

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

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of)	WT Docket No. 03-66
the Commission's Rules to Facilitate the)	RM-10586
Provision of Fixed and Mobile Broadband)	
Access, Educational and Other Advanced)	
Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	WT Docket No. 03-67
Part 1 of the Commission's Rules - Further)	
Competitive Bidding Procedures)	
)	MM Docket No. 97-217
Amendment of Parts 21 and 74 to Enable)	
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in)	
Fixed Two-Way Transmissions)	
)	WT Docket No. 02-68
Amendment of Parts 21 and 74)	RM-9718
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. 00-230
Promoting Efficient Use of Spectrum Through)	
Elimination of Barriers to the Development of)	
Secondary Markets)	

**CONSOLIDATED OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

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Executive Summary

The Commission's recently enacted rules for the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) open up unprecedented opportunities for development of the 2.5 GHz band. For its part, Nextel Communications intends to use the revamped 2.5 GHz band to offer integrated wireless solutions that will enable consumers to interact with high-bandwidth applications through visual-centric services, such as video conferencing, distance learning, video-on-demand, online gaming, and document collaboration. Enhanced access to detailed, video-based information could improve the ability of the nation's law enforcement officials to protect the public, accelerate the ability of students to learn, increase productivity of the nation's businesses, and improve the quality of life of millions of Americans.

Several petitioners, however, have sought changes to the Commission's *BRS-EBS Realignment Order* that would reverse the Commission's basic decision to make the band useful for wireless interactive multimedia services. If adopted, the exceptions, deviations, and diversions that the petitioners have sought would diminish the incentive to invest in this band, delay the transition, and disserve the public interest in rapid deployment of innovative new wireless services in the 2.5 GHz band.

Clearwire Communications (Clearwire), for example, has submitted a number of byzantine cost-sharing proposals to reimburse proponents that are both impractical and inordinately expensive. Other petitioners hope to reverse the Commission's decision to assign an equitable ownership structure for the J and K guard bands. Still other petitioners demand that the Commission return to "command-and-control" regulation and impose a non-renewable, fifteen-year term limit on EBS leases. These petitions and the

others identified here threaten to disrupt the equitable, market-based regulation necessary to permit carriers such as Nextel to make the hundreds of millions of dollars of investment needed to deliver new, wireless multimedia services to consumers.

While recent Commission rulings have begun to establish the foundations of the regulatory regime necessary to permit carriers to make the hundreds of millions of dollars of investment needed to deliver new, cutting-edge, multimedia products and services to consumers, carriers must overcome many different obstacles to successfully deploy new, broadband data services to millions of Americans. The Commission should reject the petitioners' attempts to erect new barriers to the deployment of services in the 2.5 GHz band.

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**CONSOLIDATED OPPOSITION TO
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I. Introduction

Nextel opposes several petitions for reconsideration that attempt to revisit fundamental elements of the Federal Communications Commission's *BRS-EBS Realignment Order*.¹ These proposals would needlessly establish new barriers to

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced*

deploying services in the band, frustrate the transition process, and diminish the investment incentives necessary to transform the band into useful spectrum. The Commission should reject these proposals and, with the minor modifications to accelerate deployment and simplify the transition process proposed by Nextel and other parties, affirm its *BRS-EBS Realignment Order*.²

II. Attempts to Delay the Effective Date of the Transition Disserves the Public Interest in Rapid Deployment of Wireless Interactive Multimedia Services.

The Independent MMDS Licensee Coalition (IMLC) urges the Commission to delay the effective date of the license transition rules until the Commission has concluded its Further Notice of Proposed Rulemaking.³ In a similar vein, BloostonLaw recommends allowing licensees that serve rural areas to continue operations under the old band plan until January 10, 2013, which is five years after *all* proponents will have completed the last geographic-area transition.⁴ BloostonLaw also recommends tolling the three-year transition period pending resolution of disputes of the transition plan.⁵ Nextel opposes these and similar proposals to delay transition to the new band plan.

The comprehensive transition to a new band plan in the 2.5 GHz band will only work if the plan is truly comprehensive. Each additional exception, limitation, or other allowance to the comprehensive plan harms the public interest in effecting a long-

Services in the 2150-2162 and 2500-2690 MHz Bands, 19 FCC Rcd. 14165 (2004) (*BRS/EBS Realignment Order*).

² See Petition for Reconsideration of Nextel Communications (Nextel Petition). Unless otherwise noted, all petitions cited herein were filed in WT Docket No. 03-66 on Jan. 10, 2005.

³ Petition for Reconsideration of the Independent MMDS Licensee Coalition at 4 (IMLC Petition).

⁴ Petition for Reconsideration and Clarification, Blooston, Mordkofsky, Duffy & Prendergast, at 7 (BloostonLaw Petition).

⁵ *Id.* at 7-8.

overdue restructuring of the historically underused 2.5 GHz band. The opportunity cost of any delay to the comprehensive restructuring of this band is enormous; thus, each petition for delay deserves special scrutiny.

By any standard, however, IMLC's and BloostonLaw's proposals to delay the transition are unwarranted. IMLC's proposal for the Commission to adopt an open-ended halt to the transition process pending completion of the Further Notice in this proceeding would impose extraordinary costs on licensees and the public in terms of services delayed and new deployments denied.⁶ The group's parallel proposal for the Commission to "liberally" grant special temporary authority in those cases where a timely transition was warranted would impose an enormous and unwarranted burden not only on the Commission that would have to process these STA requests, but also on proponents that would have to affirmatively demonstrate the suitability of each market in the country to transition to the more rational 2.5 GHz band plan.⁷

BloostonLaw's similar proposal for delay would also impose a similarly costly burden on the public. BloostonLaw proposes the Commission delay transitions until relevant arbitrations are complete.⁸ If the Commission were to delay transitions pending every arbitration of a dispute as BloostonLaw proposes, the transition process would crawl to a halt in scattershot fashion across the country. More importantly, delaying the transition pending the outcome of every arbitration proceeding is pointless. In nearly all arbitration disputes in this band, almost any harm that might befall the parties if the transition proceeds on schedule is readily capable of remedy through a simple monetary

⁶ IMLC Petition at 4.

⁷ *Id.*

⁸ BloostonLaw Petition at 7-8.

damage award. Neither the parties to the dispute nor the public at large should be forced to wait for an award of monetary damages before licensees in the band transition to the new, more rational band plan.

The Commission should also reject BloostonLaw's proposal to deny rural citizens the benefits of the new band plan for an additional five years based on its belief that some unspecified subset of BRS licensees made poor investment decisions.⁹ BRS licensees in rural areas, whose interest BloostonLaw purports to represent, are no more or less likely to have deployed new equipment than BRS licensees in urban areas. As an economic matter, moreover, BRS licensees will not make decisions about future investments in the BRS spectrum based on sunk costs, but rather based on future possibilities. The Commission can best maximize investment in the band and help all licensees realize the most benefit from the 2.5 GHz spectrum resource by affirming measures that promote a swift transition to the new band plan. Accelerating the transition by minimizing uncertainty and delay provides both urban and rural licensees with the ability to make future investment decisions in a more stable and more rewarding regulatory environment.

III. All Commercial Operators Should Share Transition Expenses in an Equitable, Timely, and Non-Discriminatory Manner With Minimal Administrative Costs.

Nextel agrees with Clearwire Communications (Clearwire) that all commercial operators should share transition expenses in an equitable and timely manner. The proposals that Clearwire has submitted to achieve these goals, however, would prove ineffective and impose inordinate costs on the licensees, the Commission, and the public. The Commission should reject Clearwire's cost-sharing proposals.

⁹ *Id.* at 6-7.

A. Measures that Try to Assign Transition Expenses Among Different Types of Commercial Lessees Are Ambiguous, Complex, and Anticompetitive.

The Commission adopted rules to ensure that all commercial operators share in the cost of transitioning the 2.5 GHz band. The Commission's rules require BRS licensees in the LBS/UBS to pay both their own transition expenses and a *pro rata* share of the cost of transitioning the facilities that the BRS licensee uses to provide commercial service.¹⁰ Clearwire correctly notes that commercial operators that lease BRS/EBS spectrum bear an obligation to reimburse the proponent a *pro rata* share of the costs of transitioning the band.¹¹ Clearwire, however, proposes an inordinately complex scheme to assign a proponent's transition costs among different *types* of spectrum lessees, depending on the term remaining at the time of transition and other factors.

Under Clearwire's proposal, EBS and BRS lessees that have "less than three years remaining" on their lease terms and do not possess "an assured right of renewal" would be exempt from cost-sharing reimbursement obligations.¹² Only non-exempt commercial lessees of BRS/EBS spectrum would bear the obligation to reimburse the proponent a *pro rata* share of transition expenses. The Clearwire scheme suffers from numerous infirmities.

First, Clearwire's proposal is ambiguous. Clearwire, for example, does not explain what it means by "an assured right of renewal." What degree of "assurance" must a lessee have to become exempt from its reimbursement obligation to the proponent? Is a lease renewal only "assured" when rental payments are sufficiently lower than fair market value at the date of expiration that an exercise of the option

¹⁰ 47 C.F.R. § 27.1233(c).

¹¹ Petition for Partial Reconsideration of Clearwire Corporation at 4 (Clearwire Petition).

¹² *Id.*

appears to be reasonably assured? Or is some lower standard of “assurance” permitted? Similarly, how would one determine whether a lease agreement, in fact, has “less than three years remaining”? When and how is a lease term is measured? Does this process begin upon transition, upon receipt of a reimbursement request, or upon some other event? The terms for Clearwire’s proposed exemption are capable of multiple different interpretations that neither commercial licensees, nor the Commission are particularly well equipped to resolve.

Second, the Clearwire proposal would prove inordinately difficult to administer. Is the *Commission* to review the level of “assurance” of each lease’s renewal provision and determine the remaining term of each private contractual agreement? If so, will the Commission maintain a centralized and public database of lease terms available for public inspection? If not, what happens when other contributors believe that a lessee has not correctly divulged all lease agreements with unassured renewals or with more than three years remaining that would have to contribute to the proponent’s transition expenses? Would the Commission hear these disputes or would they be sent to a third party arbitrator? The administrative procedures needed to resolve the ambiguous terms of Clearwire’s proposed exception would saddle commercial operators and the Commission with a costly, time-consuming, and complex process.

Third, Clearwire’s scheme is anticompetitive. Like other commercial licensees in the 2.5 GHz band, Nextel considers information concerning lease terms highly confidential and proprietary. Mandatory disclosure of lease information, particularly information affecting *future* lease plans and terms, presents a grave competitive risk. Forced disclosure of lease terms – whether to other BRS/EBS licensees or to the

Commission – should not be required absent a truly compelling public interest rationale that Clearwire has failed to establish. Moreover, mandatory disclosure of lease terms would require the Commission to develop detailed prophylactic measures for collecting and disseminating the lease information. Because disclosure has few, if any, benefits and enormous costs to the Commission, licensees, and the public, the Commission should reject Clearwire’s proposal to exempt certain licensees from reimbursement based on the specific terms of their lease provisions.

Rather than try to parse individual lease agreements to sort out which lessees should contribute their *pro rata* shares and which should not, the Commission should simply affirm its decision to require that *all* commercial lessees contribute their *pro rata* shares of the proponent’s transition expenses based on the MHz-pops covered by spectrum leases used to provide commercial service.¹³

B. Mandating Arbitration for All Invoices In Excess of Some Arbitrary Amount Burdens Licensees and Creates Unwarranted Impediments to Private Dispute Resolution.

The Commission should also reject Clearwire’s proposal to require arbitration of any transition expenses that exceed an arbitrary monetary threshold, such as \$250,000.¹⁴ Referring all invoices in excess of some arbitrary value to arbitration would needlessly impose arbitration expenses on parties that may not actually disagree. Facts – not some arbitrary monetary value – determine the reasonableness of an invoice. Depending on the specific work performed, a bill for \$2500 might well prove unreasonable while a bill for \$250,000 might be entirely reasonable. If the Commission were inclined to adopt an

¹³ 47 C.F.R. § 27.1233(c) (“BRS licensees in the LBS or UBS must reimburse the proponent(s) a pro rata share of the cost of transitioning the facilities they use to provide commercial service, either directly or through a lease agreement with an EBS licensee.”).

¹⁴ Clearwire Petition at 7.

amount certain above which all invoices would be sent to arbitration, the Commission would likely need to develop and adopt a sliding rate scale to account for the different costs attributable to each of the many different types of system changes that a proponent may need to perform. Establishing a list of presumptively reasonable prices for a long list of equipment and services would be a costly, time-consuming, and ultimately fruitless exercise since all invoices would be judged by their reasonableness, not some wholly arbitrary number established prior to performing the work.

Any reasonable invoices should be paid. If the recipient of the invoice feels that any expense is too high, the recipient can always challenge that invoice in an arbitration regardless of the amount of the invoice.¹⁵ Additional rules and mandatory referrals simply create an unwarranted impediment to private resolution of differences.

C. Thirty Days Is Insufficient Time for a Proponent to Receive and Process Invoices Eligible for Reimbursement from Transitioned Licensees.

The Commission should reject Clearwire's call for a thirty-day window within which proponents must submit reimbursement invoices to an administrator or eligible licensees.¹⁶ Clearwire's proposal to cut off reimbursement for invoices submitted more than thirty days after the proponent files a post-transition notification with the Commission does not provide enough time for the proponent to receive and process the expenses associated with the transition. As a likely transition proponent, Nextel has a strong monetary interest in obtaining reimbursement for transition expenses from all eligible parties as quickly as possible. And as a licensee that may need to reimburse a

¹⁵ Even if mandatory referrals were warranted, however, the Commission would need to set the threshold far in excess of \$250,000. The cost of transitioning a *single* station and making its facilities digital would barely be covered by \$250,000.

¹⁶ Clearwire Petition at 7.

proponent, Nextel appreciates the need for some measure of finality in invoicing for the transition; however, proponents will need to use a host of vendors and sub-contractors to complete the BRS/EBS transition process, and some of these vendors and sub-contractors will operate on effective billing cycles of sixty to ninety days.

If the Commission were to bar proponents from obtaining reimbursement for expenses within just thirty days of filing the post-transaction notification, the proponent would likely have insufficient time to receive and process otherwise legitimate expenses simply due to the vagaries of its sub-contractors' long billing cycles. To ensure all expenses are reimbursed while providing finality to all licensees involved in the transition, the Commission should require proponents to submit invoices for reimbursement within not less than 120 days of filing a post-transition notification with the Commission.

D. Clearwire's Proposal to Extend Cost-Sharing Obligations to Non-Operational Commercial Licensees Would Create More Problems than it Would Solve.

The Commission currently requires only *operational* commercial carriers to reimburse the proponent.¹⁷ Clearwire, however, recommends against delaying reimbursement until commercial deployment occurs on each channel group. As the Commission noted in its *PCS Relocation Order*, delaying reimbursements creates incentives for licensees to delay deploying commercial services to the public in the hope that some other licensee incurs the costs of transition first.¹⁸ With delayed

¹⁷ 47 C.F.R. § 27.1233(c).

¹⁸ Clearwire Petition at 8, *citing 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 Rulemaking, 11 FCC Rcd. 8825 at 8831 & 8861-62 (1996) (*PCS Relocation Order*).

reimbursement, the first-moving commercial licensee must carry the late-entrant's transition expenses on its books for a relatively long period of time even if the late-entrant has commenced commercial operations. To avoid this "free rider" problem, Clearwire's proposes to require immediate reimbursement of a commercial operator's share of transition expenses upon invoice.

The "free rider" problem Clearwire has identified is a cause for concern and, depending on the circumstances, may even warrant regulatory relief of some type from the Commission. Unfortunately, however, implementing Clearwire's approach with broadly applicable prophylactic rules adopted by the Commission would require the development of costly and time-consuming regulatory machinery far in excess of the potential costs that first-moving commercial licensees are ever likely to have to bear.¹⁹ While Clearwire's proposal to require reimbursement upon invoice represents a good faith effort to ensure timely reimbursement of expenses, Clearwire's proposal will not work without regulatory intervention so significant as to threaten timely transition and reimbursement.²⁰ Because Clearwire's proposal to extend cost-sharing obligations to non-operational commercial licensees will require intrusive and administratively cumbersome regulations, it should be denied.

¹⁹ The policies, rules, and procedures concerning how to account for commercial spectrum leases that were discussed above represent just one example of how extending cost sharing beyond the scope of the Commission's current rules would quickly become unmanageable.

²⁰ Clearwire Petition at 7-8.

IV. A Proposal to Alter the Rules Governing the Guard Band Spectrum on Either Side of the MBS Needlessly Prejudices Non-Adjacent Licensees and May Increase the Risk of Harmful Interference.

The Commission's current rules equitably assign all four-channel licensees a one megahertz license in the guard band spectrum at 2568-2572 MHz and 2614-2618 MHz.²¹ The four-megahertz wide guard band channels, also known as the J and K channels, provide low-power licensees in the LBS and UBS with protection from high-power uses in the MBS. The Commission established a four-megahertz guard band between the high-power MBS and the low-power LBS/UBS because it concluded that "low-power services are especially susceptible to interference from high-power transmissions on adjacent channels."²² Without four megahertz of interference protection, low-power licensees in the LBS and UBS would experience a greatly increased potential for harmful interference. The Commission reached this conclusion first in its extensively researched *3G Report* and, again, in its recent *BRS-EBS Realignment Order*.²³

Based on its unsupported assertion that guard bands are "not needed" to separate the MBS from the LBS and UBS, however, the IMLC recommends that the Commission should assign roughly half of the guard band spectrum to the MBS licensee adjacent to the guard band with the other half of the guard band channels going to the adjacent LBS

²¹ *BRS-EBS Realignment Order*, 19 FCC Rcd. 14165 at ¶ 43. Specifically, the Commission held that "a licensee that presently has four interleaved 6 megahertz channels and four associated 0.125 megahertz response channels will receive 16.5 megahertz of contiguous spectrum in either the LBS or UBS, a 6 megahertz channel in the MBS, and 1 megahertz of contiguous spectrum in either the J or K guard bands after the transition." *Id.*

²² *Id.* at ¶ 21.

²³ *Id.* at ¶ 40 & n.87, citing *Spectrum Study of 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems* (rel. March 30, 2001).

licensee.²⁴ The IMLC also recommends that the Commission adopt rules and power limits governing operations in the guard band channels on either side of the MBS that are the same that apply to their associated adjacent channels.²⁵ Finally, the IMLC proposes that licensees should not have to protect dark or vacant channels until those channels are activated.²⁶ Collectively, these proposals would narrow the guard band channels between the high-power MBS and the low-power LBS and UBS from four megahertz to two or, in some cases, zero megahertz.

Nextel opposes these proposals. While the IMLC claims that guard bands are “unnecessary,” the IMLC provides no information or technical studies to refute the Commission’s well-reasoned conclusion that four megahertz of guard band spectrum is, in fact, required to permit low-power licensees to operate in the LBS/UBS. Without a four-megahertz guard band, MBS licensees, which use facilities that are not generally susceptible to interference from low-power, low-site operations in the LBS/UBS, would have little to lose by extending their operations further out into the J and K Guard Bands even though those operations would cause harmful interference to LBS/UBS licensees. In the *BRS-EBS Realignment Order*, therefore, the Commission chose to assign J and K Guard Band licenses licensees equitably among all four-channel licensees in the band, rather than give this guard band spectrum exclusively to the adjacent channel licensees for the very simple reason that creating a diffuse ownership structure in the guard band ensured that no licensee could use the J and K guard bands without broad, cooperative

²⁴ IMLC Petition at 5. IMLC states that only the adjacent LBS licensee would receive spectrum under its proposal, but presumably IMLC intended to refer to any low-power licensee adjacent to the guard band spectrum whether from the LBS or the UBS. IMLC Petition at 5.

²⁵ *Id.* at 5-6.

²⁶ *Id.* at 6.

support from licensees in both the LBS/UBS and the MBS. By contrast, arbitrarily assigning the bulk of the J and K channels to either the MBS or LBS licensees that happen to be positioned immediately adjacent to the guard band spectrum would allow MBS licensees to circumvent the consensus-building process of making the guard band spectrum useful without causing harmful interference.

The Commission should also reject demands that the Commission remove the interference abatement measures that benefit LBS/UBS licensees. Requiring the guard band segment to protect vacant channels allows prospective LBS/UBS licensees to immediately deploy service to the public in the EBS-D3 and BRS-2 channels without having to wait for MBS licensees to curb emissions or move operations. The IMLC proposal to allow MBS licensees to operate without the need to protect vacant channels, however, would frustrate timely deployment of wireless interactive multimedia services to the public by requiring new procedures for EBS-D3 and BRS-2 licensees to complete prior to providing service to the public. A new entrant in the LBS/UBS would need to identify an interfering MBS Guard Band user and then begin remedying the interference problem prior to deploying service to the public. This process would create an administrative problem for both for the Commission and the prospective LBS/UBS licensees. For example, would the LBS/UBS victim licensee bear the burden of proof of demonstrating harmful interference in order to remove the MBS Guard Band licensee from the band? And how quickly must an MBS Guard Band licensee mitigate interference from its high-power guard band operations? The answers to these and related questions are not readily apparent and solving these problems would only serve to delay successful deployment of wireless interactive multimedia services in the 2.5 GHz

band. By lifting the power limits and other restrictions on use of the J and K guard band channels, the IMLC would effectively eliminate the J and K guard bands that the Commission set aside to isolate high-power uses from low-power uses. The Commission should reject these proposals.

V. Imposing Arbitrary Limits On The Ability Of Parties To Negotiate Lease Term Renewals Will Discourage Investment And Undermine Regulatory Parity.

The Commission should affirm its ruling to permit renewable lease terms for EBS spectrum consistent with the current, ten-year license term of EBS facilities. In its *Secondary Markets Order*, the Commission amended its rules and policies governing spectrum leasing to facilitate the development of secondary spectrum markets and to rely more on the marketplace to promote efficient and dynamic spectrum use.²⁷ The *BRS/EBS Realignment Order* extended these new leasing rules and policies to BRS and EBS spectrum to enhance the ability of parties to lease BRS and EBS spectrum and achieve a more efficient market for this spectrum.²⁸ The Catholic Television Network and the National ITFS Association, however, urge the Commission to reject its Secondary Markets rules and policies and instead impose a single, non-renewable fifteen-year limit on EBS leases. Nextel opposes this request.

In its *BRS-EBS Realignment Order*, the Commission applied its *Secondary Markets Order* to licensees in the 2.5 GHz band:

We agree with the commenters that we should extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum. In the *Secondary Markets Report and Order*, we

²⁷ *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 (2003) (*Secondary Markets Order*).

²⁸ *BRS/EBS Realignment Order*, 19 FCC Rcd. 14165 at ¶ 179.

took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. . . . We agree with the commenters that there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of these rules and policies. We also agree with WCA that extending those rules and policies to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services.²⁹

The *Secondary Markets Order* permits renewal provisions in lease agreements; however, intermediate lease terms are limited to the license term, which is currently ten years, rather than fifteen years as under the prior BRS/EBS rules. In its *BRS-EBS Realignment Order*, the Commission recognized this difference in intermediate lease term limits between the old ITFS rules and the new EBS rules and accounted for it. “[O]ur Secondary Market rules,” the Commission wrote, “limit spectrum leasing arrangements to the length of the license term.”³⁰ The Commission’s *BRS-EBS Realignment Order* sought to avoid forcing EBS licensees to renegotiate existing leases to comply with the newly applicable ten-year intermediate lease terms that would apply to the BRS/EBS leases under the newly applied Secondary Markets rules; therefore, the Commission grandfathered existing BRS/EBS leases with lease terms longer than ten years and with other slight differences.³¹ The Commission stated that “it would be unduly burdensome to force licensees that wish to have their existing leases remain in effect to renegotiate

²⁹ *Id.*

³⁰ *Id.* at ¶ 180.

³¹ *Id.* (stating that “although our Secondary Market rules limit spectrum leasing arrangements to the length of the license term, we will allow pre-existing ITFS leases to remain in effect for up to fifteen years, consistent with our current rules”).

those leases to comply with our *Secondary Markets* policies and rules,” such as the ten-year lease term requirement.³²

At the same time, the Commission’s *BRS-EBS Realignment Order* provided that certain “*substantive* use requirements” would continue to apply to EBS leases in light of EBS licensee’s educational mission.³³ The “substantive use requirements” included a mandated minimum educational use of the EBS spectrum every week; a recapture requirement so that EBS licensees might obtain additional capacity for educational purposes, if needed; and a compliance obligation that the EBS licensee retain responsibility for compliance with FCC rules regarding station construction and operation.³⁴ In enumerating these substantive use requirements, the Commission simply quoted from the rules governing Instructional Television Fixed Service (ITFS) stations. The Commission did not edit or otherwise alter the old ITFS rule requirements. Amidst the substantive use restrictions, however, there was a passing reference to the old fifteen-year lease term limitation that previously applied to all ITFS leases and continues to apply to grandfathered EBS leases. A requirement for a fifteen-year lease term is not a “substantive use requirement.” Unlike the other substantive use restrictions applied to EBS licensees, the fifteen-year lease limitation has nothing whatsoever to do with the educational mission of EBS licensees. Nevertheless, CTN-NIA seize upon this passing reference to the old fifteen-year term limit and assert that this reference is somehow sufficient to overrule paragraphs 179 and 180 of the Commission’s Order, where the

³² *Id.*

³³ *Id.* at ¶ 181 (emphasis added).

³⁴ *Id.*

Commission repeatedly stated that the rules and policies of the *Secondary Markets Order* would apply to all EBS leases that were not grandfathered.

CTN-NIA's contorted reading of the *BRS-EBS Realignment Order* contradicts a plain reading of the text. If the Commission had somehow intended to establish a single, non-renewable fifteen-year lease term for EBS leases as CTN-NIA claim, then the Commission would have had no need to *exempt* existing, fifteen-year ITFS leases from the Secondary Markets rule. The Commission should reject CTN-NIA's attempt to fundamentally rewrite the Secondary Markets rules as they apply to EBS leases. Unless grandfathered or subject to the *substantive* use restrictions uniquely relevant to EBS licensees, EBS leases should have the same flexibility to reach mutually agreeable contract terms as any other licensees subject to the *Secondary Markets Order*.

As a policy matter, moreover, establishing additional artificial limitations on the already constrained ability of EBS licensees to lease their licensed spectrum would move in precisely the wrong direction. The *Secondary Markets Order* established limits on the contract right to negotiate lease provisions that would automatically renew or give parties the option to renew EBS lease terms, subject to Commission renewal of the license in question. Indeed, the Commission's *Secondary Markets Order* expressly contemplated that parties to a lease agreement could very well find it in their interest to agree to a renewal provision.³⁵ Such provisions are common in lease agreements; parties negotiate them every day in all sorts of leasing contexts.

³⁵ *Secondary Markets Order*, 18 FCC Rcd. 20604 at ¶¶ 107, 141, 171; *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd. 24203 at ¶ 62 (2000).

Neither the *BRS/EBS Realignment Order* nor the CTN/NIA Joint Petition provides a legitimate rationale for a regulatory prohibition against renewal provisions. The record contains no evidence that merely permitting parties to negotiate renewal terms would somehow undermine the traditional educational purposes of EBS. It should be emphasized that EBS licensees will be free to reject renewal provisions or negotiate renewal terms that are tailored to their individual needs, including lease terms that are less than ten years long. The Commission should not presume that EBS licensees are incapable of protecting their own interests and that an across-the-board regulatory prohibition is preferable to individual marketplace negotiations. Providing parties the flexibility to negotiate renewal terms will allow them to take into account individual marketplace dynamics without undermining the EBS licensee's educational mandate, which will continue to be protected by the Commission's minimum educational use requirements.

Barring this flexibility would be contrary to the Commission's stated effort to move away from "command-and-control" regulation toward a "greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country."³⁶ As the Commission has observed, market forces are generally the best means of ensuring that "spectrum is put to its highest valued use," a goal that has grown in importance given "[i]nnovative technological changes and substantially increased demand" for wireless services.³⁷ These same goals underlie the

³⁶ *Secondary Markets Order*, 18 FCC Rcd. 20604 at ¶ 2; *BRS/EBS Realignment Order*, 19 FCC Rcd. 14165 at ¶ 179.

³⁷ *Secondary Markets Order*, 18 FCC Rcd. 20604 at ¶ 7.

Commission's decision to reconfigure the BRS/EBS bands and permit parties to make the most efficient use of this spectrum.

To achieve this goal, BRS licensees and EBS lessees such as Nextel will need to invest very substantial resources in not only taking the lead in reconfiguring the band, but also in deploying facilities to provide broadband service to the public. The Commission can help encourage this large investment – and the new and innovative services for consumers that will result – by allowing parties to negotiate renewal terms in EBS leases. With this flexibility, lessees can bargain for extended leases that will provide certainty and help justify the capital investment they will be making. The Commission has recognized that “for secondary markets to operate effectively, licensees and users must have certain rights and responsibilities that define and ensure their economic interests.”³⁸ This has prompted the Commission to state that licensees “should generally have ... license terms of sufficient length, with reasonable renewal expectancy, to encourage investment.”³⁹ Nextel is merely seeking the opportunity to negotiate through marketplace agreements the same type of “renewal expectancy” when it comes to leasing EBS spectrum.

Permitting parties to negotiate renewal terms in EBS leases will also promote regulatory parity. Lessees of other spectrum bands face no prohibition against such terms, and, as stated, spectrum licensees enjoy a license renewal expectancy. Imposing this regulatory prohibition on EBS lessees would consequently place them at a competitive disadvantage. The Commission stated in the *BRS/EBS Realignment Order*

³⁸ *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd. 24178, ¶ 20 (2000).

³⁹ *Id.*

that extending the flexible rules and policies adopted in the *Secondary Markets Order* “to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services.”⁴⁰ Consistent with this objective, the Commission should provide parties to an EBS spectrum lease the same right to negotiate renewal terms at the outset of an agreement that parties to other spectrum lease agreements enjoy. Even if the Commission somehow – contrary to all textual evidence – intended to adopt a lease-term limit of fifteen years as opposed to the ten-year limit that applies to virtually all other wireless services licensees, then the Commission should at a minimum do nothing that would prohibit parties from negotiating an option to renew an EBS lease agreement for an additional period of time.

VI. Granting An Across-the-Board MVPD Opt Out Will Frustrate the Transition Process and Delay Service to Consumers.

In the *BRS-EBS Realignment Order*, the Commission rejected the multi-channel video programming distributor (MVPD) opt-out proposal that the Coalition Plan advanced and instead required all MVPDs to file time-consuming waiver petitions.⁴¹ Nextel joins with the WCA and other petitioners in continuing to support the Coalition Proposal as an administratively simple means of providing relief to those MVPDs most likely in need of some sort of accommodation under the new band plan.⁴² The industry-consensus Coalition Proposal proposed a method by which to respond to particularly compelling factual situations without granting a blanket exemption to *all* MVPDs. The

⁴⁰ *BRS/EBS Realignment Order*, 19 FCC Rcd. 14165 at ¶ 179.

⁴¹ *Id.* at ¶¶ 75-76.

⁴² *See, e.g.*, Petition for Partial Reconsideration of the Wireless Communications Association International, Inc. at 30-37 (WCA Petition); *see also A Proposal for Revising the MDS and ITFS Regulatory Regime, submitted by the Wireless Communications Association International, Inc. (WCA), the National ITFS Association (NIA) and the Catholic Television Network (CTN)*, RM-10586 (filed Oct. 7, 2002) (Coalition Proposal).

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 “opt-out” of the transition process. Under the Coalition Proposal, the Commission would have established a thirty-day window during which any qualifying MVPD would certify to the Commission in writing that it qualified for opt-out treatment.⁴³

MVPD licensees that meet the Coalition Proposal’s criteria for automatic opt-out will more likely than not prove able to demonstrate the extraordinary and compelling circumstances that would override the public interest in a uniform band plan for the 2.5 GHz spectrum capable of supporting cutting-edge, wireless interactive multimedia services. Requiring individualized showings from parties that meet the showing required in the Coalition Proposal, however, diverts resources into filing and processing waiver petitions that are unlikely to be denied. The Commission should adopt the Coalition Proposal’s treatment of MVPDs rather than rely on costly and time-consuming individualized waiver requests, where, as here, a clear set of criteria exists to identify those licensees most likely to require administrative relief.

At a minimum, however, the Commission should reject proposals that seek to expand the MVPD opt-out process far beyond what the industry-consensus Coalition Proposal recommended. BloostonLaw, Central Texas Communications, Inc. (CTC), and the BRS Rural Advocacy Group, for example, recommend granting *all* or some large subset of MVPDs the ability to opt-out of the transition process as “a matter of right.”⁴⁴

⁴³ See Coalition Proposal, App. B at 16-18.

⁴⁴ BloostonLaw Petition at 9; *see also* CTC Petition at 7-9 (proposing that “rural” MVPD licensees be allowed to automatically opt out of the transition process); BRS Rural

Proposals to create an across-the-board opt-out mechanism for incumbent MVPD operators in excess of the generous industry-consensus Coalition Proposal would recreate the very problem that the Commission's *BRS-EBS Realignment Order* sought to solve. The entire purpose of *BRS-EBS Realignment Order* was to group like uses of the spectrum together. Prior to adoption of the *BRS-EBS Realignment Order*, channels in 2.5 GHz band could alternate between high-site, high-power operations and low-site, low-power operations. The Commission found that the "the interleaved channelization scheme is particularly problematic when one licensee seeks to operate at low-power while the adjacent licensee operates at high power, because low-power services are especially susceptible to interference from high-power transmissions on adjacent channels."⁴⁵ As the Commission held, permitting too many MVPDs to opt-out of the transition would also "result in interference to licensees in neighboring population centers, which would prevent these neighboring locales from receiving wireless broadband services under the rules adopted today."⁴⁶

The blanket opt-out approaches recommended by BloostonLaw, CTC, and the BRS Rural Advocacy Group would ignore the likely public-interest costs to the successful deployment of wireless interactive multimedia services in the affected geographic area. In many cases, the countervailing costs are likely to be substantial. As the Commission acknowledged, islands of high-power, high-site operation would create zones of interference that could disrupt low-power, low-site services for many miles.

Advocacy Group Petition at 14-15 (proposing that rural 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 geographic service area).

⁴⁵ *BRS-EBS Realignment Order*, 19 FCC Rcd. 14165 at ¶ 21.

⁴⁶ *Id.* at ¶ 76.

Awarding a blanket exemption to MVPD licensees would impose a costly new burden on BRS licensees that would need to work around the high-power operations during and after transition to the new band plan. If all MVPD licensees were eligible for relief as a matter of right, BRS licensees would face these limitations in many markets and service to the public would suffer as a result. The Commission should reject attempts to create new, blanket exemptions for MVPDs and instead adopt the Coalition Proposal, which balances the competing needs of legacy MVPD licensees against the public interest in rapid deployment of wireless interactive multimedia services in the 2.5 GHz band.

VII. Adopting the Series of Anti-Competitive Rule Changes Advanced by IMWED Would Harm Carriers, Consumers, Educators, and the Public.

In its Petition for Reconsideration, the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED) proposes an assortment of rule changes that are contrary to the public interest and the development of the 2.5 GHz band.⁴⁷ These proposals would harm commercial providers, educators, and consumers, and the Commission should summarily dismiss these proposed changes.

A. IMWED's Proposal to Abrogate Private Agreements That Seek to Prevent Harmful Interference Is Absurd, Unsupported, and Unsupportable.

IMWED demands that the Commission limit the enforceability of licensees' private agreements designed to prevent interference among parties in a given region. IMWED proposes that "any party to such an agreement should be free to disregard it, without liability, in proposing and operating LBS and UBS facilities, as well as digital

⁴⁷ Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED Petition).

MBS facilities.”⁴⁸ The Commission should reject this unwarranted intrusion into the privately negotiated relationships between 2.5 GHz band licensees. BRS and EBS licensees have often entered into contractual agreements requiring continued offset operation to avoid interference. The Commission has a continuing interest in promoting private interference agreements between licensees, rather than adjudicating every possible interference dispute.⁴⁹ At the very least, IMWED has failed to submit any record evidence that would justify such heavy-handed regulatory intervention. The Commission should reject attempts to negate private contracts to prevent interference.

B. Mandating the Public Disclosure of Thousands of Lease Agreements Imposes Enormous Burdens on Licensees and Needlessly Creates Opportunities for Collusion.

Nextel opposes IMWED’s proposal for full public disclosure of all lease agreements for EBS spectrum. According to IMWED, the Commission should require EBS licensees to file unredacted lease agreements with the Commission, or make unredacted copies available for public inspection at their principal place of business.⁵⁰ In making this proposal, IMWED fails to offer any legitimate reason why the terms of such lease arrangements, including those containing commercially sensitive information, should be made available to the public. Adopting a public disclosure requirement would impose an administrative burden on EBS licensees, has no public interest benefit, and runs counter to the Secondary Markets policies that the Commission has now applied to

⁴⁸ *Id.* at 11.

⁴⁹ *See, e.g., Report of the Interference Protection Working Group, Spectrum Policy Task Force*, at 35-37 (Nov. 15, 2002).

⁵⁰ IMWED Petition at 10-11.

the 2.5 GHz band.⁵¹ As previously explained, moreover, mandatory disclosure of leases would promote potentially anti-competitive efforts by licensees that might seek access to commercially sensitive information in other licensees' EBS lease agreements.⁵² The Commission should reject IMWED's proposal for mandatory public disclosure of all EBS lease agreements.

C. A Paternalistic Ban on Including Routine Commercial Lease Provisions In EBS Leases Would Raise Costs and Limit Flexibility For No Discernable Reason.

The Commission should reject IMWED's proposed ban on EBS lease agreement provisions that provide commercial lessees an option to acquire those EBS authorizations in the event the Commission eliminates its EBS eligibility restrictions.⁵³ A prohibition on this lease term would reduce parties' flexibility in negotiating EBS lease arrangements, without any corresponding benefit. IMWED's claim that this ban would somehow help the Commission to "resolve" the EBS "eligibility question" is without merit. The Commission has already resolved the EBS "eligibility question" by unambiguously precluding commercial ownership of any EBS station.⁵⁴ Additional measures are pointless and unnecessary. The costly and invasive IMWED proposal serves no purpose and should be dismissed.

⁵¹ In its *Secondary Markets Order*, the Commission declined to require public filing of lease arrangements and did not require the disclosure of commercially sensitive lease terms. See *Secondary Markets Order*, 18 FCC Rcd. 20604 at ¶¶ 105, 124.

⁵² See *supra* § III(A).

⁵³ IMWED Petition at 10.

⁵⁴ Ultimately, IMWED's proposal would have only counterproductive effects: if commercial lessees are not permitted to pay for these options, EBS licensees will obviously miss out on revenues that could have been used to further their educational mission.

D. IMWED's Proposal for Different Educational Use Requirements for EBS Licenses Arbitrarily Limits the Flexibility of EBS Licensees to Decide How Best to Serve their Constituencies.

The Commission should reject IMWED's proposal to alter the 5% educational usage requirement.⁵⁵ EBS licensees benefit from having 95% of their capacity available for commercial use. These licensees are able to receive nearly full value for their spectrum from commercial lessees, and can utilize such revenues to fund the production of programming and the provision of other educational and instructional services. The Commission should not hinder EBS licensees' efforts to further their educational mission by enforcing an artificial educational use requirement that bears no relationship to the actual goals of these licensees. In addition, EBS licensees remain free to negotiate lease agreements that dedicate more channel capacity to educational programming than the Commission's minimum requirements. The Commission should promote opportunities for commercial leasing in the 2.5 GHz band and avoid imposing additional restrictions or mandates on EBS lease arrangements.

VIII. Any Prohibition on Two-Way Service Pending Completion of the Transition Process Would Needlessly Prevent Carriers from Deploying Services to American Consumers on an Accelerated Basis.

IMWED and CTN-NIA propose that the Commission prohibit carriers from deploying two-way services in the LBS or UBS until the transition is complete.⁵⁶ Based on a perceived potential for interference during the transition process, these parties call upon the Commission to revoke the regulatory flexibility granted to all licensees to

⁵⁵ IMWED Petition at 7-9. Under the IMWED proposal, new EBS lease agreements would initially be subject to a 5% capacity set-aside requirement for educational content, with this requirement increasing by 5% each year up to 25%. According to IMWED, existing EBS capacity agreements should be grandfathered.

⁵⁶ *Id.* at 6; Catholic Television Network-National ITFS Association Petition at 13.

conduct two-way operations in the 2.5 GHz band pending completion of the transition process.

Nextel opposes this restriction. The Commission first authorized two-way operations in 1998 after finding that permitting two-way operations under the existing band plan would “benefit commercial operators, educational institutions and the public.”⁵⁷ The Commission authorized two-way operations with a deregulatory approach that was “premised on cooperation between all the parties involved rather than on the Commission acting as an arbiter of every possible dispute that may arise, especially in regard to interference resolution.”⁵⁸

Nextel intends to rapidly deploy wireless interactive multimedia services. Licensees should retain the flexibility where spectrum holdings permit to run trials and deployments of two-way services prior to transition. Cooperation among licensees, not regulatory fiat, will best serve the interest of all licensees in the band. As a practical matter, moreover, the low-power, two-way operations are more likely to *receive* harmful interference from high-power one-way operations than they are to cause it. Low-power licensees, thus, have strong incentives to locate their facilities away from high-power, high-site operations to ensure that their new deployments do not receive harmful interference from the high-power operations. The Commission should therefore reject the calls to prohibit licensees from deploying two-way services to consumers. The Commission should reaffirm its longstanding decision to allow two-way operations by

⁵⁷ *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, ¶ 6 (1998) (*Two-Way Order*).

⁵⁸ *Id.* at ¶ 4.

relying on longstanding cooperative practices in the 2.5 GHz band over intrusive regulatory requirements governing the potential for interference.

IX. A Proposal to Allow Rural EBS Licensees to Receive Three MBS Channels and One LBS/UBS Channel Represents a Wholly Unworkable and Patently Unfair Effort to Receive Far More than Reasonable Replacement Spectrum.

BloostonLaw proposes that rural BRS/EBS licensees serving rural areas be permitted to relocate from their existing spectrum to three 6 MHz MBS channels, one 5.5 MHz channel in either the LBS or UBS, and 1 MHz of contiguous spectrum in the J or K guard bands.⁵⁹ Nextel opposes the creation of this special option for rural BRS/EBS licensees.

BloostonLaw's proposal would provide rural BRS/EBS licensees with an unfair benefit by providing them with additional spectrum. While other BRS/EBS licensees would be returned to 23.5 MHz of spectrum (three 5.5 MHz LBS/UBS channels, one 6 MHz MBS channel, and 1 MHz of contiguous J/K band spectrum), the licensees exercising BloostonLaw's option would receive 24.5 MHz. BloostonLaw does not acknowledge this increase in bandwidth, and makes no effort to justify such favorable treatment.⁶⁰ BloostonLaw also says nothing about the effect of its proposal on proponents' obligation to bear the cost of transitioning EBS licensees to comparable facilities in the MBS. If some EBS licensees received the option to migrate to three MBS channels, transition proponents will likely have to absorb significant additional costs that could potentially impede the transition to the new band plan.

⁵⁹ BloostonLaw Petition at 4-5.

⁶⁰ While BloostonLaw appears concerned that six megahertz may not be sufficient to preserve existing high-site, high-power video operations, a conversion to digital operations would enable licensees to provide the same services on one six megahertz MBS channel as they can today on four analog channels.

Even if its proposal made sense for some unidentified policy reason, BloostonLaw's proposal is unworkable. Assuming that numerous BRS/EBS licensees in rural areas will take advantage of this relocation option, insufficient spectrum is available in the MBS to implement this plan. With only seven, six-megahertz MBS channels available in each market, it would likely be impossible, even in rural areas, to accommodate all of the BRS/EBS licensees that choose to migrate to three MBS channels.

X. Conclusion

If adopted, the additional exceptions, deviations, and diversions from the Commission's comprehensive transition plan that are identified in this petition would diminish the incentives to invest in this band, delay the transition, and thwart the public interest in rapid deployment of innovative new wireless services in the 2.5 GHz band. The Commission should reject these proposals and, with the minor modifications that Nextel and other parties have submitted, affirm its *BRS-EBS Realignment Order*.

Respectfully submitted,

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