *See* 47 C.F.R. § 1.2110(a). Although the Commission previously extended designated entity preferences to minority- and women-owned businesses, as well as to small businesses, following the Supreme Court's rulings in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *United States v. Virginia, et al.*, 518 U.S. 515 (1996), the Commission concluded that it would not be appropriate to adopt special provisions for minority-owned and (continued....)

telephone companies that qualify as small businesses may take advantage of the special provisions we have adopted for small businesses.[616] We seek comment on whether our small business provisions are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies.[617] To the extent that commenters propose additional provisions to ensure participation by minority- or women-owned businesses, or rural telephone companies, they should address how such provisions should be crafted to meet the relevant constitutional standards.

284. We seek comment on the appropriate definition(s) of small business that should be used to determine eligibility for bidding credits in the auction. With respect to the auction of EBS licenses, we further seek comment on any special challenges associated with governmental educational institutions or non-governmental non-profit educational institutions participating in auctions.

285. In the *Competitive Bidding Second Memorandum Opinion and Order*, the Commission stated that it would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[618] The Part 1 Third *Report and Order*, while it standardizes many auction rules, provides that the Commission will continue a service-by-service approach to defining small businesses.[619] Generally, when establishing service-specific small business size standards, we look to the capital required to provide likely service using the spectrum. We do not know the precise type of service that new licensees may attempt to provide in this band. The Coalition has suggested that the ITFS and MDS bands may be used to provide ubiquitous broadband services using next generation low-power, cellular systems on fixed, portable and/or mobile bases.[620] We invite comment on whether likely services in this band may have capital requirements similar to current BRS services; or similar to mobile services, such as Personal Communications Services; or similar to fixed services, such as services in the 24 GHz and 39 GHz bands.

286. In the *Part 1 Third Report and Order*, we adopted a standard schedule of bidding credits for certain small business definitions, the levels of which were developed based on our auction experience.[621] The standard schedule appears at Section 1.2110(f)(2) of the Commission's rules.[622] Are

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women-owned businesses pending the development of a more complete record on the propriety of race- and gender-based provisions for future auctions. *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15318-20 ¶¶ 45-50 (discussing constitutional standards and governmental interests that would justify the use of race- or gender-based preferences).

[616] *See Part 1 Fifth Report and Order*, 15 FCC Rcd at 15319 ¶ 48; *see also* FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 at 29 (rel. Oct. 9, 1997) (finding that special provisions for small businesses also increase opportunities for minority- and women-owned businesses).

[617] We have issued a Notice of Inquiry seeking information about the effectiveness of our provisions to promote participation by rural telephone companies in our competitive bidding proceedings. *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Notice of Inquiry*, FCC 02-325 (rel. Dec. 20, 2002).

[618] Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269 ¶ 145 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*); 47 C.F.R. § 1.2110(c)(1).

[619] *Part 1 Third Report and Order*, 13 FCC Rcd at 388 ¶ 18; 47 C.F.R. § 1.2110 (c)(1).

[620] *See* White Paper at 11.

[621] *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 ¶ 47.

these levels of bidding credits appropriate for this band? For this proceeding, we would propose to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding $15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding $3 million for the same period as an "entrepreneur."[623] In the event that we offer bidding credits on this basis, we propose to provide qualifying "small businesses" with a bidding credit of 15%, qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).[624] Finally, we invite comment on the effect of potentially having three small business sizes, and bidding credits, for new licenses in this band while having had only one small business size (average annual gross revenues for the preceding three years not exceeding $40 million) and one credit (15%) in the BRS service.[625] We seek comment on this proposal.

287. We recognize that educational institutions and non-profit educational organizations eligible to hold EBS licenses may have unique characteristics. We therefore invite comment on whether distinctive characteristics of EBS licensees require distinct rules for assessing the relative size of potential participants in an auction. How do our designated entity provisions comport with the unique challenges and status of educational institutions? Should we establish special provisions for non-profit educational institutions that may want to have access to EBS spectrum but do not have the financial capability to compete in an auction for spectrum licenses? Commenters that propose special provisions for non-profit educational institutions should address the statutory basis for such proposals. Our standard schedule of small business bidding credits provides for bidding credits based on a calculation of bidders' average annual gross revenues for the three years preceding the auction.[626] We seek comment on whether the non-commercial character of EBS licensees requires any special procedures for determining the average annual gross revenues of such entities. For example, are our standard gross revenue attribution rules an appropriate method of evaluating the relative resources of universities and government entities? We also invite comment on whether some other criterion besides average annual gross revenues should be used for identifying small entities among EBS licensees and similar applicants.

288. Commenters proposing alternative business size standards should give careful consideration to the likely capital requirements for developing services in this spectrum. In this regard, we note that new licensees may be presented with issues and costs involved in transitioning incumbents and developing markets, technologies, and services. Commenters also should consider whether the band plan and characteristics of the band suggest adoption of other small business size definitions and/or bidding credits in this instance.

2. Transitions to the New Band Plan When No Proponent Files a Timely Initiation Plan

289. Notwithstanding the Commission's rules facilitating proponent-initiated transitions to the new band plan, there may be some MEAs where potential proponents are unable or unwilling to develop a

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[622] *See* 47 C.F.R. § 1.2110(f)(2).

[623] *See* 47 C.F.R. § 1.2110(f)(2). We note that we will coordinate the small business size standards for ITFS in this proceeding with the U.S. Small Business Administration.

[624] 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[625] *See* 47 C.F.R. § 21.961(b).

[626] *See* 47 C.F.R. § 1.2110(b).

viable Initiation Plan within the allotted three-year period. Although we could extend the three-year period for filing Initiation Plans, we are concerned that this would introduce delay and uncertainty into the transition process and could frustrate successful implementation of the new band plan. We believe that in MEAs for which no Initiation Plan is submitted within the three-year period, the Commission should move the transition forward by adopting an alternative process for transitioning to the new band plan. Accordingly, with respect to such MEAs, we seek comment on the proposal detailed below, as well as on other alternatives proposed.

290. In summary, the proposal presented here calls for the Commission to adopt rules to clear current spectrum assignments from the band while preserving the incumbents' ability to access spectrum comparable in value to currently assigned spectrum. As an initial matter, incumbents would receive modified licenses to enable them to continue current operations, for the duration of the license, so long as those operations did not conflict new licensees' plans to utilize the spectrum pursuant to the new band plan.[627] Moreover, incumbents would be issued bidding offset credits to enable them to obtain spectrum licenses comparable in value to their original licenses. The proposal calls for new licenses consistent with the new band plan to be assigned by an auction open to all potentially qualified licensees. Accordingly, licenses with restricted eligibility, such as EBS licenses, could be bid on only by parties potentially meeting all the restrictions on licensees. Incumbents could use their bidding offset credits to obtain licenses comparable in value to their original licenses in this or any other Commission auction. Finally, we propose that this alternative transition process include a limited "opt-out" option for incumbents who prefer to preserve current high-power operations to the extent possible on a frequency block in the MBS, rather than to pursue the wider options available under the new band plan. New licensees whose licenses cover spectrum made available by the relocation of such opt-outs would be required to pay the incumbent's costs of relocating its operations, including any upgrade to digital transmission. We seek comment on all aspects of this proposal, as well as on all aspects of other alternatives proposed.

291. We also welcome comment on the following principles guiding the proposal outlined below, both generally and with regard to how particular aspects of the proposal, or suggested alternatives, comply or conflict with them. First, the proposal seeks to achieve the benefits of the new band plan and service rules without imposing inequitable or unnecessary burdens or disruptions on existing spectrum users and uses, or more particularly on prior Commission licensing decisions authorizing those users and uses. In this regard, the proposal need not impose any burdens or disruptions greater than those that will result from a transition to the new band plan pursuant to a proponent-sponsored Initiation Plan. Indeed, if all the incumbents in an MEA act together under the proposal, they should be able to use the bidding offset credits that they would receive to outbid any other applicants for new licenses covering all the incumbents' original spectrum assignments in their MEA. Acting together, such incumbents then could partition and disaggregate the spectrum to achieve the same result they could have achieved under a transition pursuant to a proponent's Initiation Plan. Obviously, incumbents seeking such an outcome simply should proceed with a consensus Initiation Plan. We seek comment on this alternative proposal for transitioning to the new band plan precisely because incumbents may be unable to reach consensus on an Initiation Plan. The point here is simply to illustrate that incumbents need be no worse off under this proposal than they would be under an Initiation Plan.

292. Second, the proposal to issue bidding offset credits to incumbent licensees, while somewhat different from past practice, is fundamentally similar to the Commission's prior grant of

[627] This portion of the proposal would not apply to licenses for operations on MDS channels 1 and 2/2A, which would be subject to the separate clearing procedures for that spectrum. However, the remaining element of the proposal, issuing bidding offset credits, would apply to licensees for MDS channels 1 and 2/2A.

bidding credits when assigning licenses by auction. In essence, the bidding offset credits proposed here give a bidding preference to incumbent licensees in order to limit the burdens and disruptions on existing spectrum users and use while facilitating a transition to a new band plan and new service rules. Limiting the burdens and disruptions on existing spectrum users and uses reflects the public interest in avoiding unnecessary disruptions to the Commission's licensing decisions in the public interest. The Commission's decisions to license spectrum are only the first step to achieving the public interest benefits of spectrum use. While past Commission licensing decisions are subject to review and revision, spectrum utilization is facilitated to the extent that parties utilizing spectrum are able to rely reasonably on the continued effectiveness of past Commission action licensing the spectrum. All parties, licensees and consumers, benefit when they can act in reasonable reliance on past Commission licensing action. While the benefits of the new band plan and service rules cannot be achieved without changing the status quo of existing licensees, the proposal's use of bidding offset credits preserves the existing licensees' ability to access spectrum of comparable value, and thereby serves the public interest in effective utilization of the spectrum.

293. Third, the proposal reflects the indispensable role of the Commission in the management of the public spectrum resource. The proposal makes use of market mechanisms, such as auctions, where appropriate but is not an attempt to substitute Commission action for private markets. Adoption of the new band plan and service rules; the creation of new licenses with more effective GSAs; and the assignment of licenses taking into account all potential licensees, are functions the Commission is best, and perhaps uniquely, able to achieve. The proposal attempts to incorporate all these functions in assigning new licenses for the band.

294. Fourth, the proposal reflects appropriate limits on the Commission's authority as a manager of the public spectrum resource. The proposal does not use public funds or credit to compensate licensees. The bidding offset credits that would be issued would be defined by the spectrum that would be made available in an auction of Commission licenses. As detailed below, the Commission would quantify these bidding offset credits in terms of bandwidth and covered population, and the sum total of all the bidding offset credits would be no greater than the sum total of all the licenses measured in bandwidth and covered population. While the proposal would create a process for calculating a face dollar value of those bidding offset credits, the sum total of all bidding offset credits measured in dollars would be no greater than the sum total of winning bids in an auction of licenses for the spectrum.[628]

295. The Commission always balances a variety of public interest goals when managing the spectrum or making any other decisions within its authority. Accordingly, the foregoing principles are guidelines and not absolute requirements for the process of transitioning to the new band plan.

a. Modified Licenses for Incumbents to Continue Current Operations Pending Notice from New Licensees

296. In considering any proposed mechanism for clearing spectrum in MEAs that do not develop their own transition plan, we must consider the public interest in protecting existing spectrum uses and users from needless disruption or inequitable treatment. To accomplish these objectives, we

[628] Should the Commission determine for any reason that the sum total of bidding offset credits should not exceed the sum total of net winning bids, the Commission would have to consider whether to calculate the face dollar value of bidding offset credits using net winning bids or whether to refrain from using small business bidding credits in the auction which will be used as the source of winning bids used to calculate the face dollar value of bidding offset credits.

propose to modify existing EBS and BRS licenses, with the exception of licenses for MDS channels 1 and 2/2A, so that incumbents may continue current operations until a new licensee is prepared to use spectrum pursuant to the new band plan in a manner incompatible with incumbent operations and to issue existing EBS and BRS licensees bidding offset credits that should enable them to preserve their access to spectrum of comparable value. With respect to the ability to continue current operations using current spectrum assignments, licenses for MDS channels 1 and 2/2A would be subject to the separate procedures for clearing that spectrum.

297. Under this proposal, modified licenses would authorize incumbent licensees to continue offering services on existing channels for the duration of the original license, but these rights would be secondary to those conferred by new licenses that we would issue authorizing primary access under the new band plan. This is intended to enable incumbents to continue operations until new licensees prepare to offer incompatible new service; not to enable incumbents to conduct long-term secondary operations. The modified licenses would expire at the end of their term and would not be renewed. Modifying existing licenses in this manner would effectively require incumbents to clear their current spectrum assignments when new licensees are ready to use the spectrum in ways incompatible with existing uses. We seek comment on this proposal.

298. As discussed further below, the bidding offset credits would enable incumbent EBS and BRS licensees to obtain new spectrum licenses offering spectrum access comparable in value to their existing licenses. In addition, we propose permitting incumbent licensees to transfer their bidding offset credits in whole or in part. This could enable incumbents with otherwise limited resources to finance upgrading or relocating existing facilities to take advantage of the wider options under the new band plan. We seek comment on this proposal.

299. *Geographic Areas of Modified Licenses.* The proposed modified licenses held by incumbents would have a GSA determined according to the process for converting PSAs to GSAs, with two exceptions. First, as noted above, licensees for MDS channels 1 and 2/2A would not receive modified licenses. Their continued use of current spectrum assignments would be governed by the separate process for clearing that spectrum. Second, for purposes of determining modified license rights, we propose that BRS licenses issued on a BTA basis that have not been built out as required by Commission rules in effect on the date this *Report and Order* and Further *Notice of Proposed Rulemaking* is released be treated as site-based licenses for sites in operation as of that release date. Under this proposal, post-release build-out would have no effect on the incumbent's modified license or bidding offset credit. Alternatively, BTA licensees could receive credit for post-release build-out only if the post-release build-out satisfies build-out requirements in place prior to the release date. In other words, BTA licensees would be given credit for build-out that was not completed as of the release date but that was undertaken to meet requirements existing prior to that date. We seek comment on these alternatives.

300. *Procedure for Making New Licenses Primary.* We propose the following process to determine when incumbents with modified licenses would be required to accommodate new primary licensees. We also seek comment on alternatives. We would require new licensees to provide notice to the Commission and any affected licensees of intent to commence authorized spectrum use that may interfere with modified licenses. The notice would identify the relevant new and modified licenses and certify that the new licensee has complied with Commission rules regarding service of the notice on all affected licensees and the Commission. As described in the discussion below of the option for incumbents to "opt-out" of this transition process, the notice also would be required to include a certification that the new licensee has taken certain actions to relocate "opt-out" licensees covered by the new license. In the event the Commission subsequently finds that any filed certification regarding relocation is inaccurate, the new licensee on whose behalf the certification was made shall be responsible

for all reasonably required costs incurred in the relocation, including the costs of any party arising from the inaccurate certification. Further, we propose that unlike comparable new licensees making correct certifications, a new licensee on whose behalf an incorrect certification was made would not be entitled to recover relocations costs from any other potentially responsible new licensee.

301. We would delegate authority to the Wireless Telecommunications Bureau to issue a Public Notice listing receipt of such notices from new licensees. The Public Notice listing receipt of a notice from the new licensee shall constitute constructive notice to all affected licensees. Absent the required certification, any notice shall be deemed null and void, irrespective of being listed on any Public Notice listing notices received by the Commission. One hundred and eighty (180) days after release of the Public Notice announcing the receipt of the notice or 18 months after the close of the three year period for filing Initiation Plans, whichever comes later, the new license(s) designated in the notice shall become primary to the modified license(s) designated in the notice. Prior to that time, the modified licenses would remain primary. As noted above, modified licenses shall not be eligible for renewal, irrespective of primary or secondary status, in order to assure finality regarding the transition.

302. We seek comment on this proposed notice process. Commenters are asked to discuss whether any special sanction should be imposed on secondary licensees that interfere with primary licensees and whether any sanction should be imposed on new licensees that do not commence new use within a year after filing the notice. Commenters proposing special sanctions for interference by secondary use should address the appropriate method for measuring the interference. Commenters proposing sanctions for new licensees not commencing new use should address when to evaluate the new use, the standards for such evaluation, and the most appropriate sanctions.

b. Bidding Offset Credits for Incumbents to Obtain Spectrum Licenses of Comparable Value

303. *Issuing Bidding Offset Credits.* In addition to modifying incumbent licenses as discussed above, we propose to issue existing licensees, including licensees for MDS channels 1 and 2/2A in the relevant MEAs, bidding offset credits that can be used to obtain new licenses in the 2496-2690 MHz band or auctioned licenses in any other spectrum band. We further propose that these bidding offset credits would be transferable to any other party, so that licensees would have the option of transferring them to others rather than being required to use them themselves. We seek comment on this proposal. As a threshold matter, we believe we have authority to issue the bidding offset credits. The Commission has authority to take actions necessary to execute its functions and to carry out the provisions of the Communications Act, not otherwise inconsistent with the Act. 47 U.S.C. §§ 154(i) and 303(r). The Commission's functions include management of the spectrum in the public interest, pursuant to Section 303 of the Act, and assignment of licenses to use spectrum in the public interest, pursuant to Section 309. Issuing bidding offset credits in order to protect existing spectrum uses – and past Commission public interest judgments reflected in prior licensing decisions – while clearing existing spectrum assignments is necessary to the management of spectrum in the public interest and not inconsistent with the Communications Act.

304. Effectively clearing prior spectrum assignments so that new licenses for this spectrum may be assigned by competitive bidding will promote statutory objectives.[629] Issuing bidding offset credits is within the Commission's statutory authority regarding the design of competitive bidding systems. Section 309(j)(4) of the Communications Act grants the Commission authority to consider a

[629] *See* 47 U.S.C. § 309(j)(3).

variety of methods of helping entities pay for licenses that are offered at auction, including alternative payment schedules, tax credits, and bidding preferences. The legislative history also indicates that Congress intended that Section 309(j)(4) would provide the Commission with "flexibility to utilize any combination of techniques that would serve the public interest."[630] Section 309(j)(4)(A) specifically authorizes the Commission to consider methods of payment that promote Section 309(j)(3)(B) statutory objectives of competitive bidding, which include disseminating licenses among a wide variety of applicants. Existing EBS and BRS licensees reflect in part the public interest in disseminating such licenses (particularly EBS licenses) to a wide variety of locally based licensees. Issuing bidding offset credits should ensure that such licensees can participate effectively in an auction of new licenses and thereby promotes that public interest.

305. We propose to quantify the bidding offset credits based on the bandwidth, measured in megahertz, of the incumbent's modified license multiplied by the population within the modified license's GSA. We refer to this unit of measurement as MHzPops. For licensees of MDS channels 1 and 2/2A, bidding offset credits would be based on the MHzPops of the licensee's original license. An incumbent holding a bidding offset credit for a certain amount of MHzPops could offset, *i.e.*, satisfy, some or all of a winning bid for a new license in the same service in this band covering the same population depending on the ratio between the bidding offset credit MHzPops and the new license's MHzPops. For example, suppose an incumbent held a modified EBS license for a single frequency block that entitled it to a 10 MHzPop bidding offset credit. Suppose further that a new EBS license for the same frequency block, *i.e.*, with the same bandwidth, as the incumbent's modified license covered the entire population within the incumbent's GSA as well as an equal amount of population outside the GSA, *i.e.*, reached twice the population with the same bandwidth. That new license could be measured as having 20 MHzPops. The ratio between the bidding offset credit and the new license, in terms of MHzPops, would be 1:2. Accordingly, the EBS incumbent could offset 1/2 of the winning bid, regardless of the dollar amount, for the new EBS license. Note that if the incumbent held modified licenses for two frequency blocks in the same area, it would double its bidding offset credit and have a 1:1 ratio between its bidding offset credit and the new license. Such an incumbent could offset, or satisfy, a winning bid of any amount for the new license. We propose that bidding offset credits be used in this manner only with respect to licenses in the same service, given the potential different market values of otherwise comparable spectrum, depending on the service to which it is allocated. Otherwise, licensees in one service could convert their licenses to the other service without taking into account the differences between the two. We seek comment on this proposal.

306. We further propose that incumbents be able to use their bidding offset credits to obtain spectrum licenses in new areas or different bands than those authorized by their original license. However, spectrum licenses in different areas or in different bands may differ so substantially that it would be inappropriate to offset winning bids for such spectrum licenses on a uniform MHzPops basis. Nevertheless, bidding offset credits could be used to offset winning bids for other spectrum licenses fairly and effectively if the bidding offset credit could be quantified in a generally applicable measurement of value, such as dollars, rather than MHzPops. We propose that we use an average price per MHzPops, derived from the auction for new licenses in this band, to give the bidding offset credit a face dollar value. Once given a face dollar value, bidding offset credits could be used to offset any winning bid for any

[630] P.L. 103-66, Omnibus Budget Reconciliation Act of 1993, House Report No. 103-111, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255.

Commission spectrum license, up to the face amount of the bidding offset credit.[631] In the event that we issue bidding offset credits, we propose that the Wireless Telecommunications Bureau develop procedures to advise bidders of the current projected face dollar value of their bidding offset credits during the auction of licenses in this band based on winning bids in the most recent round, so that the bidding offset credits could be used for any license in the auction. We seek comment on these proposals.

307. We also seek comment on how to determine the appropriate average price per MHzPops for quantifying bidding offset credits. For example, should we account for the fact that the new licenses permit new uses of the spectrum and may reach other population and/or use different frequencies than the original license? If so, how? Should we calculate different averages for different incumbents depending on whether the spectrum being cleared by the incumbent in exchange for the bidding offset credit is in high-power, MBS or for the low-power, lower and upper band segments?

308. We seek comment on three potential methods for calculating the value of bidding offset credits under this proposal. First, we could average the prices per MHzPops for all the related new licenses, regardless of any differences between the new licenses, and multiply the bidding offset credit's MHzPops by that average price. Like the proponent-initiated transition process, which would grant each licensee equal shares of each new band segment, this method makes no distinction among different licensees that cover the same geographic area. However, as a consequence, this method also makes no distinction between the different values for the different types of new licenses. Second, recognizing that the original ITFS or MDS license only permitted high-power use of the spectrum, we could determine the face dollar value of the licensee's bidding offset credit by multiplying the bidding offset credit's MHzPops by the average price per MHzPops for related MBS licenses permitting similar high-power use. Third, recognizing that original licensees may need to acquire LBS/UBS licenses to retain current bandwidth and that prices for such licenses may exceed MBS prices, we could multiply the bidding offset credit's MHzPops by a weighted average of the average price per MHzPops for related MBS licenses and related LBS/UBS licenses. For example, we could weight the two equally (even though there is more than three times as much LBS/UBS spectrum) by taking the mean of the average price per MHzPops for related MBS licenses and the average price per MHzPops for LBS/UBS licenses. We seek comment on these and any other alternatives for determining the average price per MHzPops to use in calculating the face dollar value of bidding offset credits.

309. Regardless of how we take into account various factors discussed above, we propose to set average prices per MHzPops for bidding offset credits issued to EBS licensees using prices for new EBS licenses and average prices per MHzPops for bidding offset credits issued to BRS licensees using prices for new BRS licenses. In this way, we can take into account the effect of restricting the parties eligible to hold EBS licensees in setting the face dollar value of bidding offset credits and leave the parties holding the bidding offset credits free to use them as they see fit.

310. As discussed above, we believe that each new MBS license will cover an entire EA and each new license for the LBS and UBS will cover an entire MEA. Consequently, each new license will

[631] For example, if the modified license authorized exclusive use of frequencies equaling 10 megahertz in a GSA with a population of 10 million, the licensee would receive a bidding offset credit for 100 million MHzPops. Subsequently, presuming the appropriate average price per MHzPops of related new licenses is $2, the bidding offset credit would have a face value of $200 million (100 MHzPops * $2 per MHzPops). A party holding the bidding offset credit could use it to offset up to $200 million of winning bids for Commission spectrum licenses. For example, if the winning bid for a new license is $150 million, the bidding offset credit could be used to offset that winning bid in entirety, while retaining a remaining face value of $50 million.

cover larger areas and different populations than the modified EBS and BRS licenses. The face dollar value of the bidding offset credit would be calculated using a uniform average price per MHzPops with respect to all population covered by the new license. Accordingly, the difference in population between the incumbent's modified license, which is the basis of the bidding offset credit's MHzPops, and the new license does not require altering the proposed process above for calculating the face dollar value of the bidding offset credit. However, EBS and BRS licenses may reach populations covered by more than one new license geographic areas. In that event, to take into account the potential differences between the average prices per MHzPops in the different new license areas, the bidding offset credit issued to the licensee would be treated as two independent bidding offset credits, one in each new license area.[632] We seek comment on this approach.

311. *Dividing and Transferring Bidding Offset Credits.* We propose that bidding offset credits should be divisible, given that parties using the bidding offset credits may be interested in a variety of licenses and that bidding offset credits are unlikely to precisely equal future winning bids. In addition, parties receiving bidding offset credits may need flexibility regarding business plans to offer spectrum-based services. We believe that such parties should be free to transfer some or all of their bidding offset credits. Because the Commission will be able to evaluate whether any transferee holding a bidding offset credit is qualified to be a licensee at the time the Commission considers a license application, the public interest in the qualifications of licensees would not be implicated by a transfer of the bidding offset credit. Moreover, permitting existing EBS and BRS licensees to transfer their bidding offset credit in whole or in part could facilitate relocating existing facilities, thus serving the public interest in avoiding unnecessary disruptions to existing services. We seek comment on whether it would be appropriate to adopt a time limit for parties to make us of the bidding offset credit, to provide definition and certainty with respect to the continued viability of the bidding offset credit or for any other reason. Finally, we do not see any reason to propose limitations on the transfer or use of bidding offset credits held by EBS licensees. The face dollar value of the bidding offset credits issued to EBS licensees would be calculated using the average price per MHzPops of new EBS licenses. Accordingly, the face dollar value of the bidding offset credit will incorporate any effect restrictions on EBS licenses may have on the price for such licenses. Therefore, we do not propose to limit subsequent use of the bidding offset credit to EBS licensees or EBS licenses. In effect, EBS licensees that do not use their bidding offset credit to obtain a new EBS license have transferred their former spectrum assignment to a new EBS-qualified licensee and are then free to use the bidding offset credit they receive as best serves their needs. The public interest reflected in the restrictions on licensees eligible to hold EBS licenses is protected by limiting new EBS licenses to qualified licensees.

312. However, in order to prevent future disputes regarding the parties that are entitled to use a bidding offset credit, we propose to require that all parties to any transfer notify the Commission of any transfer, identifying all relevant parties, and waive any claims for relief that would require returning the bidding offset credit to the transferee. Such a waiver would not require that the parties waive any claims for relief other than returning the bidding offset credit, *e.g.*, claims for monetary damages. We seek comment on this procedure generally and in particular regarding whether additional protections are

[632] For example, if a modified 10 megahertz license reaches two million people in the area covered by one new license and eight million people in the area covered by a second new license, we will treat the bidding offset credit as having 20 million MHzPops with respect to the first new license and 80 million MHzPops with respect to the second. Assume the auction results in an average price per MHzPops of $1 for the first new license and $2 for the second. The bidding offset credit have a face dollar value of $180 million ((20 million MHzPops * $1/MHzPops) + (80 million MHzPops * $2/MHzPops)) = $20 million + $160 million = $180 million). Once the face dollar value is determined, no further distinction needs to be made between the two areas reached by the modified license.

available and necessary to protect against any efforts to force returns of the bidding offset credit. Would it protect against subsequent attempts to avoid transfers in bankruptcy to require that the parties give advance notice of a transfer and only consummate the transfer after a waiting period? If so, how long should the waiting period be? Would a waiting period unnecessarily complicate transfers of bidding offset credits?

c. New Licenses and Relocation of Incumbents Opting not to Receive Modified Licenses and Bidding Offset Credits

313. *Opt-outs.* 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. For example, there may be no new license covering precisely the same geographic area as the existing license. Consequently, we propose offering such licensees an opportunity to retain their GSA rather than receive a bidding offset credit to obtain a new license. In such cases, the licensee's current license would be modified in the same manner as all other licensees being cleared. The modified license would grant the licensee primary status on the relevant spectrum until a new licensee gives proper notice of incompatible new uses. The modified license then would grant the licensee secondary status for the remainder of the license term. The modified license would not be renewable. In addition, an opt-out licensee would receive a new 6 megahertz primary license for operations in its current GSA on frequencies selected by the Commission at the core of the MBS. The new license would have the same geographic area as the modified license, would have primary status, and would be eligible for renewal. We seek comment on this proposal.

314. The new band plan provides only one six megahertz block for high-power operations in the MBS for each original license in the band. Consequently, in areas subject to an proponent's Initiation Plan, incumbent licensees are entitled to only one six megahertz block in the MBS. In areas not transitioned pursuant to an Initiation Plan, incumbents that opt-out of receiving bidding offset credits in order to continue high-power operations likewise will receive a six megahertz block in the MBS. In addition, such incumbents will have others pay for their relocation. The conversion to digital transmission may enable some licensees to continue offering the same services on six megahertz that they may have offered on twenty-four, presuming they were licensed on all four channels in a group, prior to the implementation of the new band plan. As discussed below, we propose that digital facilities capable of transmitting on six megahertz the same services previously transmitted on a larger amount of bandwidth using analog facilities be considered "comparable" to such analog facilities when determining the obligations of others to pay for the incumbent's relocation. Perhaps most importantly, in areas where bidding offset credits are made available, incumbent licensees that want additional bandwidth in the MBS for high-power operations will have the opportunity to obtain it at the auction of new licenses.

315. *Financing Relocation of Opt-Outs.* We propose that the cost of relocating current licensees that opt-out should be paid by the new licensees for whose licenses spectrum is made available by the relocation. Licensees choosing to receive new MBS licenses rather than bidding offset credits may incur significant costs to relocate to the new high-power MBS. Given the non-commercial nature of EBS licensees, licensees that opt to receive a six megahertz license rather than a bidding offset credit in order to assure continuation of existing services may have difficulty financing their relocation. BRS licensees choosing to receive a new MBS license rather than a bidding offset credit also may lack capital for relocation. If we adopt the proposal to auction new licenses without designating frequency blocks until after the auction, bidders for new licenses may not know when bidding whether their specific spectrum was occupied by the relocating licensee. Given that all bidders for new licenses that encompass the geographic area covered by the original license may win frequencies covered by the original license, we propose that in such circumstances all new licensees with licenses encompassing the geographic area covered by the original license be deemed to benefit from the relocation. In the event that we accept bids

for new licenses for specific frequencies, the new licensees winning license for frequencies covered by the original license would benefit from relocation. We propose that relevant new licensees pay for the relocation of the original licensee pursuant to the procedure described below. We seek comment on this proposed procedure.

316. With respect to licensees who propose to opt-out of the bidding offset credit process and accept MBS spectrum, we propose delegating authority to the Wireless Telecommunications Bureau to announce a date for such licensees to file a relocation plan. The date for filing shall be at least sixty (60) days prior to the start of any auction for new licenses in this band. In the filing, relocating licensees would provide a detailed proposal setting forth all actions reasonably required to relocate their current facilities or construct comparable new facilities consistent with the new MBS license. In light of the limited availability of MBS spectrum and the need for relocating licensees to make due with less bandwidth, we propose that digital transmission facilities capable of carrying the same number channels previously carried by the licensee on four analog channels be considered comparable to the analog transmission facilities. The proposal would itemize the cost of each action to be taken, and would document costs already incurred. We seek comment on this proposed approach.

317. We also propose that relocating licensees be able to relocate themselves and subsequently seek reimbursement from new licensees. Itemized costs related to relocation that the licensee incurs prior to the date of filing shall be deemed reasonably required. Itemized costs related to relocation that the licensee incurs after the date of filing that are less than or equal to the estimates provided in the filed relocation plan shall be deemed reasonably required but subject to review. Costs related to relocation that the licensee incurs after the date of filing that exceed the estimates provided in the filed plan shall be deemed not reasonably required and are not recoverable.

318. Further, we propose that new licensees holding licenses that encompass the geographic area of any relocated license would be required to certify to the Commission that they have taken reasonably required actions to relocate the affected licensee and that the relocated licensee has been reimbursed for all reasonably required relocation costs that it incurred. Such certifications would be required to detail all actions taken in this regard. Reimbursement would include any reasonably required costs subject to review, unless such costs were determined by binding arbitration to be not reasonably required as part of the relocation. We propose that if the Commission should find relocated licensees unreasonably refused to submit to binding arbitration, the relocating licensee would not be entitled to recover any costs subject to review. In the event that affected licensees do not relocate themselves, new licensees would be required to relocate them by taking the actions set forth in the filed relocation plan, paying the cost of such relocation up to one hundred and twenty percent (120%) of the estimate provided in the plan. No new licensee would have any obligation to relocate the affected licensee or pay any relocation costs to the relocated licensee once any responsible new licensee certifies that it has paid reasonably required relocation costs of one hundred and twenty percent (120%) of the estimate provided in the plan.

319. Absent the required certification, we propose that any notice of intent to commence new operations pursuant to the license that may conflict with existing uses would be deemed null and void, regardless of whether it is inadvertently listed on any Public Notice listing notices received by the Commission. In the event the Commission subsequently found that any filed certification is inaccurate, we propose that the new licensee on whose behalf the certification was made would be held responsible for all reasonably required costs incurred in the process of relocation irrespective of the estimates in the filed relocation plan, including the costs of any party arising from the inaccurate certification. Under this proposal, such a new licensee would not be entitled to recover any amounts it pays from any other new licensee responsible for relocation costs. With the exception of any responsible new licensee that files an

inaccurate certification regarding relocation, we propose that any responsible new licensee paying more than the fraction of the recoverable relocation costs equal to the new licensee's fraction of bandwidth made available in the area in the auction would be entitled to recover excess amounts from any other responsible new licensee that has not previously paid its own fractional share.

B. Performance Requirements

320. *Background.* In the *NPRM*, we sought comment on what performance requirements should be applicable to MDS BTA authorization holders and site-based MDS and ITFS licensees.[633] Given our decisions to adopt geographic area licensing for these services,[634] and to eliminate forfeiture, cancellation, and discontinuance of service rules for certain BRS and EBS licensees,[635] we conclude that it is necessary to review performance requirements for these services as well. Because these standards exist in order to encourage licensees to build out wireless facilities, we sought comment specifically on whether the existing benchmarks were adequate or whether these standards actually frustrated licensees' abilities to deploy service quickly and efficiently.[636] As noted in the *NPRM*, the Commission has been willing to entertain "substantial service" as a flexible, alternative approach that fulfills our goal of promoting innovation and development by maximizing flexibility in the service rules.[637] Many commenters favor this standard, offering that a substantial service approach is a better alternative to current static build-out requirements, which follow fixed time-schedules.[638] We also sought comment in the *NPRM* as to the appropriate method for conducting a substantial service analysis, including what factors a licensee may use to demonstrate substantial service including "safe harbors".[639]

321. The Commission seeks to prescribe performance requirements that serve "to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[640] Additionally, we seek to promote the availability of broadband to all Americans, including broadband

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[633] *NPRM*, 18 FCC Rcd at 6799-6804 ¶¶ 190-198.

[634] *See* Section *IV.A.4*, *supra*.

[635] See Section IV.D.11, *supra*.

[636] *See NPRM*, 18 FCC Rcd at 6799 ¶ 190.

[637] *See NPRM*, 18 FCC Rcd at 6800 ¶ 191. *See also*, Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16951 ¶ 37 (2000) (*24 GHz Report and Order*) ("Based on the record in this proceeding, we believe that the substantial service standard, in lieu of specific coverage requirements best serves the public interest. In addition to being consistent with the approach used in other wireless services, we believe that this standard is sufficiently flexible to foster expeditious development and deployment of systems and will ultimately create competition among service providers in this band.").

[638] *See NPRM*, 18 FCC Rcd at 6802 ¶ 193. The most important construction requirements currently applicable to MDS BTA authorization holders are that such licensee has a five-year build-out period, beginning on the date of the grant of authorization, and in that time the licensee must construct stations that will provide service signals to at least two-thirds of the population of the applicable service area. *See generally* 47 C.F.R. § 21.930. Site-based MDS licensees must construct their facilities within twelve months of the date of their grant. *See* 47 C.F.R. § 21.43. Site-based ITFS licensees must construct their facilities within eighteen months of following the issuance of their construction permit. *See* 47 C.F.R. § 73.3534.

[639] *See NPRM*, 18 FCC Rcd at 6800, 6802-03 ¶¶ 191, 193-97.

[640] 47 USC §309(j)(4)(B).

technologies for educators, and to encourage the highest valued use of radio licenses and promote the economic viability of services in this band by ensuring that the spectrum is as fungible, tradable, and marketable as possible. Thus, in order to accomplish these goals, we believe a market-oriented approach to spectrum policy best ensures the build-out of wireless facilities and broader provision of wireless services.[641] We believe that economic forces will guide competing providers to innovate and broaden deployment of services. To this end, we aim to provide licensees greater flexibility "to tailor the use of their spectrum to unique business plans and needs."[642] We believe that establishing more flexible rules will result in ubiquitous, high-quality service to the public and at the same time encourage investment by increasing the value of licenses. We believe more flexible rules will make licensees more economically viable and will provide incumbents with reasonable opportunities to continue their current uses of the spectrum. We believe flexible rules will also facilitate speedier transition and deployment in the band. For the reasons discussed herein, we tentatively conclude that performance requirements based on the substantial service standard set forth in Part 27 of our Rules[643] will provide the strongest incentives to licensees to develop and deploy new services. We seek comment on specific safe harbors that will satisfy the substantial service requirements tentatively adopted for BRS and EBS services.

322. "'Substantial' service is defined in Part 27 of our Rules as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."[644] The Commission has implemented substantial service requirements for other wireless services.[645] Among our goals, we seek to clarify and stabilize the regulatory treatment of similar spectrum-based services. Thus, we believe that adopting substantial service performance requirements for BRS and EBS services will create regulatory parity between these services and other wireless services.[646] And "[w]hile the definition of substantial service is generally consistent among wireless services, the factors that the Commission will consider when determining if a license has met the standard vary among services."[647] We believe that within a substantial service framework, refined measures may be adopted to suit any challenges that BRS and EBS licensees face in development and deployment. Our decision to

[641] *See* 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 ¶ 34 (2003) (*Rural NPRM*).

[642] *See Rural NPRM*, 18 FCC Rcd at 20819 ¶ 34.

[643] *See* 47 C.F.R. § 27.14(a) (2004).

[644] 47 C.F.R. § 27.14(a).

[645] *See, e.g., Rural NPRM*, 18 FCC Rcd at 20819 ¶ 34 ("In more recently adopted rules for wireless services, such as our Part 27 rules for private services, Lower and Upper 700 MHz, 39 GHz, and 24 GHz, the Commission established the substantial service standard as the only construction requirement."). *See also* Coalition Proposal at 44. ("There is ample precedent for [a substantial service] approach as the Commission has adopted this very same requirement for operate at 2.3 GHz, the Upper 700 MHz band, the Lower 700 MHz band, the paired 1392-1395 MHz and 1432-1435 MHz bands or the unpaired 1390-1392 MHz, 1670-1675 MHz and 2385-2390 MHz bands.").

[646] *See also Rural NPRM*, 18 FCC Rcd at 20821-22 ¶ 37-38. *See also 24 GHz Report and Order, supra* note 5, at 16951 ¶ 37.

[647] *See Rural NPRM*, 18 FCC Rcd at 20819 ¶ 32. "For example, in some wireless services, the Commission indicated that licensees providing niche, specialized, or technologically sophisticated services may be considered to be providing 'substantial service.' In other services, the Commission has indicated that licensees providing an offering that does not cover large geographic areas or population..., but nonetheless provides a benefit to consumers, also may meet the standard." *Id.* at n.75 (citations omitted).