

March 23, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *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 –
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

I am writing on behalf of the Wireless Communications Association International, Inc. (“WCA”) to respond to a recent *ex parte* submission by the National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”) regarding their proposals to restrict the maximum permissible term of Educational Broadband Service (“EBS”) spectrum leases.¹ Unfortunately, for the reasons discussed below, adoption of the EBS lease restrictions that NIA and CTN advocate would undermine the Commission’s dual objectives of promoting the use of the 2.5 GHz band for commercial broadband services and of advancing education through the leasing of EBS spectrum.

All economic evidence in this proceeding indicates that imposing abbreviated lease terms on EBS licensees will diminish commercial investment in the band.² It includes a Policy Bulletin from the Phoenix Center for Advanced Legal & Economic Public Policy Studies that, based on a technical analysis of the relationship between lease terms and investment, concludes that “[r]e-imposing lease restrictions on the EBS band could undermine the Commission’s vision

¹ See Letter from Todd D. Gray, Counsel to NIA, and Edwin N. Lavergne, Counsel to CTN, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Mar. 17, 2006) [“NIA/CTN Letter”].

² Under the Commission’s *Secondary Market* rules and policies, the maximum permissible initial lease term can be no longer than the remaining term of the EBS license, but the lease agreement may provide for additional terms at the option of the lessee conditioned upon renewal of the EBS license. For purposes of this correspondence, WCA will refer to the maximum lease term as the cumulative total of the initial lease term and all additional terms that are available at the lessee’s option.

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for enhanced and more-efficient use of this band.”³ In addition, the record includes a declaration from Dr. Michael Pelcovits, a principal in the consulting firm MiCRA, Inc. and former Senior Staff Economist in the Commission’s Office of Plans and Policy, who utilized an economic model to examine the cash flows of a potential entrant in the wireless broadband arena utilizing leased 2.5 GHz band spectrum. Dr. Pelcovits concludes that “any lease period shorter than 35 years will expose the investor to a substantial possibility of earning inadequate returns on investments.”⁴ He establishes that “[t]erm limits are not in the public interest,” that they “limit the utility of the spectrum to potential lessees,” “reduce the likelihood that the spectrum will be put to its best use,” and “are unnecessary and counterproductive to achieving the [Commission’s] educational goals.”⁵

By contrast, *no* economic evidence indicates that abbreviated license terms will either encourage educational use, promote broadband deployment, or achieve any other of the objectives that CTN and NIA purport to seek.⁶ Without citation to any record evidence, NIA and CTN would have the Commission conclude that, absent adoption of their unduly restrictive proposals to limit the maximum term of EBS leases, EBS licensees will be incapable of crafting lease provisions that preserve their ability to adjust to changing circumstances. WCA respectfully disagrees. The Commission’s *Secondary Markets* policies provide EBS licensees and commercial lessees the flexibility needed to assure both that the spectrum is driven to its

³ Ford and Koutsky, Phoenix Center for Advanced Legal & Economic Public Policy Studies, “Unnecessary Regulations and the Value of Spectrum: An Economic Evaluation of Lease Term Limits for the Educational Broadband Service,” Phoenix Center Policy Bulletin No. 14, at 5 (Feb. 2006), *submitted as an attachment to* Letter from Paul J. Sinderbrand, Counsel to WCA to Hon. Kevin J. Martin, Chairman, FCC, WT Docket No. 03-66 (filed Feb. 17, 2006).

⁴ Declaration of Dr. Michael D. Pelcovits at 9, *submitted as an attachment to* Letter from Paul J. Sinderbrand, Counsel to WCA, to Hon. Kevin J. Martin, Chairman, FCC, WT Docket No. 03-66 (filed Mar. 10, 2006) [“Pelcovits Declaration”].

⁵ *Id.* at 3.

⁶ Although CTN indicates its support for a 30 year maximum lease term, it conditions that support on the Commission requiring every EBS lease to include provisions “which provide the EBS licensee at the 15th year and every 5 years thereafter, with the ability to review its educational use requirements so as to ensure the efficient and effective use of the EBS licensee’s reserved capacity for educational purposes in light of changes in educational needs, technology and other relevant factors.” NIA/CTN Letter at 2. Presumably, CTN is not merely proposing that an EBS licensee engage in a unilateral review of changes, but that the commercial lessee be required in some fashion to accommodate those needs. It is this latter, unspecified obligation on the part of the commercial lessee that would prove problematic, for it prevents an investor from today understanding what the operator’s rights and obligations will be after 15 years. Thus, as a practical matter, adoption of CTN’s proposal would lead investors to view EBS leases, at best, as having 15 year terms – a term Dr. Pelcovits establishes is far too short to generate investment in the band. While WCA is sensitive to CTN’s desire for EBS leases to provide the licensee with an opportunity to adjust to changing circumstances, WCA continues to believe that this is something best left to individual contractual negotiations. Only through individualized negotiations can provisions be crafted that promise to meet the EBS licensee’s future needs, while providing sufficient certainty that the commercial lessee’s ability to attract investment is not hampered.

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highest and best use through commercial investment and that future educational needs are met.⁷ EBS licensees hold valuable spectrum, are generally pursued by multiple potential commercial suitors when they are ready to lease their EBS spectrum, and have at their disposal highly-effective counsel ready, willing and able to take advantage of the competitive marketplace to assure that EBS licensees realize their objectives during lease negotiations.⁸ The Diocese of Lafayette is one of the many EBS licensees on record as opposing the leasing restrictions that NIA and CTN seek.⁹ As the Diocese advised the Commission in opposing maximum lease

⁷ Indeed, it is the flexibility inherent in the *Secondary Markets* rules that convinced the Commission it could retain EBS eligibility requirements without undermining its goal of driving EBS spectrum to its highest and best use. As the *Report and Order* in this proceeding 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.” *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*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14196, 14226 (2004) [“*Report and Order*” or “*FNPRM*”] (citation omitted). 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:

[T]he 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.

Id. at 14226. Eliminate the flexibility inherent in the Commission’s current EBS leasing rules by imposing a maximum term limit, and the Commission will undercut its own rationale for retaining EBS eligibility restrictions that have undoubtedly contributed to the underutilized state of the spectrum.

⁸ The Pelcovits declaration includes an extensive discussion of the ability of EBS lessors to negotiate long-term agreements in a variety of settings. *See Pelcovits Declaration* at 23-27. Of course, as WCA has previously noted, different EBS licensees have different objectives during spectrum lease negotiations. Thus, when the Commission mandates that lease agreements include specific provisions, the Commission may not necessarily be benefiting a particular EBS licensee. However, such mandatory requirements do impose costs on the commercial operator – costs that preclude it from offering to the EBS licensee other benefits that the EBS licensee may actually desire.

⁹ *See, e.g. See, e.g.*, Letter from Father Jim Vlaum, President & CEO, Diocesan Television Operations, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 6, 2005); Letter from Father Edward Anthony, Franciscan Canticle, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 6, 2006); Letter from Kemp Harshman, President, Clarendon Foundation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 5, 2005); Letter from James W. Trietsch, Associate Chief Information Officer, Abilene Christian University, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 20, 2005); Letter from Alisa Jones, Supervisor of Instructional Support Services, School District of Clay County, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 5, 2006); Letter from Rayford Fontenont, Superintendent, Evangeline Parish Schools, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 20, 2005); Letter from Wesley Wells, Superintendent, Morrisonville C.U.S.D. #1, to Marlene H. Dortch, Secretary, FCC, WT

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terms, “[w]e know how to best utilize our spectrum, and craft our leases with commercial operators to do just that. As long as we continue to meet the educational needs of our students and remain in compliance with the EBS rules, we do not believe that a regulatory restriction on lease terms is necessary.”¹⁰ The marketplace works, and there is no need to tamper with the *Secondary Markets* policies here.

There is no basis in the record for the Commission to depart from its *Secondary Market* principles and impose additional limitations on the leasing of EBS spectrum. Even NIA and CTN have recognized that it is “in the public interest to ensure that investments will be made in support of wireless broadband deployments in the band” and thus have retreated from their earlier proposal to limit the term of EBS leases to just 15 years.¹¹ Unfortunately, the most recent proposals advanced by NIA and CTN still do not permit licensees and lessees the flexibility they need to address the fundamental problem here – unless EBS spectrum leases can provide the commercial lessee with assured access to spectrum for a sufficient length of time to generate an acceptable return on investment, investment capital will not flow to the 2.5 GHz band, commercial lessees will invest in other bands and reduce or eliminate the support that has proven essential for most EBS educational operations. The *Report and Order* in this proceeding recognized “that extending [the *Secondary Markets*] rules and policies to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services,” and there is no reason for the Commission to diminish the utility of EBS relative to other spectrum alternatives.¹²

NIA and CTN continue to assert – wrongly – that the Commission’s rules currently limit EBS lease terms to 15 years.¹³ In fact, no restriction currently exists on the maximum term of EBS leases. EBS leases are subject to the Commission’s general *Secondary Market* rules under Part 1, Subpart X and to special provisions set forth in Section 27.1214 of the Commission’s

Docket No. 03-66 (filed Dec. 29, 2005); Letter from Travis Roundcount, Superintendent, Patoka Community School District No. 100, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 12, 2005); Letter from Heritage Baptist Church & Christian Academy, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 3, 2006); Letter from Rudolph Geist, Counsel to the Hispanic Information and Telecommunications Network, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 27, 2006); Letter from David Kumm, VP for Finance, Operations & Planning/CFO, Concordia University, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 22, 2005); Letter from Richard Joyer, Assistant Superintendent, Pearsall Independent School District, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Jan. 10, 2006); Letter from Bob Schmoll, Executive VP and CFO, Dana College, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 03-66 (filed Dec. 30, 2005).

¹⁰ Letter from Gerald M. Dill, Director, Diocese of Lafayette, Office of Human Resources, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, at 1 (filed Dec. 21, 2005).

¹¹ NIA/CTN Letter at 1.

¹² *Report and Order*, 19 FCC Rcd at 14233.

¹³ See NIA/CTN Letter at 1.

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Rules.¹⁴ Although Section 27.1214 subjects EBS leases to a variety of “substantial use” requirements designed to assure that the EBS licensee retains capacity for educational use and actually utilizes that capacity, *nowhere in the Commission’s Rules is there any restriction on the maximum term of an EBS lease.*¹⁵ Indeed, the Commission has routinely granted applications for consent to *de facto* transfer leasing arrangements that have terms extending well beyond 15 years even since the *Secondary Markets* rules became applicable to EBS on January 10, 2005.¹⁶

Given the absence of any maximum EBS lease term in the current rules, EBS licensees and commercial system operators have enjoyed for the past fourteen months, the flexibility to craft long-term leasing arrangements that not only will promote investment in the band, but will enhance local educational activities through increased revenue, operational support and access to enhanced facilities. As such, the Commission should reject NIA’s suggestion (apparently one not advocated by CTN) that the Commission roll back the maximum term of lease agreements entered into since January 10, 2005 to just 25 years.¹⁷ It is not surprising that NIA has failed to cite to any legal authority that would permit such a retroactive modification of valid contracts, for none exists. The law is clear that if the Commission adopts a new maximum EBS term limit on reconsideration, it must grandfather existing leases entered into following the January 10,

¹⁴ See 47 C.F.R. §§ 1.9001 *et seq.*, 27.1214.

¹⁵ NIA and CTN have previously based their position on Paragraph 181 of the *Report and Order*. 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. *Report and Order*, 19 FCC Rcd at 14234. 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. 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 adopted by the *Report and Order* fully incorporate the discussion in Paragraph 181.

¹⁶ See, e.g., Application for Consent to *De Facto* Transfer Spectrum Lease from Orange Catholic Foundation to Nextwave Broadband Inc., File No. 0002434215 (granted Jan. 25, 2006); Application for Consent to *De Facto* Transfer Spectrum Lease from Morrisonville Consolidated Unit School District #1 to Unison Spectrum LLC, File No. 0002302105 (granted Sept. 29, 2005); Application for Consent to *De Facto* Transfer Spectrum Lease from South Fork School District #14 to Unison Spectrum LLC, File No. 0002307943 (granted Sept. 30, 2005); Application for Consent to *De Facto* Transfer Spectrum Lease from Hutsonville Community Unit S.D. #1 to Pegasus Broadband Communications, LLC, File No. 0002443522, (granted Feb. 1, 2006); Application for Consent to *De Facto* Transfer Spectrum Lease from Unified School District #101 to Xanadoo, LLC, File No. 0002488726, (granted March 16, 2006).

¹⁷ See NIA/CTN Letter at 2.

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2005 effective date of the prior restriction.¹⁸ Moreover, even were it lawful for the Commission to order a modification in the term of existing leases, it would be poor public policy to do so.

First, imposing a maximum lease term on agreements entered into after January 10, 2005 would have immediate, adverse financial consequences on EBS licensees. As NIA and CTN acknowledged earlier in this proceeding in an analogous situation, it would be fundamentally unfair to allow an EBS licensee that negotiated significant concessions to be performed by the lessee in the initial stages of the long-term lease, such as upfront payments of money or purchases of expensive equipment to be used by the EBS licensee, to nullify the lease agreement, retain the upfront consideration, and leave the commercial lessee without the consideration it bargained for.¹⁹ Indeed, were the Commission to retroactively limit lease terms, the Fifth Amendment just compensation requirement would require it to compensate lessees, perhaps by providing commercial lessees the option of either terminating the lease *ab initio* and receiving reimbursement for all up-front consideration paid, or of retaining the shorter lease and recouping a *pro rata* share of any up-front consideration it received.²⁰ So, for example, if an EBS licensee entered into a lease with a total term of 50 years and received \$2 million in up-front payments, the Fifth Amendment would dictate that if the NIA proposal were adopted and a retroactive 25 year term adopted, the lessee must be empowered to either terminate the lease and recover its \$2 million or accept the reduced term and recover \$1 million from the lessor. Suffice it to say that most EBS licensees would prefer to retain their benefits under long term agreements that they negotiated over the past fourteen months than disgorge consideration already received (and likely already spent).

¹⁸ The law is settled that, save for circumstances not present here, the Commission lacks authority to retroactively modify contracts such as EBS spectrum leases. *See, e.g., Georgetown University Hosp. et al. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988) (“[T]he [Administrative Procedure Act] requires that legislative rules be given future effect only.”). The Supreme Court has rejected the notion that the general authority conferred under the Communications Act of 1934 empowers the Commission to authorize nullification of a contract by a Commission licensee. *Regents v. Carroll*, 338 U.S. 586, 600-602 (1949) (“We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.”). In a similar situation, the Commission found that it would not be reasoned decision-making (or otherwise in the public interest) to retroactively void private long-term contracts that were entered into by parties in response to a change in Commission policy. *See Direct Access to the INTELSAT System*, Report and Order, 14 FCC Rcd 15703, 15754 (1999) (“The long-term contracts between AT&T, MCI WorldCom and Comsat represent the current agreements that resulted from [the FCC’s] 1988 decision to eliminate imposition of circuit distribution guidelines.... [The FCC] abandoned this policy in favor of long-term contracts between Comsat and U.S. carriers.... AT&T and MCI WorldCom entered into [the long-term contracts] on their own accord based on business judgment, their benefit in terms of the elimination of a Commission policy they found undesirable, and for the ability to obtain [benefits in exchange for a long-term commitment].... Therefore, we do not believe it would be reasoned decision-making to upset previous commitments freely entered into by all parties that [were] formed [on] the basis of a change in longstanding Commission policy.”).

¹⁹ *See Reply Comments of National ITFS Ass’n, Catholic Television Network and Wireless Communications Ass’n Int’l, Inc.*, WT Docket No. 03-66, at 69-70 (filed Sept. 8, 2003).

²⁰ U. S. Const., Amend. 5 (“nor shall private property be taken for public use, without just compensation”).

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Second, not only would such a ruling have a dramatic adverse impact on EBS spectrum leasing, but it would undermine *Secondary Markets* leasing activity in all bands. If the Commission can retroactively modify EBS leases, potential lessees of other spectrum and their investors inevitably will have second thoughts about building businesses predicated on access to leased spectrum. The success of the Commission's *Secondary Markets* policies depends upon providing participants with regulatory certainty.²¹ Raise doubts about the binding nature of those lease arrangements, and the Commission will provide one more reason for potential lessees to focus on spectrum that they can secure directly, without a lease.

In sum, the Commission's *Secondary Markets* proceeding was designed "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."²² NIA and CTN cannot deny that the EBS spectrum is underutilized today – indeed, most EBS channels across the country today are not being utilized to any material extent, pending the deployment of innovative broadband networks by commercial operators. As the Commission recognized in the *Report and Order* in this proceeding, "the ultimate success in recreating this band is . . . 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."²³ If the Commission adopts the NIA or CTN proposals for limiting EBS lease terms, investment in the band will be reduced and the EBS spectrum will continue to be underutilized to the detriment of potential commercial and educational users.

²¹ *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, 20607 (2003) [*"Secondary Markets Order"*]. See also *Ryder Communications, Inc. v. AT&T Corp.*, 18 FCC Rcd 13603, 13613-14 (2003) (affirming that the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts.).

²² *Secondary Markets Order*, 18 FCC Rcd at 20620-21 (2003) (citation omitted).

²³ *FNPRM*, 19 FCC Rcd at 14301.

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Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand
Paul J. Sinderbrand

Counsel to the Wireless Communications
Association International, Inc.

cc: Fred Campbell
John Giusti
Barry Ohlson
Aaron Goldberger
Catherine Seidel
Peter Corea
Walter Strack
Joel Taubenblatt
John Schauble