

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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 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 RM-9718
)	
)	

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

Paul J. Sinderbrand
Robert D. Primosch
Nguyen T. Vu
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037-1128
202.783.4141

Its attorneys

January 10, 2005

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DISCUSSION.....	2
	A. THE COMMISSION SHOULD APPLY ITS PART 27 SUBSTANTIAL SERVICE AT RENEWAL PERFORMANCE TEST AND TRADITIONAL SAFE HARBORS TO BRS/EBS LICENSEES, AND ADOPT ADDITIONAL SAFE HARBORS TO ADDRESS THE UNIQUE CIRCUMSTANCES OF BRS/EBS.....	2
	1. The Part 27 Substantial Service Test is the Most Appropriate Performance Test to Apply to BRS/EBS.	2
	2. The Commission Should Afford to BRS/EBS Licensees The Same Safe Harbors Generally Afforded Licensees Subject to the Substantial Service Test, Plus Additional Safe Harbors to Reflect the Unique Circumstances of BRS/EBS Service.	8
	3. A BRS/EBS Licensee Should Be Required To Demonstrate Substantial Service At License Renewal, But No Earlier Than Five Years After Its Transition To The New Bandplan Has Been Completed.	14
	B. THE COMMISSION MUST PROVIDE AN OPPORTUNITY FOR LICENSEES TO SELF-TRANSITION BEFORE FORCING THEM TO ACCEPT BIDDING CREDITS OR A REDUCTION IN SPECTRUM.	17
	C. FUTURE AUCTIONS OF BRS/EBS SPECTRUM SHOULD OCCUR PROMPTLY AND NOT UNDERMINE THE TRANSITION PROCESS OR THE PUBLIC INTEREST OBJECTIVES OF THE NEW BRS/EBS RULES.....	20
	D. THE COMMISSION SHOULD ADOPT THE COALITION PROPOSAL’S PROPOSED TREATMENT OF GRANDFATHERED E AND F GROUP EBS LICENSEES.....	26
	E. THE COMMISSION SHOULD ELIMINATE THE REQUIREMENT THAT ALL OF AN EBS LICENSEE’S CHANNELS MUST COME FROM THE SAME CHANNEL GROUP.....	28
	F. THE COMMISSION MUST PRESERVE THE RIGHTS OF EXISTING COMMERCIAL EBS LICENSEES AND PENDING COMMERCIAL EBS APPLICANTS.....	30
	G. THE COMMISSION SHOULD DISTRIBUTE REGULATORY COSTS AMONG BRS LICENSEES IN A FAIR AND EQUITABLE MANNER.....	31
	H. THE COMMISSION MUST ASSURE THAT ANY BRS/EBS OPERATIONS IN THE GULF OF MEXICO WILL NOT ADVERSELY IMPACT THE PROVISION OF LAND-BASED SERVICES IN THE 2.5 GHZ BAND.	33
III.	CONCLUSION.....	43

EXECUTIVE SUMMARY

The *Further Notice of Proposed Rulemaking* (“*FNPRM*”) in this proceeding represents the next phase of the Commission’s unprecedented effort to create a new regulatory paradigm for Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) licensees in the 2496-2600 (“2.5 GHz”) band. As a member of the industry coalition (the “Coalition”) that devoted thousands of man-hours and substantial financial resources towards crafting the original rulemaking proposal that gave rise to this proceeding (the “Coalition Proposal”), The Wireless Communication Association International, Inc. (“WCA”) has a direct and immediate interest in the Commission’s resolution of the issues raised in the *FNPRM*. The prior filings of the Coalition and others on the original *Notice of Proposed Rulemaking* address many of the issues broached by the *FNPRM* and confirm that there is substantial industry agreement on how the Commission should proceed with its proposals in the *FNPRM*. WCA thus urges the Commission to adopt the following rule changes as soon as practicable.

Performance Requirements. The Commission should apply its Part 27 “substantial service” performance test and related safe harbors to BRS/EBS licensees at renewal, as it already does for other Part 27 flexible use services. However, to account for the unique circumstances of BRS/EBS and encourage BRS/EBS licensees nearing renewal to take maximum advantage of service flexibility and to move spectrum to its highest and best use, the Commission should also adopt the following additional safe harbors: (1) a given call sign should be entitled to a finding of substantial service so long as the call sign is part of a system that is providing substantial service and the spectrum at issue is either employed as guardband or is being held in reserve by the system operator for expansion; and (2) for the first renewal following the *Report and Order*, a BRS/EBS renewal applicant should be entitled to a finding of substantial service upon demonstration that it provided such service at some time during the term of its license, even if it is not providing sufficient service at the renewal “snapshot” to satisfy that test.

Furthermore, it makes no sense to conduct a substantial service review at renewal until the transition of the market at issue has been completed and the BRS/EBS system with which the licensee is associated has had an adequate opportunity to deliver service to the public. Hence, where a BRS/EBS license expires prior to the date that is five years after the filing of the post-transition notification applicable to that license pursuant to Section 27.1235 and the licensee is unable to demonstrate substantial service, the Commission should nonetheless grant renewal, conditioned upon demonstration of substantial service no later than five years after the filing of the post-transition notification.

Auction Issues. As reflected in WCA’s petition for partial reconsideration of the *Report and Order*, the Commission must reduce the size of a proponent’s transition area from its Major Economic Area (“MEA”) to its Basic Trading Area (“BTA”). Although WCA is troubled by the Commission’s approach, WCA is prepared to accept auctions of BRS/EBS licenses not included in timely filed Initiation Plans if the filing deadline for those plans falls no earlier than 30 months after the effective date of the rule change reducing the size of transition areas from MEAs to BTAs. In connection with the

Commission's proposal for auctioning BRS/EBS spectrum not included in a timely-filed Initiation Plan, WCA urges adoption of the following rules and procedures.

- In the event a BRS/EBS licensee is not covered by a timely filed Initiation Plan, it should be allowed until the 60th day after the Initiation Plan filing deadline to notify the Commission whether it will self-transition, accept bidding credits in exchange for a cancellation of its license, or accept a channel in the Middle Band Segment ("MBS") and financial reimbursement for the costs of migrating to that channel. Then, on a date in the future after those self-transitioning have had a reasonable opportunity to address the associated logistical issues (but no later than 18 months from the deadline for filing Initiation Plans) those self-transitioning and those accepting MBS channels will be required to stop transmissions entirely or to modify their equipment to operate on their designated channels in accordance with the new bandplan and technical rules.
- The Commission should declare that a licensee who has leased spectrum will not be permitted to return its licenses for bidding credits unless the lessee specifically gives its consent. Notwithstanding a lessor's likely legal liability under the terms of a lease if it returns its license, the Commission can do much to promote its secondary market policies and eliminate disputes in state and federal court by requiring lessors to obtain the consent of their lessees prior to returning their licenses for bidding credits.
- To promote rapid transitions and deployment of services, the Commission should immediately reactivate any BRS BTA authorizations that have been cancelled or forfeited and any EBS white space. However, to avoid increasing the complexity of transitions, those purchasing EBS white space should not be entitled to new downconverters or program track migration as part of a transition of that white space to the new bandplan. Spectrum not otherwise transitioned and spectrum that is returned by licensees in exchange for bidding credits or financial assistance in migrating to the MBS should be auctioned after the transition process has taken place.
- To minimize confusion and retain consistency with how BRS spectrum has been geographically licensed, all auctions of available BRS and EBS spectrum should be conducted utilizing BTAs as the geographic area for licensing.
- The Commission should auction the first three channels in a channel group (*i.e.* channels A1, A2, A3, B1, B2, B3, etc.) as a package, but separate from the fourth channel (A4, B4, etc.). By separating the first three channels, which will be in the Lower Band Segment and the Upper Band

Segment post-transition, from the fourth channel, which will be in the MBS channel, the Commission will minimize the possibility that auction participants will be forced to bid on channels in which they have no interest.

Treatment of Grandfathered E and F Group EBS Licenses. Where the protected service area of a grandfathered E or F Group EBS station overlaps that of a cochannel BRS station, the new rules for creating exclusive Geographic Service Areas (“GSAs”) should be applied to provide each with an exclusive service area. Once exclusive GSAs are created in this manner, grandfathered E and F group EBS licensees should enjoy the same technical and operational flexibility within their GSAs as other EBS licensees.

EBS Channel Limitations. WCA supports the Commission’s proposal to eliminate the requirement in Section 74.902(d)(1) that all of an EBS licensee’s channels in a single area of operation be drawn from the same channel group.

Commercial Licensing of Vacant EBS Spectrum. WCA sees no need for the Commission to continue authorizing new commercial licenses of EBS spectrum per former Section 74.990 (current Section 27.1201(c)) of the Commission’s Rules. However, the Commission must preserve the rights of commercial entities who either have already licensed commercial EBS channels or had applications pending for commercial EBS channels prior to the adoption of new rules in response to the *FNPRM*. To minimize regulatory confusion and simplify the rules, commercial EBS stations should hereafter be treated as BRS stations.

Regulatory Fees. EBS licensees should remain exempt from both regulatory and filing fees, and the Commission has very little statutory leeway to rule otherwise. Consistent with precedent, however, the Commission must recover its costs of regulating EBS licensees by allocating such costs on a proportional basis across *all* fee categories, so as to not unduly impact BRS licensees or any other specific category of fee payers. As to BRS regulatory fees, WCA would not object to allocation of BRS regulatory fees on a “MHz/pops” basis.

Licensing of BRS/EBS in the Gulf of Mexico. To date, no one in this proceeding has provided any indication that there is any demand for use of the 2.5 GHz band in the Gulf waters. Accordingly, the Commission should refrain from determining how much spectrum to license in the Gulf or when to auction that spectrum until it receives legitimate expressions of interest for such spectrum. However, to provide land-based licensees adjoining the Gulf with regulatory certainty even in the absence of any imminent licensing of BRS/EBS service in the Gulf, the Commission should adopt the technical and licensing rules previously proposed by the Coalition to govern operations in the Gulf and the land areas near the Gulf.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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 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 RM-9718
)	
)	

COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") in the captioned matter.¹

I. INTRODUCTION.

The *FNPRM* represents the next phase of the Commission's unprecedented effort to create a new regulatory framework for Broadband Radio Service ("BRS") and Educational

¹ *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 Band, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004)[*"Report and Order"* and *"FNPRM,"* respectively].

Broadband Service (“EBS”) licensees in the 2.5 GHz band. The Commission took a historic first step towards achieving this goal in the *Report and Order* released last July, finally putting the BRS/EBS industry on a path towards a *bona fide* flexible use model that promotes rapid deployment of broadband and other new services in response to market demand, while still providing spectrum for high-power, high-site facilities in the 2.5 GHz spectrum.

As is discussed in more detail in the petition for partial reconsideration of the *Report and Order* that WCA is filing today, WCA believes that while the Commission has made significant strides, adjustments to the new rules are essential if the Commission’s objectives are to be fully realized. By and large, the *FNPRM* seeks additional input on issues raised in the Commission’s original *Notice of Proposed Rulemaking* (“*NPRM*”)² but unresolved in the *Report and Order*. As a result, many of WCA’s positions on these matters are already set forth in the filings it made jointly with the National ITFS Association (“*NIA*”) and the Catholic Television Network (“*CTN*”) (WCA, *NIA* and *CTN* collectively, the “*Coalition*”) in response to the *NPRM*.

II. DISCUSSION.

A. **The Commission Should Apply Its Part 27 Substantial Service At Renewal Performance Test And Traditional Safe Harbors To BRS/EBS Licensees, And Adopt Additional Safe Harbors To Address The Unique Circumstances Of BRS/EBS.**

1. *The Part 27 Substantial Service Test is the Most Appropriate Performance Test to Apply to BRS/EBS.*

For the reasons already discussed in the *Coalition*’s prior filings in this proceeding, WCA generally supports application of the Part 27 substantial service performance test at renewal for

² *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003)[“*NPRM*”].

BRS/EBS licensees.³ Adoption of the Part 27 substantial service performance test will “provide [BRS/EBS] licensees greater flexibility ‘to tailor the use of their spectrum to unique business plans and needs.’”⁴ The Commission has endorsed this approach for other geographically licensed Part 27 services, and, as shown below, there is no reason for it not to do so again here.

For purposes of BRS/EBS, the Commission should define “substantial service” as it has always done, *i.e.*, as service “which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.”⁵ The application of this same definition to BRS/EBS will permit the Commission to “consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee’s operations serve niche markets or focus on serving populations outside of areas served by other licensees.”⁶ The benefits of this approach are well established: “Compared to a construction standard, a substantial service requirement will provide licensees greater flexibility to determine how best to implement their business plans based on criteria demonstrating actual service to end users, rather

³ See *FNPRM*, 19 FCC Rcd at 14287-88 ¶ 322; See also, “A Proposal For Revising The MDS And ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586 (filed Oct. 7, 2002)[“Initial Coalition Proposal”]. Subsequent to October 7, 2002, WCA, NIA and CTN submitted two supplements that addressed issues left open in the original white paper and sought to clarify points that apparently had been misunderstood by some parties within the industry. See “First Supplement To ‘A Proposal For Revising The MDS And ITFS Regulatory Regime,’” RM-10586 (filed Nov. 14, 2002); “Second Supplement To ‘A Proposal For Revising The MDS And ITFS Regulatory Regime,’” RM-10586 (filed Feb. 7, 2003). For simplicity’s sake, unless the context requires a different meaning, references to the “Initial Coalition Proposal” in these comments should be read to reference all three filings; Comments of WCA, NIA and CTN, WT Docket No. 03-66 at 83-95 (filed Sept. 9, 2003)[“Coalition Comments”]; Reply Comments of WCA, NIA and CTN, WT Docket No. 03-66 at 73-76 (filed Oct. 23, 2003)[“Coalition Reply Comments”].

⁴ *FNPRM*, 19 FCC Rcd at 14283 ¶ 321 (footnote omitted).

⁵ 47 C.F.R. § 27.14(a).

⁶ *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, Report and Order, 12 FCC Rcd 10785, 10844 (1997)[“WCS R&O”](footnotes omitted).

than on a showing of whether a licensee passes a certain proportion of the relevant population.”⁷

Equally important, the substantial service model promotes innovation in wireless services:

[T]he types of service available from 39 GHz providers is tremendously varied, and the service promises to develop in ways we cannot predict at this time. Thus, an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz licensees can provide. Permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall.⁸

Certainly, there is more than ample precedent for application of the Part 27 substantial service performance test at renewal to BRS/EBS. Indeed, prior to commencement of this rulemaking the Commission had already adopted the very same requirement for all Part 27 flexible use licensees, whether they 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.⁹ Indeed, just recently the Commission

⁷ *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980, 10010 (2002)[“27 MHz R&O”].

⁸ *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600, 18623 (1997)[“39 GHz Order”]. The Commission has also highlighted the benefits of the substantial service performance test vis-à-vis promoting deployment of wireless services to rural and other less populated areas. 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, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-166 at ¶ 76 (rel. Sept. 27, 2004)[“Rural Wireless R&O”](“[P]articularly in cases where a licensee has a population-based construction requirement, licensees have both an economic and practical incentive to achieve compliance with the Commission’s build-out obligation by providing service to urban areas. Further, current population-specific benchmarks may have the unintended consequence of encouraging several licensees within a particular market to provide coverage to the same populous areas. . . . With the additional flexibility afforded by a substantial service option, however, licensees will be free to develop construction plans that tailor the deployment of services to needs that are otherwise unmet, such as the provision of service to rural or niche markets.”)(footnotes omitted).

⁹ See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, First Report and Order, 15 FCC Rcd 476, 505 (2000)[“Upper 700 MHz R&O”]; *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022, 1079 (2001)[“Lower 700 MHz R&O”]; *27 MHz R&O*, 17 FCC Rcd at 10009-11. See also *Rulemaking to Amend Parts 1,*

adopted its Part 27 substantial service performance test for Advanced Wireless Service (“AWS”) licensees in the 1710-1755/2110-2155 MHz band,¹⁰ as well as 30 MHz broadband PCS licensees, 800 MHz SMR licensees (blocks A, B, and C), certain 220 MHz licensees, Location and Monitoring Service (“LMS”) licensees, and 700 MHz public safety licensees.¹¹ It therefore is no surprise that application of the Part 27 substantial service renewal test to BRS/EBS has already received substantial record support in this proceeding.¹²

Furthermore, in addition to fulfilling Chairman Powell’s pledge to regulate like services similarly,¹³ application to BRS/EBS of the same substantial service performance test applied to other Part 27 services at renewal will yield all of the benefits the Commission has identified when applying the test to other geographically licensed, flexible use services. It cannot be overemphasized that the purpose of this proceeding is to move BRS/EBS to a regulatory model

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, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12659-61 (1997), affirmed Melcher v. FCC, 134 F.3d 1143, 1161-62 (D.C. Cir. 1998); 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, 16950-52 (2000)[“24 GHz Order”]; 39 GHz Order, 12 FCC Rcd at 18623-24.

¹⁰ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, 25192 (2003)[“AWS Service Rules R&O”].

¹¹ See *Rural Wireless R&O* at ¶ 74. The Commission declined to do the same for BRS/EBS because the matter was already pending in this proceeding. *Id.*

¹² See *FNPRM*, 19 FCC Rcd at 14292 ¶ 320 (“Many commenters favor this standard, offering that a substantial service approach is a better alternative to the current static build-out requirements....”)(footnote omitted); see also Coalition Reply Comments at 74 n. 194; Comments of BellSouth Corporation and BellSouth Wireless Cable, WT Docket No. 03-66 at 31-33 (filed Sept. 8, 2003); Comments of EarthLink, WT Docket No. 03-66 at 8-9 (filed Sept. 8, 2003); Comments of Hispanic Information and Telecommunications Network, WT Docket No. 03-66 at 2 (filed Sept. 8, 2003); Reply Comments of Network for Instructional TV, WT Docket No. 03-66 at 8 (filed Oct. 16, 2003); Comments of Independent MMDS Licensee Coalition, WT Docket No. 03-66 at 22-23 (filed Sept. 8, 2003); Comments of Sprint, WT Docket No. 03-66 at 16-18 (filed Sept. 8, 2003); Reply Comments of Blake Twedt and John Dudeck, WT Docket No. 03-66 at 4 (filed Oct. 22, 2003).

¹³ See Opening Statement of Michael K. Powell before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, at 2 (March 29, 2001)(“We will rationalize and harmonize regulations across industry segments wherever we can and wherever the statute will allow.”).

that empowers BRS/EBS operators to respond quickly to marketplace demand for innovative new services, and to otherwise take advantage of the substantial opportunities that next generation BRS/EBS technology offers for the provision of commercial services and educational applications.¹⁴ That is precisely the point of the substantial service performance test – by taking a less statistically dependent view of the services operators are providing, the test gives operators comfort that they can make investments in studying their markets and developing new services uniquely tailored thereto without putting their license renewals at risk.

As such, WCA is puzzled by paragraph 325 of the *FNPRM*, in which the Commission states that it “[does] not plan to proceed on a case-by-case basis in determining whether substantial service has been met.”¹⁵ As recognized in the Commission’s own precedent, the primary advantage of the substantial service standard is that it is tied to the individual circumstances of each licensee.¹⁶ Across-the-board statistical benchmarks, on the other hand, do not paint a complete picture of how the licensee has actually performed and may actually hinder widespread deployment of wireless services. Indeed, the *FNPRM* points out that “fixed, inflexible construction requirements hinder widespread deployment of wireless services and do not always reflect elements of service such as cost or, more importantly, populations served.”¹⁷

¹⁴ See Initial Coalition Proposal at 10.

¹⁵ *FNPRM*, 19 FCC Rcd at 14285 ¶ 325.

¹⁶ See *27 MHz R&O*, 17 FCC Rcd at 10010 (“In determining whether a licensee has provided substantial service at the end of the license term, we will consider factors such as: i) whether the licensee’s operations service niche markets or focus on serving populations outside of areas serviced by other licensees; ii) whether the licensee’s operations serve populations with limited access to telecommunications services; and iii) a demonstration of service to a significant portion of the population or land area of the licensed area. We emphasize that this list is not exhaustive and that the substantial service requirement can be met in other ways. Hence, *we will review licensees’ showings on a case-by-case basis.*”)(emphasis added).

¹⁷ *FNPRM*, 19 FCC Rcd at 14284 ¶ 324.

This is especially true for BRS/EBS, where new entrants will be confronted with incumbents having different sized Geographic Service Areas (“GSAs”) dotted throughout the different size Basic Trading Area (“BTA”) authorizations issued for BRS and for EBS channels. As the Commission previously noted with regard to the lower 700 MHz band:

[Since] new licensees in different geographic areas will not be similarly situated due to varying levels of incumbency, specific benchmarks for all new licensees would be inequitable. . . . [T]he substantial service standard provides [the Commission] with flexibility to consider the particular circumstances of each licensee and how the level of incumbency has had an impact on the licensee’s ability to build-out and commence service in its licensed area.¹⁸

Simply put, individualized review of each licensee’s performance is necessary in order to properly evaluate whether a licensee has satisfied the substantial service standard. While WCA welcomes any effort to streamline the substantial service review process to eliminate administrative burdens on the Commission and licensees, case-by-case review in some cases is inevitable. Of course, the Commission can reduce the number of such reviews by adopting additional safe harbors as proposed below to address additional factual situations at licensee renewal.

Finally, WCA strongly objects to the suggestion in paragraph 323 of the *FNPRM* that a Commission evaluation of “qualitative factors important to end-users and the market such as reliability of service, and the availability of technologically sophisticated premium services” has any place in evaluating whether a licensee is providing substantial service.¹⁹ The Commission has emphasized time and again that the substantial service concept is designed to permit

¹⁸ *Lower 700 MHz R&O*, 17 FCC Rcd at 1079. See also *Rural Wireless R&O* at ¶ 73 (“The substantial service standard was intended to provide flexibility for services with a variety of uses for the spectrum (*i.e.*, fixed or mobile, voice or data) or with a high level of incumbency that would prevent a new geographic-based licensee from meeting the coverage requirements.”)(footnotes omitted).

¹⁹ *FNPRM*, 19 FCC Rcd at 14284 ¶ 323 (footnote omitted).

economic forces to drive innovation and deployment of wireless services, and “will result in ubiquitous, high-quality service to the public and at the same time encourage investment by increasing the value of licenses.”²⁰ It is very difficult to square that approach with the notion that the Commission, not the marketplace, is the better evaluator of whether a BRS/EBS licensee is providing reliable or “technologically sophisticated premium services.” The Commission should let the marketplace make these evaluations and businesses succeed or fail accordingly.

2. *The Commission Should Afford BRS/EBS Licensees The Same Safe Harbors Generally Afforded Licensees Subject To The Substantial Service Test, Plus Additional Safe Harbors To Reflect The Unique Circumstances Of BRS/EBS Service.*

Without question, BRS/EBS licensees should be afforded the same substantial service safe harbors already available to other Part 27 licensees. As previously recommended by the Coalition, the minimum safe harbors for BRS/EBS should be those used for 2.3 GHz licensees in the Wireless Communications Service (“WCS”) and 700 MHz licensees.²¹ Hence, where a BRS/EBS licensee offers fixed, point-to-point services, the construction of four permanent links per one million people in its licensed service area would constitute substantial service.²² Where a BRS licensee provides fixed, point-to-multipoint or mobile services, substantial service should be found where the licensee demonstrates coverage for 20 percent of the population of its licensed service area.²³

²⁰ *Id.* at 14283 ¶ 321.

²¹ *See* Coalition Comments at 86 n. 189.

²² *See WCS R&O*, 12 FCC Rcd at 10843-44 (footnotes omitted).

²³ *See Lower 700 MHz R&O*, 17 FCC Rcd at 1079. *See also WCS R&O*, 12 FCC Rcd at 10844.

Also, as proposed in paragraph 330 of the *FNPRM*, the Commission should give BRS/EBS licensees the same right as other Part 27 licensees to demonstrate substantial service via the new rural safe harbors adopted in the *Rural Wireless R&O*.²⁴ Hence, a BRS/EBS licensee should be deemed to have provided substantial service where, if providing fixed service, it has constructed at least one end of a permanent link in at least 20% of the “rural areas” within its licensed area.²⁵ Where a BRS/EBS licensee provides mobile service, the Commission should make a finding of substantial service where it provides coverage of at least 75% of the geographic area of at least 20% of the “rural areas” within its service area.²⁶

As recognized in the *FNPRM*, however, “the factors that the Commission will consider when determining if a licensee has met the [substantial service] standard vary among services,” and “within a substantial service framework, refined measures may be adopted to suit any challenges that BRS and EBS licensees face in development and deployment.”²⁷ Consistent with that approach, the Commission must adopt additional safe harbors that, while inapplicable to other Part 27 licensees, properly account for the unique circumstances of BRS/EBS licensees.

As observed in the *Report and Order*, “the regulatory history of the [BRS/EBS] band has been marked by changing and sometimes conflicting policy goals, which have tended to suppress investment, innovation, and responsiveness to changes in wireless technology and demand for

²⁴ See *Rural Wireless R&O* at ¶¶ 79-80. In this context, a “rural area” is a county whose population density is less than or equal to 100 persons per square mile. *Id.* at ¶ 79.

²⁵ *Id.* at ¶ 79.

²⁶ *Id.*

²⁷ *FNPRM*, 19 FCC Red at 14283 ¶ 322 (footnote omitted).

services.”²⁸ Indeed, “at the time [the Commission] adopted the *NPRM* and *MO&O* [for this proceeding], the existing record indicated that any deployment of advanced two-way systems in the 2500-2690 MHz band would be minimal” until the Commission completed this proceeding.²⁹ Clearly, the unprecedented regulatory uncertainty that has plagued BRS/EBS licensees for years must be acknowledged in crafting any substantial services test for BRS and EBS.

Similarly, if flexible use policies are to promote the evolution of the 2.5 GHz spectrum to its highest and best use, the Commission’s substantial service evaluation must reflect that licensees have deployed a variety of service offerings in the band, but have been foreclosed from converting to wireless broadband because of this regulatory uncertainty. The Commission’s goals thus will be compromised if the next BRS/EBS renewals are based solely on a “snapshot” taken when those renewal applications are filed. In that regard, it is significant that the *Report and Order* recognizes that the dramatic regulatory changes in the 2.5 GHz band will prompt BRS/EBS licensees to discontinue obsolete legacy services in order to transition to the new bandplan, thus potentially putting their license renewals at risk if their discontinuance of service falls close to renewal time. The Commission clearly wishes to avoid any action that would punish such licensees in this situation:

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

²⁸ *Report and Order*, 19 FCC Rcd at 14171 ¶ 9.

²⁹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Second Memorandum Opinion and Order, 18 FCC Rcd 16848, 16851 (2003).

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.³⁰

Furthermore, unlike other wireless service operators, BRS/EBS system operators will be employing channels cobbled together from a variety of sources – their own BTA-authorized stations, incumbent BRS stations they own, and leased capacity of BRS and EBS stations licensed to others. This is no surprise – as the Commission anticipated when it auctioned BRS BTA authorizations, “market forces will lead to the accumulation of channels into one operating system.”³¹ Thus, an approach to substantial service that narrowly focuses on the level of service provided via any individual license would ignore the realities of how BRS/EBS service will be provided – a more global view of how a license functions in a larger system is the better approach.

For example, BRS/EBS channels may be devoted by the system operator to guardband – while not “used” in the classic sense, guardbands will have to be a critical component of system design if consumers are to reap the benefits of the Commission’s decision to permit the use of both time division duplex (“TDD”) and frequency division duplex (“FDD”) technologies in the 2.5 GHz band.³² If the Commission is serious about promoting wireless broadband at 2.5 GHz,

³⁰ *Report and Order*, 19 FCC Rcd at 14254 ¶ 233 (footnote omitted).

³¹ *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9607 (1995) [“MDS BTA Auction Order”].

³² *See Report and Order*, 19 FCC Rcd at 14216 ¶ 132 (“We agree with the Coalition and the overwhelming majority of Commenters who argue that the [2.5 GHz] band should be technology neutral. Allowing the band to be technology neutral is consistent with our goal to make the spectrum as flexible as possible as it permits licensees and the marketplace to determine which technologies should be utilized. . . [N]ot restricting the band to a particular

then it must afford licensees the flexibility to devote spectrum to the necessary guardbands without jeopardizing their authorizations. Given the value of spectrum, licensees can be expected to act rationally and minimize the amount of spectrum that is devoted to guardband. However, some guardbands are going to be inevitable, and the Commission will only stall deployment of the 2.5 GHz band for new broadband service if it seeks to penalize licensees that use spectrum for guardbands.

In addition, at any point in time, spectrum licensed under a particular call sign may not be employed by a BRS/EBS system operator for transmissions – instead, it may be held by a system operator for future use as subscriber demands expand. Because initial deployment of second generation BRS/EBS systems will be taking place around the time that many licenses will be expiring, it is highly likely that when renewal applications are filed, systems will be in nascent stages and using only a portion of the spectrum available to the operator. It is an unavoidable business reality that system operators must hold spectrum in reserve for future growth, and a Commission rule that effectively precludes such a practice will not serve the Commission’s objective of promoting the deployment of advanced systems. If the Commission adopts rules in this proceeding under which it may repossess spectrum not actually being used to provide services in the short-term, then the Commission will sound a death knell for system deployment – no rational system operator is going to devote resources to a business if the Commission is going to effectively preclude long-term growth.

WCA believes that these special circumstances can be readily addressed by two safe harbors that are straightforward and easy to apply. First, where a licensee demonstrates that its

technology allows licensees and system operators to deploy either FDD or TDD technology, and freely switch between the two as the technology develops and the marketplace demands evolve.”).

spectrum is licensed to or leased by the operator of a multichannel system comprising spectrum licensed under multiple call signs, that licensee should be deemed to have provided substantial service if the multichannel system, taken as a whole, satisfies the substantial service test or any safe harbor related thereto. This will give BRS/EBS licensees assurance that their license renewals will not be put at risk where their channels have been used for guardband or reserved capacity, provided that the system they are associated with has provided substantial service.

Second, with respect to the first application for renewal submitted after the effective date of the rules adopted in response to the *Report and Order*, the Commission should make a finding of substantial service where the licensee demonstrates that it met a safe harbor at any time during the license term, as opposed to just at renewal time.³³ Thus, for example, a licensee that was providing a commercial video service that reached more than 20% of the population of its service area, but then discontinued that service in contemplation of converting to a two-way wireless broadband service, should be deemed to have provided substantial service, regardless of whether it is doing so at the moment its renewal application is filed. That, in turn, will permit the Commission to tailor its review to the peculiar circumstances that are confronting many BRS and EBS licensees who face renewal over the next few years, *i.e.*, spectrum that they used

³³ See Initial Coalition Proposal at 46 n.122. In addition, the Commission should renew any BRS BTA authorization where the licensee met its build-out requirement under former Section 21.930(c)(1). Under those requirements, a BTA holder was required to construct BRS stations reaching at least two-thirds of the population within its BTA, excluding any population covered by signals of incumbent stations. Specific recommendations on this issue were advanced in the Coalition Proposal, and WCA incorporates that argument herein by reference. See Initial Coalition Proposal at 48-50. The Commission took a comparable approach in applying its substantial service test to incumbent 24 GHz licensees when it moved the 24 GHz band to a geographic licensing/substantial service paradigm in the *24 GHz Order*. In that case, 24 GHz incumbents were facing renewal within approximately one year. See *24 GHz Order*, 15 FCC Rcd at 16952. Rather than completely disregard the incumbents' prior performance and mandate that they demonstrate substantial service within that one-year time frame, the Commission elected to permit a finding of substantial service where the licensee had built out its facilities in compliance with the performance requirements previously in effect, thus permitting them to move forward with their business plans without fear of losing their licenses. *Id.*

extensively for video services or first generation broadband service during the license term may not be used extensively at the time of renewal because renewal happens to occur in the midst of a transition to the next generation of service offerings. As recognized in the *Report and Order*, there is no public interest benefit to preserving non-viable service offerings merely because renewal approaches.³⁴ To avoid that result, the Commission must assure BRS/EBS licensees that they may do what is necessary to transition to the new bandplan without putting their license renewals in jeopardy.

3. *A BRS/EBS Licensee Should Be Required To Demonstrate Substantial Service At License Renewal, But No Earlier Than Five Years After Its Transition To The New Bandplan Has Been Completed.*

As discussed above, geographically licensed Part 27 licensees are subject to substantial service review at the time of license renewal. While WCA generally believes that this approach should be applied to BRS/EBS licensees as well, a special rule is required to ensure fairness to those licensees whose first license renewal under the new rules occurs before they have had a fair opportunity to deploy services under the new bandplan.

The *Report and Order* explicitly acknowledges that the transition process will change the way in which many BRS/EBS licensees operate – indeed, the Commission leaves no doubt that the benefits of the new BRS/EBS bandplan cannot be achieved “if BRS and EBS licensees have to focus their resources on preserving legacy services solely because renewal approaches and licensees fear losing their authorizations”³⁵ Similarly, the *Report and Order* recognizes that

³⁴ See *Report and Order*, 19 FCC Rcd at 14255 ¶ 235. See also *Rural Wireless R&O* at ¶ 77 (“In keeping with our market-oriented policies, we do not propose to require licensees to deploy services where their market studies or other analyses indicate that service would be economically unsustainable.”).

³⁵ *Report and Order*, 19 FCC Rcd at 14254 ¶ 233.

“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.”³⁶ Logically, the Commission therefore has eliminated its forfeiture, cancellation and discontinuance of service rules for BRS and EBS licensees, concluding that “[o]ur market-driven service goals will not be reached if licensees are forced to continue providing obsolete services solely to preserve their authorizations.”³⁷

While WCA applauds the Commission’s decision, more must be done to ensure that the license renewal process does not have the same chilling effect on BRS/EBS deployment that the Commission clearly was trying to avoid in the *Report and Order*. Given the unprecedented scope of the rule changes adopted in this proceeding and consequent termination of legacy BRS/EBS operations anticipated in the *Report and Order*, it simply makes no sense for the Commission to conduct a “substantial service” review of a transitioned licensee’s renewal until the transition of the licensee’s market has been completed and the BRS/EBS system with which the transitioned licensee is associated has had an adequate opportunity to deliver service to the public. Otherwise, a transitioned BRS/EBS licensee will be forced into the Hobson’s choice of either wasting resources on maintaining obsolete legacy operations until renewal solely to assure license renewal, or discontinuing its obsolete legacy operations and run the attendant risk that its new service deployment will not be sufficiently advanced at the time of renewal to permit a finding of substantial service. As pointed out in the *Report and Order*, there is no public interest reason to put BRS/EBS licensees in this situation.

³⁶ *Id.*

³⁷ *Id.* at 14256 ¶ 239.

Fortunately, the Commission can avoid this result with a relatively simple modification to its rules for BRS/EBS license renewal. Specifically, where a BRS/EBS license expires prior to the date that is five years after the filing of the post-transition notification applicable to that license pursuant to Section 27.1235 (or, the deadline for the filing of a notice of self-transition under the WCA proposal discussed in Section II.B) and the licensee is unable to demonstrate substantial service at that time, the Commission should nonetheless renew the license, conditioned upon a demonstration of substantial service no later than five years after the filing of the post-transition notification. A five-year post-transition period for demonstration of substantial service is certainly reasonable given that Part 27 licensees generally are given a full ten (10) year license term within which to do the same.³⁸ Indeed, the Commission has permitted wireless licensees even longer periods within which to demonstrate substantial service where, as here, there are special circumstances that might delay a licensee's initiation of service. In the case of AWS, the Commission held that the need to clear the 1710-1755 MHz band of incumbents and relocate them to alternative spectrum warranted an initial license term (and thus a period within which to demonstrate substantial service) of 15 years.³⁹ The Commission also made a similar accommodation for 700 MHz licensees:

Although we proposed a ten-year license term [for upper 700 MHz licensees], we are concerned that the continued existence of incumbent broadcasters in the licensed spectrum may retard a licensee's development and use of the spectrum. Thus, we are modifying the license term as it relates to the 747-762 MHz and 777-792 MHz bands, to accommodate licensees' need for additional time to

³⁸ See 47 C.F.R. § 27.14(a) and 27.13(b)-(f).

³⁹ See *AWS Service Rules R&O*, 18 FCC Rcd at 25190 ("AT&T Wireless, Cingular, CTIA, Ericsson, RCA and Verizon Wireless argue that given the relocation and band clearance issues associated with these bands, it makes sense to adjust our usual ten-year license term. We agree with these commenters that the circumstances surrounding the future development and deployment of services in these bands warrant an initial license term longer than 10 years in order to encourage the investment necessary to develop these bands.") (footnote omitted).

develop and use this spectrum, in light of its continued use by broadcasters until 2006. *Based on our estimate that an average of eight years additional time is a reasonable time period in which to comply with the [substantial service] performance requirements set forth below, we have determined that a license issued to a winning bidder for this spectrum will extend eight years beyond the year 2006, the date as of which incumbent broadcasters are required to have relocated to other portions of the spectrum, that is, until January 1, [2015], for a total of approximately 14 years.*⁴⁰

As with AWS and 700 MHz licensees, BRS/EBS licensees often will be unable to deploy facilities until after the transition process is complete and the new regulatory framework fully applicable. Yet, WCA is only asking the Commission to afford BRS/EBS licensees *five* years from when their “special circumstances” are eliminated (*i.e.*, the date on which their transition is completed) to demonstrate substantial service. While shorter than what the Commission has approved in the past, WCA is confident that a five-year period following transition is a reasonable amount for licensees to study their markets, evaluate new technologies that are currently under development such as WiMAX and OFDM, design and deploy innovative new networks and provide a level of service deemed “substantial” under the Commission’s rules.

B. The Commission Must Provide An Opportunity For Licensees To Self-Transition Before Forcing Them To Accept Bidding Credits Or A Reduction In Spectrum.

The *FNPRM* proposes a system designed “to clear current spectrum assignments from the band” in order to facilitate transition to the new bandplan in those markets for which Initiation Plans are not filed by a Commission-set deadline.⁴¹ Although the *FNPRM* attempts to put a favorable gloss on its proposal, the bottom line is simple – under the Commission’s proposal, a

⁴⁰ *Upper 700 MHz R&O*, 15 FCC Rcd at 504 (emphasis added)(footnotes omitted); *see also* 47 C.F.R. § 27.13(b). The Commission has extended similar relief to lower 700 MHz licensees. *Id.*

⁴¹ *See FNPRM*, 19 FCC Rcd at 14272-82 ¶¶ 289-319.

licensee that is not subject to a timely-filed Initiation Plan either loses its license entirely in exchange for bidding credits that may or may not be sufficient to allow it to regain its operating rights, or can opt to sacrifice its Lower Band Segment (“LBS”) and Upper Band Segment (“UBS”) channels in exchange for reimbursement of its costs for migrating to the Middle Band Segment (“MBS”).⁴² Quite frankly, WCA believes that the public interest would be far better served by adoption of the Coalition’s proposal for allowing marketplace demand, rather than arbitrary deadlines, to drive the timing of transitions.⁴³ However, WCA also recognizes that the Commission is committed to promoting rapid transitions, and thus is not seeking reconsideration of the rejection of the Coalition’s approach.

However, WCA believes that an additional step can be added to the approach proposed in the *FNPRM* that will add a much-needed element of fairness to existing licensees and not materially impact the Commission’s timeline for transitioning the 2.5 GHz band. WCA’s view, simply stated, is that the Commission should not resort to its proposed draconian approach unless and until it has provided those licensees that are not covered by an Initiation Plan one last opportunity to voluntarily transition to the new BRS/EBS bandplan. Indeed, if the Commission truly believes that the transition process “represents an efficient means of . . . managing the spectrum,”⁴⁴ it should embrace an approach that assures that no current BRS or EBS licensee loses any authorization it desires to keep, while expediting transitions to the new bandplan.

⁴² *Id.*

⁴³ See Initial Coalition Proposal at App. B, pp. 1-4.

⁴⁴ *Report and Order*, 19 FCC Rcd at 14198 ¶ 73.

The specifics of WCA's proposal are set forth in its petition for partial reconsideration of the *Report and Order*. In essence, WCA proposes that in the event a BRS/EBS licensee is not covered by a timely-filed Initiation Plan, it should be allowed until the 60th day following the Initiation Plan filing deadline to notify the Commission whether it will self-transition, accept bidding credits in exchange for cancellation of its license, or accept a single channel in the MBS and reimbursement of its costs of migration to that channel. Thereafter, after self-transitioning licensees have had a fair opportunity to address the logistical issues associated with a self-transition (which should be less than 18 months from the deadline for filing Initiation Plans), those licensees that are securing bidding credits would cease operating entirely, and those that are self-transitioning or accepting only a single MBS channel would either stop all transmissions on its channels or would modify their equipment to operate only on their designated channel(s) under the new bandplan in accordance with the new technical rules.⁴⁵

WCA's proposal is far more fair to licensees than the approach advanced in the *FNPRM* because it assures that no licensee is at risk of losing all or part of its authorization because of the transition to the new bandplan. To the contrary, WCA's approach ultimately provides every BRS/EBS licensee with control over its destiny whether an Initiation Plan is filed or not, and therefore achieves the Commission's objective of "provid[ing] a measure of certainty to licensees and allow[ing] licensees to plan for the future."⁴⁶

⁴⁵ WCA also suggests that a similar self-transition period be afforded for any licensee that was covered by a timely-filed Initiation Plan on the deadline for self-transitioning, but ultimately was not transitioned by a proponent.

⁴⁶ *Report and Order* 19 FCC Rcd at 14201 ¶ 81.

C. Future Auctions Of BRS/EBS Spectrum Should Occur Promptly And Not Undermine The Transition Process Or The Public Interest Objectives Of The New BRS/EBS Rules.

The *FNPRM* solicits comment on a wide variety of issues associated with the use of auctions to assign spectrum that is presently unlicensed and to license spectrum that the Commission proposes to reclaim either because the market in issue is not covered by a timely-submitted Initiation Plan, or because the licensee voluntarily elects to submit its license for cancellation in exchange for bidding credits or reimbursement of the costs associated with migrating to a single channel in the MBS.⁴⁷ Subject to the caveats set forth below, WCA does not oppose the use of auctions to award new licenses for BRS BTA authorizations that have been forfeited, existing EBS white space, BRS/EBS spectrum that has not been included in a timely-filed Initiation Plan or self-transitioned, and BRS/EBS licenses that have been relinquished by their licensees in exchange for bidding credits or assistance in migrating to the MBS.⁴⁸ At the same time, the Commission must take certain steps to ensure that any such auctions promote the rapid deployment of service and do not interfere with a proponent's ability to effectuate orderly transitions as intended under the Commission's rules.

First, auctions of available BRS/EBS spectrum should be conducted as quickly as possible in order to promote the most rapid introduction of service to the public. Thus, WCA urges the Commission to schedule two separate auctions for the assignment of new licenses. The first such auction should occur as soon as possible after the adoption of new rules in response to the *FNPRM* and offer bidders the opportunity to acquire forfeited BRS BTA authorizations and

⁴⁷ *See id.*, at 14265-82 ¶¶ 264-319.

⁴⁸ *Id.* at 14265-14272 ¶¶ 266-288.

available EBS white space. However, because those participating in the EBS white space auction will be fully aware of the upcoming transition to the new bandplan, they should not be entitled to replacement downconverters or migration of program tracks to the MBS as part of the transition or self-transition process. Admittedly, the spectrum available in such an auction would not be significant, measured by MHz/pops. Nonetheless, there are significant benefits to adoption of this approach.

Perhaps most significantly, because BRS BTA authorization holders are among the most likely entities to serve as proponents, re-auctioning the handful of licenses that have been forfeited or cancelled now will promote transitions and the funding of EBS's migration to the new bandplan. Indeed, it is probably fair to assume that anyone bidding on a BRS BTA authorization in the coming environment will do so with the intention of serving as a proponent if the market is not otherwise transitioned.

While the same cannot be said of likely bidders for EBS white space, that spectrum amounts to little more than "table scraps" – it is all that remains after more than thirty years of EBS licensing.⁴⁹ Thus, in virtually every market of any size in the United States, all of the EBS channels have been licensed, and where that is not the case, rarely is more than a single channel group available. Yet, given that it has been almost a decade since the Commission last accepted applications for new EBS stations, where spectrum is available there likely is a pent-up demand for immediate access to serve local educational needs. Given how little EBS white space actually exists but how important licensing may be where it is available, it makes no sense to delay that auction for years while the transition to the new bandplan occurs. Importantly,

⁴⁹ See Coalition Comments at 95.

because WCA is proposing that those securing spectrum by way of the EBS white space auction not be entitled to replacement downconverters or migration of programming tracks to the MBS, WCA has assured that an early auction of the EBS spectrum will not add to the complexity and cost of the transition process.

The second auction should occur as soon as possible after the deadline for the completion of all transitions conducted pursuant to Initiation Plans,⁵⁰ and would include all spectrum available at that time either because the spectrum was not transitioned or because the licensee voluntarily returned the spectrum in exchange for bidding credits or financial assistance in migrating to the MBS.

Second, while WCA does not object to allowing untransitioned BRS/EBS licensees to turn in their authorizations to secure bidding credits for future auctions,⁵¹ the Commission must ensure that the availability of bidding credits does not inadvertently provide a vehicle for such licensees to avoid their obligations under any spectrum leases they have with BRS/EBS lessees. Certainly, the Commission should make clear that the availability of this option does not suggest the Commission is voiding existing spectrum leases. As demonstrated in the Coalition's reply comments in response to the *NPRM*, the Commission has no legal authority to retroactively

⁵⁰ The *Report and Order* has given BRS/EBS system operators three years from its effective date within which to file their Initiation Plans with the agency. See *Report and Order*, 19 FCC Rcd at 14201 ¶ 83. However, as reflected in WCA's petition for partial reconsideration of the *Report and Order*, it is essential that the Commission reduce the size of a proponent's transition area from its MEA to its BTA. Because this issue goes to the very heart of the transition process, WCA has proposed that the Commission's period for filing of Initiation Plans not commence until BRS/EBS operators have certainty that BTAs will be the governing geographic area under the Commission's transition rules. Accordingly, WCA is urging that the filing deadline for Initiation Plans should be no earlier than 30 months after the effective date of any order on reconsideration of the *Report and Order* reducing the size of transition areas from MEAs to BTAs. WCA is not seeking reconsideration of the Commission's requirement that transitions be completed within 18 months of the conclusion of the Transition Planning Period, which ends 90 days after the filing of the Initiation Plan.

⁵¹ Those licensees who seek bidding credits should be required to notify the Commission that they intend to do so within the same 60-day period described above for self-transitions.

abrogate existing BRS/EBS leases, particularly where, as here, the record is bereft of any evidence that such action would serve the public interest.⁵² Moreover, even if the Commission could do so, such a step would be ill-conceived.

The Commission cannot expect to preserve a credible secondary markets policy for BRS/EBS if licensees are permitted to abandon their lease obligations in the hope of obtaining bidding credits under the Commission's transition rules:

It . . . would be unwise as a matter of policy for the Commission to be seen as flip-flopping on . . . spectrum leasing rights, first expressly authorizing long-term leases, then abrogating them. . . [The Commission] has repeatedly affirmed that the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts. . . The Commission also has recognized that '[f]acilitating the development of secondary markets in spectrum usage rights is of critical importance as the Commission moves forward in implementing spectrum policies that increase the public benefits from the use of radio spectrum.' . . . For the Commission to reverse course and nullify long-term capacity leases that it previously authorized will send the marketplace a signal not to rely on the Commission's stated intention to embrace free market principles such as the enforceability of freely negotiated, arms-length contracts.⁵³

Licensees and commercial system operators have taken advantage of the flexibility granted by the Commission to enter into long-term leases and submitted those leases for Commission review. In many instances, the licensee negotiated significant concessions to be performed by the lessee in the initial stages of the long-term lease, such as upfront payments of money or purchases of expensive equipment to be used by the licensee. Because such upfront costs can only be recovered by the lessees over the life of the contract, nullification of long-term leases

⁵² See Coalition Reply Comments at 66-69.

⁵³ *Id.* at 70-71 (footnotes omitted).

will certainly be problematic, as the commercial operators that made the upfront expenditures will find themselves without the consideration they bargained for.

Hence, to ensure that there is no uncertainty about this issue going forward, the Commission should declare in the strongest possible terms that licensees who have leased their spectrum will not be permitted to turn in their authorizations and secure bidding credits under the Commission's transition rules unless the lessee gives its consent. In this manner, the Commission can do much to promote its secondary market policies and will eliminate any potential that disputes in state and federal court between licensees and lessees will delay auctions or add substantial regulatory uncertainty.

Third, to minimize confusion and retain consistency with how BRS spectrum has been geographically licensed for nearly ten years, all auctions of available BRS/EBS spectrum should be conducted according to BTAs based on the same boundary definitions used for BRS.⁵⁴ As discussed in the Coalition's initial comments on the *NPRM* and in WCA's petition for partial reconsideration of the *Report and Order*, MEAs are far larger than the areas in which many BRS/EBS licensees provide service. By forcing auction participants to bid for geographic areas where they do not intend to provide service, the Commission increases the likelihood that the winning bidder in an auction is not the party with the highest valued use for a given geographic

⁵⁴ See Coalition Comments at 100-101; Initial Coalition Proposal at 42. Former Section 21.924 of the Commission's Rules specified that "MDS service areas are regional Basic Trading Areas (BTAs) which are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39." The concept that the BTA boundaries are fixed based on the 1992 BTA definitions has been carried over to Section 27.1208 of the Commission's new rules, which provides that "Most BRS/EBS service areas are Basic Trading Areas ("BTAs"). BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39." Accordingly, if BTAs are used for transitions and white space auctions as recommended by WCA, BTA boundaries should continue to be based on the 1992 designations, so as to provide BRS/EBS licensees with certainty as to the exact geographic parameters of each BTA.

area, thus undermining the integrity of the auction process as a means of getting spectrum into the hands of those most likely to use it. Moreover, any bidders who wish to bid for larger service areas can achieve their objectives by purchasing contiguous BTAs, thereby securing large regional operating authority.⁵⁵

Fourth, the Commission should auction the first three channels in each existing channel group as a package (e.g. channels A1, A2 and A3 as one package, channels B1, B2 and B3 as another, etc.), but auction the fourth channel (e.g. A4, B4, etc.) separately. The former group of three channels represents the channels that will reside in the LBS/UBS following the transition, while the latter channels comprise the MBS and thus after transitions have occurred, the two proposed groupings are likely to be used by licensees to meet very different objectives. Licensees of spectrum in the LBS/UBS may have no need for MBS spectrum, and *vice versa*.⁵⁶ By separating auctions for the future LBS/UBS and MBS channels, the Commission will minimize the possibility that auction participants will be forced to bid on channels in which they have no interest and, conversely, will maximize the likelihood that the LBS/UBS and MBS channels will be awarded to the bidders to whom they have the highest value.

Regarding WCA's opposition to auctioning all the available spectrum in a given area in a single package, the relevant language from the Coalition Proposal bears repeating:

By holding auctions on a group-by-group basis, the Commission will best serve the needs of incumbent [EBS] licensees – the most likely participants.

⁵⁵ See *39 GHz Order*, 12 FCC Rcd at 18611 (“We believe that BTAs offer a sufficiently large service area to allow applicants flexibility in designing a system to maximize population coverage and to take advantage of economies of scale necessary to support a successful operation. Moreover, to the extent that 39 GHz licensees desire to provide service over a larger geographic region, the rules we adopt today will allow them to aggregate BTAs.”)(footnote omitted).

⁵⁶ *FNPRM*, 19 FCC Rcd. at 14280 ¶ 313 (“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.”).

Particularly as portable, nomadic and mobile commercial and educational applications develop, wide-area coverage will be required, which means that many incumbent licensees are going to be interested in expanding use of their current channels beyond the borders of their current GSA. Conducting auctions on a group-by-group basis will allow incumbents to secure the rights to their current channels in a larger area, without having to purchase spectrum they are not interested in utilizing.⁵⁷

Accordingly, the *FNPRM* is wrong in suggesting that auction participants might be indifferent to the specific frequencies they receive.⁵⁸ As noted above, bidders will frequently be seeking to expand existing service areas on their existing channels, and thus will be most interested in bidding on those specific frequencies at auction. Moreover, because incumbency issues will vary from channel group to channel group, bidders are likely to be very particular about which channels are best suited for their individual circumstances – a given channel group will not necessarily be optimal for all bidders in all situations.

D. The Commission Should Adopt The Coalition Proposal's Proposed Treatment Of Grandfathered E And F Group EBS Licensees.

The *FNPRM* requests comment on how grandfathered E and F group EBS licensees should be treated under the new regulatory framework for BRS/EBS.⁵⁹ On this issue, WCA agrees with Commission's observation that:

If grandfathered E and F group [EBS] licensees are not permitted to modify their equipment and [BRS] licensees must continue operating on a secondary basis, grandfathered E and F group [EBS] licensees will cause interference to low-power [BRS] co-channel licensees in some markets. Put another way, if [BRS] licensees that are on co-channel frequencies with grandfathered E and F group [EBS] licensees must avoid interfering with these frozen licensees, then the deployment of [BRS] broadband services may be hindered. Additionally, the grandfathered E and F group [EBS] licensees will never be able to transition to a

⁵⁷ Initial Coalition Proposal at 42. *See also* Coalition Comments at 98-100.

⁵⁸ *See FNPRM*, 19 FCC Rcd at 14269 ¶ 280.

⁵⁹ *Id.* at 14288-91 ¶¶ 333-343.

low-power cellularized broadband system due to the restriction on modifying their equipment, which is presently contained in our rules.⁶⁰

Accordingly, in those cases where the protected service area of a grandfathered E or F group EBS licensee overlaps that of a cochannel BRS station and the parties are unable to agree to a voluntary designation of service area boundaries, the Commission should grant the grandfathered EBS station and cochannel BRS station exclusive GSAs in accordance with the new rules designed for “splitting the football.” Once those exclusive GSAs are created, the Commission can then safely eliminate its current policy of restricting technical changes for grandfathered E and F group EBS stations.⁶¹

The restrictions on grandfathered EBS licenses adopted in 1983 were designed to minimize the adverse interference impact that changes to EBS facilities would have on the E and F group operations of BRS lottery winners.⁶² Those restrictions were adopted under a site-licensing regulatory regime. With the adoption of the new bandplan, the move to geographic licensing and the adoption of associated rules to provide interference protection without site-licensing, BRS and EBS licensees alike will be amply protected, and thus there is no longer any need to impose restrictions on grandfathered E and F group EBS licensees.

WCA’s intent here is not to favor grandfathered EBS stations over BRS stations, but to recognize that where both EBS and BRS stations exist on the E and F group channels, they must be treated fairly and pragmatically under the new regulatory regime. While it is true that the

⁶⁰ *Id.* at 14290 ¶ 336.

⁶¹ See Initial Coalition Proposal at 51; Coalition Reply Comments at 95.

⁶² See *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, Report and Order, 94 FCC 2d 1203, 1206-07 (1983).

Commission's pre-existing rules had already defined the "protection" relationship between grandfathered EBS and BRS stations,⁶³ going forward these stations must transition to the new bandplan and geographic licensing scheme just as other EBS and BRS stations must. Adoption of WCA's suggested approach is necessary to ensure that, just like other BRS/EBS licensees, grandfathered EBS E and F group licensees are each afforded their own exclusive GSAs within which they can place transmitters and provide service (subject to interference protection obligations to other licensees) without seeking prior Commission approval.⁶⁴ As such, the Coalition's proposal is an even-handed approach that permits grandfathered EBS E and F group licensees and BRS lottery winners to take full advantage of the Commission's new rules.

E. The Commission Should Eliminate The Requirement That All Of An EBS Licensee's Channels Must Come From The Same Channel Group.

WCA supports the Commission's proposal to eliminate the requirement of former Section 74.902(d)(1) that all of an EBS licensee's channels in a single area of operation must be drawn from the same channel group.⁶⁵ As the *FNPRM* points out, the rule has become outmoded under the new BRS/EBS bandplan, under which an EBS licensee may use channels from different groups in the MBS when delivering high-power services.⁶⁶ Enforcement of the rule, by contrast, would effectively limit a transitioned EBS licensee to just one channel in the MBS, an obviously absurd result given that the record evidences strong interest among EBS licensees to secure multiple MBS channels for high-power, high-site video programming distribution.

⁶³ *Id.*

⁶⁴ See *FNPRM*, 19 FCC Rcd at 14189-94 ¶ 54-67.

⁶⁵ *Id.* at 14291 ¶ 344.

⁶⁶ *Id.* at 14291-92 ¶ 345.

Moreover, retention of the rule limiting an EBS licensee to a single channel in the MBS would vitiate the ability of a proponent to control the costs of transition by placing multiple tracks of an EBS licensee's video programming on multiple EBS channels, rather than incurring the expense of digitization. As discussed in WCA's petition for partial reconsideration, it is patently reasonable, in those cases where an EBS licensee is entitled to two or more video programming tracks, for the proponent to migrate one of those programming tracks to the EBS licensee's default channel in the MBS and provide the EBS licensee with an additional 6 MHz channel in the MBS for each additional video programming or data transmission track.⁶⁷ This provides proponents with a more economical option for handling these situations as compared to digitization, a benefit that limiting EBS licensees to a single channel group would not allow.

Likewise, the substantial flexibility afforded both to educators and commercial operators under the new bandplan would be unnecessarily compromised by requiring them to locate EBS operations within the same channel group at all times. For example, while the default channel plan results in a given licensee securing three contiguous channels in the LBS or the UBS (which is optimal for TDD technologies), licensees may prefer to implement channels swaps that will result in them being licensed on spectrum in both the LBS and the UBS (a likely scenario where FDD technologies are deployed, since FDD systems will likely use channels in the LBS for user-to-base transmission and channels in the UBS for base-to-user transmissions). In that case, licensees would necessarily be securing licenses for channels drawn from more than one channel group, since each channel group is either in the LBS or the UBS.

⁶⁷ See Initial Coalition Proposal, at App. B, p. 23. The Coalition offered this proposal as one of its nine proposed safe harbors that will allow proponents to craft transition plans with the knowledge that they will be deemed reasonable in the event of a dispute. See *id.* at App. B, p. 21. The Commission did not adopt this proposed safe harbor in the *Report and Order*, and WCA is requesting review of that decision in its petition for partial reconsideration.

F. The Commission Must Preserve the Rights Of Existing Commercial EBS Licensees And Pending Commercial EBS Applicants.

The *FNPRM* requests comment as to what extent, if at all, the Commission should continue to permit commercial entities to license vacant EBS channels under the “wireless cable” exception to the EBS eligibility restrictions, set forth in former Section 74.990 (current Section 27.1201(c)) of the Commission’s Rules (47 C.F.R. § 74.990).⁶⁸ Due to the rule’s tight restrictions on when and where commercial licensing of EBS channels is permitted, only a relatively small number of EBS channels have been licensed to commercial entities. WCA agrees that future opportunities for commercial licensing of EBS channels are likely to become even more infrequent as the BRS/EBS industry moves to its new geographic licensing system and the remaining EBS white space is auctioned as proposed in the *FNPRM*.⁶⁹

Accordingly, WCA sees no need for the Commission to permit future licensing of these stations *provided that the Commission preserves the rights of commercial entities who either have already licensed EBS channels or have applications pending for EBS channels prior to the adoption of new rules in response to the FNPRM*. Such action is necessary as a matter of fairness to existing licensees that have deployed facilities on commercial EBS stations and to recognize that the right to apply for vacant EBS channels was among the bundle of rights that BRS BTA holders acquired at the 1996 BRS BTA auction and which they still have to this day.⁷⁰

Finally, to simplify the regulatory treatment of commercial EBS stations under the new rules, the Commission should simply reclassify such stations as BRS and regulate them

⁶⁸ See *FNPRM*, 19 FCC Rcd at 14293 ¶¶ 349-350.

⁶⁹ *Id.* at 14293 ¶ 349.

⁷⁰ See *MDS BTA Auction Order*, 10 FCC Rcd at 9612.

accordingly. There is no regulatory benefit to preserving the current subclass of commercial EBS stations that are subject to some, but not all, EBS rules and that, as a practical matter, have been operated in a manner indistinguishable from BRS stations.⁷¹

G. The Commission Should Distribute Regulatory Costs Among BRS Licensees In A Fair And Equitable Manner.

The *FNPRM* seeks comment on whether (if at all) the Commission should amend the regulatory fees applicable to BRS/EBS licensees due to the rule changes adopted in this proceeding.⁷² As to EBS, WCA's position remains as before: there is no reason to revisit the Commission's previous determination that EBS licensees are exempt from both regulatory and filing fees, and the Commission has very little statutory leeway to do otherwise.⁷³ WCA thus supports the Commission's decision not to subject EBS licensees to regulatory and application fees in this proceeding.⁷⁴ Consistent with precedent, however, the Commission must recover its costs of regulating EBS licensees by allocating such costs on a proportional basis across *all* fee categories, so as to not unduly impact BRS licensees or any other specific category of fee payers.⁷⁵

⁷¹ WCA notes that while former Section 74.992 required the licensee of a commercial EBS station to make capacity available for educational use in response to certain requests made during the first three years of operation, WCA is unaware that any request has ever been made for such access in the more than a decade that commercial EBS stations have been licensed. As such, WCA believes that there is no longer any reason to retain this requirement, which is now incorporated at Section 27.1201(c)(6).

⁷² See *FNPRM*, 19 FCC Rcd at 14293-97 ¶¶ 351-359.

⁷³ See Coalition Comments at 140.

⁷⁴ See *FNPRM*, 19 FCC Rcd at 14295 ¶ 355.

⁷⁵ See *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, Report and Order, 12 FCC Rcd 17161, 17170 (1997).

With regard to the Commission's suggestion that it may discard its per call sign formula for BRS regulatory fees in favor of a methodology "based on factors more reasonably related to the benefits [licensees] receive under their spectrum authorizations,"⁷⁶ WCA agrees that like licensees should be treated in a like fashion, consistent with the principles of regulatory parity endorsed by the Commission throughout this proceeding and considerations of fundamental fairness.⁷⁷ For the same reason, however, WCA is puzzled by the Commission's desire to adopt a population-based (per MHz/pops) or coverage-based (per MHz/km²) formula for calculating BRS/EBS regulatory fees when it uses neither in calculating regulatory fees for other geographically licensed Part 27 licensees. Accordingly, if the Commission is to achieve true regulatory parity here, any population-based or coverage-based regulatory fee formula adopted for BRS/EBS should be applied in the same manner to other geographically licensed Part 27 licensees going forward.

As to which formula is most appropriate for BRS, WCA believes that a per MHz/pops approach is the most equitable method of tying a BRS licensee's regulatory fees to the benefits it receives under its authorization. Given the Commission's concern about unduly burdening rural licensees,⁷⁸ WCA does not believe that the Commission should utilize a per MHz/km² or other coverage based formula, as it likely would force rural licensees to pay regulatory fees disproportionate to the number of persons they actually serve. However, when applying a per MHz/pops formula, the Commission must announce a clear and easily applied standard that will

⁷⁶ *FNPRM*, 19 FCC Rcd at 14296 ¶ 357.

⁷⁷ *See Report and Order*, 19 FCC Rcd at 14256-57 ¶ 241 (noting Commission's goal of "fostering regulatory parity and transparency between like services"); *NPRM*, 18 FCC Rcd at 6742 ("[R]egulatory parity will promote more efficient use of the spectrum allocated for [the BRS and EBS] service.").

⁷⁸ *See FNPRM* at 14295-96 ¶ 356.

permit licensees to determine the population within a given service area in a consistent manner. One possibility for upcoming regulatory fee allocations would be to use population figures from the 2000 U.S. Census, as the Commission recently did for purposes of calculating upfront payments for bidders in broadband PCS Auction No. 58.⁷⁹

Along similar lines, in the petition for partial reconsideration of the *Report and Order* being filed today by WCA, the Commission is urged to provide greater clarity as to how GSA boundaries are to be calculated and to maintain sufficient information in ULS so that GSA boundaries can be ascertained. That the Commission intends to impose regulatory fees based on the population within a given licensee's GSA reinforces WCA's arguments that it is essential for the rules to allow a licensee and the Commission to readily and unambiguously ascertain the licensee's GSA boundaries.

H. The Commission Must Assure That Any BRS/EBS Operations in the Gulf of Mexico Will Not Adversely Impact the Provision of Land-Based Services in the 2.5 GHz Band.

Just as the Commission has done several times before, including in the *NPRM*, the *FNPRM* requests comment on appropriate licensing and technical rules for BRS/EBS service in the Gulf of Mexico.⁸⁰ Significantly, to date no one in this proceeding has provided any indication that there is any demand for use of the 2.5 GHz band in the Gulf waters. Indeed, in their joint comments, WCA, NIA and CTN expressed skepticism regarding the demand for BRS/EBS based services in the Gulf of Mexico.⁸¹ That skepticism was well-founded, as no

⁷⁹ See *Broadband PCS Spectrum Auction Scheduled for January 12, 2005*, Public Notice, DA 04-3005 (rel. Sept. 16, 2004).

⁸⁰ See *FNPRM*, 19 FCC Rcd at 14297-00 ¶¶ 360-367.

⁸¹ See Coalition Comments at 74-83.

party provided any indication that there is any demand for use of the 2.5 GHz band in the Gulf waters; in fact, no other party even addressed the issue other than Sprint, which shared the same concerns as WCA, NIA and CTN.⁸² Not surprisingly, then, the *FNPRM* concedes that the record “is not sufficiently developed to resolve issues concerning the amount of spectrum to license in the Gulf Service Area”⁸³

As such, the Commission should refrain from deciding at this juncture how much spectrum in the 2.5 GHz band to license in the Gulf or when to conduct an auction for such spectrum. The *NPRM* itself recognized that the Commission has insufficient data “to resolve issues concerning the amount of spectrum to license in the Gulf Service Area,” and since nothing was submitted in response to the *NPRM*, the record does not support any licensing at this time.⁸⁴ Refraining from determining how much spectrum to license in the Gulf and when to do so would be fully consistent with the Commission’s decision to defer any auction of PCS spectrum in the Gulf under similar circumstances when it concluded that there was no basis for actually licensing PCS in the Gulf despite the adoption of applicable rules.⁸⁵ There is no reason to proceed differently here.

⁸² See Comments of Sprint, WT Docket No. 03-66 at 15-16 (filed Sept. 8, 2003).

⁸³ *FNPRM*, 19 FCC Rcd at 14300 ¶ 367.

⁸⁴ *NPRM*, 18 FCC Rcd at 6762.

⁸⁵ See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Order on Reconsideration, 18 FCC Rcd 13169, 13183 (2003)[“*Gulf CMRS Reconsideration Order*”](“We also reiterate that we find no basis in the record to create a separate PCS Gulf licensee with primary rights in this proceeding. The *Gulf Report and Order* sought only to provide flexibility in cases where carriers in a particular service seek to establish a separate Gulf market. In those cases, we would commence a proceeding to determine whether, based on a service’s specific rules, a new Gulf market should be established. In the *Gulf Report and Order*, however, we did not find that a new PCS market should be created. To the contrary, we stated that the lack of support in the record suggests that there is limited interest among PCS carriers in serving offshore facilities in the Gulf.”)(footnotes omitted).

However, the Commission should proceed with adoption of rules to govern operations in the Gulf and the land areas near the Gulf. Now that the Commission has created a Gulf BTA-like service area, such rules are essential to provide land-based licensees with the certainty they need to design and implement wireless broadband systems. As the Commission crafts a regulatory regime to govern the operation of facilities in the Gulf, it is essential that the Commission both fully protect land-based operations and not hamper the deployment of land-based systems designed to serve the significant population centers that are within either the GSAs afforded incumbent BRS/EBS licensees or holders of the BRS BTA authorizations auctioned in 1996.

The basis for WCA's concern is a matter of record before the Commission – interference protection rules applicable to Gulf operations must be carefully crafted to assure that facilities serving the miniscule number of persons in any new Gulf Service Area not jeopardize service to the 20.4 million people who reside in the BTAs that border the Gulf of Mexico.⁸⁶ Indeed, in the cellular radio service, the Commission has struggled for years to modify its rules so that land-based carriers can serve the dense population centers at or near the coastline without interference from those providing service in the Gulf.⁸⁷ The problems encountered in the cellular service can and should be avoided here.

⁸⁶ See COMMERCIAL ATLAS & MARKETING GUIDE 2003, RAND MCNALLY (2003). This represents an increase from the 16.7 million residents of the Gulf coast that WCA had reported in 1999, an increase that only exacerbates the adverse consequences that will befall the public if the Commission's efforts to license the Gulf hamper operations on land. See, e.g., Opposition of Wireless Communications Ass'n Int'l to Petition for Rule Making, RM-9718 at 8 (filed Sept. 10, 1999); see also Coalition Comments at 74.

⁸⁷ See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Report and Order, 17 FCC Red 1209 (2002)[“Gulf CMRS Order”]; *Gulf CMRS Reconsideration Order*, 18 FCC Red at 13169.

The BRS/EBS technical rules proposed by the Coalition and largely adopted in the *Report and Order* were carefully structured to permit cochannel operations near service area boundaries without interference. Yet, the need for concepts like “height benchmarking” illustrate how difficult it will be to provide ubiquitous service near GSA boundaries under the best of circumstances. Yet, the problems of doing so will be compounded by the unusual RF propagation characteristics in the Gulf that result from “ducting” unless the Commission moves with great care in licensing services in the Gulf. WCA is not alone in that concern; Section 21.902(c)(1)(ii) of the Rules, which governed MDS licensing in the site-based licensing era, imposed special interference protection obligations where signals will propagate over large bodies of water, and the Commission reiterated its concerns over potential interference in the *Notice of Proposed Rulemaking* in WT Docket No. 02-68 (“*Gulf NPRM*”).

The primary problem, as succinctly summarized in the *Gulf NPRM*, is this:

[T]he overriding issue with respect to possible interference from, and to, Gulf systems is the matter of signal propagation, specifically, the propagation of signals over large bodies of water. Although not an exact science, the process of evaluating the propagation of signals over land masses has been refined to the point where the results of applying widely-accepted propagation models, such as the modified Epstein/Peterson model required by the Commission’s *Two-Way Order* for MDS and ITFS two-way systems, are sufficiently reliable for all but the most unusual signal paths. Unfortunately, the propagation of signals over large bodies of water can differ markedly from signal propagation over land and no comparably acceptable and standardized model is available for calculating over-water propagation. The principal difference involved, at least with respect to Gulf waters, is the presence of “ducting” along the signal path. Simply put, ducting is a phenomenon whereby a radio signal is trapped within and between stratified layers of the atmosphere which have non-uniform refractivity indexes. This layering is caused by climatological processes such as subsidence, advection, surface heating and radiative cooling and the ducts created due to these factors can extend for distances of tens to hundreds of miles. Ducting of signals, including MDS/ITFS microwave signals, enables these signals to travel relatively

unattenuated for distances far greater than would occur without the presence of the duct.⁸⁸

As recognized by the Commission in the *Gulf NPRM*, there are two significant upshots of the ducting phenomenon. First, the Commission concluded that there was a “*certainty* that ducting will occur between Gulf and land-based stations,” that this ducting will cause interference over much greater distances than caused by land-based systems, and that Gulf-based systems must therefore comply with interference protection requirements that are more stringent than those imposed on land-based facilities.⁸⁹ Second, the Commission concluded that “it will be virtually impossible for current licensees to achieve [full coverage of the population along the Gulf coast] if they must afford full interference protection to Gulf of Mexico systems.”⁹⁰ Thus, the Commission determined that:

Given the much greater population density of the land-based relative to Gulf systems, the steps taken to modify one land-based main or booster station so that it can fully protect a very few Gulf stations might mean the loss of service to hundreds or thousands of households in the urban or suburban area the main or booster station was designed to serve. We believe this tradeoff would be unacceptable and we are therefore proposing that land-based stations be allowed to provide a lesser degree of protection to Gulf stations than Gulf stations must provide to land stations.⁹¹

To address these concerns, the *Gulf NPRM* proposed that applicants for facilities in the new Gulf Service Area be required to conduct their pre-licensing interference analyses assuming flat earth when analyzing interference to facilities within 20 miles of the Gulf, and assuming a

⁸⁸ *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*, Notice of Proposed Rulemaking, 17 FCC Rcd 8446, 8463-64 (2002)[“*Gulf NPRM*”](footnotes omitted).

⁸⁹ *Id.* at 8465-66 (emphasis in original)(footnotes omitted).

⁹⁰ *Id.* at 8467.

⁹¹ *Id.*

hybrid combination of flat earth and standard Epstein/Peterson propagation models when analyzing interference to facilities further inland.⁹² The Commission did not propose to impose on applicants for land-based stations any obligation to consider ducting when conducting their pre-licensing interference studies.

The proposals advanced in the *Gulf NPRM* would have fairly achieved the Commission's objective of assuring that land-based facilities not be hampered by future activities in the Gulf under the former site-based licensing rules.⁹³ However, a somewhat different approach is required because the *Report and Order* abandoned the former system of site-by-site licensing based on predictions of desired-to-undesired signal ratios. Because the *Report and Order* has adopted a system of geographic licensing under which cochannel interference protection is afforded through two different mechanisms, a different approach to Gulf-related issues is necessary.

First, the Commission has adopted rules that control cochannel interference through a 47 dB μ V/m limit on signal strength at the GSA boundary.⁹⁴ However, if land-based licensees are forced to limit their signal strengths near the coast to accommodate the potential for ducting, then service to the highly-populated areas near the Gulf coast will be seriously jeopardized.

Second, where adjacent system operators do not utilize synchronized technology, the potential for interference exists even where the proposed signal strength limit at the boundary is

⁹² See *id.* at 8466.

⁹³ See Comments of WCA, WT Docket No. 02-68 at 2 (filed Oct. 1, 2002).

⁹⁴ See *NPRM*, 18 FCC Rcd at 6777.

met.⁹⁵ Thus, the Commission has adopted the Coalition's suggestion for a "height benchmarking" system. Under newly-adopted Section 27.1221(b), the licensee of a base station constructed above its height benchmark must reduce its signal strength as measured at a base station in a neighboring GSA that is within its height benchmark. The calculation of a given station's safe harbor height is based on line-of-sight predictions using a standard formula. With respect to stations in the Gulf, however, ducting can result in the reception of signals far beyond the line-of-sight prediction under that formula, and thus the safe harbor formula will not provide the requisite protection.

In light of the foregoing, it is clear that the Commission cannot merely rely on its newly-adopted rules to control cochannel interference between operations on land and in the Gulf. Thus, WCA proposes that the following bedrock requirements be applied in connection with operations in any new Gulf service area.

First, as proposed in the *Gulf NPRM*, the service area of any Gulf auction winner should exclude the circular 35 mile radius GSAs of any incumbent BRS or EBS licensees, just as the service area awarded to any land-based BRS BTA auction winner excluded the protected service area of an incumbent pursuant to former Section 21.933(a) of the Rules (a rule carried forward as Section 27.1206(a)(2)).⁹⁶ As illustrated by the record developed in response to the *Gulf NPRM*, land-based licensees have provided service into the Gulf in the past,⁹⁷ and WCA believes that broadband services will prove particularly attractive to boaters and others within existing GSAs.

⁹⁵ See Initial Coalition Proposal at 27-28.

⁹⁶ See *Gulf NPRM*, 17 FCC Rcd at 8448-49.

⁹⁷ See, e.g., Opposition to Petition for Rule Making of Wireless One, Inc., RM-9718 at 2 (filed Sept. 10, 1999).

There is no basis for allowing any new Gulf auction winner to encroach upon existing BRS/EBS service areas.

Second, the Commission should reaffirm that BRS BTA authorizations for areas bordering the Gulf extend at least to the boundaries of the counties that comprise the BTA, including areas that are within counties but beyond the coastline. The Commission has reaffirmed that broadband PCS service areas, which are based on BTAs just like BRS auctioned service areas, extend into the Gulf to the full extent of county boundaries under applicable state law.⁹⁸ There is absolutely no basis for interpreting the rights acquired by BRS BTA authorization holders at auction as anything less.⁹⁹

Third, while WCA is not proposing any expansion of the exclusive service areas afforded BRS BTA authorization holders or incumbents,¹⁰⁰ in order to assure that operations in the Gulf not hamper the provision of service on land, WCA urges the Commission to adopt the proposal in the *Gulf NPRM* and draw the innermost boundary of a new “Gulf Service Area” at the limit of the territorial waters of the United States in the Gulf, which is approximately 12 nautical miles

⁹⁸ See *Gulf CMRS Reconsideration Order*, 18 FCC Rcd at 13181.

⁹⁹ The Commission’s holding in the *Gulf CMRS Reconsideration Order*, which expressly acknowledges that BTA boundaries extend well into the Gulf of Mexico (*see id.* at 13180 n.68), is particularly significant in that it illustrates the fallacy in arguments that the BTA boundary occurs at the land-water line. Indeed, given the Commission’s recent acknowledgement that defining the boundary for cellular at the coastline created a situation in which “land-based carriers seeking to cover shore areas...were unable to site transmitters close to the shoreline without incurring substantial engineering costs to avoid their signals being transmitted over water,” it would be bizarre for the Commission to repeat its mistake and adopt a similar boundary here. *Gulf CMRS Order*, 17 FCC Rcd at 1211.

¹⁰⁰ WCA continues to believe that the public interest would best be served were the Commission to do as it proposed in the *Gulf NPRM* and extend the authorized service area of BRS BTA holders to the limit of the territorial waters of the United States. However, in light of the decision to limit the authorized service area of broadband PCS licenses to county boundaries, WCA believes that pressing that argument would be fruitless, and therefore has focused its attention on an approach that will assure protection for land-based operations even with the BTA boundary being limited to county boundaries.

from the coastline.¹⁰¹ As noted in the *Gulf NPRM*, this is the same boundary that was used in another flexible use service – the 2.3 GHz band WCS.¹⁰² In fact, since the release of the *Gulf NPRM* the Commission has consistently employed that same boundary in adopting rules for new flexible use services regulated under Part 27, including the upper 700 MHz band,¹⁰³ the 700 MHz guardband,¹⁰⁴ the 1390-1392 MHz band,¹⁰⁵ and the 1392-1395/1432-1435 MHz bands.¹⁰⁶

Fourth, the Commission should follow the approach taken in its recent proceedings regarding cellular service in the Gulf and establish a “Gulf Coastal Zone” that would extend from the boundaries of the BTAs bordering the Gulf to the limit of the territorial waters of the United States (*i.e.*, the inner boundary of the new Gulf Service Area). Within the Gulf Coastal Zone, the holder of either the adjacent BTA authorization or the Gulf Service Area authorization could provide service, so long as it meets the new cochannel interference protection requirements at the other’s service area boundary.¹⁰⁷ The Commission has recognized “there are no offshore oil and gas drilling platforms on which to site cellular facilities” and there is “no likelihood of such platforms being constructed in the Eastern Gulf any time in the near future.”¹⁰⁸ Thus,

¹⁰¹ See *Gulf NPRM*, 17 FCC Rcd at 8452-53.

¹⁰² *Id.* at 8453.

¹⁰³ See *Upper 700 MHz R&O*, 15 FCC Rcd at 500 n.137; *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, Errata, 15 FCC Rcd 25495 (2000)[“700 MHz Errata”].

¹⁰⁴ *Id.* at 25495.

¹⁰⁵ See *27 MHz R&O*, 17 FCC Rcd at 9988-90.

¹⁰⁶ *Id.* at 9990-91.

¹⁰⁷ In other words, a land-based BTA authorization holder would be required to meet the signal strength limit at the boundary of the Gulf Service Area, while the holder of the Gulf Service Area authorization would be required to meet the signal strength limit at the boundary of the BTA.

¹⁰⁸ *Gulf CMRS Order*, 17 FCC Rcd at 1210, 1214.

WCA's approach provides the only vehicle for the provision of service at least twelve nautical miles into the eastern Gulf by land-based licensees – the only possible service providers.¹⁰⁹ With respect to the western portion of the Gulf, this approach will promote the negotiation of market-based solutions between the holders of BTA authorizations and the holder of the Gulf Service Area authorization. Such an approach is similar to that adopted recently for cellular licensing in the Gulf (albeit modified to reflect significant differences in the current status of the two services – particularly the lack of any BRS/EBS facilities in the Gulf Coastal Zone). As the Commission has found, “the best way to achieve reliable, ubiquitous service in the Western Gulf is to encourage further reliance on negotiation and market-based solutions to the fullest extent possible.”¹¹⁰

Fifth, operations in any new Gulf Service Area should generally be subject to the rules applicable to the LBS/UBS or MBS, as appropriate. More specifically, Gulf operations should be required to comply with the signal strength limit at the boundary of the GSAs of incumbent BRS/EBS licensees and BTA authorization holders and should not be excused even if non-compliance is caused by ducting.¹¹¹ While the licensee of any land-based operation should be required to comply with the signal strength limit at the boundary of the Gulf Service Area,¹¹² consistent with the *Gulf NPRM* it should not be required to cure any non-compliance if it can

¹⁰⁹ Of course, the many licensees along the Gulf coast with PSAs that extend farther into the Gulf will be able to meet marketplace needs to the geographic limit of their PSAs.

¹¹⁰ *Gulf CMRS Order*, 17 FCC Rcd at 1218.

¹¹¹ For purposes of the cochannel height benchmarking rule, the distance to the border used in the formula $D^2/17$ should be the distance to the border of the BTA in issue.

¹¹² For purposes of the cochannel height benchmarking rule, the distance to the border used in the formula $D^2/17$ should be the distance to the border of the Gulf Service Area.

demonstrate using the Epstein/Peterson propagation model that its operations are predicted to comply with the signal strength limit in the absence of ducting.

III. CONCLUSION.

If adopted, the recommendations set forth above and in WCA's petition for partial reconsideration will complete the BRS/EBS industry's quest for a truly flexible, market-driven regulatory framework that will finally unleash the 2.5 GHz band's potential as a vehicle for broadband and other advanced services. As confirmed by the record in this docket, BRS/EBS licensees and channel lessees, BRS/EBS system operators, educational institutions and the vendor community will reap substantial benefits from the new regulatory paradigm. The ultimate beneficiaries, however, will be consumers, particularly those who are still waiting for competitive broadband service to arrive in their communities. WCA thus urges the Commission to amend its rules as proposed above and in WCA's petition for partial reconsideration as soon as practicable, so that full scale deployments of new BRS/EBS service can be completed in the near term.

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: /s/ Paul J. Sinderbrand

Paul J. Sinderbrand
Robert D. Primosch
Nguyen T. Vu

WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128
202.783.4141

Its attorneys

January 10, 2005