

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

In the Matter of)
)
Amendment of Part 2 of the Commission’s) ET Docket No. 00-258
Rules to Allocate Spectrum Below 3 GHz for)
Mobile and Fixed Services to Support the)
Introduction of New Advanced Wireless)
Services, including Third Generation Wireless)
Systems)

To: The Commission

**JOINT REPLY COMMENTS OF
POLAR COMMUNICATIONS AND NORTHERN WIRELESS
COMMUNICATIONS, INC.**

Polar Communications (“Polar”) and Northern Wireless Communications, Inc. (“Northern”) submit these Joint Reply Comments in the above-referenced proceeding¹ to express their concerns over certain proposed rules, as supported by some commenters, which if adopted, would create severe financial and operational hardships on providers of BRS services in rural areas. In particular, Polar and Northern believe the Commission should reject any proposal to prohibit modifications and enhancements to existing BRS-1/2 facilities and reject any reimbursement “sunset” in favor of establishing a firm deadline for full reimbursement to all BRS incumbents. To better protect the interests of incumbent BRS operators and their subscribers, the Commission should adopt rules that ensure that BRS operators control the relocation of their facilities and require relocation where AWS operations would have line of sight to the incumbent’s protected area. The Commission

¹ In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, *Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order*, 20 FCC Rcd 15866 (2005) (“FNPRM” or “Order,” as context dictates). A summary was published in the Federal Register on October 26, 2005. See 70 Fed. Reg. 61752 (2005).

also should adopt a proposal made by the Wireless Communications Association International, Inc. (“WCA”) that would assign BRS-1/2 licensees alternative spectrum in the 2.5 GHz band if the post-transition spectrum designated by the Commission is encumbered by licensees that have not transitioned or are exempt from transitioning. If the Commission fails to take these steps, Polar and Northern could not rationally expand broadband services to underserved areas of rural America, and will be forced to bear sole responsibility for funding relocation – a cost that could prove prohibitive for incumbent operators.

Background

Polar Communications offers broadband services over BRS-1/2 spectrum in the Grand Forks, North Dakota Basic Trading Area (“BTA”), with hub sites located at Grand Forks, Lakota and Northwood, North Dakota and Robbin, Minnesota. At present, Polar provides service to more than 500 customers, many of whom do not have access to DSL or cable modem services. Northern provides broadband services on BRS-1 and BRS-2 from hub sites located at Aberdeen and Redfield, South Dakota and today serves approximately 725 subscribers. Since 1988, Northern has provided multichannel video programming distribution (“MVPD”) services on BRS frequencies, and it now serves approximately 950 subscribers with such programming. Like other rural BRS operators,² Polar and Northern integrate and bundle their MVPD and broadband offerings by using the 2.5 GHz spectrum to deliver MVPD services and downstream broadband services, and the 2150-2160 MHz band for upstream broadband communications from subscribers to the respective hub sites.

² See Comments of the Wireless Communications Association International, Inc., ET Docket No. 00-258, filed Nov. 25, 2005 (“WCA Comments”), at 3 (summarizing operations of other rural BRS providers); Petition for Partial Reconsideration of the BRS Rural Advocacy Group, WT Docket No. 03-66, filed Jan. 10, 2005, at 3-4 (same); Opposition of the BRS Rural Advocacy Group, IB Docket No. 02-364, filed Oct. 27, 2004, at 2-4 (same). Both Polar and Northern are members of the BRS Rural Advocacy Group.

Discussion

In its *Fourth Report* to Congress, the Commission “document[ed] the continuation of a positive trend:”³

namely, the increasing availability of advanced telecommunications capability to certain groups of consumers – those in rural areas, those with low incomes, and those with disabilities – who stand in particular need of advanced services. Consumers in these groups are of particular concern to the Commission in that they are the doubly vulnerable: that is, although they are most in need of access to advanced telecommunications capability to overcome economic, educational, and other limitations, they are also the most likely to lack access precisely *because* of these limitations.⁴

With respect to rural areas in particular, the Commission observed that:

Rural areas are typically characterized by sparse and dispersed populations, great distances between the customer and the service provider, and difficult terrain. These factors present a unique set of difficulties for providers attempting to deploy broadband services. Yet despite these obstacles, the data described in the preceding section [of the *Fourth Report*] demonstrate that significant progress is being made towards ubiquitous availability of advanced services in rural areas.⁵

In no small measure, this progress is a product of the investment and innovative services that BRS operators like Polar and Northern provide in rural America. In order for this progress to continue, the Commission must eliminate the significant obstacles that remain in the way of the deployment of broadband services to underserved and rural areas where advanced services are needed.⁶

³ Availability of Advanced Telecommunications Capability in the United States, *Fourth Report to Congress*, FCC 04-208, at 8 (2004) (“*Fourth Report*”) (emphasis in original).

⁴ *Id.* at 8-9.

⁵ *Id.* at 38. As Commissioner Jonathan S. Adelstein stated: “Broadband gives businesses in Rural America the tools they need to compete across the globe. Access to telemedicine and distance learning, and the vast array of resources available through the Internet, gives rural Americans the same opportunities that others enjoy.” Statement of Commissioner Jonathan S. Adelstein, Dissenting, Availability of Advanced Telecommunications Capability in the United States, *Fourth Report to Congress*, FCC 04-208 (2004).

⁶ See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004). In its Report entitled “High-Speed Services for Internet Access: Status as of December 31, 2004” (July 2005) (“FCC Report”), data collected by the Commission showed that many zip codes in rural areas were served by fewer than two providers. For example, in North Dakota, 68 percent of

I. THE COMMISSION SHOULD ENSURE THAT BRS-1/2 LICENSEES THAT MODIFY THEIR FACILITIES WILL RETAIN PRIMARY STATUS AND BE ELIGIBLE FOR RELOCATION.

The Commission proposes that major modifications to authorized BRS facilities “will not be eligible for relocation,” but instead will be authorized on a secondary basis “unless the incumbent affirmatively justifies primary status and establishes that the modification would not add to the relocation costs of the emerging technology licensees.”⁷ Verizon Wireless would take this proposal even further, proposing “a freeze on the construction of new facilities and any other modifications to BRS systems.”⁸

Polar and Northern fail to see how this wrongheaded approach would promote the expansion of rural broadband services, in particular to those already serving hundreds of subscribers that do not otherwise have access to DSL or cable modem services. On one hand, the Commission has acknowledged that rural consumers “stand in particular need of advanced services” and has implemented rules and policies designed to stimulate investment and innovation in underserved rural areas. On the other hand, with its proposal to render modified facilities secondary (if permitted at all), the Commission would effectively discourage (if not eliminate) improvements to existing systems that serve rural Americans. This disparity cannot be reconciled, a situation made worse when considering that incumbent services would be sacrificed at the expense of those provided by newcomers.

To give one example, in February of this year Polar constructed a wireless broadband hub site at Northwood, North Dakota, using BRS-1/2 as the upstream path. At present, that site serves 72 subscribers, the vast majority of whom lack access to DSL or

the zip codes were served by one or fewer provider, and in South Dakota, 52 percent of the zip codes were served by one or fewer provider. *See* FCC Report at Table 13.

⁷ *FNPRM* at ¶22. *See also* Comments of CTIA – the Wireless Association, ET Docket No. 00-258, filed Nov. 25 (“CTIA Comments”) at 12; Comments of Verizon Wireless, ET Docket No. 00-258, filed Nov. 23, 2005 (“Verizon Comments”) at 6.

⁸ *See* Verizon Comments at 7.

cable modem services. This site, along with others that Polar and Northern have placed in service, is authorized under BTA rights that were purchased from the Commission. Those rights include the right to fully develop the geographic area within the BTA borders under primary status.

No doubt, there are many areas within rural BTAs that would benefit from having broadband access. But under the Commission's proposed rules, operators deciding whether to invest in equipment, construction, marketing and operating new sites face a series of questions that have no good answers. Should the operator go forward with its plans knowing that, in the next few years, it might have to relocate to comparable facilities at its own expense? Would that expense be so prohibitive that the operator would not be able to realize any return on its investment? Would the disruption in service be worthwhile? Verizon's freeze proposal takes these questions away from BRS incumbents – it would prevent any new deployments entirely. This cannot be given serious consideration.

BRS operators – particularly those operating in rural areas where the need for broadband is greatest – must retain the right to expand and modify their licenses and have those licenses remain primary. Anything less would contravene the rights of incumbent operators to develop their BTA rights on the same terms on which those licenses were awarded. Relegating incumbent licensees to secondary status to ease the burden on AWS newcomers contravenes the interests of rural operators, their subscribers and other consumers that would benefit from expanded service.

II. THE COMMISSION SHOULD NOT IMPOSE A DEADLINE ON THE PAYMENT OF RELOCATION EXPENSES.

In another proposal that would strip BRS incumbents of their reimbursement rights, the Commission proposed a 10-year sunset on the right of BRS incumbents to obtain reimbursement for relocating to comparable facilities. No commenter supported this

proposal, but CTIA⁹ asked the Commission to adopt a 15-year deadline for reimbursement, a date that corresponds to the initial AWS F Block license term. Although Sprint – like other incumbent operators¹⁰ – opposed the 10-year sunset, it also advocated a 15-year deadline because “[a]llowing the BRS relocation obligation to expire five years before the AWS licensee must construct facilities in the band creates a perverse incentive for the AWS licensee to delay broadband deployment in order to avoid having to pay to relocate the incumbent BRS licensees.”¹¹

Polar and Northern submit that the “perverse incentive” remains even after 15 years. First, in many parts of the country – especially rural areas – AWS licensees will be able to satisfy their “substantial service” obligation of 20 percent coverage by constructing in other areas of the Regional Economic Area Grouping that serves as the license area. AWS licensees thus can easily avoid relocating an incumbent simply by waiting until the day after the sunset date to initiate service that would result in interference to a long-standing incumbent, one that has provided continuous service to persons unable to receive DSL and cable modem service. By adopting rules that would deny incumbents relocation funding, the Commission would be discouraging AWS licensees from meeting the Commission’s “goal of providing an opportunity for early entry to the 2150-2160 MHz” band.¹²

Second, as WCA stated, “[t]he fundamental unfairness of this approach is exacerbated by the competitive relationship between BRS and AWS.”¹³ In areas where AWS licensees elect to operate, they will be competing directly with broadband providers such as

⁹ See CTIA Comments at 12.

¹⁰ See Comments of BellSouth Corporation, *et al.*, ET Docket No. 00-258, filed Nov. 23 (“BellSouth Comments”) at 9-10; WCA Comments at 28-32; Comments of C&W Enterprises, Inc., ET Docket No. 00-258, filed Nov. 25, 2005, at 6; Comments of SpeedNet, L.L.C., ET Docket No. 00-258, filed Nov. 25, 2005, at 6.

¹¹ Comments of Sprint Nextel Corporation, ET Docket No. 00-258, filed Nov. 25, 2005 (“Sprint Comments”) at 44-45.

¹² FNPRM at ¶12.

¹³ WCA Comments at 30.

Polar and Northern. Yet, under the sunset proposal, the new entrant would get a free ride and the incumbent would have to foot the bill to relocate to make room for a competitor.

For the Commission to promote expeditious band-clearing and early entry for AWS licensees, the Commission's rules should encourage new entrants that are displacing the incumbent to undertake timely relocation, not incumbents that are being forced to relocate existing services. Coupled with the Commission's proposal to downgrade modified BRS facilities to secondary status, it is easy to see that rural operators will suffer a double-whammy of extraordinary financial hardship – they can continue to provide service to the public, but may have to fund relocation, or they can modify stations to better serve the public, but be ineligible to receive reimbursement for secondary services. These untenable alternatives fly in the face of the Commission's objective to “guarantee payment of all [BRS] relocation expenses.”¹⁴

III. BRS LICENSEES MUST CONTROL THE RELOCATION OF THEIR FACILITIES TO “COMPARABLE FACILITIES.”

The Commission suggests that AWS licensees would, consistent with its policies for point-to-point relocations, “construct, test, and deliver to the incumbent comparable replacement facilities.”¹⁵ In light of the differences between point-to-point services and BRS point-to-multipoint services, Polar and Northern strongly support the views of WCA and Sprint that would require BRS licensees to control relocation of their own facilities.¹⁶ Any other solution would needlessly create an opportunity for anti-competitive behavior.

Adopting rules that give relocation control to the AWS licensee ignores the Commission's own declaration regarding “the unique circumstances faced by the various

¹⁴ *FNPRM* at ¶25.

¹⁵ *Id.*

¹⁶ *See* Sprint Comments at 25; WCA Comments at 11-14.

incumbent [BRS] operations”¹⁷ – namely, the need for professional installers to perform work at hundreds of subscribers’ premises. To quote Sprint, “the trained technician remains an important point of contact with the consumer and the technician’s visit to the customer represents an opportunity to build – or destroy – customer satisfaction and loyalty.”¹⁸ By sending an unrelated and disinterested third party, the chances of destroying customer loyalty will rise.

Here again, it should also be remembered that the unrelated party would be a direct competitor to Polar and Northern. In the 800 MHz relocation proceeding, the Commission took note of the competitive issues that could arise if an unrelated third party had access to an operator’s subscriber information and physical facilities, stating that “[w]e do not foresee any party having access to competitively-sensitive information such as the identity and other details of an incumbent’s customers.”¹⁹ Polar and Northern fail to see how they would benefit from allowing a competitor to access customers premises, make arrangements with the customer for relocation and perform the physical relocation of facilities. This opportunity for mischief would exacerbate disruption, not “minimize the disruption to incumbent BRS . . . operations” and puts them at a competitive disadvantage.²⁰

IV. THE COMMISSION SHOULD REQUIRE RELOCATION WHEN INCUMBENT FACILITIES WOULD SUFFER INTERFERENCE.

Sprint and CTIA ask the Commission to require relocation of BRS-1/2 facilities located in so-called “relocation zones,” areas where AWS receivers would be expected to

¹⁷ FNPRM at ¶13.

¹⁸ Sprint Comments at 25.

¹⁹ See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order and Fourth Memorandum Opinion Order, and Order*, 19 FCC Rcd 14969 (2004) (“800 MHz Order”) at 15078. Polar and Northern note that the Commission is requiring the submission of information related to the technical facilities of BRS-1 and BRS-2 licensees in order to provide AWS auction participants with “reliable information on the construction and/or operational parameters of each BRS system.” See *Order* at ¶53. See also *Public Notice*, “Licensees of Broadband Radio Service Channels 1 and/or 2/2A Must File Site and Technical Data by December 27, 2005,” DA 05-3126, rel. Nov. 30, 2005.

²⁰ FNPRM at ¶12.

receive interference.²¹ Polar and Northern believe that relocation should be required whenever the AWS licensee's operations would have line of sight within the BRS licensee's Geographic Service Area ("GSA"). Any obligation to relocate that looks to the effect on the new entrant rather than the incumbent takes the wrong approach. BRS licensees are entitled to full interference protection within their respective GSAs. Polar and Northern thus support WCA's approach, which would require relocation whenever the AWS receiver would have line of sight into the BRS licensee's GSA.²²

V. THE COMMISSION MUST PROVIDE FOR ADEQUATE REPLACEMENT SPECTRUM IN THE 2.5 GHz BAND IF COMMISSION-DESIGNATED SPECTRUM IS NOT AVAILABLE.

As members of the BRS Rural Advocacy Group, Polar and Northern endorsed WCA's proposal to allocate replacement spectrum for BRS-1 and BRS-2 where the licensee has "opted out" of the transition²³ or where the relocation of BRS-1 and BRS-2 pre-dates the BRS/EBS market transition. Specifically, the relocation of BRS-1 to 2496-2502 MHz and the relocation of BRS-2 to 2618-2624 MHz, as specified in the new band plan, would overlap a portion of Channel A1 (2500-2502 MHz) and Channels F2 (2618-2620 MHz) and E3 (2620-2624 MHz) under the interleaved band plan.²⁴ In this docket, WCA and BellSouth have reiterated their concerns and restated a proposal to address the situation under which BRS-1 would be relocated to 2496-2500 MHz (subtracting 2500-2502 MHz) and BRS-2 would be relocated to 2686-2690 MHz (currently authorized for underutilized response channels).²⁵ Although this reduces the total licensed spectrum to 4 MHz per channel, Polar

²¹ See Sprint Comments at 27; CTIA Comments at 5

²² See WCA Comments at 36.

²³ See Consolidated Opposition to and Comments in Support of Petitions for Reconsideration of the BRS Rural Advocacy Group, WT Docket No. 03-66, filed Feb. 22, 2005, at 15-16; Petition for Partial Reconsideration of the Wireless Communications Association International, Inc., WT Docket No. 03-66, filed Jan. 10, 2005, at 31-33.

²⁴ See Sections 27.5(i)(1) and (2).

²⁵ *Id.* at 32.

and Northern agree that this is the best solution. As BellSouth stated in its Comments, “an out-of-band solution would involve more expense and more complexity, and would undermine many of the intended benefits of relocating BRS-1 and BRS-2 to the 2.5 GHz band.”²⁶ The Commission thus should adopt this alternative band plan for situations where a licensee is exempt from the BRS/EBS transition or is relocated prior to the transition for the market.

Conclusion

In light of the foregoing, Polar Communications and Northern Wireless Communications, Inc. request that the Commission:

- Permit BRS-1/2 licensees to modify their facilities and retain primary status and eligibility for reimbursement;
- Require all BRS-1/2 licensees to be reimbursed, with no sunset on relocation funding;
- Require BRS-1/2 licensees to be responsible for relocating their own facilities;
- Require relocation where the AWS receiver would have line of sight within the incumbent BRS licensee’s GSA; and
- Provide for adequate alternative spectrum where the new band plan cannot accommodate relocation to designated spectrum.

Respectfully submitted,

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²⁶ BellSouth Comments at 8.

Certificate of Service

I, John Dalager, of Dalager Engineering on behalf of Polar Communications and Northern Wireless Communications, Inc., do hereby certify that on this 12th day of December, 2005, I caused copies of the foregoing Joint Reply Comments to be delivered by first class mail to:

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