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April 5, 2006

Via Electronic Filing

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

**Notice of Ex Parte Presentation**

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, Education and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66

Dear Ms. Dortch:

On Tuesday, April 4, 2006, Gerard Salemmé and Terri Natoli of Clearwire Corporation ("Clearwire"), a licensee, lessee, and operator of 2.5 GHz spectrum in the Broadband Radio Service (BRS) and Educational Broadband Service (EBS), met with Aaron Goldberger of Commissioner Tate's office. The purpose of the meeting was to discuss an important outstanding issue currently before the Commission on reconsideration in the above-referenced proceeding--the appropriate maximum term limit for long-term leases of EBS spectrum and a related proposed provision to afford EBS licensees a periodic review of their educational needs during the lease term. This issue, which initially arose as a result of differences within the industry in interpreting the text of the Commission's *BRS/EBS Order*<sup>1</sup>, in conjunction with the language of the applicable Part 1 and Part 27 rules<sup>2</sup>, and related *Secondary Markets* orders<sup>3</sup> is critically important to both the broadband lessee/operators of this spectrum and the EBS licensees for whose benefit this spectrum has been specifically set aside.<sup>4</sup> During the discussions Clearwire expressed the following points:

Due to the potential adverse impact on investment in this band, Clearwire reiterated its continued opposition to a reinstatement of the 15 year EBS lease term limit which was eliminated when the Commission applied the *Secondary Markets* rules to leases in this spectrum. Clearwire explained, however, that if the Commission departs from the *Secondary Markets* framework and imposes a maximum lease term it must be sufficiently long enough to enable investment to flow

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<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, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS Order*) (indicating that *Secondary Markets* rules would apply to EBS spectrum leases going forward).

<sup>2</sup> See 47 C.F.R. § 27.1214 (setting forth educational substantive use requirements and leasing rules).

<sup>3</sup> See *Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503 (2004) at para. 151 ("[s]pectrum leasing parties are free to extend an existing spectrum leasing arrangement beyond the term of the license authorization if the license is renewed"); see also 47 C.F.R. §§ 1.9030(g) & (l).

<sup>4</sup> See *BRS/EBS Order*, 19 FCC Rcd 14165 at para. 36 (describing the various goals of the new rules).

to the band. In addition, if the Commission imposes any other conditions on EBS leases to ensure that changes in educational use requirements are met, it must recognize the lessee's commercial broadband operations, and avoid adopting any rule that would result in disruption to the lessee's wireless broadband services provided to consumers and others, or materially change the economics of the lease arrangement. Finally, should the Commission adopt a maximum lease term limit on reconsideration, Clearwire stressed the importance of grandfathering existing EBS leases which complied with applicable lease term limits, including automatic renewal provisions, in effect at the time in which they were entered.

In particular, Clearwire explained that over the past several months, the primary representatives of the EBS licensee community, NIA and CTN, have expressed reasonable concerns regarding the ability of EBS Licensees to ensure that their educational needs are being met if EBS lease terms are not somehow limited.<sup>5</sup> In response, Clearwire and other major EBS lessee/operators (in conjunction with their representative trade association, the Wireless Communications Association (WCA)), have tried to address the legitimate needs of the true educators in the 2.5 GHz band, while preventing those parties attempting to extract unreasonable financial advantages from adversely influencing the resolution of this matter.<sup>6</sup> Indeed, in recent weeks, the lessee/operators and NIA/CTN have diligently worked to avoid an unintended adverse outcome that would undermine the Commission's otherwise carefully crafted regulatory regime for this spectrum to the detriment of both sides.<sup>7</sup> To that end, this issue has consumed numerous resources of both sides in attempting to reach a compromise that maximizes, most effectively, the Commission's dual objectives of promoting the availability of broadband to all Americans through the commercial development of this spectrum and furthering the educational mission through the availability of broadband technologies for educators.<sup>8</sup> While these efforts, unfortunately, as of the time of Clearwire's meeting, had not resulted in any single unified agreement by all parties involved, Clearwire believes that each side has made significant strides in understanding the issues and concerns of the other. Specifically, certain EBS licensees,

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<sup>5</sup>See Letter from Todd D. Gray on behalf of the National ITFS Association and Edwin N. Lavergne on behalf of the Catholic Television Network, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, (filed March 17, 2006).

<sup>6</sup>For example, some parties have erroneously suggested that some EBS licensees and lessees have provided inconsistent information to the Commission regarding lease terms to support their continued claims that the Commission's application process alone can not be relied upon to ensure compliance with EBS substantive use requirements. These parties have done so to support their desire for, *inter alia*, the anticompetitive filing of unredacted *de facto* transfer leases lessees that would publicly disclose the confidential financial and other commercial business terms that facilitate the unique operational/educational objectives of the parties to such arrangements. See e.g., *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, Amendment to Petition for Extraordinary Relief of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (IMWED), dated January 5, 2006 (IMWED Amendment). *But see*, Letter from Alisa Jones, Supervisor of Instructional Support Services, School District of Clay County, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Feb. 3, 2006) (responding to IMWED Amendment); Letter from Melissa S. Kager, Principal, Heritage Christian Academy to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Feb. 2, 2006) (responding to IMWED Amendment); Letter from Concordia University and Gryphon Wireless, LLC, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Jan. 24, 2006) (responding to IMWED Amendment).

<sup>7</sup>See *BRS/EBS Order*, 19 FCC Rcd 14165 at para. 36 (describing the various goals of the new rules).

<sup>8</sup>See *id.*

recognizing that the EBS/BRS spectrum band has been underutilized for far too long,<sup>9</sup> now agree (as evidence in the record has demonstrated<sup>10</sup>) that lease terms longer than 15 years are, in fact, necessary to attract investment in EBS spectrum.<sup>11</sup> At the same time, many lessee/operators now understand the reason educators want to have some identified lease term limit and some ability to revisit educational needs during the term of a lease in excess of 15 or more years.

As a result of the on-going efforts to support EBS licensees' legitimate desire that the educational use of their licensed EBS spectrum keep pace with technological development, Clearwire, which previously advocated an unlimited, unconditioned lease term,<sup>12</sup> has come to agree that a term limit of no less than 30 years could be acceptable, assuming no other contractual provision was required that could adversely impact the economic viability of its operations or disrupt the broadband services provided to consumers and other educators during the term of the lease.<sup>13</sup> Indeed, Clearwire has entered into numerous *de facto* long term EBS spectrum leases with EBS licensees over the past year since the new rules became effective, the overwhelming majority of which provide for a total lease term of 30 or more years (subject, of course, to the license being renewed at the end of each successive EBS license term).<sup>14</sup> All of

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<sup>9</sup> The promise of technologically advanced broadband services has not been realized in this spectrum band, in part, because of the prior inflexible nature of the spectrum assignment and uncertainty surrounding lease term length, conditions and permitted spectrum use. *See BRS/EBS Order*, 19 FCC Rcd 14165 at paras. 9-21 (describing the history the EBS/BRS band and the rule changes made over the past several years to maximize the potential of this band).

<sup>10</sup> *See, e.g.*, Letter from James N. Perry, Jr., Madison Dearborn Partners, LLC, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, (filed March 31, 2006); Letter from Peter Pitsch, Intel Corporation, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, (filed March 10, 2006); Letter from Paul Sinderbrand to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, (filed March 10, 2006) transmitting a Declaration from Dr. Michael D. Pelcovits; Letter from Paul Sinderbrand to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66, (filed February 17, 2006) transmitting a Policy Bulletin released by the Phoenix Center for Advanced Legal & Economic Public Policy Studies authored by George S. Ford, PhD, and Thomas M. Koutsky, JD entitled "Unnecessary Regulations and the Value of Spectrum: An Economic Evaluation of Lease Term Limits for the Educational Broadband Service."

<sup>11</sup> *See* Letter from Todd D. Gray, Counsel, NIA, and Edwin N. Lavergne, Counsel, CTN, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed March 17, 2006); *see also* Communications Daily, March 17, 2006, "NIA, CTN Offer Compromise on Length of EBS Leases."

<sup>12</sup> *See e.g.*, Letter from George Alex, Nextwave Broadband Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Dec. 16, 2005) (reporting meeting between Nextwave and Clearwire and the Chairman's office to discuss the need for a lease term limit in excess of 15 years); *see also* Letter from Paul J. Sinderbrand, Counsel for WCA (of which Clearwire is a member), to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Dec. 21, 2005) (addressing an *ex parte* meeting on the EBS lease term limit); Letter from Paul J. Sinderbrand, Counsel for WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Feb. 6, 2006) (addressing an *ex parte* meeting on the EBS lease term limit).

<sup>13</sup> Clearwire believes other lessees/operators of the spectrum have come to a similar conclusion.

<sup>14</sup> Many of the EBS licensees with whom these leases exist are members of NIA and/or CTN. Because these EBS licensees have freely entered into these lease arrangements with the understanding that the Commission's current rules permit them to do so, and have willingly negotiated arrangements that are based on lease terms well in excess of 15 years in many cases, Clearwire submits that this provides practical, undisputable evidence of the fact that these EBS licensees believe their educational needs can best be accommodated through lease terms which they are free to establish as they see fit. As a result, to the extent the Commission reinstates an EBS lease term limit, *it is imperative* that this limit be imposed prospectively, only, so as not to interfere with existing leases, entered into in good faith, pursuant to which the parties to those agreements, particularly the lessee/operators, have already begun performing their obligations under the lease, including expending significant capital to build out broadband networks and deploy broadband facilities and services for both consumer and educational use.

these leases are a matter of record before the Commission. While these leases, generally, do not include specific provisions enabling the EBS licensee to reevaluate its educational needs at any specified point during the lease term, because Clearwire views the unique relationship between EBS licensee and its lessee as a partnership of sorts, to the extent either party to such lease determined its needs had changed from the time it originally entered into the lease transaction, Clearwire anticipated that such changed needs would be addressed through normal contractual amendment processes.<sup>15</sup>

The above notwithstanding, if EBS licensees now believe it is necessary to include specific provisions in a spectrum lease that provides for their ability to periodically reflect changes in their educational needs/requirements and to describe precisely how those changed needs will be accommodated by the lessee, Clearwire is willing to negotiate such provisions in new EBS leases. *What is critical, however,* to Clearwire's ability to meet an EBS licensee's *bona fide* changes in educational use requirements at specified times during the lease term *and* avoid both disruption to consumers and others using Clearwire's advanced wireless broadband services and material changes to the economics of the lease, is complete flexibility and full discretion to negotiate provisions in the lease that best accommodates both parties' needs. Including these provisions in the lease at the time it is initially negotiated will provide the lessee much-needed certainty with respect to the lease.

Just as EBS licensees have diverse educational requirements and advance their educational mission in varied ways, EBS lessees have different business models and capabilities for accommodating EBS licensees' educational use needs. The Commission must recognize these differences and avoid taking any action in this proceeding that favors one business model over another, upsetting the carefully-crafted balance that currently exists through spectrum leasing arrangements between promoting the use of EBS spectrum to advance the educational mission and concurrently facilitating the efficient and dynamic use of this spectrum for the benefit of all Americans by innovative commercial advanced wireless broadband service providers. To this end, Clearwire continues to work with all those members of the EBS spectrum community, both licensees and lessee/operators, to reach a mutually satisfactory resolution that best accomplishes the Commission's goals with respect to this spectrum, including those that further Congress' section 706 mandate to encourage the deployment of broadband technologies to all Americans.<sup>16</sup>

In view of the above, Clearwire urges the Commission in resolving this matter, to consider the benefits that EBS spectrum leasing brings to the development and use of this band for innovative advanced wireless broadband services that benefit the educational mission *and* American consumers. To that end, Clearwire respectfully requests that the Commission specifically indicate that an EBS spectrum lease may include any mutually agreeable terms designed to accommodate the EBS licensee's changed educational use requirements and lessee's wireless broadband operations using the leased EBS spectrum, which might include, for example, a provision that enables the lessee to accommodate the EBS licensee's revised educational use requirements through any comparable means available at the time, if necessary to ensure no future disruption to the advanced wireless broadband services provided by the lessee to the

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<sup>15</sup> Any subsequent amendments would necessarily ensure that EBS licensees continued to meet their substantive use requirements. *See e.g.*, 47 C.F.R. § 27.1214 (a)-(c).

<sup>16</sup> *See* Telecommunications Act of 1996, Pub.L. 104-104, § 706, 110 Stat. 56 (1996); 47 U.S.C. § 157 nt.

public and other EBS licensees for their educational use.<sup>17</sup> Providing the parties to an EBS spectrum lease with maximum flexibility to accommodate the various ways in which EBS licensees satisfy their educational use requirements and lessees utilize leased EBS spectrum to deliver wireless broadband services is most consistent with the objectives of the Commission's *Secondary Markets* framework,<sup>18</sup> which the Commission has determined, but for the unique provisions set forth in Section 27.1214 of the rules,<sup>19</sup> apply to EBS spectrum leases.

If you have any questions regarding this matter, please do not hesitate to contact the undersigned.

Respectfully Submitted,



Terri B. Natoli

Vice President, Regulatory Affairs & Public Policy

Cc:

Hon. Kevin J. Martin  
Hon. Michael J. Copps.  
Hon. Jonathan S. Adelstein  
Hon Deborah Taylor Tate  
Fred Campbell  
John Giusti  
Bruce Gottlieb  
Barry Ohlson  
Aaron Goldberger  
Catherine Seidel  
Cathleen Massey  
Joel Taubenblatt  
Peter Corea  
John Schauble  
Henry Allen  
Nancy Zaczek

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<sup>17</sup> This flexibility will be critical in particular markets based on the cellularized, shared spectrum re-use design of Clearwire's wireless broadband systems which operate on the spectrum of multiple different EBS licensees in certain markets and contiguous markets that not only serve commercial consumers but are providing educational use requirements to other EBS licensees.

<sup>18</sup> See e.g., *Secondary Markets*, 19 FCC Rcd 17503 (2004).

<sup>19</sup> See e.g., 47 C.F.R. § 27.1214.