

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
	)	
	)	

**CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION**

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## EXECUTIVE SUMMARY

By and large, the petitions for reconsideration of the *Report and Order* sound themes similar to those raised by the WCA in its own petition for partial reconsideration – the rules governing the transition to the new 2.5 GHz bandplan must be revised to promote transitions that are fair to all licensees, a last-chance opportunity must be afforded for any licensee to self-transition if it is not covered by an initiation plan filed under the proponent-driven transition system, modifications are required to the rules governing operations in the Lower Band Segment (“LBS”) and the Upper Band Segment (“UBS”) to promote interference-free operations, and the Commission must accommodate those MVPDs that have substantial penetration within their service area or that utilize more than seven digitized channels for the distribution of their video programming.

Several of the petitions include proposals not advanced by WCA that make eminently good sense. In addition to the rule changes suggested in WCA’s petition for reconsideration, the following proposals should be adopted:

- Section 27.1221(a) should be amended to make clear that the height benchmarking rules are applicable to EBS facilities;
- Section 27.53(l) should be revised to clarify that where two or more contiguous channels are utilized as part of the same system, all out-of-band emissions limitations are to be measured at the outermost edges of those contiguous channels;
- The Commission should amend Section 27.1231 to specify that the first party to submit an initiation plan pursuant to Section 27.1231(d) is the proponent for the area in question, and the addition of co-proponents should be at that proponent’s discretion;
- The provisions of Section 27.1231(f) regarding pre-transition data requests should be amended to require that responses to pre-transition data requests include certain contact information and to ensure that the responding licensee keep information on file with potential proponents current;
- The proposal for a rule specifying that service of transition-related documents on the address of record for the contact person listed in the Commission’s Universal Licensing System is sufficient should be adopted;
- The Commission should adopt the proposal for public notice of the filing of initiation plans and notifications of the completion of transitions;
- Section 27.1235(a) should be amended to provide that the proponent alone may provide notification to the Commission following the successful completion of a transition;
- The Commission should reverse its decision to permit unlicensed Part 15 operations in the 2500-2655 MHz band for the first time.

While WCA can gladly support these proposals, WCA must oppose several of the suggestions advanced by others in their petition for reconsideration of the *Report and Order*. The petitions evidence an almost universal repudiation of the Commission's mandate that the proponent of a transition must transition all stations within a Major Economic Area ("MEA"). The record establishes the wisdom of utilizing Basic Trading Areas ("BTAs") as the foundation for transitions. Since BTAs are the basis for Broadband Radio Service ("BRS") licensing and more closely mirror BRS/EBS licensing patterns than any other alternative, WCA opposes use of any other geographic area for governing transitions. While WCA believes the deadline for filing initiation plans should be extended until 30 months after the effective date of the elimination of the MEA transition requirement, the Commission should reject proposals that would extend the deadline any further.

WCA vigorously opposes the imposition of any ban on two-way deployments prior to transition. The risk of interference to Educational Broadband Service ("EBS") receive sites has been overstated, and there is no need for the Commission to take such a draconian step as freezing new deployments pending transition. The alternative proposal by the National ITFS Association ("NIA") and the Catholic Television Network ("CTN") for procedures to govern pre-transition deployments presents a helpful framework and, with appropriate modifications, can provide EBS receive sites with additional protection without undermining the most rapid deployment of wireless broadband services.

WCA is pleased that the new rules have largely incorporated the Coalition's proposal that as commercial services are deployed in a transitioned market, the costs incurred in effectuating the transition be reimbursed. The new rules are based on the Commission's long-standing microwave relocation policies, under which a reimbursement obligation attaches upon the inauguration of service. Consistent with that approach, WCA opposes the proposal to require some, but not all, licensees to reimburse transition costs immediately following the transition. Although WCA appreciates the concerns behind the proposal, Clearwire's proposal for allocating transition costs is inexact, will impose costs on some who never benefit from the transition and will allow others to avoid their fair share of the costs. In addition, the Commission must tread carefully in establishing rules governing the reimbursement of self-transition expenses and the provision of replacement downconverters to avoid "gold plating" by EBS licensees and to assure a fair allocation of costs among subsequent commercial system operators.

WCA's proposed rules governing out-of-band emissions for fixed user stations should be modified to address concerns expressed by Nextel Communications ("Nextel") regarding the need for deadlines by which remedial efforts must be taken.

In its petition, WCA proposed a well-balanced approach towards grandfathering of MVPD systems that either have substantial penetration within their authorized service areas or that utilize more than seven digitized channels to distribute video programming and thus cannot relocate to the Middle Band Segment ("MBS") (which only has seven channels). While several providers of analog wireless cable services seek to expand the number of systems entitled to opt-out of the transition process, they ignore the technical

evidence in the record that continued operation of high-power, high-site systems poses a substantial threat to base stations of wireless broadband systems. Adoption of the proposed expanded MVPD opt-out or alternative bandplan for rural areas would certainly preclude wireless broadband deployments in more urban areas. Moreover, it is totally unnecessary. Instead, the Commission should adopt the proposal advanced in the *Further Notice of Proposed Rulemaking* (“FNPRM”) which will allow high-power, high-site system operators to relocate to the MBS, return their LBS and UBS spectrum for auction and receive reimbursement for their relocation costs from the winner of the LBS/UBS spectrum reauction.

The Commission should reject the proposal for reinstatement of the former fifteen year limit on the maximum term of an EBS excess capacity lease. The *Report and Order* has properly placed EBS leasing under the same flexible regulatory regime adopted in the *Secondary Markets* proceeding for all other services, save for EBS-specific minimum use requirements. This new approach will spur the migration of EBS spectrum to its highest and best use, and should not be reversed on reconsideration. Similarly, the Commission should not expand the circumstances under which lessees must make equipment available to lessors. To the extent that lessors desire the right to acquire equipment upon termination of a lease, they certainly are free to negotiate the appropriate provisions. However, there is no reason for the Commission to dictate any such provision.

The Commission should reject the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.’s (“IMWED’s”) proposals for Commission micro-management of the 2.5 GHz band. There is no reason for the Commission to depart from the *Secondary Markets* rules and require that all EBS leases be filed and that redaction of commercially sensitive information be prohibited. Nor is there any basis in the record for the Commission to revisit its decision in the *Report and Order* to retain the 5% minimum educational reservation requirement. IMWED’s call for a five-fold increase merely repeats the arguments that have been presented before and correctly rejected. Moreover, the Commission should reject IMWED’s proposed ban on purchase options in EBS leases. The Commission has historically recognized that purchase options are benign until exercised, and IMWED fails to present any rationale for departing from the precedent here. Finally, the Commission should not issue a blanket invalidation of existing coordination agreements. Determining the enforceability of a given coordination agreement is a complex task that cannot be undertaken with a “one size fits all” blanket ruling, and is best left to the courts.

Those who seek reconsideration of the Commission’s decision to generally refrain from imposing cross-ownership and cross-leasing rules on cable operators and incumbent local exchange carriers (“ILECs”) have failed to carry their burden of demonstrating that additional restrictions are required to maintain a competitive marketplace.

The rules adopted in the *Report and Order* to govern the licensing and operation of the J and K band guard channels should not be modified on reconsideration. Those bands are primarily designed to serve as guardbands between low-power, cellular operations in the LBS/UBS and high-power, high-site operations in the MBS, and the proposed revisions to the governing rules would undermine that purpose.

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**CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby submits its opposition to certain of the petitions for reconsideration of the Commission's *Report and Order* in the captioned matters.<sup>1</sup>

**I. INTRODUCTION.**

By and large, petitions for reconsideration of the new rules governing the Broadband Radio Service ("BRS") and the Educational Broadband Service ("EBS") sound themes similar to those raised

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<sup>1</sup> *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].

by WCA in its own petition for partial reconsideration of the *Report and Order* – the rules must promote transitions the new 2.5 GHz bandplan in a manner that is fair to all licensees, a last-chance opportunity must be afforded for any licensee to self-transition, and the Commission must accommodate those multichannel video programming distributors (“MVPDs”) that have substantial penetration within their service area or that utilize more than seven digitized channels for the distribution of their video programming.

In addition, several of the petitions include proposals not advanced by WCA that make eminently good sense. Thus, WCA urges the Commission to adopt the following proposals that have been advanced in petitions filed by others, in addition to those proposed by WCA in its own petition for partial reconsideration of the *Report and Order*:

- As suggested by the National ITFS Association, Inc. (“NIA”) and the Catholic Television Network (“CTN”), Section 27.1221(a) should be amended to make clear that the height benchmarking rules are applicable to EBS facilities;<sup>2</sup>
- Section 27.53(l) should be revised as proposed by Nextel Communications (“Nextel”) to clarify that where two or more contiguous channels are utilized as part of the same system, all out-of-band emissions limitations are to be measured at the outermost edges of those contiguous channels;<sup>3</sup>
- The Commission should adopt Nextel’s proposal to amend Section 27.1231 to specify that the first party to submit an initiation plan pursuant to Section 27.1231(d) should be deemed the proponent for the area in question, and the addition of co-proponents should be at the proponent’s discretion;<sup>4</sup>

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<sup>2</sup> See Petition of Catholic Television Network and National ITFS Ass’n for Reconsideration, WT Docket No. 03-66, at 22 (filed Jan. 10, 2005)[“NIA/CTN Petition”].

<sup>3</sup> See Petition of Nextel for Reconsideration, WT Docket No. 03-66, at 31 (filed Jan. 10, 2005)[“Nextel Petition”].

<sup>4</sup> *Id.* at 11-13. Nextel proposes an alternative approach to be employed if the Commission rejects its first in time approach. *Id.* at 14-15. While WCA believes that Nextel’s proposal for a “Proponent Election Period” is a reasonable approach if the Commission rejects a first in time rule, the complexity of the process proposed by Nextel and the delays associated with it further demonstrate the wisdom of designating the first eligible party to submit a Section 27.1231(d) filing as the proponent for the area.

- The provisions of Section 27.1231(f) regarding pre-transition data requests should be amended as proposed by Nextel to require that responses include certain licensee contact information and to ensure that the responding licensee keeps information on file with potential proponents current.<sup>5</sup> These changes are in addition to WCA's own proposal that responses to pre-transition data requests be served within 21 days of receipt of the request and that certain additional information be provided by licensees in response to pre-transition data requests.<sup>6</sup>
- The Commission should specify that service of transition-related documents on the address of record for a licensee's contact person listed in the Commission's Universal Licensing System ("ULS") is sufficient;<sup>7</sup>
- The Commission should adopt the proposal for public notice of the filing of initiation plans and notifications of the completion of transitions;<sup>8</sup>
- Section 27.1235(a) should be amended to provide that the proponent alone may provide notification to the Commission following the successful completion of a transition;<sup>9</sup> and
- The Commission should reverse its decision to permit unlicensed Part 15 operations in the 2500-2655 MHz band for the first time.<sup>10</sup>

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<sup>5</sup> *Id.* at 10. However, WCA does not endorse Nextel's suggestion that those EBS licensees that fail to respond to a pre-transition data request "should result in the non-responding licensee losing primary status once the transition is complete." *Id.* Rather, WCA believes the Commission should adopt WCA's proposal that those who fail to respond to a pre-transition data request merely forfeit their right to new downconverters upon the transition and to assistance in migrating video programming to the Middle Band Segment ("MBS"). *See* Petition of Wireless Communications Ass'n Int'l for Partial Reconsideration, WT Docket No. 03-66, at 18 (corrected version filed Jan. 18, 2005) ["WCA Petition"]. Moreover, to the extent the Commission adopts proposals advanced by NIA and CTN to afford certain receive sites special interference protection, an EBS licensee that fails to timely respond to any pre-transition data request should forfeit any special interference protection afforded to EBS receive sites during and after transition. These penalties are directly related to the harm resulting from the failure to respond. As such, WCA's proposed penalty is better tailored to the harm caused than an outright reduction to secondary status.

<sup>6</sup> *See* WCA Petition at 18-22.

<sup>7</sup> *See* Petition of C&W Enterprises, Inc. for Reconsideration, WT Docket No. 03-66 at 4 (filed Jan. 10, 2005) ["C&W Petition"]; Petition of SpeedNet, L.L.C. for Reconsideration, WT Docket No. 03-66 at 4 (filed Jan. 10, 2005) ["SpeedNet Petition"]; Petition of Wireless Direct Broadcast System for Reconsideration, WT Docket No. 03-66 at 4 (filed Jan. 10, 2005) ["WDBS Petition"]; Petition of Digital Broadcast Corporation for Reconsideration, WT Docket No. 03-66 at 4 (filed Jan. 10, 2005) ["DBC Petition"]; Petition of Cheboygan-Ostego-Presque Isle Educational Service Districe/PACE Telecommunications Consortium for Reconsideration, WT Docket No. 03-66, at 4 (filed Jan. 10, 2005) ["COPES/PACE Petition"].

<sup>8</sup> *See* C&W Petition at 4; SpeedNet Petition at 4, WBDS Petition at 4; DBC Petition at 4; COPES/PACE Petition at 4.

<sup>9</sup> *See* Nextel Petition at 16-18.

<sup>10</sup> *Id.* at 22-23.

Unfortunately, not all of the proposals advanced in petitions for reconsideration by others are as helpful as those cited above. Although WCA and others have expressed legitimate concerns regarding specific provisions of the *Report and Order*, the Commission was faced with a difficult task in balancing a variety of competing interests. On reconsideration, however, suggestions have been put forth by some petitioners that clearly are designed to elevate the advocate's particular interests above all others, without regard to the adverse impact on the legitimate interests of others. Thus, WCA will devote the remainder of this pleading to addressing those ill-conceived proposals.

## II. DISCUSSION.

### A. The Commission Should Require Transitions To Be Made On A BTA-By-BTA Basis.

Whether filed by a commercial system operator, a BRS licensee or an EBS licensee, virtually every petition for reconsideration speaks loud and clear – the Commission's decision to require proponents to transition entire Major Economic Areas ("MEAs") is fundamentally flawed.<sup>11</sup> As Nextel succinctly put it:

MEAs are too large for carriers to use in transitioning incumbent licensees to the new 2.5 GHz bandplan. *MEA-sized transition areas needlessly complicate the transition by drawing in thousands of licensees across hundreds of square miles that pose no threat of interference if they are transitioned at different times. Use of MEAs will delay – rather than accelerate – deployment of broadband services in this band.*<sup>12</sup>

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<sup>11</sup> See WCA Petition at 4; C&W Petition at 2-3; NIA/CTN Petition at 4; Petition of Clearwire Corp. for Reconsideration, WT Docket No. 03-66, at 2 n.2 (filed Jan. 10, 2005)[“Clearwire Petition”]; COPES/PACE Petition at 2-3; DBC Petition at 2-3; Petition of Grand Wireless for Reconsideration, WT Docket No. 03-66, at 1 (filed Jan. 10, 2005)[“Grand Petition”]; Petition of Hispanic Information & Telecommunications Network for Reconsideration, WT Docket No. 03-66, at 3-4 (filed Jan. 10, 2005)[“HITN Petition”]; Petition of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance for Reconsideration, WT Docket No. 03-66, at 3-5 (filed Jan. 10, 2005)[“IMWED Petition”]; Nextel Petition at 2-8; Petition of Plateau Telecommunications for Partial Reconsideration, WT Docket No. 03-66, at 4-10 (filed Jan. 10, 2005)[“Plateau Petition”]; SpeedNet Petition at 2-3; Petition of Sprint Corp. for Reconsideration, WT Docket No. 03-66, at 2-4 (filed Jan. 10, 2005)[“Sprint Petition”]; WBDS Petition at 2-3.

<sup>12</sup> Nextel Petition at 3 (footnotes omitted)(emphasis added).

The educational community concurs with these concerns. As NIA and CTN correctly noted, because of the massive size of MEAs, “[r]ather than speed deployment of wireless broadband services, the MEA transition requirement may actually delay or deter such deployment.”<sup>13</sup>

The complexity of the Commission’s approach is illustrated by the petition of Plateau Telecommunications, Inc. (“Plateau”), which is providing wireless broadband service to 4200 subscribers in eastern New Mexico. Because the Basic Trading Areas (“BTAs”) in which Plateau provides service overlap two MEAs, for Plateau to transition to the new bandplan “it must (i) research and contact the licensees located in 25 BTAs in seven states, stretching from Arizona to Louisiana, including those in Arkansas, Colorado, Oklahoma, and Texas, (ii) request that these licensees forward information on their current technical facilities, and then (iii) develop a transition plan whereby it would be required to fund the transition costs of the EBS licensees in these areas.”<sup>14</sup> This is hardly an aberration – as WCA noted in its petition for partial reconsideration of the *Report and Order*, “*approximately 25% of the BTAs used for BRS licensing overlap two or more MEAs, further complicating the transition process for BTA owners with no concomitant benefit to consumers.*”<sup>15</sup>

The overwhelming majority of those addressing the issue suggest that the Commission require transitions to be accomplished on a BTA-by-BTA basis.<sup>16</sup> Obviously, BTAs are substantially smaller

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<sup>13</sup> NIA/CTN Petition at 4. Similarly, the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (“IMWED”) notes that “[f]ar from facilitating the roll-out of systems, the need to pay for transitions over large geographic areas will erect a significant barrier to transitions to the development of advance wireless systems in the 2.5 GHz band.” Petition of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., for Reconsideration, WT Docket No. 03-66, at 4 (filed Jan. 10, 2005)[“IMWED Petition”].

<sup>14</sup> Plateau Petition at 5.

<sup>15</sup> WCA Petition at 8 (emphasis in original).

<sup>16</sup> See WCA Petition at 9; C&W Petition at 3; COPES/PACE Petition at 3; Clearwire Petition at 2 n.2; DBC Petition at 3; Grand Petition at 1; HITN Petition at 4; IMWED Petition at 4-5; Nextel Petition at 4-8; NIA/CTN Petition at 4; Plateau Petition at 2; Sprint Petition at 3; WDBS Petition at 3. Although its petition is far from clear, Choice Communications, LLC (“Choice”) appears to suggest that the Commission need only permit transitions to occur on

than MEAs, and thus the burden of coordinating and funding a BTA-based transition will be far less than that associated with an MEA transition. But, use of a smaller geographic area alone is not enough – the area chosen must have a rational relationship to the manner in which the 2.5 GHz band is today licenses, and that dictates the use of BTAs.<sup>17</sup> Indeed, a common theme among those opposing the use of MEAs and supporting the use of BTAs is “[t]he absence of any rational relationship between the geographic areas for the transition and the geographic areas relevant for BRS/EBS licensees and their operations.”<sup>18</sup> Because so much activity in the 2.5 GHz band has revolved around BTAs for the past decade, a BTA-centric transition approach will most closely match the geographic area a proponent must transition to the geographic area it serves.

Indeed, only one petitioner has suggested that the Commission use a geographic area other than BTAs for transitions. The School Board of Miami Dade County, Florida (“Miami Dade School Board”) has suggested that transitions be done on a county-by-county basis.<sup>19</sup> Certainly, WCA agrees with the Miami Dade School Board that in many portions of the country, significant educational activities occur at

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a BTA basis “for remote and insular markets such as the U.S. Virgin Islands,” where it serves. Petition of Choice Communications, LLC for Reconsideration, WT Docket No. 03-66, at 6 (filed Jan. 10, 2005). Yet Choice advances no rational argument as to why “remote and insular markets” (a phrase it never even attempts to define) are impacted more adversely than any other market under the MEA-based approach adopted in the *Report and Order*. The record before the Commission on reconsideration illustrates beyond doubt that the current rule is unworkable for all manner of licensee, and Choice’s attempt to carve out special treatment for itself should be rejected in favor of a universal solution.

<sup>17</sup> For example, although Economic Areas (“EAs”) are clearly smaller than MEAs (there are 176 EAs), EAs bear no logical relationship to the BTA-based service areas heretofore used in the 2.5 GHz band. Indeed, 166 of the 493 BTAs (33.7%) overlap with two or more of the 176 EAs. Thus, in one-third of the transitions, more than one EA would have to be transitioned in order for a proponent to secure the transition of an entire BTA. This adds to the cost and complexity of transitions, without any concomitant benefit.

<sup>18</sup> Nextel Petition at 4. *See also id.* at 7 (“BTAs are the basic licensing unit in the BRS band and are, thus, well suited to govern the process by which this band is transitioned.”); Sprint Petition at 3 (“BRS spectrum has been geographically licenses as BTAs for almost a decade [and] operators and licensees have developed interference and other interoperating relationships along BTA lines.”).

<sup>19</sup> *See* Petition of School Board of Miami Dade County Florida for Reconsideration, WT Docket No. 03-66 at 2-3 (filed Jan. 10, 2005).

the county level.<sup>20</sup> However, county boundaries have never been relevant for the licensing of EBS or BRS facilities, which are almost always authorized to serve multiple counties. As a result, counties are simply too small a unit on which to base transitions. The BTA is the one geographic area that best fits the 2.5 GHz licensing pattern, and thus the BTA should be the focus of transitions.

**B. The Deadline For Filing Initiation Plans Should Be Extended Until 30 Months After The Effective Date Of The Elimination Of The MEA Transition Requirement.**

In its petition, WCA recommended “that Section 27.1231(b) be amended to provide that the new transition rules remain applicable until 30 months (two and one-half years) following the effective date of the amendment changing the focus of transitions under Section 27.1231 from MEAs to BTAs.”<sup>21</sup> WCA reasoned that this approach was necessary “to provide prospective proponents a fair opportunity to transition under BTA-oriented rules since “it is unrealistic to expect many holders of BRS and EBS authorizations to initiate transitions under a set of rules that require the proponent to fund the transition of all EBS stations within a given MEA.”<sup>22</sup> WCA was hardly alone in this regard – Sprint also advanced a similar proposal.<sup>23</sup>

Unfortunately, Consolidated Telecom and a handful of other rural licensees (“Consolidated Telecom”) have advanced a proposal that would further delay the deadline for filing initiation plans.<sup>24</sup>

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<sup>20</sup> *Id.* at 2.

<sup>21</sup> WCA Petition at 13.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *See* Sprint Petition at 2-4.

<sup>24</sup> Petition of Consolidated Telecom *et al.* for Reconsideration, WT Docket No. 03-66, at 8 (filed Jan. 10, 2005)[“Consolidated Telecom Petition”]. In addition, Consolidated Telecom suggests that the “use of the Commission’s dispute resolution process (whether before an arbitrator or the Commission) should toll the running of the three year transition period.” This proposal is a *non sequitur*. Under Section 27.1231, the three year period referenced by Consolidated Telecom appears to be the period during which a proponent may submit an initiation plan. The filing of the initiation plan then starts a collaborative process which ultimately leads to the preparation of a transition plan by the proponent. However, it is not until the transition plan is circulated by the proponent that the

Consolidated Telecom suggests that the Commission permit all licensees serving rural areas to delay transitions until January 10, 2013, contending that “the cost of the necessary replacement equipment to implement a given transition will be great” and arguing delaying the mandatory transition deadline will permit rural licensees to utilize their equipment until closer to the end of its useful life.<sup>25</sup> While WCA is sensitive to the concerns driving this proposal, WCA submits that the *FNPRM* in this proceeding points to a better way of addressing the concern.

At the outset, it should be noted that adoption of a BTA-based transition system will significantly reduce the costs that Consolidated Telecom and other rural operators will face in transitioning themselves to the new bandplan. Rather than buying downconverters and migrating video programming for perhaps hundreds of licensees over a vast MEA, a proponent under BTA-based system will guide a localized process, allowing rural operators to transition their markets without funding the transition of others.

Moreover, in considering Consolidated Telecom’s proposal (and, as discussed below, several other proposals by rural operators), the Commission should not lose sight of one critical fact – *the operation of rural high-power, high-site facilities poses a real and present risk of cochannel interference to the base stations of two-way systems operating nearby*. Were the continued operation of these rural high-power, high-site systems always benign, there would be no need for these systems to make any changes to their designs or operations. But the fact is that they are not always benign.

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dispute resolution can be invoked. In other words, the dispute resolution process has nothing to do with the three year period for filing initiation plans. WCA certainly agrees with Consolidated Telecom’s concern that applicable deadlines should be tolled pending dispute resolution, but the applicable deadline here is the 18 month period established by Section 27.1232(b)(1)(vi) between the end of the transition planning period and the mandatory completion of a transition. And, the Commission has already addressed Consolidated Telecom’s concern, since Section 27.1232(b)(1)(vi) currently provides that the 18 month deadline applies “unless dispute resolution procedures are used.” 47 C.F.R. § 27.1232(b)(1)(vi). WCA certainly would not oppose revising that section to specify more clearly that the 18 month deadline for completing a transition is tolled for the duration of any dispute resolution process.

<sup>25</sup> Consolidated Telecom Petition at 6-7.

The white paper by WCA, NIA and CTN that commenced this proceeding (the “Coalition Proposal”) was premised on just that point.<sup>26</sup> WCA, NIA and CTN recognized that even at great distances, high-power, high-site video transmissions posed a serious threat of interference to two-way wireless broadband systems (particularly to the highly-sensitive base stations used by those systems to receive transmissions from subscribers). Thus, the Coalition Proposal invested in the proponent the ability to transition any operations that posed a threat to the new bandplan, save for the handful of relatively unique situations where the equities dictated an MVPD opt-out plan.<sup>27</sup>

WCA, NIA and CTN demonstrated the need for this provision on several occasions during earlier phases of this proceeding, providing the Commission with detailed technical analyses illustrating that continued operation by high-power, high-site rural MVPD systems would cause interference to broadband services offerings in neighboring markets despite geographic separations exceeding 100 miles.<sup>28</sup> It should be noted that these analyses illustrated that the problem is not just one of rural vs. urban

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<sup>26</sup> See “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 at 10 (filed Oct. 7, 2002)[“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)[“First Coalition Supplement”]; “Second Supplement To ‘A Proposal For Revising The MDS And ITFS Regulatory Regime,’” RM-10586 (filed Feb. 7, 2003)[“Second Coalition Supplement”]. For simplicity’s sake, unless the context requires a different meaning, references to the “Coalition Proposal” in these comments should be read to reference all three filings.

<sup>27</sup> On the other hand, where a high-power, high-site video transmission system was sufficiently distant from any contemplated two-way operation, the Coalition Proposal would have permitted that video system to remain in perpetuity. As discussed *infra* at Section II.G, it is the Commission’s insistence that all transitions be accomplished by a date certain that will force many rural MVPD operations to transition notwithstanding the fact that they are sufficiently isolated that they will not interfere with any two-way system.

<sup>28</sup> See Reply Comments of Wireless Communications Ass’n Int’l, National ITFS Ass’n and Catholic Television Network, WT Docket No. 03-66 at 48-51 (filed Oct. 23, 2003)[“Coalition NPRM Reply Comments”(examining interference from Twin Falls, ID to wireless broadband system in Boise and from Clayton, OK to surrounding rural areas); Reply Comments of Wireless Communications Ass’n Int’l, National ITFS Ass’n and Catholic Television Network, RM-10586 at 31-33 (filed Nov. 29, 2002)[“Coalition Rulemaking Reply Comments”](examining interference from Madison, WI to wireless broadband systems in Milwaukee and Chicago and from Socorro, NM to wireless broadband system Albuquerque).

interests – at the heart of the issue is cochannel interference into the sensitive base station receivers necessary for a two-way system, and thus WCA, NIA and CTN demonstrated that the continued operation of a high-power, high-site MVPD system in a rural area will also preclude the deployment of a cochannel wireless broadband system in a neighboring rural market.<sup>29</sup>

In the interest of brevity, those previously filed analyses are incorporated herein by reference and need not be discussed in detail. Not surprisingly though, Paragraph 19 of the *Report and Order* recognizes the fundamental incompatibility of cochannel high-power, high-site operations and cellular operations.<sup>30</sup> Indeed, it should not be lost on the Commission that neither Consolidated Telecom nor any other rural MVPD petitioner has presented the Commission with any technical analysis disproving the fundamental premise here – that high-power, high-site systems are prone to cause interference to the base stations of two-way systems in neighboring areas.<sup>31</sup>

Were the Commission to grant Consolidated Telecom’s proposal and permit licensees serving rural areas to resist any proponent-driven transition until 2013, two-way system operators in the vicinity of such rural systems would be forced to suffer cochannel interference until 2013, interference which might make the deployment of wireless broadband services using the Lower Band Segment (“LBS”) and the Upper Band Segment (“UBS”) spectrum impossible. *The Commission should not lose sight of the fact, based on 2000 census data, that 86% of all BTAs (423 of the 493 BTAs) include at least one rural county!* Thus, adoption of Consolidated Telecom’s proposal could, for all intents and purposes, stop the

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<sup>29</sup> See Coalition NPRM Reply Comments at Att. D.

<sup>30</sup> See *Report and Order*, 19 FCC Rcd at 14176 ¶ 19.

<sup>31</sup> Indeed, Oklahoma Western, an MVPD that serves just 270 subscribers, conceded earlier in this proceeding that “the best way to [reconfigure the band] is to separate low power uses of the spectrum from high power uses in order to promote the most efficient use of the spectrum by consolidating channels into contiguous blocks with a guard band in between.” Comments of Oklahoma Western, WT Docket No. 03-66, at 3 (filed Sept. 8, 2003).

transition process in its tracks because so many BTAs could be implicated. And, because the victim licensees would be unable to deploy services through no fault of their own, fundamental fairness would force the Commission to grant those licensees additional time to transition and meet performance requirements. In other words, the domino effect of granting Consolidated Telecom's proposal is to delay large numbers of transitions and deployments.

Given the Commission's resistance towards the proposal by WCA, NIA and CTN for an open-ended transition process, WCA is not now suggesting that approach as an answer to the concerns presented on reconsideration by rural interests. Instead, WCA submits that the best solution to Consolidated Telecom's concern is adoption of the *FNPRM* proposal of a system under which Consolidated Telecom could opt to return its spectrum in the LBS and the UBS and retain just its spectrum in the MBS.<sup>32</sup> In exchange, its costs of migrating operations to the MBS, including the digitization of operations that today utilize analog technology, would be subject to reimbursement by the winner of the auction for the returned LBS/UBS spectrum.<sup>33</sup> Under this approach, rural markets will be transitioned on the same schedule as all other markets, but those rural operators that desire to continue high-power, high-site operations can do so through the use of digital technology in the MBS, and ultimately will not incur any costs. This approach is a classic "win, win" – the rural MVPD can continue offering its service *ad infinitum* without incurring additional costs, while the risk of interference to two-way base stations in neighboring areas is mitigated over time.

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<sup>32</sup> See *FNPRM*, 19 FCC Rcd at 14280 ¶¶ 313-314.

<sup>33</sup> *Id.* at 14273, 14280-81 ¶¶ 290, 314-16.

**C. Calls For A Ban On Two-Way Deployments Prior To Transition Should Be Rejected.**

WCA is troubled that NIA/CTN and IMWED have called for the Commission to immediately ban any two-way system deployments under the Commission's new geographic licensing regime until after the deploying licensee has transitioned to the new bandplan. IMWED would have the Commission believe such a ban is necessary to provide licensees with an appropriate incentive to transition.<sup>34</sup> NIA and CTN, meanwhile, contend that this draconian step is necessary to avoid interference to EBS receive sites.<sup>35</sup> IMWED and NIA/CTN are wrong – now that licensees have begun operating under the new geographic licensing regime, it would be absurd for the Commission to turn back the clock and ban further deployments pending transitions.<sup>36</sup>

Admittedly, the Coalition Proposal called for a ban on new facilities and major modifications to existing facilities prior to a licensee's transition as a means of assuring ironclad interference protection to all EBS receive sites. However, the Commission has obviously determined that the benefits of affording BRS and EBS licensees immediate flexibility under geographic licensing outweigh the potential risks of interference to some EBS receive sites. The Commission concluded that:

Implementing geographic area licensing will allow licensees to rapidly deploy and modify facilities within their geographic licensing areas to provide ubiquitous service without the regulatory burdens of notifying and securing Commission approval. Geographic area licensing for BRS and EBS will also have the benefit of eliminating

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<sup>34</sup> See IMWED Petition at 6.

<sup>35</sup> See NIA/CTN Petition at 13-14.

<sup>36</sup> Indeed, it is curious that, although the *Report and Order* was released on July 29, 2004, IMWED and NIA/CTN waited until January 10, 2005, the day the new regulatory regime went into effect, before bringing this matter to the Commission's attention. By contrast, as soon as WCA became aware of certain deficiencies in the rules adopted in the *Report and Order* that would have led to irreparable harm had they not been remedied prior to the effective date of the rules, WCA brought those deficiencies to the Commission's attention and the Commission issued a curative *Order*. See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, Order, FCC 04-258 (rel. Oct. 29, 2004).

inefficient, administratively burdensome site-by-site licensing rules, the transaction costs of which are too high to permit competitive businesses to flourish using next generation technology.<sup>37</sup>

That decision is hardly unreasonable. The Commission has substantial experience using geographic licensing in a variety of services, and that experience has generally been positive. Indeed, in the six weeks since the new BRS/EBS regulatory regime went into effect on January 10, 2005, licensees have been deploying new facilities and modifying existing ones under the geographic licensing system without any reports of harmful interference. Thus, the evidence to date is that the Commission made the correct judgment call.

Certainly, WCA is not suggesting that the spectral separation of high-power, high-site video operations from cellularized data services into separate bands is unnecessary. To the contrary, as discussed above, *the record developed in response to the Notice of Proposed Rulemaking (“NPRM”)*<sup>38</sup> *clearly establishes that cellular base stations will receive massive cochannel interference if cochannel, high-power video operations are permitted.*<sup>39</sup> As the *Report and Order* acknowledges, substantial geographic separation (often exceeding 100 miles) is required to avoid cochannel interference from high-power, high-site video operations into cellularized broadband networks.<sup>40</sup>

It is because of this cochannel interference from high-powered, high-site video operators to cellularized broadband systems that the measure proposed by IMWED and NIA/CTN goes far beyond anything necessary to achieve the Commission’s objectives. Simply put, no sane licensee is going to

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<sup>37</sup> *Report and Order*, 19 FCC Rcd at 14189-90 ¶ 54.

<sup>38</sup> *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”].

<sup>39</sup> *See supra* note 28.

<sup>40</sup> *See Report and Order*, 19 FCC Rcd at 14176 ¶ 19.

deploy a cellularized system in close geographic proximity to a cochannel high-power, high-site video system. Yet, that is exactly the scenario portrayed by NIA and CTN to “demonstrate” that EBS systems are in danger.<sup>41</sup> Thus, the interference threat postulated by NIA and CTN is overblown.

Moreover, in suggesting that the current system allowing some pre-transition deployments provides operators a disincentive to transition, IMWED misses some important facts. First, while all of the details of how the costs of a transition will be allocated are not yet settled, it is crystal clear that an operator of commercial services will have to bear its proportionate allocation of the costs of transitioning its market, whether the transition occurs now, later, or through the proposed self-transition process. Thus, no wireless broadband system operator will avoid costs by deploying prior to transition, it will merely defer those costs for a relatively short period of time (*i.e.*, until the Commission-mandated transition deadline). The slight benefit of that deferral pales in comparison to the benefits that accrue to system operators with transition. Most importantly, licensees will receive contiguous spectrum and the LBS/UBS will be free of the interference risk associated with high-power, high-site video operations.

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<sup>41</sup> It is for this reason that WCA takes issue with the engineering analysis presented by NIA and CTN as an attachment to their petition for reconsideration. That analysis postulates the impact that a cochannel commercial two-way base station would have on reception of video programming at the receive sites of EBS station KGG38. The scenario presented is an extreme one – it examines an EBS station with 281 receive sites (far more than most EBS stations) and presumes the deployment of a cochannel two-way base station extremely close to the Geographic Service Area (“GSA”) boundary. Nonetheless, before any consideration of shadowing from buildings and other man-made objects that often prevent predicted interference from occurring, the results suggest that, depending on certain variables, the number of receive sites suffering interference will be somewhere between 3 and 20. However, even more importantly, *the base station hypothesized by NIA and CTN would never be built. Given the technologies currently being deployed to provide two-way services in the 2.5 GHz band, that hypothetical base station would suffer such massive interference from KGG38 that it could not possibly operate!*

Indeed, the NIA/CTN petition is internally inconsistent. On one hand, it suggests that protection to EBS receive sites during the pre-transition phase can be accomplished by banning just two-way deployments in the band. *See* NIA/CTN Petition at 13-14. No similar ban is proposed on the deployment of new or modified high-power, high-site video facilities. Presumably, NIA and CTN believe that licensees can freely deploy new or modified one-way high-power, high-site video transmission facilities under the new geographic licensing regime without threat of interference. Yet, the base station postulated in the engineering analysis accompanying the NIA/CTN filing would be no greater threat of interference to EBS receive sites than if it were a downstream video station. So, logically NIA and CTN should be seeking a ban on all deployments pending transition, not just two-way cellular deployments.

Thus, it is unrealistic to presume, as IMWED does, that a wireless broadband system operator is likely to delay transitioning to the new bandplan merely to defer its inevitable transitioning costs.

That said, WCA is pleased that NIA and CTN have advanced an alternative proposal that would allow deployments to continue under the current geographic licensing system prior to transitions to the new bandplan.<sup>42</sup> WCA believes that the NIA/CTN proposal presents a useful framework, but that it is not sufficiently detailed to be endorsed at the present time. Thus, WCA has entered into discussions with NIA and CTN designed to further refine the proposal. Before WCA can support any proposal for pre-transition restrictions on geographic licensing, the following elements will have to be considered:

- Procedures will have to be adopted by which licensees seeking to deploy new or modified facilities under the geographic licensing regime prior to transition can obtain the information regarding EBS deployments necessary to provide appropriate interference protection to eligible EBS receive sites.<sup>43</sup> Whatever procedures are adopted must assure that those licensees seeking to deploy new or modified facilities are not unduly delayed, and must afford licensees the option to move ahead without invoking a detailed data collection program.
- WCA is not opposed to the NIA/CTN proposal that notice be given prior to pre-transition deployments under geographic licensing. However, NIA/CTN have not specified which EBS licensees are entitled to notice and have requested more information from those deploying under the geographic licensing model than the EBS licensee requires to invoke its rights to interference protection.

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<sup>42</sup> See NIA/CTN Petition at 13-15.

<sup>43</sup> NIA and CTN have proposed that the Commission revise its rules to require that, in conjunction with transitions, an EBS licensee be provided with upgraded downconverters at eligible receive sites that are outside of its current GSA, but were inside its former protected service area. *Id.* at 9-10. In so doing, NIA and CTN have made clear that they *are not* seeking reconsideration of the Commission's decision to deny those receive sites interference protection. *Id.* In determining which EBS receive sites should be entitled to protection under any new pre-transition system, the Commission should be guided by Section 27.1233(a)(1), which sets out the criteria for determining those receive sites entitled to protection during the transition. See 47 C.F.R. § 27.1233(b)(3) (requiring certain desired signal to undesired signal ("D/U") ratios to be met at those receive sites entitled to replacement downconverters under Section 27.1233(a)(1)). Under that rule, replacement downconverters are due to any EBS receive site within the licensee's GSA so long as (i) a reception system was installed at that site on or before the date the EBS licensee receives its pre-transition data request; (ii) the reception system was installed by or at the direction of the EBS licensee; and (iii) the reception system receives EBS programming under Sections 27.1203(b) and (c) or is located at a cable television system headend and the cable system relays educational or instructional programming for an EBS licensee. Unless the Commission utilizes the pre-transition data request process to provide licensees with information regarding EBS deployments, this approach will have to be modified in some manner so that licensees are not required to protect after-constructed EBS receive sites.

- The degree of protection against actual interference that an eligible EBS receive site is entitled to during the pre-transition period must be specified. WCA does not oppose evaluating interference based on D/U ratios, provided that the existing D/U language in Section 27.1233(b)(3) is modified as proposed in WCA's petition for reconsideration.<sup>44</sup> However, licensees deploying new or modified facilities should only be responsible for addressing actual interference – predictive models should play no role in any new rule.
- The rules governing interim pre-transition operations must recognize that the operator has little control over the location at which self-installed fixed, portable and mobile subscriber units operate.
- The restrictions should apply to all new or modified main station and base station facilities deployed during the pre-transition phase, not just those associated with two-way systems.
- The rules must assure that those suffering interference cooperate fully in the curing of interference, including making reasonable modifications to their facilities, and must protect those deploying prior to transitions against frivolous interference allegations.<sup>45</sup>

WCA notes that NIA and CTN have also called upon the Commission to adopt similar restrictions on the post-transition deployment of new facilities within the MBS.<sup>46</sup> Again, WCA is not necessarily opposed to the use of D/U ratios as the basis for providing post-transition interference protection, and applauds NIA and CTN for advancing an approach designed to afford such protection without the former prior approval, site licensing regime that proved so burdensome in the past. However, many of the same concerns noted above apply to the NIA/CTN proposal for governing post-transition operations in the MBS and are the subject of ongoing discussions among the organizations.

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<sup>44</sup> See WCA Petition at 35-37. See also NIA/CTN Petition at 15 n.29.

<sup>45</sup> In its petition for reconsideration, the Hispanic Information & Telecommunications Network ("HITN") has suggested that in the case of a relocation of high-power facilities, "it would not be unreasonable to require the EBS Licensee effectuating the relocation to undertake to provide needed filters at the affected receive sites of [adjacent channel] stations." HITN Petition at 7. WCA believes that there are a multitude of techniques that adjacent channel licensees can utilize to meet the proposed -10 dB D/U adjacent channel benchmark, including the use of filters at the affected receive site. Thus, WCA urges the Commission not to mandate any particular remedy, but to allow the licensee responsible for remedying the interference flexibility to select the best tool for the job. However, HITN's proposal does illustrate the need for cooperation by the licensee suffering the interference – if installation of a filter at the victim receive site will solve the problem, the rules should require the victim licensee to cooperate in implementation of that solution.

<sup>46</sup> See NIA/CTN Petition at 14-15.

**D. WCA Opposes Requiring Any Licensee To Reimburse Transition Costs Until It Or Its Lessee Deploys Commercial Service Under The New Bandplan.**

Under Section 27.1233(c), the Commission has established a mechanism by which a proponent may recover a portion of its transition-related costs as subsequent commercial use is made of the 2.5 GHz band in the area transitioned. As WCA explains in its petition for partial reconsideration, while it generally supports the objectives of Section 27.1233(c) – the concept of which was initially part of the Coalition Proposal<sup>47</sup> – certain modifications to new rule are required to achieve its objective.<sup>48</sup> Thus, WCA certainly agrees with Clearwire Corporation (“Clearwire”) that the rule governing the sharing of transition costs “provides insufficient detail and guidance about how the cost-sharing mechanism will work.”<sup>49</sup>

WCA also agrees with Clearwire when it states “Clearwire urges the Commission to adopt a cost-sharing mechanism for EBS/BRS transitions similar to the Part 24 cost-sharing requirements for the broadband PCS industry when it cleared microwave incumbents.”<sup>50</sup> Indeed, that is precisely what the Coalition Proposal called for.<sup>51</sup> Thus, WCA is mystified why Clearwire is calling for the Commission to modify Section 27.1233(c) to provide for cost-sharing payments to be made by licensees before they commence commercial operations.<sup>52</sup> In essence, Clearwire complains that it would be inequitable if it is required to bear all of the costs of a transition until some other system operator deploys service in a market. This, despite the fact that the PCS microwave relocation rules that Clearwire endorses expressly

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<sup>47</sup> See Coalition Proposal, App. B at 28-29.

<sup>48</sup> See WCA Petition at 20-21.

<sup>49</sup> Clearwire Petition at 3.

<sup>50</sup> *Id.*

<sup>51</sup> See Coalition Proposal, App. B at 28-29.

<sup>52</sup> See Clearwire Petition at 7-8.

provided that no PCS licensee is responsible for sharing microwave relocation costs until that PCS licensee is prepared to inaugurate its commercial service.<sup>53</sup>

The very complaint that Clearwire now lodges against Section 27.1233(c) could be said of the PCS microwave relocation rules – the first to deploy in the market bears a disproportionate burden until the other spectrum is utilized. The Commission was well aware of that when it adopted the PCS microwave relocation rules, but concluded that any burden was outweighed by the benefits accruing to the first party to provide service in the given market. Most significantly, the Commission recognized that the first PCS licensee to launch realizes a substantial benefit by beating its competitors to the marketplace.<sup>54</sup> So, while Clearwire is certainly correct in noting that the Commission was concerned about the “free rider” problem, it ignores the Commission’s determination that the most appropriate mechanism for addressing the problem is to require cost-sharing payments at the time a licensee is poised to deploy commercial service.

Moreover, Clearwire’s proposal to require a licensee or lessee to make payments to the proponent immediately following a transition, regardless of whether the licensee or lessee is providing a service, is fraught with difficulties. For example, Clearwire recognizes that it would be fundamentally unfair to force an EBS licensee that utilizes its spectrum for purely educational purposes to share in the costs of a transition. It also recognizes that it would be unfair to require a lessee to contribute to a transition if the lease has only a short term remaining – the lessee is unlikely to deploy a commercial service under those

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<sup>53</sup> See 47 C.F.R. § 24.249. See also *Amendment of the Commission’s Rules Regarding A Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, 8895-96 (1996)(“We agree with the majority of the commenters that payment should be due when a subsequent licensee commences commercial operation . . .”).

<sup>54</sup> See *Amendment To The Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 8825, 8862 (1996).

circumstances.<sup>55</sup> Logic dictates that the same would be true of a lessee under an agreement that does not give the lessee authority to deploy a two-way broadband service – since the lessee cannot benefit from the transition, why should it be required to share in the costs? Indeed, given the unique nature of the BRS/EBS regulatory and licensing regime, there likely are a myriad of situations in which a given licensee or lessee does not benefit from a transition. It will be difficult, if not impossible, for the Commission to identify all of the possible scenarios where fundamental fairness calls for a licensee or lessee to be excused from cost-sharing and to then implement such a plan while still preserving confidential information (such as lease terms).

As such, it makes good sense for the Commission to retain the policy applied to PCS microwave relocation and apply cost-sharing obligations when a given licensee or lessee is prepared to deploy commercial service. In this manner, the Commission need not adopt rules designed to predict when a licensee or lessee is going to benefit from transition – the proof will be the deployment of commercial service.

**E. The Commission Must Tread Carefully In Establishing Rules Governing The Reimbursement Of Self-Transition Expenses And The Provision Of Replacement Downconverters.**

As is clear from the petitions for reconsideration filed by WCA and several other parties, as well as from the record developed in response to the *FNPRM*, there is substantial support in the record for allowing licensees to transition themselves to the new bandplan if they are not covered by an initiation plan submitted by whatever deadline the Commission establishes for the filing of such plans.<sup>56</sup> In

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<sup>55</sup> See Clearwire Petition at 4 (“EBS and BRS lessees that have less than three years remaining on their lease terms should also be exempt from cost-sharing reimbursement obligations, unless they have an assured right of renewal.”)

<sup>56</sup> See WCA Petition at 33-35; Sprint Petition at 4-5; NIA/CTN Petition at 5-7; HITN Petition at 4-6; Grand Petition at 2. See also Reply Comments of Wireless Communications Ass’n Int’l, WT Docket No. 03-66, at 17-18 (filed

implementing a self-transition process, however, the Commission must move carefully to assure that the regulatory consequences of a self-transition are as similar as possible to those of a proponent-driven transition. The Commission's goal should be, to the greatest extent possible, to create an approach under which no licensee perceives that it was materially better or worse off because it self-transitioned. Of particular concern to WCA are two proposals by NIA and CTN.<sup>57</sup>

*1. The Rules Governing Reimbursement Of Self-Transitioning Expenses Should Mirror Those Applicable To Proponent-Driven Transitions.*

The first of these NIA/CTN proposals calls for a rule that, where an EBS licensee has self-transitioned, "the expenses incurred by the EBS licensee to retune and/or digitize its MBS channel(s) are subject to reimbursement by any commercial entity that subsequently uses any LBS or UBS channels within any portion of the geographic areas served by the EBS licensees."<sup>58</sup> WCA is not opposed to such a requirement in principle, so long as the rule is appropriately crafted.

For example, the Commission must make clear that an EBS licensee engaged in self-transition may not seek reimbursement for the migration of more video tracks to the MBS than it is permitted during a proponent-driven transition pursuant to Section 27.1233(b)(1). Under that rule, an EBS licensee is only entitled to migration of a simultaneous program track that contains EBS programming, that complies with Sections 27.1203(b) and (c), and that was being transmitted on December 31, 2002 or within six months prior thereto. If a licensee self-transitions to the new bandplan, it should be free to migrate whatever programming tracks it chooses to the MBS. However, subsequent commercial users of

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Feb. 8, 2005)[“WCA FNPRM Reply Comments”](addressing comments submitted in response to *FNPRM* proposing self-transition regime).

<sup>57</sup> See NIA/CTN Petition at 5-9.

<sup>58</sup> *Id.* at 6 n.11.

the spectrum should only be responsible for the costs associated with migrating program tracks meeting the Section 27.1233(b)(1) criteria.

Moreover, the Commission must establish limits on the expenses that an EBS licensee can incur during a self-transition to assure that no EBS licensee “gold plates” its system with the intention of passing the excessive costs on to subsequent commercial users of the LBS and UBS. The Commission has addressed this concern in crafting similar cost-sharing plans, reimbursements, and there is no reason to depart from that precedent here.<sup>59</sup>

The Commission must also make clear that where an EBS licensee engages in a commercial activity using its LBS or UBS spectrum, either directly or through leasing, it is responsible for reimbursing self-transition costs. As WCA noted in its petition for partial reconsideration, the current version of Section 27.1233(c) must be revised to provide for reimbursement to the proponent of any operator that deploys a commercial service in the LBS or USB. Specifically, WCA proposed that “[t]o avoid the “free rider” problem that could result from the exclusion of those who provide commercial service through leased BRS channels or their own EBS channels from the current version of the rule, the Commission should simply clarify that anyone who uses a licensed or leased BRS/EBS channel for

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<sup>59</sup> See, e.g., *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, 12347 (2000) (“if the relocating party provides an incumbent with an extravagant and possibly unwise relocation premium, only reasonable relocation costs need be paid by subsequent entrants who benefit from the relocation.”); *Amendment to the Commission's Rules Regarding A Plan for Sharing the Cists if Microwave Relocation*, Second Report and Order, 12 FCC Rcd 2705, 2717-18 (1997) (addressing the reimbursement of microwave licensees that engage in self-relocation). In the microwave relocation context, the Commission was able to control potential gold plating by imposing absolute caps on the recoverable cost of a microwave link. See id. However, that approach will not work here because of the variety of different self-transitions. Most will merely involve retuning an existing transmitter, while a handful may involve deployment of a digitized system. Thus, no “one size fits all” solution will be appropriate in all cases. Rather, WCA suggests the Commission specify that a self-transitioning licensee should be entitled to reimbursement only of its reasonable and prudent costs to migrate eligible programming to the MBS, and that any costs above the minimum necessary to accomplish that task are not reimbursable.

commercial purposes must share in the reimbursement obligation.”<sup>60</sup> The same holds true here – the NIA/CTN proposal must be revised to make clear that whatever the status of the entity, if it provides a commercial service in the LBS or UBS, it is required to reimburse eligible EBS self-transition expenses.

And, finally, the Commission should adopt for self-transition scenarios the same approach to allocation of reimbursement expenses that WCA has proposed for proponent-driven transitions – one allocating the costs among the beneficiaries based on spectrum and population within the appropriate service area.<sup>61</sup> Although the formula for self-transition reimbursements will necessarily be more complex than that for proponent-driven transitions because the former occurs on a channel-by-channel and GSA-by-GSA basis while the latter occurs uniformly for an entire BTA at once, the principle that a licensee’s reimbursement obligation is allocated based on MHz/pops should remain at the heart of both cost-allocation schemes.

2. *The Rules Proposed By NIA And CTN For Governing The Provision Of Upgraded Downconverters To An EBS Licensee Following Its Self-Transition Must Be Modified.*

In addition to proposing a reimbursement of the costs associated with migrating video programming to the MBS, NIA and CTN have proposed a regulatory regime under which upgraded downconverters would be provided to EBS licensees that have self-transitioned prior to commencement of LBS and UBS operations.<sup>62</sup> WCA does not object to that concept. However, the rules proposed by NIA and CTN require modification to assure that this requirement does not unduly delay deployment of wireless broadband services utilizing LBS and UBS spectrum and does not impose an unreasonable economic burden.

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<sup>60</sup> WCA Petition at 21.

<sup>61</sup> *See id.* at 21-22.

<sup>62</sup> *See* NIA/CTN Petition at 7-9.

NIA and CTN call for the installation of upgraded downconverters “at all MBS receive sites located within 20 miles of the nearest proposed LBS/UBS two-way base station to be constructed by the Two-Way Operator.”<sup>63</sup> WCA does not oppose this requirement, so long as the rule makes clear that the only EBS receive sites entitled to upgraded downconverters are those that would have been entitled under Section 27.1233(a)(1) of the Rules to an upgraded downconverter in a proponent-driven transition.<sup>64</sup> What troubles WCA, however, is the logistical nightmare that could result from adoption of the NIA/CTN proposal.

The NIA/CTN proposal begs a simple question – how will a prospective user of the LBS or UBS determine the receive sites eligible for replacement downconverters? The Commission has elected not to maintain a database within ULS of EBS receive sites, and thus some other approach to the problem is necessary. NIA and CTN have proposed that a prospective operator of facilities in the LBS or UBS “would be required to send a written data request (‘EBS Data Request’) to all EBS licensees with MBS transmitter sites located within 20 miles of the nearest proposed LBS/UBS two-way base station to be constructed by the Two-Way Operator.”<sup>65</sup> However, the prospective operator has no way of knowing the location of MBS transmitters, since with the January 10, 2005 advent of geographic licensing, EBS licensees have been free to move their transmit facilities without prior approval of the Commission or any obligation to notify the Commission afterwards. To address this problem, WCA proposes that a prospective user of the LBS or UBS be required to notify any EBS MBS licensee with a GSA that

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<sup>63</sup> *Id.* at 8.

<sup>64</sup> Specifically, only those receive sites that are within the licensee’s GSA, that have a reception system installed by or at the direction of the EBS licensee, and that receive EBS programming under Section 27.1203(b) and (c) or are located at a cable television system headend and the cable system relays educational or instructional programming for an EBS licensee should be entitled to a replacement downconverter.

<sup>65</sup> NIA/CTN Petition at 7.

overlaps or is within 20 miles of any of its proposed base stations. This will require more notifications than under the NIA/CTN approach, but that increased paperwork burden appears inevitable given the lack of any public data regarding the location of actual EBS facilities.

NIA and CTN propose that upon receipt of an EBS Data Request, the EBS licensee be required to provide certain data regarding its receive sites within sixty days, or forfeit its right to replacement downconverters.<sup>66</sup> In WCA's view, a sixty day period is far too long. The information to be provided is simple, straightforward and should be known to each EBS licensee long before it receives a request – the street address and coordinates of eligible receive sites, whether the downconverting antenna is mounted on a structure attached to a building or a free-standing structure, and the approximate height above ground level of the downconverting antenna. To avoid unnecessary delays in wireless broadband deployments, WCA suggests that no more than twenty-one days be afforded EBS licensees to respond to EBS Data Requests, just as WCA has proposed that no more than twenty-one days be afforded EBS licensees to respond to pre-transition data requests.<sup>67</sup>

Finally, after the first commercial use is made of the LBS or UBS spectrum and replacement downconverters have been provided to EBS licensees, the entity that provided those downconverters should be entitled to reimbursement by other entities that make commercial use of the LBS or UBS bands. Again, the cost allocation should be along the lines of WCA's proposal for a MHz/pop approach. This will fairly allocate costs among service providers and effectively eliminate any risk of "free riders."

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<sup>66</sup> See NIA/CTN Petition at 8. Note that the data to be provided only relates to the receive site, and does not include any of the transmit information that WCA has indicated must be provided in response to a pre-transition data request used in connection with a proponent-driven transition. See WCA Petition at 19-20. WCA believes that NIA and CTN have it right. The additional data WCA has sought in responses to pre-transition data request is necessary because a proponent must assure certain D/U ratios in connection with a transition, and can only do so if it knows the EBS licensee's transmit parameters. However, in a self-transition scenario, no D/U requirement exists and thus the transmit parameters are not needed.

<sup>67</sup> See WCA Petition at 18.

**F. WCA's Proposed Rules Governing Out-Of-Band Emissions For Fixed User Stations Should Be Modified To Address Concerns Expressed By Nextel.**

In its petition, WCA urged the Commission to modify its rules governing out-of-band emissions by user stations to address the risk of interference caused by out-of-band emissions from a fixed user station that utilizes a transmission antenna that is affixed to the outside of a building or other non-antenna structure, or appurtenance thereto, or that is affixed to a tower, mast or other structure installed outdoors for the purpose of supporting an antenna. As WCA noted, these user stations will tend to be higher above ground level, and operate at higher EIRPs, and those pose a unique interference risk.<sup>68</sup> WCA was not alone – Nextel advocated similar rule revisions.<sup>69</sup>

Indeed, Nextel went further than WCA, proposing that the Commission incorporate into the rules certain deadlines by which licensees will be required to comply with the more stringent of the spectral masks provided for under Section 27.53(l).<sup>70</sup> WCA certainly agrees with Nextel that the Commission should modify Section 27.53(l) to establish timelines. Thus, WCA is modifying the proposal set forth in its petition by adding the italicized language to proposed Sections 27.53(1)(3)(a) (i) and (ii) as follows:

(i) if a documented interference complaint is received from a licensee with an overlapping GSA and such complaint cannot be mutually resolved between the parties, the party causing the interference shall reduce the out-of-band emissions associated with the offending antenna's transmissions by at least  $67 + 10 \log (P)$  dB (measured at 3 MHz from the channel's edges) *no later than 60 days of the date on which the documented interference request is received*;

(ii) upon request received from any licensee with an overlapping GSA and an operational base station, the operator(s) receiving such request shall reduce the out-of-band emissions associated with the transmissions from all such devices' antennas located within 1.5 km radius of the requesting adjacent channel licensee's base station by at least

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<sup>68</sup> See *id.* at 44-48.

<sup>69</sup> See Nextel Petition at 26-30.

<sup>70</sup> See *id.* at 18-19 and App. A.

$67 + 10 \log(P) - 20 \log(D_{km}/1.5)$  (measured at 3 MHz from the channel's edges) *no later than 60 days of receiving such request.*

**G. Adoption Of The Proposed Expanded MVPD Opt-Out Or Alternative Bandplan For Rural Areas Would Preclude Wireless Broadband Deployments In More Urban Areas.**

During the development of the Coalition Proposal, WCA understood that the BRS/EBS industry's transition to the new bandplan could impose certain inconveniences on MVPDs that utilized BRS/EBS spectrum. Thus, the Coalition Proposal recommended that the Commission allow MVPDs that serve 5% or more of the households within their GSA or that had deployed digital technology on more than seven channels as of October 7, 2002 to provide video programming to "opt-out" of the transition process.<sup>71</sup> In its petition for partial reconsideration of the *Report and Order*, WCA urged the Commission to afford those meeting these criteria the right to opt-out of the transition process automatically, rather than requiring them to seek and secure an individualized waiver from the Commission under the system adopted by the *Report and Order*.<sup>72</sup>

Central Texas Communications, Inc. ("Central Texas") has urged the Commission not only to permit those qualifying under the Coalition Proposal to invoke an automatic opt-out, but has proposed to substantially expand the category by including any licensee with a GSA that overlaps any rural county, is providing video or broadband service to 500 or more subscribers, and is utilizing 20 or more co-located channels.<sup>73</sup> The BRS Advocacy Group ("BRS Advocacy") goes further, suggesting that even those rural

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<sup>71</sup> See Coalition Proposal at App. B, pp. 16-18; First Coalition Supplement at 4-5; Coalition NRPM Reply Comments at 45.

<sup>72</sup> See WCA Petition at 26-30.

<sup>73</sup> See Central Texas Petition at 11. Indeed, Central Texas suggests that licensees with as few as 11 co-located channels should be permitted to opt-out "upon further explanation to the Commission of the channel availability in its individual market." *Id.* Consolidated Telecom has endorsed this proposal. See Consolidated Telecom Petition at 9-10.

operators that are serving less than 500 subscribers be permitted to opt-out if they service 15% of the households within the rural portion of their GSA.<sup>74</sup> Both of these proposals must be rejected.

As WCA has noted throughout this proceeding, it is sensitive to the concerns of the small rural analog MVPD operators that do not qualify for an automatic opt-out under WCA's proposal because they serve less than 5% of the population within their GSA. Yet, those concerns must be balanced against the record evidence that continued operation of rural analog MVPD systems will cause massive interference in areas 100 miles or more away.<sup>75</sup> Thus, not only did the Coalition Proposal provide for an automatic opt-out for certain systems, it also proposed an open-ended transition process under which those analog MVPD systems that truly are so remote that they pose no threat of interference to others would never be required to transition. One of the unfortunate consequences of the Commission's decision to mandate a timetable for transitions is that those rural systems are now forced to implement a bandplan that the local marketplace does not demand.

The fundamental flaw in the filings by Central Texas and BRS Advocacy is their failure to come to grips with the fact that rural high-power MVPD systems can cause massive interference to two-way base station operations. Both Central Texas and BRS Advocacy assert that their particular systems will not cause interference.<sup>76</sup> WCA cannot comment on those assertions, since neither presents one iota of technical analysis to back up their claims. But even if one assumes that their particular rural systems do not pose a threat to others, it does not necessarily follow that all high-power MVPD operations that would qualify under their proposed opt-out criteria are benign. To the contrary, the record developed in response

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<sup>74</sup> See BRS Advocacy Petition at 14.

<sup>75</sup> See *supra* note 28.

<sup>76</sup> See Central Texas Petition at 9; BRS Advocacy Petition at 12.

to the *NPRM*, including detailed technical analyses presented by the Coalition, shows that just the opposite is true – rural analog high-power, high-site MVPD operations will cause cochannel interference to the base stations of broadband systems 100 or more miles away.<sup>77</sup>

For the same reasons, WCA must also object to the proposal by Consolidated Telecom that upon transition rural licensees be given three 6 MHz channels for high-power operations, a 5.5 MHz channel for low-power operations, and 1 MHz of contiguous spectrum in the J or K bands.<sup>78</sup>

As WCA noted in replying to a similar proposal advanced by Consolidated Telecom in response to the *FNPRM*:

The problem here is obvious – since the MBS is fixed at a total of 42 MHz in every market and each of the A, B, C, D, E and F channel groups is entitled to one MBS channel, it is impossible to award varying amounts of MBS spectrum to individual licensees, and it is equally impossible to accommodate all migrating licensees with 12-18 MHz of spectrum each without depleting the spectrum in the MBS. It therefore is hardly surprising that Consolidated Telecom offers no explanation as to how its proposal can possibly work.<sup>79</sup>

And, as the record in this proceeding already shows, increasing the size of the MBS in some markets simply is not an option because of the risk that high-power, high-site operations in rural areas will cause cochannel interference to base stations in more densely populated areas.<sup>80</sup> Simply put, if the Commission were to expand the MBS in rural areas and permit high-power, high-site video operations on

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<sup>77</sup> See *supra* note 28.

<sup>78</sup> See Consolidated Telecom Petition at 5.

<sup>79</sup> WCA FNPRM Reply Comments at 29-30.

<sup>80</sup> See *supra* note 28.

spectrum that is used for cellular wireless broadband services in other areas nearby, those wireless broadband services would suffer significant interference.<sup>81</sup>

Moreover, those seeking to expand the automatic MVPD opt-out ignore that many of the analog wireless cable systems that do not qualify under the WCA criteria still will be able to operate in much the same manner as today following a transition.<sup>82</sup> Central Texas and BRS Advocacy fail to address any of the following:

- Even after being transitioned to the new bandplan, many MVPDs and their affiliated licensees will be able to continue operating their current analog systems without making any technical modifications. The *Report and Order* does not bar the transmission of downstream video programming on any channel, so the only question is whether the system complies with the new rules applicable to the LBS, UBS and Transition Bands. That will depend on the location of the

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<sup>81</sup> In addition, it should be noted that adoption of Consolidated Telecom's proposal makes no accommodation for the relocation of BRS channels 1 and 2 were the Commission to adopt its proposal. By contrast, in their petitions for reconsideration, WCA and W.A.T.C.H. TV Company have renewed their prior call for the Commission to provide for the relocation of BRS channels 1 and 2 to the 2496-2500 MHz and 2686-2690 MHz bands, respectively, in the handful of markets where the system operator is utilizing in excess of seven digitized channels to provide a multichannel video programming service. See WCA Petition at 31-32; Petition of W.A.T.C.H. TV Company for Reconsideration, WT Docket No. 03-66, at 11-13 (filed Jan. 10, 2005) ["WATCH TV Petition"].

<sup>82</sup> Because of these ample avenues by which rural wireless cable systems can continue to provide video programming to their subscribers, the Commission need not consider whether, at this juncture, those systems are providing a valuable public service. However, it is worth noting that virtually all residents of rural areas have access to Direct Broadcast Satellite ("DBS") service from two competing providers (EchoStar and DirecTV), C-band satellite services and, in many cases, a wireline cable system. See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, 1273 (2002) ("According to DirecTV, its subscribers are distributed across the continental United States with approximately 50 percent residing in urban counties and 50 percent residing in smaller rural counties. As compared to cable subscribers, DirecTV subscribers are more likely to live in rural areas.") (footnotes omitted); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901, 26975, App. B, Table B-1 (2002) (stating that as of June 2002, DBS served 20.3% of all multichannel video households, versus .55% for MMDS). As Clarendon Foundation previously noted "[t]here is no true public policy need for promoting wireless cable subscription television service in rural areas. All of these areas can be reached by satellite – without the line-of-sight problems and with much more content." Comments of Clarendon Foundation, RM-10586, at 3 (filed Nov. 18, 2002). While it had been claimed in response to the *NPRM* that absent wireless cable many rural residents would not have access to local over-the-air broadcasting or other services, the low penetration rates (below 5%) of those who cannot opt-out under the WCA approach suggest rather strongly that whatever unique local services they provide are not highly valued by local residents. Indeed, the record developed in prior phases of this proceeding shows without doubt that the systems operated by those who complained loudest about the transition plan proposed by WCA, NIA and CTN were in most cases small and losing subscribers with regularity. See, e.g., Coalition *NPRM* Reply Comments at 48 n.121; Coalition *Rulemaking* Reply Comments at 30-31 n.84.

transmission tower relative to the borders of the GSA and the transmission system parameters (antenna height and orientation, beam tilt, EIRP, etc.). However, WCA suspects that where an MVPD controls the licensed channels in an isolated rural market, it may be able to continue its existing video operations without modification.

- Even in those cases where there has been a transition and the MVPD's facilities do not comport with the new technical rules, the MVPD and its affiliates may be able to secure consents from neighboring licensees to such facilities. Every rule designed to protect a licensee against interference permits the intended beneficiary of the rule to waive those protections.
- Even in those cases where there has been a transition and the MVPD's facilities do not comport with the new technical rules and consents from neighbors are not available, the MVPD and its affiliated licensees will often be able to make relatively minor modifications to their transmission system in order to comply with the new rules. It is worth noting that because the primary concern here is the propensity of high-power, high-site downstream transmissions to interfere with base stations in neighboring service areas, the solution will often be as simple as adding beam tilt and/or lowering the height of the transmission antenna so that the MVPD's signals will not reach outside the MVPD's GSA.

And, if none of the options apply, the *FNPRM* proposes a further solution for – return the LBS/UBS spectrum for reauction and digitize operations within the MBS at the expense of the winner of the auction of the LBS/UBS spectrum.<sup>83</sup> This approach will assure that rural MVPD operations will not cause interference to wireless broadband base station operations in the LBS and UBS, while at the same time permitting rural analog MVPD operations that do not serve even 5% of the population of their GSA to continue operations with as many, if not more, channels of video programming as they provide today.

**H. The Commission Should Not Reinstitute A 15 Year Limit On The Maximum Term Of An EBS Excess Capacity Lease Or Expand The Circumstances Under Which Lessees Must Make Equipment Available To Lessors.**

In WCA's view, one of the most significant benefits of the *Report and Order* has been the Commission's decision to replace its antiquated system for regulating EBS excess capacity leases with a system based on the rules and policies adopted in the *Secondary Markets* proceeding and generally

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<sup>83</sup> See *FNPRM*, 19 FCC Rcd at 14280 ¶¶ 313-314.

applied to all other services. Thus, WCA strenuously objects to the proposal by NIA and CTN that the Commission reinstate its former policy of restricting the total term of an EBS leasing arrangement, including renewals, to just fifteen years.<sup>84</sup> Similarly, WCA takes issue with their proposal for an expansion of the circumstances under which a lessee must sell equipment to the lessor upon conclusion of the leasing relationship.<sup>85</sup>

With all due respect, WCA believes that NIA and CTN are engaged in wishful thinking when they proclaim that the Commission intended to retain its prior policies on these two issues. WCA concedes that Paragraph 181 of the *Report and Order*, on which NIA and CTN base their interpretation, is not a model of clarity. However, the Commission's conclusion there – “we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our prior leasing policy and retaining EBS substantive use requirements” – is fully reflected by the rule revisions adopted by the Commission, which do not include any special limit on the term of EBS leases.<sup>86</sup> The revisions to Sections 1.9020 and 1.9030 adopted by the *Report and Order* generally apply the *Secondary Markets* rules to EBS, new Section 1.9047 makes clear that any EBS leases are subject to the provisions of newly-adopted Section 27.1214, and new Section 27.1214 provides that existing leases are grandfathered, that all EBS licensees engaged in leasing must make substantive use of their spectrum (with the amount of use depending upon whether digital or analog technology is deployed), and that all leases must provide the EBS licensee with the opportunity to purchase EBS equipment in the event that the lease is terminated by action of the lessee.

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<sup>84</sup> See NIA/CTN Petition at 19-20.

<sup>85</sup> *Id.*

<sup>86</sup> *Report and Order*, 19 FCC Rcd at 14234 ¶ 181.

The new rules do not set any special cap on the length of an EBS lease because there are no such limits under the *Secondary Markets* regime and a lease term limit is not a “substantive use” restriction of the sort the Commission elected to retain. In other words, the new rules set forth in Appendix C of the *Report and Order* fully incorporate the discussion in Paragraph 181.<sup>87</sup>

More importantly, the rule changes that NIA and CTN are now requesting are inappropriate. Take first the proposal that the Commission, by rule, reinstate the policy it adopted in 1998 and mandate that all EBS excess capacity leases provide that upon conclusion of the lease, whether by termination of the lessee or expiration of the term, the lessee is required to sell to the licensee the equipment currently being used or comparable equipment at fair market value.<sup>88</sup> At a time when the Commission is attempting to provide leasing parties with flexibility to craft mutually-beneficial agreements, it is difficult to envision what possible public interest is advanced by requiring all EBS excess capacity leases to include this provision. Indeed, NIA and CTN do not even attempt to explain why the Commission must step in and mandate such a contractual provision. The mandatory contractual provision NIA and CTN seek to restore is and has always been a silly one – why does the lessor need the right to buy comparable equipment at fair market value upon completion of a lease when the lessor is perfectly able to purchase the same equipment at the same price in the open marketplace if it so chooses? How does making this provision mandatory benefit the EBS licensee, or the public? NIA and CTN offer no clue.

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<sup>87</sup> It is for this reason that WCA believes that the request by NIA and CTN for a declaration that EBS licensees need not retain responsibility for complying with the Commission’s rules and need not retain the right to file modification applications is unnecessary. *See* NIA/CTN Petition at 20-21. Although NIA and CTN had initially asked for such restrictions, and the Commission recounts that request in Paragraph 181, they clearly are not substantive use restrictions, were not adopted and properly were omitted from the rules set forth in Appendix C to the *Report and Order*. That said, WCA certainly does not object to the Commission issuing the clarification that NIA/CTN requests to eliminate any doubt.

<sup>88</sup> *See* NIA/CTN Petition at 20.

Similarly, the Commission's policy of restricting EBS lease terms, including renewals, to no more than fifteen years, is a vestige of a failed regulatory regime. In the *Secondary Markets* proceeding, the Commission sought "to develop and propose spectrum leasing policies that afforded licensees and spectrum lessees sufficient flexibility to enter into leasing arrangements that would meet their respective business needs and enable more efficient use of underutilized spectrum."<sup>89</sup> Reinstatement of the former requirement that EBS leases, including renewals, be limited to just fifteen years, would run counter to that objective.

What NIA and CTN ignore in seeking a return to the former lease term limit is the impact that such a limit has on the ability of prospective system operators to make the substantial investment necessary to transition the 2.5 GHz band and deploy innovative new wireless services. As the Commission put it: "We recognize that the ultimate success in recreating this band is also closely linked to the availability of investment dollars in support of wireless broadband services. We believe that our rules create a more stable environment that will promote additional capital investment."<sup>90</sup> WCA wholeheartedly agrees with this sentiment. Yet, adoption of the NIA/CTN proposal for restoring the former limits on EBS lease terms would undermine that stable environment and deter funding of efforts in the band.

Rather obviously, investment in the 2.5 GHz band is going to be deterred by Commission policies that limit EBS lease terms and thus limit the period over which system operators and their investors can depend upon receiving a return on investment. WCA is not suggesting that the Commission force EBS licensees to enter into leases extending more than fifteen years. To the contrary,

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<sup>89</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20620-21 (2003)[*"Secondary Markets R&O"*].

<sup>90</sup> *FNPRM*, 19 FCC Rcd at 14301 ¶ 374.

WCA believes that every EBS licensee should be free to craft its excess capacity lease in the manner that best suits its own needs. In some cases, that might result in short-term leases and in some cases it might result in a lease extending beyond fifteen years (for which the EBS licensee is likely to receive a more substantial package of direct financial compensation, equipment and/or services in recognition of the greater benefit the lessee realizes by virtue of the long-term certainty provided). The EBS licensee should decide what best meets local educational needs, not the Commission.

Finally, if the Commission is going to reopen its decision to eliminate the fifteen year limit on EBS lease terms, it perforce must re-examine the decision in the *Report and Order* to retain the EBS eligibility restrictions. As the *Report and Order* noted, “the Commission’s trend towards eliminating eligibility restrictions is driven by its general belief that market forces should generally be allowed to operate without being restricted by government because they will tend to push the use of radio licenses to their highest valued applications.”<sup>91</sup> In explaining why its retention of an EBS eligibility restriction would not undermine the migration of the 2.5 GHz band to its highest and best use, the Commission reasoned:

the restrictions on eligibility here will not impede market forces. That is, our ITFS leasing and secondary market rules for spectrum leasing arrangements are sufficiently flexible to allow market forces to push the ITFS spectrum towards its highest valued use, and educators will continue to enjoy considerable flexibility to lease their excess capacity spectrum. Further, educators can enter into partnerships with commercial interests to improve the capacity and efficiency of their systems, which in turn could free up more spectrum for commercial operators to work towards the development of ubiquitous broadband. . . . Indeed, the additional flexibility we have provided with respect to spectrum leasing, and the other steps we have taken herein to maximize flexibility, should allow ITFS licensees to develop innovative educational systems and enter into partnerships with commercial carriers.<sup>92</sup>

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<sup>91</sup> *Report and Order*, 19 FCC Rcd at 14226 ¶ 160.

<sup>92</sup> *Id.* at 14226 ¶¶ 160-61.

Although WCA did not seek reconsideration of the decision to retain the eligibility restriction for EBS spectrum, its willingness to accept retention of that restriction was informed by the Commission's decision to move from antiquated EBS leasing policies towards the more contemporary model adopted in the *Secondary Markets* proceeding. If the Commission now rolls back the clock and reinstates a limit on the length of EBS leases, the Commission will gut the very regulatory regime that it relied on to justify retention of eligibility limits. And in so doing, the Commission will undermine its efforts to assure that EBS spectrum evolves towards its highest valued use, notwithstanding the eligibility restriction.

**I. The Commission Should Reject IMWED's Proposals For Commission Micro-Management Of The 2.5 GHz Band.**

In its petition for reconsideration, IMWED urges the Commission to revisit a series of proposals that for the most part IMWED has advanced before, that have not been supported by commercial or educational interests, and that the Commission has properly refused to incorporate into the rules adopted by the *Report and Order*. Although IMWED contends that these rules are necessary to create "an ecology . . . that supports and ensures" the educational nature of EBS, the record clearly reflects that adoption of IMWED's proposals is unnecessary and counter to the Commission's objective of relying to the maximum extent possible on marketplace forces in regulating the 2.5 GHz band.

3. *The Commission Should Reject IMWED's Proposal That All EBS Leases Be Filed And That Redaction Of Commercially Sensitive Information Be Prohibited.*

As it did in its comments in response to the *NPRM*, IMWED on reconsideration urges the Commission to adopt a rule that would require all leases of EBS excess capacity to be filed with the Commission without the redaction of commercially sensitive information.<sup>93</sup> The Commission rejected

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<sup>93</sup> See IMWED Petition at 10-11.

that approach in the *Report and Order*, and IMWED has presented no compelling argument for reconsideration here.

The *NPRM* proposed to relieve EBS licensees of the burden of filing EBS excess capacity lease agreements with the Commission, so long as they retain copies in their files and make them available to the Commission upon request.<sup>94</sup> That proposal drew substantial support from those commenting.<sup>95</sup> Indeed, the only naysayer was IMWED, which not only urged the Commission to require the filing of excess capacity agreements, but also asked the Commission to ban the current practice under which licensees redact confidential information that does not go to whether the lease comports with the Commission's rules (such as the fees paid by the lessee).<sup>96</sup> WCA, NIA and CTN jointly opposed that proposal, noting that IMWED offered no meaningful explanation as to why every lease, much less the commercially sensitive information regarding leasing fees and other matters contained within the lease, should be made available to the public.<sup>97</sup>

Given the general preference of the *Report and Order* for standardizing the rules applicable to all Part 27 services, it is not surprising that the *Report and Order* imposed on EBS and BRS leasing activities the same regulatory regime adopted in the *Secondary Markets* proceeding that governs other services where spectrum is leased.<sup>98</sup> Significantly, the rules adopted in the *Secondary Markets* proceeding do not require either the submission of leases or the disclosure of competitively-sensitive lease terms, so long as

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<sup>94</sup> See *NPRM*, 18 FCC Rcd at 6771-22.

<sup>95</sup> See Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 132, (filed Sept. 8, 2003)[“Coalition NPRM Comments”]; Comments of Catholic Television Network and National ITFS Ass’n, WT Docket No. 03-66, at 16 (filed Sept. 8, 2003).

<sup>96</sup> See Comments of ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, at 10-11 (filed Sept. 8, 2003)[“IMWED NPRM Comments”].

<sup>97</sup> See Coalition NPRM Reply Comments at 90-91.

<sup>98</sup> See *Report and Order*, 19 FCC Rcd at 14232-34 ¶¶ 177-181.

the lease is available for inspection by the Commission upon request.<sup>99</sup> In adopting those rules, the Commission concluded “[w]e are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee.”<sup>100</sup> Moreover, the Commission recognized that the submission of unredacted leases is dangerous because they “may involve data (e.g., areas of available spectrum) that could disclose a company’s business plans or sensitive information to its competitors.”<sup>101</sup> IMWED presents no rationale for the Commission to adopt a different approach regarding the filing of EBS excess capacity leases here.<sup>102</sup>

4. *The Commission Should Again Reject IMWED’S Call For An Increase In The 5% Minimum Educational Reservation Requirement.*

Using virtually the same language it employed in commenting on the *NPRM*, IMWED again urges the Commission to increase five-fold the percentage of system capacity that an EBS licensee must

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<sup>99</sup> See *Secondary Markets R&O*, 18 FCC Rcd at 20659 (“While we will not usually require the lease parties to file a copy of the lease agreement with the notification, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection upon request by the Commission or its representatives.”) Given that the Commission has permitted the redaction of commercially-sensitive information from filed EBS leases for the past twenty years without any adverse consequences, WCA is at a loss to understand how the public would benefit from IMWED’s proposal. IMWED’s petition does not even attempt to advance a substantive argument in support of its position.

<sup>100</sup> *Id.* at 20669 (as the Commission noted, “[w]hile we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection by the Commission or its representatives.”). See also *id.* at 20660.

<sup>101</sup> *Id.* at 20682.

<sup>102</sup> IMWED’s sole argument seems to be that, in its view, unless an EBS lease is filed with the Commission in unredacted form, the Commission will be unable to assure that the lease comports with the Commission’s rules. See IMWED *NPRM* Comments at 10. Yet, if true, the same argument would presumably require the filing of any lease agreement entered into under the *Secondary Markets* regime. However, IMWED’s position is based on a false assumption – by retaining the right to inspect EBS excess capacity leases, the Commission is fully able to assure that its rules regarding leasing are followed without imposing the paperwork burden and disclosure of competitively sensitive information that would result from adoption of IMWED’s approach.

reserve for its own use in any excess capacity lease.<sup>103</sup> The record in this proceeding, however, illustrates that doing so would be contrary to the Commission's careful balancing act for the 2.5 GHz band.

At the outset, it is important to note that the specific proposal that IMWED advances here was considered and rejected by the Commission in 1998 and again in the *Report and Order*. After considerable comment and debate, when it first adopted rules allowing two-way data services in the 2.5 GHz band, the Commission declined to adopt the 25% reservation approach now championed by IMWED. The Commission reasoned that:

In light of ... the broad range of educational uses to which different ITFS licensees will seek to devote their channels, it is not a simple matter to arrive at a "one size fits all" approach towards minimum ITFS educational usage requirements and reservation of spectrum solely for educational purposes... Therefore, because we seek to maximize the flexibility of educators ... to design systems which best meet their varied needs, we will adopt ITFS excess capacity leasing rules which best promote this flexibility while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation. After a careful review of the comments ..., we decide that these goals are best harmonized where digital transmissions are utilized by retaining the current 20 hours per channel per week educational usage requirements, adopting the *Joint Statement's* proposed absolute reservation of a minimum of 5% of an ITFS station's capacity for instructional purposes only, and eliminating requirements setting aside capacity for ready recapture by ITFS licensees.<sup>104</sup>

Significantly, in joining WCA in the October 2002 submission of the Coalition Proposal, NIA and CTN did not suggest any revision to this requirement. The *NPRM* did not propose any revision in the minimum educational reservation requirement for existing licensees, although it did solicit public

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<sup>103</sup> See IMWED Petition at 8-9. See also IMWED NPRM Comments at 8-10.

<sup>104</sup> *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, 19159 (1998)(footnotes omitted).

comment on whether it should mandate a higher percentage of educational use for new EBS licensees.<sup>105</sup>

The response was overwhelmingly negative. As NIA, CTN and WCA noted:

WCA, NIA and CTN are pleased that the Commission is not proposing to make any changes with respect to the minimum educational programming requirements imposed upon existing ITFS licensees. Over the past five years, many commercial system operators and ITFS licensees have entered into spectrum lease agreements in compliance with the existing leasing rules. Pursuant to these leases, ITFS licensees already have received substantial consideration in the form of equipment and financial contributions in exchange for their agreement to lease excess capacity on a long-term basis, and will be receiving important additional consideration in the future. The Commission should not interfere with these existing leases, particularly where an increase in the minimum educational reservation may require substantial reductions in the consideration ITFS licensees receive to fund educational services to their constituents. Indeed, a retroactive change in the leasing rules would have a chilling effect on future leasing of ITFS and other spectrum – if secondary markets are to work, the Commission must provide lessees with absolute certainty as to what they are leasing. A mid-stream change in the ITFS leasing rules now will deter commercial operators from investing the billions of dollars it will take to construct a nationwide 2.5 GHz broadband infrastructure, for it will not only reduce the commercial capacity of those systems, it will raise doubts as to whether future rule changes will adversely impact commercial operations. Here the Spectrum Policy Task Force Report is again instructive – “a level of certainty regarding one’s ability to continue to use spectrum, at least for some foreseeable period, is an essential prerequisite to investment, particularly in services requiring significant infrastructure installation and lead time.”

Moreover, there are several reasons why WCA, NIA and CTN do not support any change in the minimum leasing rule applicable to new ITFS licenses. First, new ITFS licenses are likely to be issued to existing ITFS licensees that decide to expand their service areas into the regions surrounding their GSAs. Imposing different minimum retention requirements on different licenses used by a single licensee to provide a single service imposes an unnecessary regulatory burden.

Second, if ITFS licensees are required to preserve significantly more capacity for their own use in the outlying ITFS white space, commercial operators may not be interested in building out ITFS facilities that will serve that white space. Because the available ITFS white space tends to cover areas for which there is limited demand for commercial services, commercial system operators will often be able to meet their demand for spectrum using just MDS capacity; certainly, the greater the minimum retention requirement, the less likely commercial operators will be to devote resources to building out ITFS networks in these areas. Thus, the Commission’s proposal could backfire –

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<sup>105</sup> See *NPRM*, 18 FCC Rcd at 6771.

rather than resulting in additional educational programming, the Commission could deter the leasing activity that may be essential for ITFS infrastructure to be constructed in the white space.

Finally, 5% of the capacity of a commercial digital system provides ITFS licensees with substantial educational capacity. Although the 5% requirement adopted in 1998 was not supported by the ITFS community, it has proven a workable minimum requirement. Many ITFS licensees reserve substantially more than the minimum requirement or have the ability to recapture more than the minimum they reserve. And, given that digital technology allows the transmission of multiple program “tracks” on a 6 MHz channel, an ITFS licensee that enters into a lease agreement that provides for digitization will have access to significantly more capacity than an ITFS licensee that continues to utilize analog technology and reserves 25% of its capacity for its own use, even if it only reserves the minimum.<sup>106</sup>

Not surprisingly, then, the *Report and Order* did not increase the minimum educational reservation requirement. Indeed, the Commission recognized that vast numbers of EBS licensees routinely utilize far in excess of 5% of their capacity.<sup>107</sup> However, IMWED again contends that increasing the minimum “reservation insulates the public and the educational community from a licensee’s possible mistake” in negotiating its lease “despite a growing need for more.”<sup>108</sup> The answer to that is simple – as BellSouth pointed out the last time IMWED made this argument:

the five percent minimum should not be raised just to ensure against an ITFS licensee’s “mistake” in negotiating a capacity lease agreement. But more importantly, to the extent an ITFS licensee has “a growing need for more” capacity, it currently has the right and ability to bargain for more capacity. To compel a licensee to have access to more capacity than it has negotiated would harm, not help, ITFS licensees. Operators would be less likely to lease spectrum, or would be required to lease from additional spectrum rights holders in order to have access to a sufficient amount of spectrum. Logically, if the operator has access to less spectrum, ITFS licensees would also receive less

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<sup>106</sup> Coalition NPRM Comments at 128-31 (footnotes omitted).

<sup>107</sup> See *Report and Order*, 19 FCC Rcd at 14224 ¶ 155.

<sup>108</sup> IMWED Petition at 9.

consideration. ITFS spectrum thus would be devalued and investment would be chilled.<sup>109</sup>

The lines of reasoning advanced by WCA, NIA, CTN and BellSouth remain as valid today. Moreover, as noted above, it is very clear from the discussion in the *Report and Order* that the Commission's decision to retain restrictions on EBS eligibility was largely driven by the ability of commercial operators to lease spectrum under the current regulatory regime – “our ITFS leasing and secondary market rules for spectrum leasing arrangements are sufficiently flexible to allow market forces to push the ITFS spectrum towards its highest valued use, and educators will continue to enjoy considerable flexibility to lease their excess capacity spectrum.”<sup>110</sup> Increasing by five-fold the amount of spectrum that an EBS licensee must reserve for its own use has obvious adverse consequences on the economics of EBS excess capacity leasing, and the Commission's careful balancing act clearly would be threatened. Thus, the Commission should reject IMWED's proposal and reaffirm the minimum educational use requirements currently set forth in the Rules.

5. *IMWED's Proposed Ban On Purchase Options Should Be Rejected.*

IMWED also urges the Commission to prohibit EBS licensees from entering into excess capacity leases that afford the lessee the option to acquire an assignment of the license at some time in the future in the event the lessee is eligible.<sup>111</sup> Although IMWED deems this “an unsavory proposition,” it fails to

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<sup>109</sup> See Reply Comments of BellSouth *et al.*, WT Docket No. 03-66, at 25 (filed Oct. 23, 2003)[“BellSouth NPRM Reply Comments”].

<sup>110</sup> *Report and Order*, 19 FCC Rcd at 14226 ¶ 160.

<sup>111</sup> See IMWED Petition at 9-10.

establish any harm to the public interest in allowing EBS licensees, if they so choose, to provide such a purchase option.<sup>112</sup>

IMWED is certainly right that the *Report and Order* maintained the current EBS eligibility restriction and that commercial system operators are generally not eligible at the present time to hold EBS authorizations. However, it is certainly possible that within the foreseeable future the Commission will either reconsider its policy on EBS eligibility or grant a waiver due to the exigencies of a particular circumstance.<sup>113</sup> By granting a purchase option to a lessee, a spectrum lessor can provide that lessee with a greater degree of certainty concerning its ability to develop the spectrum to its highest and best use. And that, in turn, will result in greater financial support for the lessor.

Purchase options are generally recognized by the Commission as benign vehicles that do not raise eligibility concerns until they are exercised.<sup>114</sup> For all its rhetoric, IMWED has failed to present one substantive argument that the Commission's objectives for the 2.5 GHz band are somehow being undermined by allowing EBS licensees to receive financial or other consideration in exchange for a purchase option that may or may not be exercisable in the future. Indeed, completely absent from

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<sup>112</sup> Indeed, it is telling that the unsworn declaration filed by IMWED on this issue is nothing more than a hearsay report by a consultant that "in multiple instances" he has been told that EBS licensees have received proposals that included a purchase option. The number of such instances and whether any EBS licensees have entered into such agreements is left to the Commission's imagination. In any event, however, as discussed above there is absolutely nothing improper should an EBS licensee choose to enter into such a purchase option.

<sup>113</sup> See *WQED Pittsburgh (Assignor) and Cornerstone Television, Inc. (Assignee)*, Memorandum Opinion and Order, 15 FCC Rcd 202 (1999). Indeed, the *Report and Order* could not be more clear – if usage of the EBS spectrum does not improve under the stable regulatory climate now being established, the EBS eligibility restriction may be revisited. See *Report and Order*, 19 FCC Rcd at 14224 ¶ 156.

<sup>114</sup> See, e.g., *Malara Broadcast Group of Duluth Licensee LLC*, Letter, DA 04-3908 at 7 (rel. Dec. 14, 2004) ("...options are not attributable until exercised, the Commission indicated that such relationships do not provide the interest holder with the incentive and means to exert influence of the core operation of a license.") citing *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1112 (2001) ("Until exercised, options...do not convey the underlying interest they entail....").

IMWED's filing is any appreciation that upon exercise of a purchase option, the parties will be required to apply to the Commission for its prior consent to the license assignment, and the Commission will then have ample opportunity to consider the merits of the particular situation.

In short, IMWED has failed to demonstrate that an EBS licensee harms the public interest in any manner when it grants a purchase option to a commercial lessee. Ultimately, the Commission still will have to determine whether the commercial lessee should be permitted to hold the license, and in the interim no harm is done.

6. *The Commission Should Not Issue A Blanket Invalidation Of Existing Coordination Agreements.*

IMWED also has called upon the Commission to declare that certain "legacy agreements" between licensees "are enforceable only to the extent that they govern analog operations in the MBS."<sup>115</sup> WCA urges the Commission to do no such thing.

At the outset, it must be noted that IMWED's filing is ambiguous, at best, as to precisely what existing agreements IMWED would have the Commission eviscerate. The text of its petition implies that only those agreements calling for the use of frequency offset techniques should be declared invalid except with respect to analog operations in the MBS.<sup>116</sup> Yet, the heading to the section states "The Commission Should Clarify that Legacy Interference Agreements, Such as Analog Frequency Offset Agreements, Do Not Apply To Low-Power Digital Operation."<sup>117</sup> The use of the phrase "such as" can only mean that IMWED believes that there are types of agreements, beyond offset agreements, that should be addressed.

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<sup>115</sup> IMWED Petition at 11.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* (emphasis added).

However, it does not specify what those are, and WCA can only speculate as to the sorts of agreements IMWED's principals seek to escape.

Agreements between licensees in the 2.5 GHz band to coordinate frequency usage, to govern interference protection and to otherwise control operations historically have been encouraged by the Commission and are relatively commonplace.<sup>118</sup> Some of these agreements are relatively short and simple and a few may just provide that the respective licensees will utilize frequency offset technology to reduce cochannel interference between the licensees. Most of the existing agreements between licensees, however, are more complex and often address a multitude of issues (of which the use of frequency offset technology may or may not be one). Some were entered into in the 1980s, while others are of more recent vintage. Some specifically address only analog video operations, some clearly contemplate digital operations (either digital video or data services), while others may not be precise. And therein lies the rub.

Given the wide range of agreements that are in existence today, a blanket ruling by the Commission without regard to the specific facts and circumstances surrounding a particular agreement would be most inappropriate. These agreements are contracts, and the Commission has routinely recognized that the judiciary is the best place to interpret private contracts.<sup>119</sup> Yet, IMWED's petition is silent as to why reference of contractual disputes to the judiciary is inappropriate here. Certainly, there may be cases where a fair reading of the agreement and full consideration of the facts and circumstances

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<sup>118</sup> See e.g., *Texas Wired Music, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 2935, 2935 (1993); *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, Second Report and Order, 6 FCC Rcd 6792, 6796 (1991).

<sup>119</sup> See, e.g., *Applications of PCS 2000, L.P.*, Memorandum Opinion and Order, 12 FCC Rcd 1681, 1691 (citing *Milford Broadcasting Co.*, Hearing Designation Order, 8 FCC Rcd 680 (1993); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982); *United Telephone Company of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 732 (1977); *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950)).

under which it was entered will lead to the result IMWED seeks – a determination that it only applies to analog operations in the MBS. However, there are many agreements in existence where a reviewing court is likely to reach some other conclusion. For example, in cases where the parties contemplated digital operations, a court might determine that the agreement should be applied to all channels, not just those in the MBS. In other cases, a court may determine that the provisions should not apply at all. Again, the key here is that these are individualized agreements that require individualized scrutiny. The blanket determination IMWED seeks will inevitably lead to the wrong result in many cases, and should be avoided.

The Commission has historically recognized that disputes over interference agreements are best left to the judiciary to resolve. For example, in one recent case the Commission refused to interpret whether a particular interference protection agreement between licensees effectively barred one of the parties from assigning its license to a third party.<sup>120</sup> The Commission reiterated that it “has determined that parties should resolve contractual disputes in court and that the Commission is not the proper forum to adjudicate these disputes.”<sup>121</sup> IMWED has provided the Commission with no compelling reason to reverse course and even attempt to address the status of the myriad interference agreements effecting the 2.5 GHz band that are in force today.

**J. The Commission Should Not Reconsider Its Decision To Refrain From Imposing Cross-Ownership and Cross-Leasing Rules On Cable Operators and ILECs.**

In the *Report and Order*, the Commission fully analyzed the competitive impact of allowing cable system operators and incumbent local exchange carriers (“ILECs”) to own or lease BRS and EBS

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<sup>120</sup> See *Hazel-Tone Communications, Inc.*, Order, 16 FCC Rcd 21211, 21213 (2001).

<sup>121</sup> *Id.*, citing *Airtouch Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9430 (1999)(citing *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987)).

spectrum.<sup>122</sup> The Commission concluded that there is no basis for imposing any restrictions on the ability of cable operators and ILECs to own or lease BRS and EBS spectrum, other than the requirement of Section 613(a) of the Communications Act, as amended, barring a cable operator from holding a license for purposes of providing multichannel video programming and the Commission's own ban on leasing of BRS/EBS capacity by a cable operator except under limited circumstances.<sup>123</sup> Section 27.1202 reflects this restriction.

On reconsideration, several entities have filed virtually identical petitions urging the Commission to change course and restrict ILECs and cable operators from owning or leasing any BRS or EBS spectrum, regardless of whether they intend to utilize the spectrum for video or for data services.<sup>124</sup>

Without citation to any precedent, these petitions take issue with the Commission's conclusion that:

Under our precedent, eligibility restrictions are imposed only when (1) there is a significant likelihood of substantial competitive harm in specific markets, and (2) eligibility restrictions will be effective in addressing such harm. Under this standard, the Commission relies on market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary. Those in favor of restricting the eligibility of cable operators and DSL providers to acquire BRS/ITFS licenses have not shown that this standard is met. They have not cited relevant market facts and circumstances sufficient to demonstrate that the eligibility of such service providers is likely to result in substantial competitive harm or that, even if specific markets experienced harm to competition, the eligibility restrictions they advocate would be effective in eliminating that harm.<sup>125</sup>

Like those who supported restrictions in response to the *NPRM*, those who have petitioned for reconsideration of the *Report and Order* have failed to provide any relevant market facts and

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<sup>122</sup> See *Report and Order*, 19 FCC Rcd at 14227-32 ¶¶ 165-176.

<sup>123</sup> *Id.* at 14231 ¶ 173.

<sup>124</sup> See C&W Petition at 5-6; COPES/PACE Petition at 4-5; DBC Petition at 5-6; SpeedNet Petition at 4-5; WDBS Petition at 4-6.

<sup>125</sup> *Report and Order*, 19 FCC Rcd at 14232 ¶ 175.

circumstances sufficient to demonstrate that restrictions are necessary to avoid “substantial competitive harm.” Indeed, they suggest that the burden is on the Commission to restrict ILEC and cable entry unless there is proof that open entry will be benign.<sup>126</sup> That, however, is not the appropriate legal standard. The Commission is not free to speculate as to competitive harm – courts have previously determined that such speculation is insufficient to justify eligibility restrictions on wireless services, and the Commission should hold no differently here.<sup>127</sup>

Two of these petitioners, Digital Broadcast Corp. (“DBC”) and Wireless Direct Broadcast System (“WDBS”) suggest that, at the very least, the Commission should restrict ILEC and cable ownership of the MBS channels.<sup>128</sup> They contend that “these channels are specifically designated for high-power video operations, which the Commission has confirmed that such entities are prohibited from using.”<sup>129</sup> Of course, this line of reasoning is wrong on two counts. First, the MBS is not designated solely for high-power video operations. Rather, fixed and mobile one-way and two-way data services also can be offered over the MBS channels using either high-power or low-power technologies. Second, prior to the adoption of the *Report and Order*, the Commission in no way banned ILECs from owning or leasing BRS and EBS spectrum for the provision of video or data services.<sup>130</sup> Since Section 27.1202 still precludes cable operators from owning or leasing MBS spectrum used for the distribution of

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<sup>126</sup> See C&W Petition at 5; COPES/PACE Petition at 4; DBC Petition at 5; SpeedNet Petition at 4; WDBS Petition at 5.

<sup>127</sup> See *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6<sup>th</sup> Cir. 1995) (“[W]hile avoiding excessive concentration of licenses certainly is a permissible goal under the Communications Act, simply precluding a class of potential licensees from obtaining licenses (without a supported economic justification for doing so) solves the problem arbitrarily.”).

<sup>128</sup> See DBC Petition at 6; WDBS Petition at 4-6.

<sup>129</sup> *Id.*

<sup>130</sup> See *Report and Order*, 19 FCC Rcd at 14231-32 ¶¶ 174-176.

multichannel video programming except under certain rather limited conditions, there is no evidence in the record to suggest that any substantial competitive harm will occur if cable operators can secure MBS spectrum for data services and/or if ILECs can secure MBS spectrum for video or data services.

**K. The Rules Adopted In The *Report and Order* To Govern The Licensing And Operation Of The J and K Band Guard Channels Should Not Be Modified On Reconsideration.**

Although the *Report and Order* deviated in several respects from the Coalition Proposal regarding the J and K group channels, WCA believes that the Commission's decisions reflecting these 4 MHz segments are reasonable and did not seek reconsideration. That view seems to have been in the majority, as only one of the 22 petitions for reconsideration in this proceeding address the substantive rules applicable to those channels.<sup>131</sup>

Each channel in the LBS and UBS, other than BRS channels 1 and 2, has associated with it a 0.33333 MHz channel in either the J or the K band at 2568-2572 MHz or 2614-2618 MHz, respectively. These two bands, which are portions of the LBS and the UBS,<sup>132</sup> are primarily intended to serve as guardband between the high-power operations in the MBS and the low-power operations in the LBS/UBS.<sup>133</sup> Given this role, it is not surprising that under Section 27.1222, the rules governing these channels are simple and straightforward:

All operations in the 2568-2572 and 2614-2618 MHz bands shall be secondary to adjacent-channel operations. Stations operating in the 2568-2572 and 2614-2618 MHz must not cause interference to licensees in operation in the LBS, MBS, and UBS and must accept any interference from any station operating in the LBS, MBS, and UBS in compliance with the rules established in this subpart. Stations operating in the 2568-2572

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<sup>131</sup> NIA/CTN properly note the footnote to Section 27.5(i)(2) is in error because it states that the spectrum at 2686-2690 MHz is now used for channel H3 when, in fact, it is used for channel G3. See NIA/CTN Petition at 21. WCA certainly has no objection to correcting this footnote to accurately reflect the substantive spectrum allocation.

<sup>132</sup> See 47 C.F.R. § 27.5(i)(2)(i) and (iii).

<sup>133</sup> See *Report and Order*, 19 FCC Rcd at 14184, 85 ¶¶ 40, 42.

and 2614-2618 bands may cause interference to stations in operation in the LBS, MBS, and UBS if the affected licensees consent to such interference.<sup>134</sup>

Independent MMDS Licensee Coalition (“IMLC”), however, has proposed a radically different approach, suggesting that the order of the channels in the band be changed to provide the licensees of channels D3, A4 and E4 with the J and K channels immediately adjacent to their own main channels and that the Commission eliminate secondary status for that spectrum.<sup>135</sup> Of course, the fundamental premise of IMLC’s petition is flawed since it is not true, as IMLC contends, that “the rules do not make clear what operational or other restrictions apply to these bands”<sup>136</sup> or that “the rules do not appear to envision any operations over the guard channels.”<sup>137</sup> To the contrary, Section 27.1222 clearly envisions that the spectrum at 2568-2572 and 2614-2618 MHz can be put to use, but only on a non-interfering basis.

WCA vigorously opposes IMLC’s proposal because it would gut the fundamental purpose of the J and K band channels – to serve as guardband between high-power and low-power operations. For all its rhetoric, IMLC provides no evidence that the Commission was wrong in concluding that 4 MHz guardbands are required to separate high-power and low-power operations.<sup>138</sup> The net effect of IMLC’s proposal would be to provide just a 2 MHz guardband between low powered operations of the extended channel G3 and the high powered operations of extended channel A4. Yet, IMLC’s filing is devoid of any technical analysis of the potential for interference – all IMLC musters is the statement that “we

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<sup>134</sup> 47 C.F.R. § 27.1222.

<sup>135</sup> See Petition of the Independent MMDS Licensee Coalition, WT Docket No. 03-66, at 5-6 (filed Jan. 10, 2005)[“IMLC Petition”].

<sup>136</sup> *Id.* at 5.

<sup>137</sup> *Id.*

<sup>138</sup> See *Report and Order*, 19 FCC Rcd at 14184 ¶ 40 (citing Spectrum Study of 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems, at 49 (rel. March 30, 2001)).

believe [that it] may often be the case [that] they are not needed for ‘guarding’ purposes.”<sup>139</sup> More should be necessary before the Commission jeopardizes protection of stations operating near the LBS/MBS and MBS/UBS boundaries.<sup>140</sup>

### III. CONCLUSION.

For the reasons set forth above and in WCA's petition for partial reconsideration, WCA urges the Commission to amend the rules adopted by the *Report and Order* as suggested by WCA.

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<sup>139</sup> IMLC Petition at 5.

<sup>140</sup> In addition, adoption of IMLC's proposal would provide a windfall for the licensees of channels D3, A4 and E4, giving each channel 1 MHz of primary spectrum more than their counterparts (*i.e.* channel D3 would have 6.5 MHz of primary spectrum compared to 5.5 MHz for all other LBS/UBS channels, while channels A4 and E4 would have 7 MHz of primary spectrum compared to 6 MHz for all other LBS/UBS channels). There is no reason for the Commission at this juncture to restructure the J and K bands and create this inequity. The current approach, under which no licensee has J or K band spectrum adjacent to its primary spectrum, promotes licensee cooperation to make the best possible use of the entire J and K bands spectrum.

## CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify that the foregoing Opposition to Petitions for Reconsideration were served this 22<sup>nd</sup> day of February, 2005 by depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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