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

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| In the Matter of | ) | |
| | ) | |
| Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands | ) | WT Docket No. 03-66<br>RM-10586 |
| | ) | |
| Part 1 of the Commission's Rules – Further Competitive Bidding Procedures | ) | WT Docket No. 03-67 |
| | ) | |
| Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions | ) | MM Docket No. 97-217 |
| | ) | |
| Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico | ) | WT Docket No. 02-68<br>RM-9178 |
| | ) | |
| Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets | ) | WT Docket No. 00-230 |

To: The Commission

**COMMENTS OF**
**BELLSOUTH CORPORATION, BELLSOUTH WIRELESS CABLE, INC. and SOUTH FLORIDA TELEVISION, INC.**


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January 10, 2005

**Summary**

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") commend the Commission for implementing important changes to the BRS/EBS band plan, streamlined application processing and implemented important changes to its technical and operational rules in the Report and Order in this docket. The fundamental changes will promote deployment of innovative and competitive advanced wireless services. In releasing a Further Notice of Proposed Rulemaking, the Commission also recognized that it could take additional steps to further facilitate the ability of the BRS/EBS industry to promote competition and introduce new services. BellSouth urges the Commission to adopt further rule changes described below to achieve these objectives.

First, the Commission should adopt a "substantial service" performance requirement with "safe harbors" that would be in harmony with other mobile and fixed wireless radio services and would recognize the operations of licensees during their existing license terms. For the definition of "substantial service," BellSouth supports adoption of the existing definition contained in Part 27 of the Commission's Rules. To provide licensees with guidelines on how to satisfy the "substantial service" test, BellSouth urges adoption of the following "safe harbors:"

- Construction of four permanent links per one million people for licensees providing fixed point-to-point services.
- Coverage of at least 20 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services.
- Provision of specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers.
- Service to niche markets or areas outside the areas served by other licensees.

- Service to "rural areas" and areas with limited access to telecommunications services.
- Demonstration of other public interest reasons.

These "safe harbors" recognize the myriad of services that BRS and EBS licensees may offer and are consistent with Commission policies promoting flexible use.

Second, in addition to these "safe harbors," the Commission should accommodate the unique circumstances of services undergoing fundamental change and transition. Specifically, as a logical extension of its decision to permit licensees to discontinue existing service in connection with an industry transition to the new band plan, the Commission should deem that the satisfaction of any "safe harbor" *at any time during the existing license term* qualifies as "substantial service."

Third, in cases where a BRS or EBS license term would expire within five years following the completion of the transition to the new band plan, the Commission should allow a permittee or licensee to obtain renewal of its license conditioned upon demonstrating "substantial service" within five years following the post-transition notification date. With this "safe harbor," a licensee will not be required to needlessly build its station merely to satisfy a construction deadline that has no relevance to post-transition service. Also, where a licensee's spectrum is being used as guardband or is intended for future commercial deployment, and the spectrum is licensed or leased to an operator of a system using more than one BRS or EBS license, the Commission should deem a licensee to have demonstrated "substantial service" where the system, as a whole, can satisfy the standard.

Fourth, if and when the Commission conducts auctions for BRS and EBS spectrum, the Commission should make that spectrum available according to channel group. This structure would afford bidders the opportunity to bid on the appropriate amount of spectrum, without having to acquire spectrum it does not desire.

Fifth, the Commission should adopt rules that protect land-based BRS and EBS licensees from receiving harmful interference caused by BRS operations in the Gulf of Mexico. In particular, existing BRS GSAs that extend over water should be protected from interference by any BRS licensee in the Gulf Service Area, just as holders of BTA authorizations are required to protect incumbent GSAs. Further, the boundary of the Gulf Service Area should be established at the limit of the U.S. territorial waters in the Gulf of Mexico, which is 12 nautical miles from the coastline. Either the Gulf licensee or the BTA holder may provide service in the area between the Gulf Service Area and the limits of BRS BTAs – the Gulf Coastal Zone – subject to applicable interference protection rights.

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**COMMENTS OF**
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BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") hereby submit Comments on certain of the proposals and suggestions contained in the Further Notice of Proposed Rulemaking ("*FNPRM*") in the above-captioned proceeding.[1] In these

[1] *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

Comments, BellSouth will address those issues that are most critical to enabling BRS and EBS licensees and operators to enjoy commercial success, meet educational objectives and better serve the public interest. Specifically, BellSouth believes the Commission should:

- Adopt a "substantial service" performance requirement with "safe harbors" that would be in harmony with other mobile and fixed wireless radio services and would recognize the operations of licensees during their existing license terms.
- Auction available BRS and EBS spectrum according to channel group.
- Adopt rules that protect land-based BRS and EBS licensees from receiving harmful interference caused by BRS operations in the Gulf of Mexico.

## Background

BellSouth is an existing BRS/EBS operator with significant spectrum holdings in a number of urban and rural markets throughout the southeastern United States. BellSouth desires to use this spectrum to provide advanced wireless services to consumers efficiently and economically. Since initially entering the BRS/EBS industry in 1996, BellSouth has expended hundreds of millions of dollars to acquire and design BRS/EBS systems, install equipment and provide commercial and educational services, and to convert its analog video systems to digital video systems. BellSouth also has conducted wireless broadband access trials in the Atlanta, Georgia, Daytona Beach, Florida and Palatka, Florida markets.

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2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004). References to the Report and Order portion of that document will be defined as the "*BRS/EBS Order*." References to the Further Notice of Proposed Rule Making portion of that document will be defined as the "*FNPRM*." A summary of the *FNPRM* was published in the Federal Register on December 10, 2004. *See* 69 Fed.Reg. 72048 (2004). By *Order*, FCC 04-258, released October 29, 2004, the Commission modified the Report and Order ("*Order*") to establish transitional technical rules and clarify certain non-technical rules.

BellSouth actively supported many of the rule changes adopted in the recent *BRS/EBS Order* that will facilitate the "rebanding" of BRS/EBS spectrum, streamline licensing procedures and rationalize operating rules for those services.[2] BellSouth agrees with the Commission that these rules "represent a major step towards unleashing the unrealized potential of this spectrum," and commends the Commission for its efforts in facilitating more flexible and efficient use of the 2500-2690 MHz band.[3]

## Discussion

### I. THE COMMISSION SHOULD ADOPT A "SUBSTANTIAL SERVICE" PERFORMANCE REQUIREMENT WITH "SAFE HARBORS."

In the *NPRM* in this proceeding,[4] the Commission sought comment on the Coalition's proposal to adopt a "substantial service" requirement for all BRS and EBS licensees, with "safe harbors" to accommodate niche and specialized services.[5] In its Comments,[6] BellSouth supported this view, and recommended the "safe harbors" adopted for the 218-219 MHz Service.[7] As BellSouth observed in its Reply Comments, a large

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[2] BellSouth filed Comments on September 8, 2003 ("BellSouth Comments") and Reply Comments on October 23, 2003 ("BellSouth Reply Comments").

[3] *BRS/EBS Order* at ¶9.

[4] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 03-56, 18 FCC Rcd 6722 (2003) ("*NPRM*").

[5] *Id.* at 6799-6804.

[6] BellSouth Comments at 31-33. BellSouth stated that the "types of service might differ from market to market" and that the safe harbors should "address these market variances . . . to ensure that licensees are not penalized for responding to consumer demand." *Id.* at 31.

[7] In the 218-219 MHz Service, the "safe harbors" include a demonstration of coverage to 20 percent of the population or land area of the licensed area, specialized service that does require a high level of coverage, and service to niche markets. *Id. at* 32, *citing* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-38 (1999) ("*218-219 MHz Flex Order*").

number of other parties also favored the proposal,[8] a point the Commission acknowledged in the *FNPRM*.[9]

In the *FNPRM*, the Commission "tentatively adopted" a "substantial service" standard.[10] The Commission stated that "[w]e believe that implementing substantial service performance requirements will also promote flexibility and thus allow licensees to provide quality, widespread services to the public."[11] For all of the reasons cited in the Comments, Reply Comments and *FNPRM*, BellSouth urges the Commission to adopt a "substantial service" standard, to be defined as "service which is sound, favorable and substantially above a level of service which just might minimally warrant renewal." This definition would be consistent with other Part 27 services[12] and other wireless services.[13] In most cases, the "substantial service" showing should be made at the time the renewal application is filed, though as discussed below, certain accommodations should be made where the license term expires within five years following completion of a transition.

The Commission also sought comment on "safe harbors" that could be adopted to provide licensees with guidance on what service would qualify for "substantial service." BellSouth proposes a series of "safe harbors" that recognize the incumbent nature of the service, the impending transition to a new band plan, and the flexible services – fixed, portable and mobile – that can be offered on the BRS/EBS spectrum.

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[8] *See* BellSouth Reply Comments at 22-24, n.91 (identifying six other commenters advocating "substantial service").
[9] *See FNPRM* at ¶328.
[10] *Id.* at ¶¶321, 328.
[11] *Id.* at ¶ 322.
[12] *See* Section 27.14(a).
[13] *See FNPRM* at n.618.

## A. **The "Safe Harbors" for "Substantial Service" Must Recognize the Myriad of Services that BRS and EBS Licensees May Offer.**

The Commission has established "safe harbors" in numerous other fixed and mobile wireless services,[14] and subsequent to the adoption of the *BRS/EBS Order*, extended the application of "substantial service" to a number of other wireless services.[15] As the Commission has acknowledged time and again, identifying specific "safe harbors" affords licensees guidance on how to meet the "substantial service" standard[16] while also providing "significant flexibility"[17] to licensees and recognizing that technological developments may be necessary for affordable build-out.[18] The Commission should apply these criteria to all BRS and EBS licensees, except for those that would be entitled to take advantage of the special rules proposed in Section I.B. hereof. These "safe harbors" must account for the likelihood that BRS and EBS licensees will provide

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[14] *See, e.g.*, Amendment of Parts 2 and 25 of the Commission's rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614 (2002) ("*MVDDS Order*"); Amendments to Parts 1, 2, 87 and 101 of the Commission's rules to License Fixed Services at 24 GHz, 15 FCC Rcd 16934 (2000) ("*24 GHz Order*"); *218-219 MHz Flex Order*; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (1997) ("*39 GHz Order*"); 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 Ferquency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) ("*LMDS Order*"); and Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, 12 FCC Rcd 10785 (1997) ("*WCS Order*").

[15] *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 19078 (2004) ("*Rural Order*") at ¶25 (applying "substantial service" standard, alongside existing service-specific construction benchmarks, to licensees in the 30 MHz broadband PCS, 800 MHz SMR (Blocks A, B and C), 220 MHz (with some exclusions), LMS and 700 MHz public safety services).

[16] *See 24 GHz Order* at 16951; *MVDDS Order* at 9684.

[17] *MVDDS Order* at 9684.

[18] *See WCS Order* at 10843 (noting that strict construction requirements could preclude efficient and innovative uses of spectrum); *LMDS Order* at 12660 (same).

different services in different markets, and that those services may change over time.[19] Also, as proposed by the Coalition,[20] the Commission should include in any "safe harbor" service provided by a BTA holder or its affiliate in that BTA. This will ensure that "substantial service" is "evaluated on the basis of the entire operating system within the BTA, rather than excluding incumbent stations owned or affiliated with the BTA authorization holder."[21] The Commission should adopt the following "safe harbors:"

1. ***Construction of four permanent links per one million people for licensees providing fixed point-to-point services.***

For licensees providing fixed point-to-point services, the Commission has in other wireless services established as a "safe harbor" the construction of four links per million population within the licensed area.[22] According to the Commission, this standard "should ensure that meaningful service will be provided without unduly restricting service offerings."[23] This standard would be equally appropriate for BRS and EBS licensees that provide point-to-point services.

In the *MVDDS Order*, the Commission indicated that a licensee could satisfy the "substantial service" standard if it demonstrated "actual delivery of service to customers via four separate transmitting locations per million population."[24] This variation of the "safe harbor" should be available to those BRS and EBS licensees that deploy multiple transmit sites to serve the public.

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[19] *See* BellSouth Comments at 21.
[20] *See* "A Proposal for Revising the MDS and ITFS Regulatory Regime," filed October 7, 2002 by the Wireless Cable Association International, Inc. ("WCA"), the National ITFS Association and the Catholic Television Network (collectively, the "Coalition"), at 49-50.
[21] *Id.* at 50.
[22] *See 39 GHz Order* at 18625; *24 GHz Order* at 14961.
[23] *Id.*
[24] *MVDDS Order* at 9684.

2. ***Coverage of at least 20 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services.***

In cases where licensees are providing either mobile services or fixed point-to-multipoint services, the Commission has consistently considered coverage of at least 20 percent of the population to be a "safe harbor."[25] There is no reason to have a different "safe harbor" for BRS or EBS. In fact, the 20 percent coverage threshold can be readily ascertained, and thus could easily be applied to GSA licenses and BTA authorizations that support either mobile or fixed point-to-multipoint services. BellSouth urges the Commission to adopt this "safe harbor."

3. ***Provision of specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers.***

In nearly every other wireless service where "substantial service" has been adopted, the Commission has recognized that in some cases, a specific coverage threshold may exclude other specialized services that benefit a smaller number of people.[26] The Commission has thus adopted as a "safe harbor" the provision of specialized or technologically sophisticated service that does not benefit a large number of consumers. Given the vast array of fixed and mobile wireless services that could be provided on the BRS/EBS platform, it would be appropriate to adopt a similar "safe harbor" here. Examples of such services would be "hot spots," systems providing carrier-grade business-only broadband service, systems used only by public safety entities, and systems serving universities and school systems.

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[25] *WCS Order* at 10844; *LMDS Order* at 12660. In the *MVDDS Order*, the Commission eschewed the 20 percent threshold in favor of a "safe harbor" of "service to a significant portion of the population or land area of the license area." *MVDDS Order* at 9685. *See also 24 GHz Order* at 16951.

[26] *See WCS Order* at 10843; *LMDS Order* at 12660; *MVDDS Order* at 9685; *218-219 Flex Order* at 1538.

4. ***Service to niche markets or areas outside the areas served by other licensees.***

Likewise, the Commission has consistently recognized that some operators may develop services for niche markets, or may choose to introduce their services where other operators have not.[27] These circumstances are equally applicable to BRS and EBS, and the Commission should establish the identical "safe harbor" here.

5. ***Service to "rural areas" and areas with limited access to telecommunications services.***

In the *FNPRM*, the Commission requested comment on whether it should adopt "rural-specific safe harbors within the substantial service framework to encourage rural build out."[28] The Commission specifically asked for comment on how to define a "rural area" for BRS and EBS and whether the Commission should establish a "rural safe harbor" for these services. Subsequent to the release of the *FNPRM*, the Commission issued the *Rural Order* where it adopted rules and policies "intended to increase the ability of wireless service providers to use licensed spectrum resources flexibly and efficiently to offer a variety of services in a cost-effective manner."[29] Among these, the Commission established definitions for "rural area" and "rural safe harbors" that would be used to demonstrate "substantial service." BellSouth believes that these definitions should be applied to the BRS and EBS services.

In the *Rural Order*, the Commission adopted a "default" definition of a "rural area" as a county having a population density of 100 persons or fewer per square mile.[30] The Commission stated that "definitions based on county boundaries are easy to

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[27] *See WCS Order* at 10843; *LMDS Order* at 12660; *MVDDS Order* at 9685; *218-219 Flex Order* at 1538.
[28] *FNPRM* at ¶330.
[29] *Rural Order* at ¶1.
[30] *Id.* at ¶11.

administer and understand, population data based on county boundaries are widely available to the public, and county boundaries rarely change."[31] With respect to BRS and EBS, this rationale is no less appropriate, and harmonization with other wireless services will promote simplicity, consistency and certainty in the administration of build-out requirements.

The Commission added that "it is sensible and administratively efficient to adopt safe harbors for geographic area licenses that are also based upon counties."[32] For mobile wireless services, "substantial service" would be met if the licensee "provides coverage to at least 75 percent of the geographic area of at least 20 percent of the 'rural areas' within its licensed area."[33] For fixed wireless services, "substantial service" would be met if the licensee "constructs at least one end of a permanent link in at least 20 percent of the number of 'rural areas' within its licensed area."[34] BellSouth believes that these "safe harbors" for BRS and EBS would encourage licensees and operators to serve "rural areas."

In addition, the Commission also established other factors it would consider in reviewing "substantial service" showings for areas that may not be "rural," but may be underserved. These include:

> coverage of counties or geographic areas where population density is less than or equal to 100 persons per square mile; (2) significant geographic areas; (3) coverage of unique or isolated communities or business parks; and (4) expanding the provision of E911 services into areas that have limited or no access to such services. [35]

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[31] *Id.* (footnotes omitted).
[32] *Id.* at ¶79.
[33] *Id.*
[34] *Id.*
[35] *Id.*

These factors also should be taken into account in reviewing "substantial service" showings in the BRS and EBS services.

6. ***Demonstration of other public interest reasons.***

In adopting "safe harbors," the Commission has consistently maintained that its examples are not exhaustive, and that case-by-case analysis would be warranted where a particular set of circumstances did not fit within the specified "safe harbors." BellSouth urges the Commission to ensure BRS and EBS licensees that it will consider other reasons when determining whether a licensee has satisfied the "substantial service" standard.

B. **The "Safe Harbors" for Existing License Terms Must Recognize the Unique Circumstances of BRS and EBS Licensees.**

Over the last few years, BRS and EBS licensees have faced the obsolescence of their legacy video and first-generation broadband service. As a result, many licensees that provided service to consumers have scaled back their operations to instead focus resources on future development of broadband following the fundamental restructuring of the BRS/EBS band in this proceeding – circumstances the Commission has come to understand in eliminating service requirements. In recognition of these circumstances in the context of the "substantial service" definition, the Commission should adopt the following additional "safe harbors:"

1. ***Satisfaction of other "safe harbors" at any time during the existing license term.***

Unlike many other wireless services where the "substantial service" standard was adopted at the same time as the service rules, the BRS and EBS services have existed for many years and, as the Commission acknowledged, have operated under disparate sets of

construction, operation and service requirements.[36] Historically, BellSouth and its BRS and EBS lessors have met their respective service obligations by providing commercial video services to subscribers over a wide geographic area. Currently, like many other licensees and operators, BellSouth is evaluating various paths to converting its business to broadband access as a result of the rebanding and other rule changes articulated in the *BRS/EBS Order*.

Accordingly, as BellSouth[37] and others[38] previously advocated in the proceeding leading to adoption of the *BRS/EBS Order*, the Commission should state definitively that the satisfaction of any "safe harbor" *at any time during the existing license term* qualifies as "substantial service." This "safe harbor" would recognize the service history of licensees prior to the adoption of the *BRS/EBS Order*,[39] even if they subsequently discontinued service as a consequence of the Commission's well-reasoned decision to eliminate the forfeiture, cancellation and service discontinuance rules for BRS and EBS licensees.[40] For example, if BellSouth were to meet the "safe harbor" by demonstrating service to "rural areas" at any point during the existing license term, it would be deemed to have satisfied "substantial service" for purposes of license renewal.

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[36] *Id.* at n.611& n.641.
[37] *See* BellSouth Comments at 33; BellSouth Reply Comments at 22.
[38] *See* Coalition Comments at 91-94.
[39] The Commission also should state that any holder of a BTA authorization that complied with the requirements of former Section 21.930(c)(1) of the Commission's Rules at any time during the license term will be deemed to have provided "substantial service." Consistent with this approach, for any BTA that has been partitioned or disaggregated during the existing license term, the Commission should affirm that the "substantial service" test can be met by demonstrating that service to customers was provided at some point in the license term in any area of the entire BTA (where it has been partitioned) or on any part of the licensed spectrum (where it has been disaggregated). It would be unfair to penalize licensees that relied on the now-suspended build-out rules only to have those rules eliminated and not replaced.
[40] *See BRS/EBS Order* at ¶¶232-233. Pursuant to Section 27.66, non-common carriers are required to notify the Commission of any service impairment within seven days, but will not need to seek waiver or be penalized if they elect to discontinue service.

Moreover, a rule that acknowledges past service would be consistent with the Commission's rationale behind the decision to permit obsolete services to be discontinued. As the Commission stated in the *BRS/EBS Order*:

> 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. 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.
>
> 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. *Accordingly, we conclude that it would be inappropriate to penalize BRS and EBS licensees while they migrate to the new band plan.*[41]

In light of these statements, the Commission cannot, on one hand, recognize the benefits of discontinuing obsolete service and, on the other hand, decree that BellSouth and other licensees that provided commercial or educational service prior to discontinuing service should not be entitled to license renewal.

2. ***Extension of build-out period for licenses subject to renewal before five years following transition period.***

The transition to the new band – and, ultimately, the deployment of broadband services – will require time and effort in order to occur on a widespread basis. This is manifest in the rules adopted by the Commission, which afford licensees and operators a

[41] *Id.* at ¶¶232-233 (footnotes omitted) (emphasis added).

three-year period to negotiate the terms of transitions before the process must be formally initiated. The transition must be initiated within 18 months thereafter. In determining that licensees need not operate during the pre-transition period, the Commission recognized that licensees should not be required to "throw good money after bad" by "preserving legacy services."[42]

This rationale applies with equal if not greater force to licensees and permittees that have upcoming build-out deadlines.[43] While it is possible that licensees and permittees may in fact be able to demonstrate "substantial service" prior to the time that the transition is completed through legacy operations or other means, the Commission should not require compliance with that standard until a reasonable period thereafter.[44]

BellSouth proposes that, in cases where a BRS or EBS license term would expire within five years following the completion of the transition, the permittee or licensee should obtain renewal of its license conditioned upon demonstrating "substantial service" within five years from the post-transition notification date determined by Section 27.1235(a). Licensees and permittees otherwise unable to meet the "substantial service" standard at the end of the license term would file FCC Form 603 on or before the five-year deadline in order to have the condition removed for the balance of the license term.[45]

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[42] *Id.*

[43] In recent months, Commission staff has been granting requests to extend EBS construction periods, without specifying new construction deadlines. Instead, the new authorizations include a "special condition" that build-out requirements are subject to rules to be adopted in this proceeding. Once the build-out rules are adopted, some permittees may only have a relatively short time remaining on their authorizations.

[44] Pursuant to Section 27.1231(b), a transition must be initiated within three years of the effective date of the rule. In light of the fact that there are no build-out rules on the effective date, licensees and permittees may be reluctant to construct new facilities since they will have no certainty that such construction (and subsequent operations) would qualify under whatever service requirements ultimately are adopted. BellSouth therefore believes that the period for initiating a transition should not commence until the effective date of the build-out requirements adopted in this proceeding.

[45] These would include EBS permittees holding construction permits that expire before the conclusion of the transition initiation period and all holders of BRS BTA authorizations, which expire in August 2006.

By adopting this approach, the Commission would afford licensees and permittees a fair and meaningful opportunity to focus resources on constructing facilities that will respond to consumer demand, rather than encouraging construction of "beat-the-clock" facilities that would preserve the license but must be dismantled as part of the transition. For example, through its lease with Christian College of Georgia, an EBS permittee in Pendergrass, Georgia, BellSouth may be able to construct facilities that cover 20 percent of the households in the GSA prior to expiration of the license term. However, these facilities may need to be subsequently dismantled and taken out of service to be reconfigured as part of a regional transition involving a number of systems. This process would require BellSouth to spend money on the initial construction of the facilities that lack any business purpose, and would unnecessarily disrupt the transition process by increasing the number of EBS receive sites that would need to be upgraded.

3. ***"Substantial service" provided on the system.***

The Commission also should adopt a "safe harbor" that takes into account the need of operators to dedicate spectrum to other uses. For example, a licensee that uses its spectrum for guardband to shield other BRS or EBS licensees on the system from interference would not be providing service *per se*, but its "use" would enable other licensees to transmit and provide non-interfering service. As another example, an operator may use some of the BRS or EBS spectrum it holds or leases, but it may not have a current use for all of the capacity on its spectrum and would desire to set aside spectrum for the future. This scenario would be more likely immediately following a transition, when the customer base may not justify the use of all spectrum rights held by the system operator, but future increases in the number of users would generate greater

capacity needs down the road. In cases where a licensee can show that its spectrum is licensed or leased to an operator of a system using more than one BRS or EBS license, the Commission should deem a licensee to have demonstrated "substantial service" where the system, as a whole, can satisfy the standard.

## II. THE COMMISSION SHOULD AUCTION BRS AND EBS SPECTRUM BY FREQUENCY BLOCK.

In the *FNPRM*, the Commission solicited input on how to group frequency blocks in an auction for available BRS and EBS spectrum.[46] The Commission stated its particular interest in learning whether parties may be "indifferent to the specific frequencies they use."[47]

BellSouth believes that licensees will not be indifferent, but rather will value certain blocks of spectrum more than others. Accordingly, BellSouth urges the Commission to auction each frequency block separately, in order to afford bidders the opportunity to acquire the appropriate amount of spectrum on the "best" available channels, without having to acquire spectrum it does not desire. For instance, if BellSouth were operating a TDD system in the UBS, it may have little interest in participating in an auction for LBS spectrum in an adjacent market, but may place a premium on UBS spectrum. Similarly, if BellSouth were operating an FDD system on Channels A1-A3 and E1-E3, it may have little interest in participating in an auction for F1-F3 spectrum in an adjacent market, but may place a premium on E1-E3 spectrum.

The Commission should not group together for auction purposes all available spectrum in the LBS, UBS and MBS. This would require a bidder to bid on spectrum it may not desire in order to acquire spectrum it desires. For example, a bidder should not

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[46] *See FNPRM* at ¶279.
[47] *Id.*

be compelled to bid on and acquire all available channels in the UBS if it only has a need for the E1-E3 channels. In this way, spectrum will be allocated to those that place the highest value on it.

## III. THE COMMISSION SHOULD ADOPT TECHNICAL AND SERVICE RULES FOR THE GULF OF MEXICO THAT FULLY PROTECT INCUMBENT LAND-BASED BRS AND EBS OPERATIONS.

In the *NPRM*, the Commission adopted a service area for BRS licensing in the Gulf of Mexico, and invited comment to address technical and service issues, including interference protection standards.[48] Noting its "concern[] that the record is not sufficiently developed to resolve" certain technical and service issues, the Commission in the *FNPRM* reiterated its request for comment.[49] As a BRS/EBS operator in New Orleans, Louisiana and Fort Myers, Florida, markets that border the newly-designated Gulf Service Area, BellSouth offers its views on the Commission's proposals to establish service area boundaries that do not interfere with BellSouth's licensed spectrum.

Regardless of whether, when or how the Commission auctions spectrum for the Gulf Service Area, the Commission should adopt rules that provide incumbent land-based BRS licensees with assurances they need to plan future build-out. For the benefit of BellSouth and others interested in serving populated coastal areas as well as those that may wish to bid for the Gulf Service Area BRS license, there is no need for the Commission to delay establishing the boundaries of the Gulf Service Area and interference standards that protect incumbent operations.

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[48] *See NPRM* at ¶¶93-97.
[49] *See FNPRM* at ¶367.

First, the GSA of any land-based BRS and EBS station must be grandfathered, including those areas that extend into the Gulf of Mexico.[50] As was the case when the Commission auctioned MDS BTAs in 1996, incumbent site-specific licensees were afforded interference protection from holders of BTA authorizations.[51] The same principle should restrict licensees in the Gulf Service Area from suppressing the size of incumbent GSAs, and adopting such a rule now will enable incumbent land-based licensees to develop business plans that incorporate coastal waters lying within the GSA.

Second, BellSouth agrees with the Commission's earlier proposal to adopt the same boundary definitions that it adopted in establishing the WCS service.[52] As applied to BRS, the borders of BTA authorizations would extend to the limit of the U.S. territorial waters in the Gulf of Mexico, which is 12 nautical miles from the coastline. This boundary definition, which has been supported by others in earlier proceedings,[53] will afford land-based BRS and EBS licensees greater flexibility in locating base stations for broadband services, both for service on land and in coastal waters. Without this flexibility, land-based incumbents would be forced to position their base stations at inferior sites that could preclude service to certain areas. Moreover, such service could be delivered sooner under existing land-based authorizations than under authorizations the Commission may, at some point in the future, award by auction.

In cases where the BTA boundary does not extend to the 12-mile distance, BellSouth supports WCA's proposal to create a "Gulf Coastal Zone" between the BTA boundary and the Gulf Service Area boundary that could be served by both the adjacent

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[50] *See* Coalition Comments at 74.
[51] *See* Section 21.938(b)(2).
[52] *See FNPRM* at ¶363, *citing WCS Order*, 12 FCC Rcd at 10816.
[53] *See, e.g.*, Comments of Sprint Corporation filed September 8, 2003, at 15-16.

land-based BTA licensee as well as any Gulf Service Area licensee the Commission may authorize, subject to applicable interference protection standards.

## Conclusion

In light of the foregoing, BellSouth Corporation, BellSouth Wireless Cable, Inc. and South Florida Television, Inc. urge the Commission to take the following actions:

- Adopt a "substantial service" performance requirement with "safe harbors" that would be in harmony with other mobile and fixed wireless radio services and would recognize the operations of licensees during their existing license terms.
- Auction available BRS and EBS spectrum according to channel group.
- Adopt rules that protect land-based BRS and EBS licensees from receiving harmful interference caused by operations in the Gulf of Mexico.

Respectfully submitted,

**BELLSOUTH CORPORATION,**
**BELLSOUTH WIRELESS CABLE, INC. and**
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January 10, 2005 By: /s/ Stephen E. Coran

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