



April 3, 2006

*Via Electronic Filing*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: **Ex Parte Notice**

***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, CC Docket No. 03-66***

Dear Ms. Dortch:

This ex parte notice is filed pursuant to Section 1.1206(b)(2) of the Commission's rules. On Friday, March 31, 2006, I met with Commissioner Tate and her legal advisor Dana Shaffer, together with our counsel, Jennifer Richter of Patton Boggs, LLP, to encourage the Commission to refrain from rushing to adopt either lease term limitations for Educational Broadband Service ("EBS") spectrum, or rules that would apply such limitations retroactively to leases that are already Commission-approved.

During the course of our meeting, we discussed the following points: (1) Secondary markets leasing rules for EBS spectrum work, and the Commission should not adopt rules that introduce uncertainty; (2) Allowing flexible, secondary markets leasing for EBS spectrum is not equivalent to a sale or a reallocation of the spectrum for commercial purposes; (3) There has been no 15 year lease term limitation since January 10, 2005, when secondary markets leasing rules became effective for EBS spectrum, and references to a 15 year lease term in the *2004 Rebanding Order*<sup>1</sup> can only be read as unintended dicta; and (4) It would be unconstitutional to impose new EBS lease term limitations on previously approved EBS lease agreements.

**1. Secondary Markets Leasing Rules for EBS Spectrum Work; the Commission Should Not Adopt Rules that Introduce Uncertainty.**

As we discussed with Commissioner Tate and Ms. Shaffer, dozens of EBS lease agreements were entered into in 2005 that provide substantial benefits for EBS licensees in reliance on secondary markets rules and policies. Given that the secondary markets leasing system adopted by the Commission in the *2004*

---

<sup>1</sup> *A 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; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; A amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service; A amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; A amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14164 (2004) (hereinafter, "2004 Rebanding Order").

*Rebanding Order* was working and was encouraging investment in EBS spectrum, the Commission should seriously consider whether any changes to the system are necessary.

At a minimum, the Commission should avoid taking action on the EBS lease term issue while there remain substantial differences of opinion and myriad proposed approaches to addressing the EBS leasing system. Above all, after the significant progress the Commission made to streamline and harmonize the EBS and Broadband Radio Service (“BRS”) rules with other wireless services, the Commission should not impose rules that will introduce more uncertainty. Specifically, any effort to adopt the language proposed by the Catholic Television Network (“CTN”), that would require “reviewing” EBS leases every five years, beginning in the 15<sup>th</sup> year, would, as George Mason University Instructional Foundation, Inc. put it, result in uncertainty and “steer potential investment from the EBS band . . . .”<sup>2</sup>

## **2. Allowing Flexible, Secondary Markets Leasing of EBS Spectrum is Not Equivalent to Authorizing the Sale or Reallocation of the Spectrum for Commercial Purposes.**

As we discussed with Commissioner Tate and Ms. Shaffer, permitting EBS licensees to take full advantage of flexible secondary markets leasing rules does not diminish the educational purpose or educational characteristics of the spectrum and will not, as the National ITFS Association (“NIA”) or CTN suggests, “transform the leases into outright purchases of spectrum for commercial purposes.” Suggestions that this is the genuine reason why the Commission must impose lease term limitations should be viewed as an unnecessary attempt to reopen the already-decided EBS eligibility issue. In the *2004 Rebanding Order*, the Commission considered but rejected proposals to open eligibility for EBS spectrum to commercial interests. There is no need to reconsider the issue now. Only educators can be licensed on EBS spectrum and only educators can decide whether and when they will retain EBS spectrum for their own educational use or lease a portion of it for commercial use and reap the corresponding financial and educational benefits.

As the *Secondary Markets Orders* make clear,<sup>3</sup> the Commission does not consider long term *de facto* spectrum leases, as “outright purchases” of spectrum in any service,<sup>4</sup> and it cannot view the issue differently here. If the Commission takes the position that long term *de facto* spectrum leases for EBS spectrum is the equivalent of a sale of the spectrum, it will call into question the validity and legality of all secondary markets leasing as a transfer of *de jure*, and not just *de facto* control.

The EBS leasing system created by the Commission in the *2004 Rebanding Order* was entirely correct. The Commission decided to both maintain restrictive educational eligibility requirements for EBS spectrum and allow for flexible, secondary markets leasing, which created an enduring system that affords EBS licensees long term educational and financial benefits. EBS licensees enter into lease arrangements to obtain substantial benefits that they would otherwise not obtain to further their educational mission. No one

---

<sup>2</sup> See, *Written Ex Parte Presentation*, George Mason University Instructional Foundation, Inc. (March 30, 2006).

<sup>3</sup> *Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets*, Policy Statement, 15 FCC Rcd 24178 (2000), *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 24203 (2000) (hereinafter, “2000 NPRM”), *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003), *Erratum*, 18 FCC Rcd 24817 (2003), *Second Report and Order*, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) (hereinafter, “*Second Report and Order*”; collectively, “*Secondary Markets Orders*”).

<sup>4</sup> *Second Report and Order*, ¶ 15. In summarizing the 2000 NPRM, the Commission stated that “the NPRM proposed to ensure that [Wireless Radio Service] licensees could enter into a wide variety of spectrum leasing arrangements with third parties, from short to long term, in small or large amounts, so as to make spectrum more easily available to additional spectrum users and for a range of uses, and to do so without the need to permanently transfer their licenses to those users.” *Id.*

compels a licensee to enter into a lease agreement; each educator decides whether the opportunities presented in a spectrum lease are greater than those of other alternative uses. The EBS leasing system adopted by the Commission in the *2004 Rebanding Order*, together with the corresponding value and benefits for educators, will be severely compromised if the Commission imposes arbitrary lease term limitations, rejects flexible secondary markets leasing rules for EBS, and fails to provide leasing parity between EBS spectrum and other spectrum.

### **3. There Has Been No 15 Year Lease Term Limitation Since January 10, 2005 When Secondary Markets Leasing Rules Became Effective for EBS spectrum; References to a 15 Year Lease Term in the *2004 Rebanding Order* Can Only be Read as Unintended Dicta.**

NIA/CTN incorrectly characterize FCC rules as containing a “continued” 15 year lease term limitation. The current Part 27 rules do not restrict EBS leases to 15 years. The 15 year lease term limitation was adopted by the Commission in 1998,<sup>5</sup> and a rule referencing the 15 year limitation was codified in Section 74.931(e) of the rules.<sup>6</sup> This rule was deleted in 2004 in connection with the *2004 Rebanding Order*. Clearly, if a 15 year lease term limitation continued to apply, it would have been necessary for the staff to incorporate Section 74.931(e) into the new Part 27 rules. The rule was not transferred into the continuing rules for EBS and BRS. The Commission provided, instead, that secondary markets leasing rules and policies would apply to EBS spectrum.<sup>7</sup> The new rule, applying secondary markets treatment to EBS and BRS leases, is contained in Section 27.1214(d) of the Commission’s rules. There is no mention of a 15 year lease term limitation in any portion of the currently applicable rules; such a reference was present in the former Part 74 rules.

As we discussed with Commissioner Tate and Ms. Shaffer, there is, admittedly, confusing dicta in the *2004 Rebanding Order* in which the Commission quotes comments filed by NIA/CTN that address historical “substantive use” educational requirements.<sup>8</sup> The quotation contains a number of erroneous references to old EBS leasing rules that are now inapplicable in long term *de facto* spectrum leases, including lease term limitations of 15 years, “command and control” responsibilities of EBS licensees for station construction and operation, and the requirement that EBS licensees file their own modification applications. None of the foregoing are “substantive use” requirements, and all of the foregoing are inapplicable under secondary markets leasing rules. The dicta, a single reference to a 15 year lease term, is notably preceded and followed by four paragraphs in the *2004 Rebanding Order* in which the Commission discusses and

---

<sup>5</sup> *A 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 (1998) (hereinafter, “*1998 Two-Way Report and Order*”). When the Commission extended EBS lease terms from 10 years to 15 years, educators argued for maintaining 10 year lease limits, but the Commission rejected these arguments and recognized the autonomy and independence of ITFS licensees. The Commission stated, “ITFS licensees concerned by lease limits longer than 10 years are free to negotiate for lease limits of 10 years or less.” *1998 Two-Way Report and Order*, ¶ 134. Such reasoning remains true and is deserving of Commission consideration today.

<sup>6</sup> Section 74.931(e) provided: “ITFS excess capacity leases entered into prior to March 31, 1997, which contain a provision for automatic renewal which would be effective after March 31, 1997, are exempt for the duration of said lease from compliance with subsequently adopted Commission rules. However, the total term of such applicable lease may not exceed fifteen years.” The foregoing rule was adopted in connection with the *1998 Two-Way Report and Order*, which provided that the total term for EBS leases entered into after March 31, 1997 may not exceed 15 years. March 31, 1997 was the date the petition for rulemaking, that culminated in the *1998 Two-Way Report and Order*, was placed on public notice.

<sup>7</sup> *2004 Rebanding Order*, ¶¶ 178-181.

<sup>8</sup> *2004 Rebanding Order*, ¶ 181.

unequivocally extends secondary markets leasing rules to EBS/BRS spectrum in order to establish regulatory parity with other services.

#### **4. It Would Be Unconstitutional to Impose New EBS Lease Term Limitations on Previously Approved EBS Lease Agreements.**

In connection with the *2004 Rebanding Order*, the Commission adopted secondary markets leasing rules for EBS spectrum that became effective on January 10, 2005.<sup>9</sup> It did not, as part of the *2004 Rebanding Order*, or the attached *Further Notice of Proposed Rulemaking*, propose reinstating a 15 year lease term or adopting new lease terms of 25, 30, 35 years or beyond. The Commission also did not propose retroactive application of new lease term limitations to leases that have already been approved. To the contrary, the Commission decided to grandfather existing leasing arrangements. In the *2004 Rebanding Order*, the Commission specifically agreed with NIA/CTN that existing lease agreements should be grandfathered: “We also agree with commenters that existing leases entered into under our existing ITFS leasing framework should be grandfathered, so long as the leases remain in effect and are not materially changed. We agree with NIA/CTN that it would be unduly burdensome to force licensees that wish to have their existing leases remain in effect to renegotiate those leases to comply with our secondary markets policies and rules.”<sup>10</sup>

As we discussed with Commissioner Tate and Ms. Shaffer, NIA now suggests that the Commission should require all previously approved lease agreements to “come into conformance” with a new EBS lease term limit, if one is adopted. Such a result would be contrary to the current Part 27 rules and would be an unconstitutional retroactive application of new rules to leasing arrangements that were entered into in reliance on the rules and are Commission-approved. Section 27.1214(d) grandfathers any leases entered into prior to January 10, 2005 that complied with the former Part 74 leasing rules. Such leases may continue in effect notwithstanding any inconsistency with new rules and may be renewed in accordance with their terms. Any leases entered into after January 10, 2005 must comply with the new Part 1 and Part 27 rules, and are approved according to the Commission’s secondary markets rules and procedures.

To the extent the Commission determines that it has the authority to reinstate a 15 year EBS lease term limit, or adopt a new lease term limit of, for example, 40 or 50 years, it is imperative that this limit is imposed prospectively, only. New rules must not interfere with existing leases that were entered into in good faith and in compliance with the rules. Parties to these agreements, particularly operators who have already begun performing their lease obligations, including making significant upfront payments in reliance on long term *de facto* leases, must not have their settled and justifiable expectations upset.

As we discussed with Commissioner Tate and Ms. Shaffer, NextWave is party to two EBS leases that were entered into in compliance with preexisting rules and were approved by the Commission. One lease was entered into prior to January 10, 2005. The agreement was reviewed and approved in writing by Commission staff as compliant with all Part 74 rules. The other agreement was entered into after January 10, 2005. It was approved by the Commission after filing a form 603-T application (a copy of this application was provided to Commissioner Tate and Ms. Shaffer and is attached to this filing). The exhibits to this application specifically note that the agreement is in compliance with secondary markets rules and policies, and exceeds 15 years. The exhibit also notes that the 15 year lease term limitation is no longer applicable. In full view of this disclosure, the Commission granted the lease application. In reliance on Commission approval of both leases, NextWave made substantial lease payments to the licensees.

---

<sup>9</sup> See 47 C.F.R. §27.1214(d) and ¶¶ 178-181 of the *2004 Rebanding Order*.

<sup>10</sup> *2004 Rebanding Order*, ¶ 180.

As we mentioned to Commissioner Tate, there is an extensive body of case law regarding impermissible retroactive application of new rules or laws, and detrimental reliance on prior agency policies.<sup>11</sup> Requiring all previously approved EBS lease agreements to “come into conformance” with a new lease term limit, as NIA suggests, would be an impermissible and unconstitutional retroactive application of new rules to completed transactions that complied with preexisting law and were approved by the Commission. Such a result would upset the settled expectations of those relying on the preexisting rules regarding permissible EBS lease terms and would work a manifest injustice on such parties who will suffer under new leasing requirements and new leasing duties with regard to transactions that are already complete and pursuant to which substantial sums of money have already changed hands in reliance on longer lease terms that were allowed under existing rules.

## 5. Conclusion.

In summary, the secondary markets leasing rules for EBS spectrum became effective on January 10, 2005 and the rules work -- dozens of EBS leases were executed in 2005. Allowing secondary markets leasing for EBS spectrum is not the equivalent of selling or reallocating the spectrum -- any such conclusion can only raise concerns that all long term *de facto* spectrum leases transfer *de jure* control of the spectrum. References to a 15 year lease term in the 2004 *Rebanding Order* can only be read as unintended dicta. Finally, as the Commission is already aware, it would be unconstitutional to impose new EBS lease term limitations on previously approved EBS lease agreements.

Pursuant to Section 1.1206(b) of the Commission’s rules, an electronic copy of this letter is being filed with the Office of the Secretary. Please contact the undersigned if there are any questions or comments associated with this notice.

Respectfully submitted,

/s/ George Alex  
George Alex, Chief Financial Officer  
NextWave Broadband Inc.

---

<sup>11</sup> See *Bowen v Georgetown University Hospital*, 488 U.S. 204, 224 (1998). See also *Verizon Telephone Co. v FCC*, 269 F.3d 1098 (2001) (“[T]he governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’”); *Id.* at 1109 (citing *Williams Natural Gas Co. v FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Moreover, retroactivity will be denied “when to apply the new rule to past conduct or to prior events would work a manifest injustice.” *Id.* (citing *Clark-Coulitz Joint Operating Agency v FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)). To determine whether a manifest injustice will result from the retroactive application of a statute, a court must balance the disappointment of private expectations caused by retroactive application against the public interest in enforcement of the statute. *Demars v First Serv Bank for Sav.*, 907 F. 2d 1237, 1240 (1<sup>st</sup> Cir. 1990) (citing *New England Power v United States*, 693 F. 2d 239, 245 (1<sup>st</sup> Cir. 1982)). The D.C. Circuit Court notes that it has not been entirely consistent in enunciating standards to determine when to deny retroactive effect in cases involving “new application of existing law, clarifications and additions” resulting from adjudicatory actions. Today, the court has moved from multi-pronged balancing tests for impermissible retroactivity in favor of applying basic notions of equity and fairness. See *Cassell v FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (declining to “plow laboriously” through the *Clark-Coulitz* factors, which “boil down to a question of concerns grounded in notions of equity and fairness”); *PSCC v FERC*, 91 F. 3d 1478, 1490 (concluding that “the apparent lack of detrimental reliance... is the crucial point [supporting retroactivity]”). In *Chadmoore Communications, Inc. v FCC*, the court stated that the test it commonly uses to determine whether a rule has retroactive effect is if “it does not impair [ ] rights a party possessed when it acted, increase [ ] a party’s liability for past conduct, or impose [ ] new duties with respect to transactions already completed.” *Chadmoore*, 113 F. 2d 235, 240 (D.C. Cir. 1997) (citing *DIRE CTV, Inc v FCC*, 110 F. 3d 816, 825-26 (D. C. Cir. 1997) (quoting *Landgraf v USI Film Prods.*, 511 U.S. 244, 280 (1994)).

## Spectrum Leasing

**File Number** 0002434215  
**Application Purpose** LL - Spectrum Leasing

Filing type:

Is this filing for a De Facto Transfer Lease? Yes.

Filing purpose:

Is this filing for a new Lease? Yes.

### Fees and Waivers

Is the applicant exempt from FCC application fees? Yes.

Does this filing include a request for waiver of the Commission's rules (other than requests for fee waivers)? No.

If 'Yes', attach an exhibit specifying the rule section(s) for which a waiver is being requested and including a justification for the waiver request.

If attaching a waiver request to this filing, enter the number of rule sections involved:

### Licensee Name

#### Licensee Type & Name

Type Corporation

Individual Name

Entity Name The Orange Catholic Foundation

### Licensee Address (\* indicates required fields)

Attention To Msgr. Lawrence Baird  
Entry of PO Box and Address is permissible

P.O.Box \*

Street Address \* 2811 East Villa Real Drive

City \* Orange

State \* California

ZIP Code \* 92867

Phone \* (714)282-3021

Fax (714)282-3136

Email

### Contact Name

Individual Name Edwin N Lavergne Esq

Company Name Fish & Richardson P.C.

### Contact Address

P.O.Box

Street Address 1425 K Street, NW, 11th Floor

City Washington

State District of Columbia

ZIP Code 20005

Phone (202)626-6359  
Fax (202)783-2331  
Email lavergne@fr.com

**Attachment**

603-T (Spectrum Leasing)	<u>Exhibit 2 Response to Schedule B Questions 3(a) &amp; 3(b)</u>	01/05/2006
603-T (Spectrum Leasing)	<u>Exhibit 1 Description of Transaction &amp; Public Interest Stmt</u>	01/05/2006
603-T (Spectrum Leasing)	<u>Schedule B</u>	01/05/2006
603-T (Spectrum Leasing)	<u>Form 603-T Main Form</u>	01/05/2006

**Call Signs Associated with FRN****Selected Licenses :**

WHG396

**FCC Wireless Telecommunications Bureau  
Application or Notification for Spectrum Leasing Arrangement**

**Type and Purpose of Filing**

Select one of the following from questions 1-3:

1)  Is this filing for a Spectrum Manager Lease?

2)  Is this filing for a *De Facto* Transfer Lease?

3)  Is this filing for an Amendment or Withdrawal of a pending Application/Notification?

Select one of the following from questions 4-8:

4)  Is this filing for a new Lease?

5)  Is this filing for a new Sublease?

6)  Is this filing for a revision of an existing Lease/Sublease?

7)  Is this filing for an assignment of a Lease/Sublease?

8)  Is this filing for a transfer of control of the Lessee/Sublessee?

**General Information**

9) If this request is for an Amendment or Withdrawal, enter the File Number of the pending Application/Notification currently on file with the FCC.

File Number:

10) If this Application/Notification is part of a series of Applications/Notifications involving the Lease or Sublease of other spectrum held by the Licensee, affiliates of the Licensee (e.g., parents, subsidiaries, or commonly-controlled entities), or third parties that are not included on this form and for which Commission approval or notification is required; enter the File Number of the lead Application/Notification.

File Number:

If this Application/Notification is part of a series of Applications/Notifications, provide a list of the Applications/Notifications in an exhibit to the lead Application/Notification.

11) Are attachments being filed with this Application/Notification?

Yes  No

**Fees and Waivers**

12a) Is the applicant exempt from FCC application fees?	<input checked="" type="radio"/> Yes <input type="radio"/> No
12b) Is a waiver/deferral of the FCC application fees being requested? If 'Y', attach to this filing a date-stamped copy of the request for waiver/deferral.	<input type="radio"/> Yes <input type="radio"/> No
13a) Does this filing include a request for waiver of the Commission's rules (other than requests for fee waivers?) If 'Y', attach an exhibit specifying the rule section(s) for which a waiver is being requested and including a justification for the waiver request.	<input type="radio"/> Yes <input type="radio"/> No
13b) If the answer to 13a is 'Y', enter the number of rule sections involved: <input type="text"/>	

**Bidding Credits, Installment Payment Plans, or Closed Bidding**

14a) Does this Application/Notification involve the Lease/Sublease of spectrum associated with any licenses that were originally awarded with bidding credits within the last five years? (If response is 'Y' complete the applicable questions on Schedule A.)	<input type="radio"/> Yes <input type="radio"/> No
14b) Does this Application/Notification involve the Lease/Sublease of spectrum associated with any licenses that were originally awarded subject to the Commission's installment payment program? (If response is 'Y', complete the applicable questions on Schedule A.)	<input type="radio"/> Yes <input type="radio"/> No
14c) Does this Application/Notification involve the Lease/Sublease of spectrum associated with any licenses that were granted pursuant to closed bidding within the last five years? (If response is 'Y', complete the applicable questions on Schedule A.)	<input type="radio"/> Yes <input type="radio"/> No

**Ownership Disclosure Information**

15) FCC Form 602, Ownership Disclosure Form (Select One)

<input checked="" type="checkbox"/> Lessee/Sublessee has a current FCC Form 602 on file with the Commission. FRN under which the FCC Form 602 was filed: <input type="text" value="0012613519"/> Name under which the FCC Form 602 was filed: <input type="text" value="NextWave Broadband Inc."/> Date the FCC Form 602 was filed: <input type="text" value="10"/> / <input type="text" value="07"/> / <input type="text" value="2005"/> (MM/DD/YYYY)
<input type="checkbox"/> Lessee/Sublessee is filing a new or updated FCC Form 602 concurrently with this Application/Notification. FRN under which the FCC Form 602 will be filed: <input type="text"/> Name under which the FCC Form 602 will be filed: <input type="text"/>
<input type="checkbox"/> Lessee/Sublessee is not required to file a FCC Form 602.

**Licensee Information**

16) Licensee is a(n): <input checked="" type="checkbox"/> Individual Corporation <input type="checkbox"/> Unincorporated Association <input type="checkbox"/> Trust <input type="checkbox"/> Government Entity <input type="checkbox"/> Joint Venture <small>Corporation    Limited Liability Corporation    Partnership    Consortium</small>					
17) FCC Registration Number (FRN): <input type="text" value="0008309395"/>					
18) First Name (if individual): <input type="text"/>		MI: <input type="text"/>	Last Name: <input type="text"/>		Suffix: <input type="text"/>
19) Entity Name (if not an individual): <input type="text" value="The Orange Catholic Foundation"/>					
20) Attention To: <input type="text" value="Msgr. Lawrence Baird"/>					
21) P.O. Box: <input type="text"/>		And /Or	22) Street Address: <input type="text" value="2811 East Villa Real Drive"/>		
23) City: <input type="text" value="Orange"/>		24) State: <input type="text" value="CA"/>		25) Zip Code: <input type="text" value="92867"/>	
26) Telephone Number: ( <input type="text" value="714"/> ) <input type="text" value="2823021"/>			27) FAX Number: ( <input type="text" value="714"/> ) <input type="text" value="2823136"/>		
28) E-Mail Address: <input type="text"/>					

**29) Race, Ethnicity, and Gender of Licensee (Optional):**

<b>Race:</b>	<input type="checkbox"/> American Indian or Alaska Native	<input type="checkbox"/> Asian	<input type="checkbox"/> Black or African American
	<input type="checkbox"/> Native Hawaiian or Other Pacific Islander	<input type="checkbox"/> White	
<b>Ethnicity:</b>	<input type="checkbox"/> Hispanic or Latino <input type="checkbox"/> Not Hispanic or Latin		
<b>Gender:</b>	<input type="checkbox"/> Female <input type="checkbox"/> Male		

**Name of Licensee Contact Representative (if other than Licensee)**

30) First Name: <input type="text" value="Edwin"/>		MI: <input type="text" value="N"/>	Last Name: <input type="text" value="Lavergne"/>		Suffix: <input type="text" value="Esq"/>
31) Company Name: <input type="text" value="Fish &amp; Richardson P.C."/>					
32) P.O. Box: <input type="text"/>		And /Or	33) Street Address: <input type="text" value="1425 K Street, N.W., Suite 1100"/>		
34) City: <input type="text" value="Washington"/>		35) State: <input type="text" value="DC"/>		36) Zip Code: <input type="text" value="20005"/>	
37) Telephone Number: ( <input type="text" value="202"/> ) <input type="text" value="6266359"/>			38) FAX Number: ( <input type="text" value="202"/> ) <input type="text" value="7832331"/>		
39) E-Mail Address: <input type="text" value="ENL@fr.com"/>					

**Lessee Information**

40) Lessee is a(n): <input checked="" type="checkbox"/> Individual Corporation					<input type="checkbox"/> Unincorporated Association <input type="checkbox"/> Limited Liability Corporation		<input type="checkbox"/> Trust <input type="checkbox"/> Partnership		<input type="checkbox"/> Government Entity <input type="checkbox"/> Consortium		<input type="checkbox"/> Joint Venture	
41) FCC Registration Number (FRN): 0012613519												
42) First Name (if individual):				MI: <input type="checkbox"/>	Last Name:				Suffix: <input type="checkbox"/>			
43) Entity Name (if other than individual): NextWave Broadband Inc.												
44) Attention To: Linda Woolcott												
45) P.O. Box:			And /Or	46) Street Address: 11500 S. Eastern Avenue, Suite 150								
47) City: Henderson				48) State: NV				49) Zip Code: 89052				
50) Telephone Number: (702) 9520353						51) FAX Number: (702) 9520330						
52) E-Mail Address: lwoolcott@nextwavetel.com												

**Name of Lessee Contact Representative (if other than Lessee)**

53) First Name: Linda				MI: <input type="checkbox"/>	Last Name: Woolcott				Suffix: <input type="checkbox"/>		
54) Company Name: NextWave Broadband Inc.											
55) P.O. Box:			And /Or	56) Street Address: 11500 S. Eastern Avenue, Suite 150							
57) City: Henderson				58) State: NV				59) Zip Code: 89052			
60) Telephone Number: (702) 9520353						61) FAX Number: (702) 9520330					
62) E-Mail Address: lwoolcott@nextwavetel.com											

### Alien Ownership Questions

- 132) Is the Lessee/Sublessee a foreign government or the representative of any foreign government?  Yes  No
- 133) Is the Lessee/Sublessee an alien or the representative of an alien?  Yes  No
- 134) Is the Lessee/Sublessee a corporation organized under the laws of a foreign government?  Yes  No
- 135) Is the Lessee/Sublessee a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?  Yes  No
- 136) Is the Lessee/Sublessee directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country?  Yes  No
- If 'Y', attach an exhibit explaining the nature and extent of alien or foreign ownership.
- 137) If the answer to 136 is 'Y', has the Lessee/Sublessee received a ruling(s) under Section 310(b)(4) of the Communications Act with respect to the same radio service(s) as the services(s) involved in this Application/Notification?  Yes  No
- If 'Y', provide in an exhibit the citation(s) of the declaratory ruling(s) received by the Lessee/Sublessee (i.e., DA or FCC Number, FCC Record citation when available, and release date).
- If 'N', attach to this filing a date-stamped copy of a request for a foreign ownership ruling pursuant to Section 310(b)(4) of the Communications Act.

### Basic Qualification Questions

- 138) Has the Lessee/Sublessee/Transferee or any party to this Application/Notification had any FCC station authorization, license, Lease, Sublease, or construction permit revoked or had any Application/Notification for an initial modification or renewal of FCC station authorization, license, Lease, Sublease, or construction permit denied by the Commission?  Yes  No
- 139) Has the Lessee/Sublessee/Transferee or any party to directly or indirectly controlling the Lessee/Sublessee/Transferee ever been convicted of a felony by any state or federal court?  Yes  No
- If 'Y', attach an exhibit explaining the circumstances.
- 140) Has any court finally adjudged the Lessee/Sublessee/Transferee or any party directly or indirectly controlling the Lessee/Sublessee/Transferee guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition?  Yes  No
- If 'Y', attach an exhibit explaining the circumstances.
- 141) Is the Lessee/Sublessee/Transferee or any party directly or indirectly controlling the Lessee/Sublessee/Transferee currently a party in any pending matter referred to in the preceding two items?  Yes  No
- If 'Y', attach an exhibit explaining the circumstances.

The following is to be completed in all Applications/Notifications relating to Leasing

**Licensee Certification Statements**

- 1) The Licensee agrees that the Lease/Sublease is not an assignment, sale, or transfer of the license itself.
- 2) The Licensee certifies that it will not consent to assignment of the Lease except to the extent such assignment complies with the Commission's rules and regulations.

The Licensee certifies that all of its statements made in this Application/Notification and in the schedules, exhibits, attachments, or documents incorporated by reference are material, are part of this Application/Notification, and are true, complete, correct, and made in good faith.

Type or Printed Name of Party Authorized to Sign:

142) First Name: <u>Msg. Lawrence</u>	MI: <u></u>	Last Name: <u>Baird</u>	Suffix: <u></u>
143) Title: <u>Vice President</u>			
Signature: <u><i>Lawrence J. Baird</i></u>		144) Date: <u><i>4 January 2006</i></u>	
WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).			

**Lessee/Sublessee Certification Statements**

1)	The Lessee/Sublessee agrees that the Lease/Sublease is not an assignment, sale, or transfer of the license itself.
2)	The Lessee/Sublessee acknowledges that it is required to comply with the Commission's rules and regulations and other applicable law at all times, and if the Lessee/Sublessee fails to so comply, the Lease/Sublease may be revoked, cancelled, or terminated by either the licensee or the Commission.
3)	The Lessee/Sublessee certifies that neither it nor any other party to the Application/Notification is subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862, because of a conviction for possession or distribution of a controlled substance. (See Section 1.2002(b) of the rules, 47 CFR § 1.2002(b), for the definition of "party to the application" as used in this certification.)
4)	The Lessee/Sublessee hereby accepts Commission oversight and enforcement consistent with the license authorization. The Lessee/Sublessee acknowledges that it must cooperate fully with any investigation or inquiry conducted either by the Commission or the Licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and suspend operations at the direction of the Commission or the Licensee and to the extent that such suspension of operation would be consistent with the applicable Commission policies.
5)	The Lessee/Sublessee acknowledges that in the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked, cancelled, terminated, or otherwise ceases to be in effect, the Lessee/Sublessee will have no continuing authority to use the leased spectrum and will be required to terminate its operations no later than the date on which the Licensee ceases to have any authority to operate under the license, unless otherwise authorized by the Commission.
6)	The Lessee/Sublessee agrees the Lease/Sublease shall not be assigned to any entity that is not eligible or qualified to enter into a spectrum leasing arrangement under the Commission's rules and regulations.
7)	The Lessee/Sublessee waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by spectrum lease or otherwise.
8)	If the Lease/Sublease involves spectrum in the Cellular Radiotelephone Service in Rural Statistical Areas (RSAs), the Lessee/Sublessee certifies that it does not hold more than 5 percent ownership interest in the other cellular license(s) within the same RSA.
The Lessee/Sublessee certifies that all of its statements made in this Application/Notification and in the schedules, exhibits, attachments, or documents incorporated by reference are material, are part of this Application/Notification, and are true, complete, correct, and made in good faith.	

**Lessee**

- \* For a Lease Application/Notification, the Lessee must certify to statements 1-8.
- \* For a Sublease Application/Notification, the Lessee must certify to statements 1, 6, and 8 only.

**Type or Printed Name of Party Authorized to Sign:**

145) First Name:	Linda	MI:		Last Name:	Woolcott	Suffix:	
146) Title:	VP, Sr. Counsel for Business Operations						
Signature:	<i>Linda M. Woolcott</i>				147) Date:	1-4-06	
WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).							

**Sublessee**

- \* For a Sublease Application/Notification, the Sublessee must certify to statements 1-8.

**Type or Printed Name of Party Authorized to Sign:**

148) First Name:		MI:		Last Name:		Suffix:	
149) Title:							
Signature:					150) Date:		
WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503).							



Schedule for New Lease

1) Call Sign: WHG396 (Complete separate schedule for each Call Sign)

Type of Lease

2a) If a Spectrum Manager Lease, is the Lease term for more than one year or one year or less?  
 More than one year  One year or less

2b) If a De Facto Transfer Lease, is the Lease Long-Term or Short-Term (no longer than 180 days, renewable up to 360 days)?  
 Long-Term  Short-Term

2c) If a Long-Term De Facto Transfer Lease, is this a 'conversion' of a Short-Term De Facto Transfer Lease to a Long-Term De Facto Transfer Lease?  Yes  No

2d) If the answer to Item 2c is 'N', have the Licensee and Lessee entered into any Short-Term De Facto Transfer Lease(s) with regard to any spectrum covered by the License or within the same geographic area?  Yes  No

Term of Lease

3a) Provide the date the Lease is due to commence: 01 / 25 / 2006 (MM/DD/YYYY)

3b) Provide the date the Lease is due to expire: 08 / 17 / 2015 (MM/DD/YYYY)

Spectrum Leased (For Geographically-Licensed Services)

4) If the Lease encompasses only a portion of the licensed spectrum or licensed geographic area, check here and complete Schedule F and, if applicable, Schedule G.

CMRS Spectrum

5a) If this is a Spectrum Manager or Long-Term De Facto Transfer Lease, does the Lease involve Cellular Radiotelephone, broadband PCS, or Specialized Mobile Radio (SMR) spectrum (referred to for purposes of this question as CMRS spectrum)?  Yes  No

If the answer to Item 5a is 'Y', complete the following two questions.

5b) Does the Lessee hold direct or indirect interests (of 10 percent or more) in any entity that already has access to 10 MHz or more of CMRS spectrum (through License(s), Lease(s), or Sublease(s)) in the same geographic area?  Yes  No

5c) Does the Lease reduce the number of entities providing CMRS in the affected market(s)?  Yes  No

Regulatory Status

6a) The Lessee will provide radio offerings on the following basis (enter all that apply):  
 Common Carrier  Non-common Carrier  Private, internal communications  Broadcast Services

6b) Does the regulatory status indicated in response to Item 6a differ from the regulatory status authorized with regard to the Licensee?  Yes  No

7a) The Lessee will provide the following type(s) of radio service (enter all that apply):  
 Fixed  Mobile  Radiolocation  Satellite (sound)  Broadcast services

7b) Does the type(s) of radio service indicated in response to Item 7a differ from the type(s) of radio service authorized to be provided by the Licensee?  Yes  No

8a) Does the Lessee propose to provide interconnected service?  Yes  No

8b) Does the response to Item 8a differ from whether the Licensee provides interconnected service?  Yes  No

### Description of Transaction and Public Interest Statement

As set forth in the foregoing FCC Form 603-T, the Orange Catholic Foundation (“Orange”) and NextWave Broadband Inc. (“NextWave”) (collectively the “Parties”) are parties to a Lease Agreement (“Agreement”) executed on December 19, 2005, for the long term *de facto* lease of spectrum on Educational Broadband Service (“EBS”) Station WHG396 (the “Station”). While the Agreement is effective as of its execution, the long term *de facto* lease of spectrum thereunder requires Commission consent in accordance with applicable rules and policies.<sup>1</sup> Consistent with the Agreement and Commission rules, NextWave, whose qualifications are a matter of Commission record,<sup>2</sup> will have *de facto* control of the leased spectrum and Orange will retain *de jure* control of the leased spectrum. Orange also retains complete control over a portion of the spectrum for educational purposes as required by Section 27.1214 of Commission rules.<sup>3</sup>

Approval of the long term *de facto* leasing arrangement contained in the Agreement, which conforms with secondary markets rules and polices,<sup>4</sup> is in the public interest. Secondary markets leasing arrangements like the Agreement rely on the marketplace “to expand the scope of available wireless services and devices,”<sup>5</sup> and are in the public interest because they further important Commission policy initiatives, such as efforts “to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services, and enable development of additional and innovative services in rural areas.”<sup>6</sup> The Agreement between Orange

---

<sup>1</sup> See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd. 14165, 14233 (2004) (“Report and Order”). The Report and Order was published in the Federal Register on December 9, 2004 and became effective on January 10, 2005. Thereafter, the Commission’s secondary markets rules and policies became effective for the lease of EBS spectrum: “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 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.” Report and Order, ¶ 179.

<sup>2</sup> See, e.g., *Public Notice*, Report No. 2276A (Oct. 5, 2005) (consenting to assignment of license from Multi-Channel MDS, Inc. to NextWave), *Public Notice*, Report No. 2294 (Oct. 26, 2005) (consenting to assignment of license from TeleCorp WCS, Inc. to NextWave), *Public Notice*, Report No. 2320 (Nov. 23, 2005) (consenting to assignment of license from (a) Bal\Ringam, L.L.C. to NextWave; (b) Central States Communications, Inc. to NextWave; and (c) Allegheny Communications Holdings I, LLC to NextWave).

<sup>3</sup> 47 C.F.R. §27.1214(b)(1) (stating that licensees must retain a minimum of 5% of its digital transmission channel capacity for instructional use).

<sup>4</sup> 47 C.F.R. §1.9001, et seq.

<sup>5</sup> Report and Order, ¶ 179.

<sup>6</sup> *Id.*

and NextWave promotes the foregoing policy initiatives and is in the public interest because it affords NextWave with access to spectrum to build and operate a broadband system for the benefit of consumers in and around Orange County, California; the Agreement also assists Orange in providing an educational service in compliance with its educational mission and EBS rules.

NextWave is financially, technically and legally qualified to be a Commission lessee and will at all times conduct operations under the Agreement subject to applicable rules and regulations. The Agreement raised no foreign ownership, competitive or other public interest concerns. NextWave certifies, pursuant to Section 27.1202 of Commission rules, that it is not directly or indirectly affiliated with, nor does it have any leasing arrangements with, a cable television company.<sup>7</sup> NextWave also certifies that it will comply with the technical requirements and interference protection requirements contained in Sections 27.50, 27.55 and 27.1221 of Commission rules.<sup>8</sup>

Orange certifies that it complies with Section 27.1203(b) and (c) of the Commission's rules and will use its retained spectrum in furtherance of its educational mission and in conformance with Commission rules.<sup>9</sup>

---

<sup>7</sup> 47 C.F.R. §27.1202.

<sup>8</sup> 47 C.F.R. §§27.50, 27.55 and 27.1221.

<sup>9</sup> 47 C.F.R. §27.1203(b) and (c).

**Response to Schedule B, Question 3(a) and 3(b)**

Pursuant to Section 1.9030(f) of Commission rules, the term of the long term *de facto* spectrum lease Agreement for EBS Station WHG396 will commence on the date the FCC's grant of the foregoing FCC Form 603-T application becomes a Final Order. FCC grant of the application is expected on or about January 25, 2006.<sup>1</sup> The initial term of the lease expires on August 17, 2015, concurrent with expiration of the current term of the WHG396 license. Thereafter, the term of the Agreement renews subject to renewal of the underlying license.<sup>2</sup> The term of the Agreement is in compliance with secondary markets rules and policies,<sup>3</sup> and is not limited to a total term of fifteen years.<sup>4</sup>

---

<sup>1</sup> 47 C.F.R. §1.9030(e)(1)(iv) (No later than 21 days from the date of the Public Notice listing the lease application as accepted for filing, it will be granted, denied or identified as subject to further review by the Wireless Telecommunications Bureau.).

<sup>2</sup> 47 C.F.R. §1.9030(g)(2) ("A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the applicable application procedures set forth in §1.9030(e).").

<sup>3</sup> See, Report and Order, ¶ 179: "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 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." See *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).

<sup>4</sup> The former fifteen-15-year lease term limitation for EBS spectrum, that was contained in Section 74.931(e) of Commission rules, was deleted and is not contained in the new Part 27 rules for EBS spectrum.