

Period, which occurs after the Initiation Planning phase.<sup>276</sup> Sprint agrees with WCA and adds that because the term “engineering analysis” is not defined anywhere in the *BRS/EBS R&O* or its accompanying rules, it is unclear what the Commission would expect of such analysis.<sup>277</sup>

105. Section 27.1231(d)(4) requires that the Initiation Plan include a statement of “when the transition plan will be completed.” WCA maintains that a potential proponent cannot possibly provide an accurate response to that inquiry until it has fully explored a variety of logistical issues during the Transition Planning Period.<sup>278</sup> WCA further argues that compliance with Section 27.1232(b)(1)(vi), which requires that the Transition Plan provide an approximate timeline for the completion of the transition, is sufficient for the Commission’s purposes.<sup>279</sup> IMWED, however, argues that Commission should retain Section 27.1231(d)(4) to ensure that a timely transition occurs.<sup>280</sup>

106. *Discussion.* We agree to extend the length of the Initiation Planning Period until 30 months after the effective date of the amended rules. We further agree to delete Section 27.1231(d)(3) and to modify Section 27.1231(d)(4) to require only that the proponent give its best available estimate of when the transition will be completed. With regard to Section 27.1231(d)(3), we agree that the requirement to complete an engineering analysis at the Initiation Planning stage is premature and thus we remove this requirement. With regard to the deadline for submitting Initiation Plans, we are sensitive to the concerns of petitioners that the Commission’s original adoption of MEAs as the transition area would make it difficult to complete all of the requirements of the Initiation Plan by January 10, 2008. Today we have adopted changes that significantly reduce the size of transition areas. In addition, by deleting Section 27.1231(d)(3) and modifying Section 27.1231(d)(4), we have significantly reduced the requirements of the Initiation Plan, especially for single proponents.<sup>281</sup> As a result of today’s actions, a single proponent would only be required to file a list of the BTAs to be transitioned, a list of the call signs of the stations to be transitioned, a best estimate of when the transition will be completed, and a certification that the proponent has sufficient funds to pay the reasonable expected costs of the transition. Despite these changes, we agree with petitioners that proponents may not be able to meet the original January 10, 2008 deadline under certain circumstances.<sup>282</sup> We note that to date, not one Initiation Plan has been filed with the Commission. We conclude, in light of the record, that potential proponents cannot or will not transition under the rules effective on January 10, 2005, which require the transition to occur by MEA and are significantly more burdensome than the rules we adopt today. In light of these

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<sup>276</sup> WCA PFR at 14-15. *See also* BellSouth PFR Opposition at 20.

<sup>277</sup> Sprint PFR at 9.

<sup>278</sup> WCA PFR at 15.

<sup>279</sup> *Id.*

<sup>280</sup> IMWED PFR Opposition at 8-9.

<sup>281</sup> Multiple proponents, which we believe will be rarely used, will have two additional requirements. *See* 47 C.F.R. § 27.1231.

<sup>282</sup> We note that NextWave advocates retaining the January 10, 2008 deadline and argues that parties will have sufficient time to create and file initiation plans. *See* Letter from George Alex, Chief Financial Officer, NextWave Broadband Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 7, 2006). While NextWave may be correct with respect to some of the markets, given the number of BTAs that will have to be transitioned, we believe the best action is to grant a minor extension of the deadline.

factors, we agree with petitioners that the Initiation Period should start from the effective date of the amended rules. We further agree with petitioners that 30 months is an adequate time for a proponent to transition one or several BTAs under the rules we adopt today, which streamline the requirements for filing an Initiation Plan. Although several large entities may seek to transition many BTAs, we believe that they will be able to meet this deadline because of their experience working with BRS and EBS licensees and the resources available to them. Although we decline to delete Section 27.1231(d)(4), we believe that submitting a best estimate of when the transition will be complete will not be burdensome to proponents and will provide the Commission with an overview of the state of the 2.5 GHz band transition.

**e. Transition Planning Phase**

107. When the proponent files the Initiation Plan, the second phase of the transition process begins: the Transition Planning Phase. The Transition Planning Phase is the ninety-day period that commences on the day after the proponent(s) files the Initiation Plan with the Commission. During this ninety-day period, the proponent sends a Transition Plan<sup>283</sup> to all EBS and BRS licensees in the BTA being transitioned. The EBS or BRS licensees may then submit a counterproposal, so long as the counterproposal is submitted to the proponent ten days before the end of the Transition Planning Period. If a timely filed counterproposal is received, the proponent(s) may accept the counterproposal and modify the Transition Plan accordingly or invoke dispute resolution procedures for a determination of whether the Transition Plan is reasonable. If the proponent decides to seek dispute resolution, the proponent(s) may take no action to transition the BTA until the dispute is resolved or may continue to transition the BTA while it awaits the results of the dispute resolution process. The Transition Plan must include plans for relocating the EBS and BRS incumbents from spectrum that has been redesignated for BRS Channel No. 1 and BRS Channel No. 2/2A.<sup>284</sup>

**(i) Safe Harbors**

108. To reduce the potential for disputes, the Coalition originally had asked the Commission to adopt nine safe harbors. In the event of a dispute between a proponent and an EBS or BRS licensee, a proponent's offer would be automatically reasonable if it fell under one of the nine safe harbors. The Commission, however, declined to adopt all nine safe harbors. Instead, the Commission adopted two of the nine safe harbors, numbers 1 and 2, which the Commission found were of general applicability.<sup>285</sup> The Commission also adopted the key principle of safe harbor numbers 6 and 7 into the requirements of the Transition Plan.<sup>286</sup> Petitioners ask the Commission to adopt safe harbors numbers 3, 4, and 9 from the Coalition's original proposal.<sup>287</sup>

**(a) Safe harbor No. 3**

109. *Background.* Safe harbor No. 3 would apply when an EBS licensee is entitled to two or

<sup>283</sup> See *BRS/EBS R&O*, 19 FCC Rcd 14165, 14203 ¶ 88.

<sup>284</sup> *Id.* at 14203 ¶ 88.

<sup>285</sup> See *id.* at 14204 ¶ 90.

<sup>286</sup> See 47 C.F.R. § 27.1232(b)(2)-(4).

<sup>287</sup> See Coalition Proposal, Appendix B at 23-27.

more video programming or data transmission tracks in the MBS. As WCA explains, safe harbor No. 3 permits the proponent either to digitize the EBS licensee's operations so that it can operate on its single default MBS channel or to arrange one or more channel swaps under which the EBS licensee would obtain additional channels in the MBS in exchange for an equal number of its Lower Band Segment ("LBS") or Upper Band Segment ("UBS") channels.<sup>288</sup> If the proponent and the EBS licensee do not reach an agreement concerning these tracks during the Transition Planning Period, safe harbor No. 3 gives the proponent the following two options.

- First, the Transition Plan can call for migration of one of those programming tracks to the EBS licensee's default channels in the MBS (*e.g.* channel A4 in the case of the A Group licensee) and provide the EBS licensee an additional 6 MHz channel in the MBS for each additional EBS video programming or data transmission track. If the proponent chooses this option, it must assure that the additional MBS channels can operate with transmission parameters substantially similar to those of the channel(s) on which the EBS video or data tracks were broadcast pre-transition. In exchange, the contributor of each additional MBS channel will be entitled to one of the recipient EBS licensee's channels in the LBS or UBS (along with the associated guard band channel) for each additional MBS channel provided. The additional MBS channels can be ones that would have been licensed to the proponent under the default system, or can be made available by way of channel swapping arrangements with other licensees in the market orchestrated by the proponent. The channels the contributor receives in exchange for its MBS channel shall be located at one of the ends of the recipient EBS licensee's default allocation, rather than in the middle.<sup>289</sup>
- Second, the Transition Plan can call for pro rata segmentation of the default MBS channel for the group, provided that the proponent commits to provide each of the licensees with the technology necessary for its EBS video programming or data transmissions to be digitized, transmitted, and received utilizing the provided bandwidth. The non-MBS channels would be divided among the sharing licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).<sup>290</sup>

110. Petitioners agree that there are numerous situations across the country where an EBS licensee will be entitled to more than one MBS track under the Commission's rules, but disagree over whether the Commission should adopt safe harbor No. 3.<sup>291</sup> At issue is whether a proponent, by using

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<sup>288</sup> WCA PFR Reply at 7-8.

<sup>289</sup> The licensee contributing its MBS channel can select the channel in the LBS or UBS it will receive. For example, if the A Group licensee elects to take a second channel in the MBS, the MBS licensee contributing that channel may select either channel A1 or A3 (and associated guard band channels) to be exchanged for the second MBS channel. Such selection shall be made during the Transition Planning Period and reflected in the Transition Plan. In the event that more than one MBS channel is contributed to an EBS licensee (because it operates more than two EBS video programming tracks), the first set of channels in the LBS or UBS to be swapped shall be at one end of that EBS licensee's allocation, with additional channels to be swapped directly adjacent. For example, if the A Group licensee elects to take a third channel in the MBS, the Transition Plan may call for the exchange of either channels A1 and A2 or channels A2 and A3 (and associated guard band channels). Coalition Proposal, Appendix B, at 23-24 n.55.

<sup>290</sup> *Id.* at 23-24.

<sup>291</sup> WCA PFR at 23. *See also* 47 C.F.R. § 27.1233(b).

safe harbor No. 3, can compel an EBS licensee to give up one or more of its LBS or UBS channels in exchange for more than one MBS channel. IMWED maintains that such a scenario is likely because it is much cheaper for a proponent to offer the EBS licensee analog video operations on more than one MBS channel in lieu of the more costly digital conversion that would allow a single MBS channel to carry many video tracks.<sup>292</sup> According to IMWED, under safe harbor No. 3, EBS licensees risk hampering or entirely losing their ability to offer broadband wireless services on the LBS or UBS if they insist on maintaining their current number of video tracks.<sup>293</sup> IMWED instead urges the Commission to allow EBS and BRS licensees to voluntarily swap channels.<sup>294</sup> Sprint and WCA disagree with IMWED's assessment of the effects of a proponent's use of safe harbor No. 3 on EBS licensees. Sprint argues that if an EBS licensee wants to keep all of its LBS and/or UBS channels under Safe Harbor No. 3, it should request a single programming track in the MBS.<sup>295</sup> According to WCA, "IMWED believes that EBS licensees should be able to have their cake and eat it too – they should be able to demand two or more program tracks in the MBS while still retaining three channels in the LBS or UBS."<sup>296</sup> According to WCA, adoption of IMWED's proposal would result in a windfall to the EBS licensee, while imposing unreasonable costs on the proponent.<sup>297</sup>

111. *Discussion.* We agree with IMWED that safe harbor No. 3 unduly favors the proponent and may result in the EBS licensee having to choose between curtailing its video operations or relinquishing its LBS or UBS channels. Safe harbor No. 3 permits the proponent to choose which of the two options to present to the EBS licensee. Thus, under safe harbor No. 3, a proponent may offer the first option, while the EBS licensee may prefer the second option. The EBS licensee, however, would not be able to object because an offer under a safe harbor, by definition, is reasonable. Because, as WCA notes, there are numerous instances throughout the country where an EBS licensee would want or need more than one programming track in the MBS, we believe that the proponent and the EBS licensee must find a solution that is mutually agreeable to both. We therefore decline to adopt safe harbor No. 3 because it does not strike the appropriate balance between proponents and EBS licensees.

**(b) Safe harbor No. 4**

112. *Background.* Safe harbor No. 4 addresses situations in which more than one licensee shares a channel group in a particular location.<sup>298</sup> If a four-channel group is shared among multiple licensees in a given geographic area, the use of the post-transition three LBS/UBS channels and one MBS channel would be pro rated among them according to the number of channels they originally held.<sup>299</sup> Basically, safe harbor No. 4 permits the LBS/UBS channels and the MBS channel to be

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<sup>292</sup> IMWED PFR Opposition at 4-5.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Sprint PFR Reply at 12-13.

<sup>296</sup> WCA PFR Reply at 7-8.

<sup>297</sup> *Id.*

<sup>298</sup> George Mason University Reply Comments at 4.

<sup>299</sup> IMWED PFR Opposition at 4-5.

disaggregated and split among the sharing EBS licensees.<sup>300</sup> WCA reports that according to a study conducted by Hardin & Associates, approximately 16 percent of all EBS stations share channel groups.<sup>301</sup> WCA, NIA, CTN, and Sprint urge the Commission to adopt safe harbor No. 4.

113. Under safe harbor No. 4, a proponent has two choices absent an agreement otherwise:

- First, it can secure a 6 MHz MBS channel for each licensee in exchange for the non-MBS channels assigned to the group. Following the channel swap(s) necessary to secure those additional MBS channels, the Transition Plan can provide for the licensing of the remaining channels in the LBS, UBS, and Guard Bands on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).
- Second, the Transition Plan can call for pro rata segmentation of the default MBS channel for the group, provided that the proponent commits to provide each of the licensees with the technology necessary for its EBS video programming or data transmissions to be digitized, transmitted, and received utilizing the provided bandwidth. The non-MBS channels would be divided among the sharing licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).
- Note: If only one of the sharing EBS licensees elects to migrate video programming or data transmissions to the MBS, the default MBS channel assigned to that channel group shall be licensed to that licensee. The remaining spectrum assigned to the group will be allocated among the licensees on a pro rata basis, with the 6 MHz in the MBS counting against that licensee's portion. To the extent necessary, the non-MBS spectrum can be disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment.<sup>302</sup>

114. Petitioners argue about whether the Commission should adopt safe harbor No. 4. IMWED argues that after subchannelizing or disaggregating the LBS and UBS channels, the licensees are left with an unusable quantity of spectrum. Sharing a single analog MBS channel would cause multiple licensees to share scheduling of a single program track, with no guidelines and all the possible contention that such cohabitation would create.<sup>303</sup> Although sharing a digitized MBS channel would be easier, IMWED argues that safe harbor No. 4 offers no guidance regarding: how the capital and operating expenses of such a condominium arrangement would be handled; how the use of fractional digital channels would be apportioned; or what would happen when one licensee becomes ready to convert its MBS capacity to wireless broadband, but other residents of the condominium are not.<sup>304</sup> IMWED suggests that the following alternative to safe harbor No. 4 would better meet the needs of licensees.<sup>305</sup>

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<sup>300</sup> WCA PFR Reply at 8.

<sup>301</sup> WCA PFR at 24.

<sup>302</sup> CTN/NIA PFR at 17-18.

<sup>303</sup> IMWED PFR Opposition at 6.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 6-7.

The channel C-4 licensee would be given control over mid-band channel C-4 after the transition and it would be free to barter with those holding LBS channels C-1 through C-3, as well as other EBS licensees.<sup>306</sup> If the C-4 channel licensee wished to trade its MBS capacity for capacity on low power channels, it would be up to the affected licensees to sort through the intricacies according to their needs.<sup>307</sup> Similarly, the licensee, or licensees, holding channel C-1 through C-3 would be able to bargain for MBS capacity.<sup>308</sup>

115. CTN, NIA, and BellSouth ask the Commission to reject IMWED's plan as unfair to EBS licensees and transition proponents.<sup>309</sup> CTN and NIA argue that IMWED's plan (always to give the whole MBS channel in a group to whichever EBS licensee happens to be holding the fourth channel in the group now) could deprive some EBS licensees (*i.e.*, those holding other than the fourth channel in a group) from having any continuing video transmission capability.<sup>310</sup> Sprint and WCA argue that IMWED is incorrect in arguing that under safe harbor No. 4, licensees would have no practical means of using the proration.<sup>311</sup> WCA notes that today's digital technology allows the use of bandwidths far narrower than the standard 5.5 MHz (LBS/UBS) and 6 MHz (MBS) channels allocated under the new bandplan, and thus the disaggregated channels would be quite usable.<sup>312</sup> Sprint notes that there are numerous technologies that operate on relatively narrow channels (such as CDMA, which operates over 1.25 MHz channels and GSM, which operates over 200 kHz channels) and numerous examples of relatively narrow channel assignments contained in the Commission's rules themselves (such as narrowband PCS, which includes 100 kHz, 50 kHz and 12.5 kHz channels).<sup>313</sup> WCA notes that IMWED incorrectly assumes that there would have to be what it deems a "condominium" sharing of the single MBS channel.<sup>314</sup> WCA further notes that under safe harbor No. 4, absent agreement among the sharing licensees, the proponent could disaggregate the spectrum and each of the licensees would have their own independent facilities operating on their 3 MHz share.<sup>315</sup> Furthermore, WCA argues, if the sharing licensees would prefer full channels, they merely need to agree to split the group in some other fashion.<sup>316</sup>

116. *Discussion.* We adopt safe harbor No. 4. The record supports the finding that safe harbor No. 4 would be applicable to numerous licensees. Moreover, both options contained in safe harbor No. 4 enable EBS licensees to continue video operations. Thus, regardless of which option is

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> BellSouth PFR Reply at 9; CTN/NIA PFR Reply at 4.

<sup>310</sup> CTN/NIA PFR Reply at 4.

<sup>311</sup> WCA PFR Reply at 8.

<sup>312</sup> *Id.*

<sup>313</sup> Sprint PFR Reply at 12-13.

<sup>314</sup> WCA PFR Reply at 8.

<sup>315</sup> *Id.* at 8 n.25.

<sup>316</sup> *Id.* at 8.

selected by the proponent, EBS licensees will be able to maintain their existing video operations. We do not believe that would be the case under the alternative presented by IMWED, where one licensee obtains control of the MBS channel to the exclusion other licensees that may wish to retain high power video operations. We believe that once licensees are assured of being able to maintain their video operations, they can work out the details of how the channels are shared.

**(c) Safe harbor No. 9.**

117. *Background.* Petitioners ask the Commission to adopt safe harbor No. 9 contained in the Coalition Proposal.<sup>317</sup> Safe harbor No. 9 applies when an EBS licensee uses one or more of its channels for studio-to-transmitter links.<sup>318</sup> WCA states that this situation occurs frequently.<sup>319</sup>

118. When an EBS licensee uses one or more of its channels for studio-to-transmitter links, safe harbor No. 9 allows a proponent to provide for one of the following options:

- the use of the LBS and/or UBS band for the point-to-point transmission of the EBS video or data (through superchannelization of the licensee's contiguous LBS or UBS channels), provided the proponent commits to retune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with new equipment tuned to operate on those channels and the proposal complies with the LBS/UBS technical and interference protection rules;
- the migration of the EBS programming to the MBS by retuning the existing point-to-point equipment to operate in the MBS or replacing it with equipment tuned to operate in the MBS; or
- the replacement of the point-to-point link with point-to-point equipment licensed to the EBS licensee in alternative spectrum, so long as the replacement facilities meet the definition of "comparable facilities" set out in Section 101.75(b) of the Commission's microwave relocation rules.<sup>320</sup>

119. *Discussion.* Based upon our analysis of the available licensing records, EBS licensees frequently use some of their channels for studio-to-transmitter links. Therefore, we agree with WCA that this situation occurs frequently and that safe harbor No. 9 is of general applicability. Furthermore, we believe that the adoption of safe harbor No. 9 will be helpful both to the proponents and EBS licensees in transitioning the 2.5 GHz band by assuring EBS licensees that they can maintain their studio-to-transmitter links. We note that we did not receive any opposition to WCA's request on this matter. For all of these reasons, we conclude to adopt safe harbor No. 9.

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<sup>317</sup> WCA PFR at 24; BellSouth PFR Reply at 9.

<sup>318</sup> WCA PFR at 24.

<sup>319</sup> *Id.*

<sup>320</sup> WCA PFR at 24.

**(ii) Eligibility restrictions/channel swapping**

120. *Background.* Petitioners ask the Commission to clarify that BRS and EBS licensees may “channel swap” during the transition.<sup>321</sup> They believe that this may be prohibited under Section 27.5(i)(3) of the Commission’s rules, which they believe specifies that a given licensee is limited to one MBS channel and three LBS/UBS channels.<sup>322</sup> They further argue that channel swapping between EBS and BRS licensees may be prohibited by the Commission’s EBS eligibility restrictions.<sup>323</sup> They ask that the Commission not apply the EBS eligibility restrictions to channel swaps that further the transition of the 2.5 GHz band.<sup>324</sup>

121. *Discussion.* We agree with petitioners that we should clarify how the band plan in Section 27.5 of the Commission’s rules relates to the transition. Section 27.5 of the Commission’s rules assigns specific frequencies to specific channels.<sup>325</sup> It further assigns channels as EBS, BRS, BRS 1 and 2/2A, and Guard Bands J and K. Furthermore, Section 27.5 of the Commission’s rules limits an EBS licensee to the assignment of no more than one 6-MHz channel in the MBS and three channels in the LBS or UBS for use in one single area of operation.<sup>326</sup>

122. Section 27.5(i)(1) contains the frequency assignment for channels pre-transition while Section 27.5(i)(2) contains the frequency assignments post-transition. In essence, Section 27.5(i)(1) maps channels from the old band plan to their new default assignments in new band plan, which are set forth in Section 27.5(i)(2). During the transition, however, the proponent may seek agreement among licensees in a BTA to change their default assignments. For instance, the A group channels may change positions with another EBS licensee or with a BRS licensee. The same rationale applies to Section 27.5(i)(3): absent agreement, an EBS licensee receives one MBS channel by default. During the transition, however, the proponent may seek an agreement among the licensees in the BTA for an EBS licensee to receive more than one MBS channel in exchange for a LBS or UBS channel. Although the Commission retained the eligibility restrictions in the *BRS/EBS R&O*, those restrictions do not prohibit licensees from swapping channels to effectuate the transition. Accordingly, today we amend Section 27.5(i)(3) to clarify that EBS licensees are not restricted to four channels nor are they restricted to one MBS channel, and to clarify that the EBS eligibility restrictions do not prevent channel swapping to further the transition.<sup>327</sup>

**(iii) Financial penalties in dispute resolution process**

123. *Background.* As mentioned above, during the transition planning period, the proponent presents its offer in the form of a Transition Plan to the licensees. Licensees, covered by the plan may, in

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<sup>321</sup> Choice PFR at 8; IMWED Reply Comments at 9-10.

<sup>322</sup> Choice PFR at 8.

<sup>323</sup> IMWED Reply Comments at 9-10.

<sup>324</sup> *Id.*

<sup>325</sup> 47 CFR § 27.5(i)(2).

<sup>326</sup> 47 CFR § 27.5(i)(3).

<sup>327</sup> See *infra* ¶ 358 for a more detailed discussion of the four-channel rule.

turn, submit a counterproposal to the Transition Plan. Then, the proponent may: (1) accept the counterproposal and modify the Transition Plan accordingly; (2) reject the counterproposal, stay the transition, and seek dispute resolution; or (3) reject the counteroffer, but continue with the transition as modified by the counteroffer, and seek dispute resolution. The Commission was silent about assessing any financial penalties levied on licensees that reject a Transition Plan that is later determined to be reasonable in a dispute resolution process or financial penalties levied on the proponent if the Transition Plan is determined to be unreasonable.

124. Petitioners ask the Commission to adopt the Coalition's original proposal regarding costs incurred where a dispute has arisen between a proponent and a licensee over the terms of the Transition Plan.<sup>328</sup> Specifically, the petitioners ask that the Commission permit a proponent to require a licensee to pay "those additional documented costs incurred by the proponent which were (i) over and above what the proponent proposed in its Transition Plan, and (ii) directly related to implementing the counterproposal" if the Transition Plan was determined to be reasonable in a dispute resolution process.<sup>329</sup> The Coalition's Plan also proposed that the proponent reimburse the dispute-related costs of any licensee that objected to the initial transition plan if the Transition Plan is found to be unreasonable.<sup>330</sup> The advantage of this approach, WCA argues, is that a proponent could move forward with the counterproposal and commence providing service under the new band plan rapidly, while secure in the knowledge that it will be made whole financially if its initial proposal is found to have been reasonable.<sup>331</sup> Because the Commission is silent about levying financial penalties, WCA argues that unless the proponent is prepared to accept the risks associated with implementing its own transition plan while a challenge is awaiting resolution, the market in issue will not be transitioned.<sup>332</sup> CTN and NIA support the penalties so long as both sides are penalized for unreasonable conduct.<sup>333</sup> CTN and NIA note that such a rule would give both proponents and licensees a financial incentive to act reasonably.<sup>334</sup>

125. HITN and IMWED oppose the adoption of harsh penalties imposed on EBS licensees that submit counterproposals during the transition process.<sup>335</sup> HITN argues that while WCA's concern regarding greenmail and delay brought on by objections or counterproposals to otherwise reasonable Transition Plans is understandable, the requested penalties would further chill EBS licensees from making any objection at all to a proponent's transition proposals.<sup>336</sup> HITN notes the extremely tight time frames for EBS licensees to respond to transition plans.<sup>337</sup> Under these circumstances, HITN argues that

<sup>328</sup> WCA PFR at 25.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 25-26.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> CTN/NIA PFR Reply at 6.

<sup>334</sup> *Id.*

<sup>335</sup> HITN PFR Opposition at 4; IMWED PFR Opposition at 7.

<sup>336</sup> HITN PFR Opposition at 4.

<sup>337</sup> HITN notes that while the proponent is not required to supply the transition plan to the licensees until within 30 days of the end of the ninety-day transition planning period, licensees, in contrast, must submit any objection or (continued....)

the combination of such a short response period coupled with a substantial penalty for innocent error would almost certainly deter any and all objections by affected EBS licensees.<sup>338</sup> IMWED argues that the Coalition's Plan confers extensive powers on proponents that may lead to abuse.<sup>339</sup> IMWED further notes that under the Coalition's Plan the standards for reasonableness are unclear, as are the mechanics for adjudicating reasonableness, which increases the risk for EBS licensees.<sup>340</sup> IMWED believes that the Commission has created an environment that provides incentives for all parties to complete transitions in a timely manner.<sup>341</sup> To circumvent abusive transition plans, IMWED asks the Commission to permit EBS and BRS licensees to have the option of self-transitioning at their own expense, as an alternative to taking part in a proponent's plan.<sup>342</sup>

126. *Discussion.* We decline to reconsider the Commission's determination not to adopt financial penalties within the dispute resolution context. We believe that parties can adequately resolve disputes without mandating financial penalties, and we urge the parties to act in good faith to reach a mutually agreeable solution in all cases. We note that the rules allow the proponent to give non-proponent licensees a minimum of twenty days to respond to the proponent's Transition Plan.<sup>343</sup> Therefore, we agree with HITN that the tight timeframes coupled with the imposition of financial penalties would deter non-proponent licensees from raising any objection to the Transition Plan. Furthermore, we note that we have adopted six of the nine safe harbors originally proposed by the Coalition, which we believe will reduce the number of disputes arising out of the development of the Transition Plan.<sup>344</sup>

#### (iv) Relocation of BRS Channels No. 1 and 2

127. *Background.* Currently, BRS operations in the 2150-2160/62 MHz band consist of two channels – Channel No. 1 (2150-2156 MHz) and Channel No. 2A/2 (2156-2160/62 MHz), collectively "BRS Channels No. 1 and 2."<sup>345</sup> The Commission reallocated and designated the 2150-2155 MHz

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counterproposal within ten days of the close of the planning period. This tight timeframe means that in those instances in which a proponent submits the Transition Plan to licensees within 30 days of the end of the transition planning period, licensees would have only twenty days to not only to read and understand the proponent's plan, but to arrange for and obtain any needed engineering analysis, and where necessary to craft and serve a counterproposal on the proponent. HITN Opposition PFR at 4.

<sup>338</sup> HITN PFR Opposition at 4.

<sup>339</sup> IMWED PFR Opposition at 7.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* See *infra* ¶¶ 133-143 and ¶¶ 173-176 for a discussion of self-transitions.

<sup>342</sup> *Id.*

<sup>343</sup> The Transition Planning Period lasts 90 days. No later than 30 days before the end of the Transition Planning Period, the proponent must provide the Transition Plan to each BRS and EBS licensee. The non-proponent BRS and EBS licensees must respond to the Transition Plan at least ten days before the end of the Transition Planning Period. 47 C.F.R. §27.1232.

<sup>344</sup> See *supra* ¶¶ 108-119 for a discussion of transition safe harbors adopted by the Commission.

<sup>345</sup> Licensees may use Channel No. 2 (2156-2162 MHz) on a limited basis in 50 cities. The Commission provided the BRS service with an extra two megahertz in the 50 largest metropolitan areas so that there would be sufficient bandwidth (6 MHz) for a second analog television channel. The two megahertz at 2160-2162 MHz can only be (continued....)

segment of the band for AWS use and stated that it would identify relocation spectrum for the incumbent BRS licensees in a later, separate proceeding,<sup>346</sup> and further explored the relocation needs for the BRS licenses in the 2150-2160/62 MHz band.<sup>347</sup> In the *BRS/EBS R&O*, the Commission designated spectrum in the new 2.5 GHz BRS band plan for BRS Channels No. 1 and 2 – 2496-2502 MHz for BRS Channel No. 1 and 2618-2624 MHz for BRS Channel No. 2.<sup>348</sup> The Commission also stated that the Transition Plan must include plans for relocating the EBS and BRS incumbents from spectrum that has been redesignated for BRS Channel No. 1 and BRS Channel No. 2.<sup>349</sup> Subsequently, the Commission reallocated and designated the remaining segment at 2155-2160 MHz for AWS use and sought comment on the specific relocation procedures applicable to BRS operations in the 2150-2160/62 MHz band.<sup>350</sup>

128. *Petitions.* WCA and Sprint ask the Commission to clarify its statement that “[t]he Transition Plan must include plans for relocating the EBS and BRS incumbents from spectrum that has been redesignated for MDS 1 and 2. . . .”<sup>351</sup> with regard to the relocation of BRS Channels No. 1 and No. 2 from 2150-2162 MHz to 2496-2502 MHz and 2618-2624 MHz, respectively. The parties claim that because the *BRS/EBS R&O* requires BRS licensees currently located in the 2500-2690 MHz band to pay their own transition costs, this language could be construed to require transition proponents to pay the costs to relocate BRS Channels No. 1 and No. 2 licensees from the 2.1 GHz band. In addition, WCA and the BRS Rural Advocacy Group claim that the *BRS/EBS R&O* does not provide replacement spectrum for BRS Channels No. 1 and No. 2 operations where the incumbent licensee in the 2.5 GHz band is operating on spectrum designated for BRS Channels No. 1 and No. 2/2A relocation but has “opted-out” of the

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assigned where there is evidence that no harmful interference would occur to any authorized co-frequency point-to-point facility. See 47 C.F.R. § 27.5(i)(1); *BRS/EBS R&O*, 19 FCC Rcd 14165, 14171-72 ¶ 11. In 1992, the Commission reallocated the 2160-2162 MHz band to emerging technologies. Therefore, any BRS licensee that applied for use of the 2160-2162 MHz band after January 16, 1992 would be granted a license only a secondary basis to emerging technology use. See 47 C.F.R. § 2.106, footnote NG 153. In 1996, the Commission auctioned licenses for BRS channels on a BTA basis but noted that BRS Channel No. 2 licenses using the 2160-2162 MHz band were secondary to emerging technology licenses. See FCC Auction [for] Multipoint and/or Multichannel Distribution Service (MDS) Authorizations for Basic Trading Areas, Bidder Information Package (1995), at 21 (available at <http://wireless.fcc.gov/auctions/06/releases.html>).

<sup>346</sup> See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, *Second Report and Order*, ET Docket No. 00-258, 17 FCC Rcd 23193 (2002).

<sup>347</sup> See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, *Third Report and Order, Third Notice of Proposed Rule Making, and Second Memorandum Opinion and Order*, ET Docket No. 00-258, 18 FCC Rcd 2223 (2003).

<sup>348</sup> *BRS/EBS R&O*, 19 FCC Rcd 14165, 14184 ¶ 38.

<sup>349</sup> *Id.* at 14203 ¶ 88.

<sup>350</sup> See *AWS 8th R&O and 5th NPRM*, 20 FCC Rcd 15866.

<sup>351</sup> Sprint PFR at 7-8; WCA PFR at 15-16. See also BellSouth PFR Opposition at 23; BRS Rural Advocacy Group PFR Opposition at 15; Choice PFR Opposition at 3; C&W PFR Reply at 2; WDBS PFR Reply at 3-4.

transition.<sup>352</sup> The BRS Rural Advocacy Group claims that because there is overlap between channels in the existing and new band plans, licensees in the 2.5 GHz band that have opted-out of the transition would remain to the detriment of newly relocated BRS Channels No. 1 and No. 2 operations in the band.<sup>353</sup>

129. *Discussion.* The obligations for the relocation of BRS Channels No. 1 and No. 2 licensees from the 2150-2160/62 MHz band have been addressed in ET Docket No. 00-258.<sup>354</sup> In the *AWS 9th R&O*, the Commission has decided to generally apply its Emerging Technologies relocation policies to new AWS entrants in the 2150-2160/62 MHz band, with modifications to accommodate the type of BRS incumbent operations that are the subject of relocation.<sup>355</sup> The Commission does not require that a proponent in the 2.5 GHz band be responsible for relocating BRS Channels No. 1 and No. 2 licensees. We note that this clarification does not alter the responsibility of a proponent in the 2.5 GHz band to transition the spectrum at 2500-2502 MHz and 2618-2624 MHz, which is designated for relocated BRS Channels No. 1 and No. 2 licensees, respectively, consistent with the rules adopted in this proceeding.

130. Because the relocation of BRS Channels No. 1 and 2 licensees and the transition of the 2.5 GHz band will occur on parallel but distinct timetables, we conclude here that the concerns raised by the parties about the availability of replacement spectrum for BRS Channels No. 1 and No. 2 licensees can be addressed by providing flexibility for their relocation to the 2.5 GHz band if the transition of the spectrum designated for their relocation has not yet occurred. For example, as discussed above, BRS Channel No. 1 licensees currently operate at 2150-2156 MHz (six megahertz of spectrum) and BRS Channels No. 2A/2 licensees currently operate at 2156-2160/62 (four or six megahertz of spectrum).<sup>356</sup> In the new BRS band plan, BRS Channels No. 1 and 2 licensees each will be relocated to six megahertz spectrum blocks at 2496-2502 MHz and 2618-2624 MHz, respectively. Today, we affirm the decision to designate the 2496-2500 MHz band, combined with the restructured 2500-2690 MHz band, as suitable replacement spectrum for the provision of comparable facilities to accommodate BRS operations that currently operate in the 2150-2160/62 MHz band.<sup>357</sup> Accordingly, four megahertz of spectrum at 2496-2500 MHz will be available for the relocation of BRS Channel No. 1 operations while the remaining two megahertz at 2500-2502 MHz will become available after the transition is complete. We will amend our

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<sup>352</sup> See BRS Rural Advocacy Group PFR Opposition at 15-16; WCA PFR at 35-37. See also C&W PFR Reply at 2.

<sup>353</sup> The new band plan, which specifies the relocation of BRS Channel No. 1 to 2496-2502 MHz and BRS Channel No. 2/2A to 2618-2624 MHz, overlaps channel A1 at 2500-2502 MHz, channel F2 at 2618-2620 MHz and channel E3 at 2620-2624 MHz in the existing band plan. See BRS Rural Advocacy Group PFR Opposition at 16.

<sup>354</sup> See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, *Ninth Report and Order and Order*, FCC 06-45 (rel. Apr. 21, 2006) ("*AWS 9th R&O*").

<sup>355</sup> *Id.*

<sup>356</sup> See *supra* ¶ 127.

<sup>357</sup> See *supra* Section IV.A.

rules to designate 2496-2500 MHz as available pre-transition spectrum for BRS Channel No. 1.<sup>358</sup> We believe, as WCA and the BRS Rural Advocacy Group acknowledge, that in most cases, the four megahertz of spectrum may be sufficient for BRS Channel No. 1 operations on an interim basis through the deployment of “cellularized systems that both accommodate the shorter path lengths at 2.5 GHz and provide for frequency reuse.”<sup>359</sup>

131. With respect to BRS Channel No. 2 licensees, there may be other segments of the 2.5 GHz band plan, such as the four megahertz at 2686-2690 MHz band (the I channels in the existing band plan), that may be available for the relocation of BRS Channel No. 2 operations pending the completion of the transition.<sup>360</sup> We will amend our rules to designate 2686-2690 MHz as pre-transition spectrum for BRS Channel No. 2, subject to protection of existing facilities operating on the I channels. After the transition, BRS Channel No. 2 licensees would be relocated to their designated channel at 2618-2624 MHz. WCA notes that, “in most cases, this two-step approach could be implemented at little marginal cost, given that frequency-agile equipment could be installed as part of the first relocation and then readily retuned to operate under the new band plan.”<sup>361</sup> However, we note that while the Commission has not yet set a timetable for the competitive bidding process nor established service rules for the 2155-2160/62 MHz band (which consists of BRS Channels No. 2 and No. 2A and the upper one megahertz of BRS Channel No. 1), the BRS transition in the 2.5 GHz band will have already begun. We therefore anticipate that many of the parties’ remaining concerns about the availability of the replacement spectrum may be addressed before relocation will occur.

132. Finally, as discussed above, we have affirmed our decision to waive the transition rules on a case-by-case basis, instead of adopting automatic opt-out criteria.<sup>362</sup> As such, we expect BRS Channels No. 1 and No. 2 licensees, who will be affected by a 2.5 GHz licensee’s request to opt-out of the transition, to participate in the waiver process so that the Commission will be able to consider the BRS Channels No. 1 and No. 2 licensees’ concerns about relocation spectrum in the 2.5 GHz band in its review of the waiver request.

**f. Self-transitions**

**(i) Authority to self-transition**

133. *Background.* Petitioners ask the Commission to allow licensees to self-transition. They

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<sup>358</sup> We clarify that licensees on BRS Channels No. 1 and 2 may operate on either 2150-2156 MHz or 2496-2500 MHz pre-transition, but not on both bands.

<sup>359</sup> WCA PFR at 36 (noting also that relocation must be accomplished in a way that does not cause harmful interference to operations on adjacent channels). *See also* BRS Rural Advocacy Group PFR Opposition at 16 (noting that WCA’s proposed alternative whereby BRS Channel No. 1 would be relocated to 2496-2500 MHz, would be acceptable, so long as an overlap with a licensed channel exists).

<sup>360</sup> WCA PFR at 36-37.

<sup>361</sup> *Ex Parte* Letter from Paul Sinderbrand, Counsel, WCA to Marlene H. Dortch, Federal Communications Commission (filed Aug. 5, 2005) at 3.

<sup>362</sup> *See supra* ¶¶ 72-73.

make this request in light of the Commission's proposal to use an alternative transition mechanism if a proponent has not filed an Initiation Plan with the Commission on or before January 10, 2008. Under this alternative proposal, if a proponent has not filed an Initiation Plan with the Commission on or before January 10, 2008, the Commission would transition the 2.5 GHz band by making spectrum previously licensed to incumbent licensees accessible pursuant to new licenses and granting incumbent licensees bidding credits that could be used to obtain spectrum access using new licenses of value comparable to that provided by their original license.

134. Petitioners uniformly oppose the Commission's alternative proposal and instead ask the Commission for the authority to self-transition. The petitioners disagree, however, over when licensees should be able to exercise this option. Most believe that the ability to self-transition should only occur after January 10, 2008 and only if a proponent has either not filed an Initiation Plan or has withdrawn an Initiation Plan on or before January 10, 2008. The Illinois Institute of Technology (IIT), however, recommends that all affected licensees be able to self-transition at any time if all of the affected licensees consent to the transition.<sup>363</sup> IMWED recommends that licensees be able to self-transition at any time, at their own expense, as a means of circumventing abusive Transition Plans.<sup>364</sup> Other petitioners argue that before January 10, 2008, proponent-driven transitions should be the exclusive process used to transition a BTA.<sup>365</sup> They note a proponent-driven transition offers a coordinated planning process that would provide a near simultaneous method of transitioning all licensees in a BTA. They argue that self-transitions permitted before January 10, 2008 would cause patchwork transitions that would increase the potential for interference and ultimately delay proponent-driven transitions of the 2.5 GHz band.<sup>366</sup>

135. *Discussion.* In light of the record on this issue, we will allow licensees to self-transition. We further conclude, however, that this option may be exercised only after 30 months after the effective date of the amended rules, in markets where a proponent has not filed or has withdrawn an Initiation Plan. We agree with petitioners that allowing licensees to self-transition before 30 months after the effective date of the amended rules would negatively affect the incentives for proponents to transition their BTAs. While we endorse the concept of self-transitions, we believe that a proponent-driven transition will more quickly and efficiently transition the 2.5 GHz band. We believe that self-transitions should be used by licensees to preserve their authorizations in the event that their stations are in a BTA that is not being transitioned by a proponent.

#### (ii) Implementation of self-transitions

136. *Background.* Petitioners offer various suggestions on the mechanics of self-transitioning. WCA suggests that licensees, in areas that will not be transitioned by a proponent, electronically notify the Commission on or before March 11, 2008 (which is 60 days from January 10, 2008, the deadline for filing Initiation Plans with the Commission) whether they will self-transition, vacate their spectrum entirely for bidding credits, or vacate their LBS/UBS channels in exchange for financial assistance in migrating to the MBS channels.<sup>367</sup> Then, WCA proposes that licensees seeking to

<sup>363</sup> IIT PFR Opposition at 9, n.22.

<sup>364</sup> IMWED PFR Opposition at 7.

<sup>365</sup> See CTN/NIA PFR Reply at 8-9.

<sup>366</sup> See *id.*

<sup>367</sup> WCA PFR at 34; CTN/NIA PFR at 5-6; Sprint PFR at 4-5.

self-transition be given a reasonable amount of time to complete the self-transition.<sup>368</sup> WCA recommends that licensees be given 18 months to complete the transition, whereas BellSouth recommends one year, and Sprint recommends eight months.<sup>369</sup>

137. BloostonLaw recommends a different approach to self-transitions. Under BloostonLaw's approach, licensees seeking to self-transition must file applications before January 10, 2009 to modify their licenses to operate under the new band plan.<sup>370</sup> BloostonLaw indicates that this is a workable solution because licensees seeking to self-transition can be expected to frequency coordinate their technical proposals prior to filing so that mutually exclusive applications will not exist.<sup>371</sup> BellSouth, however, argues that filing modification applications should not be necessary to effectuate self-transitions.<sup>372</sup>

138. Other commenters recommend that the Commission adopt rules that require a licensee to notify other license holders in the BTA that it will self-transition.<sup>373</sup> These commenters recommend that such rules should not require licensees to submit engineering analyses or allow for adjacent licensees who have not transitioned to object to such transitions on the basis of interference or other reasons.<sup>374</sup>

139. CTN/NIA recommends that the Commission adopt self-transition rules parallel to those adopted for a proponent-driven transition.<sup>375</sup> Specifically, CTN/NIA recommends that licensees that self-transition LBS and UBS channels for two-way operation must install upgraded downconverters at EBS receive sites within the vicinity of the new LBS or UBS operations.<sup>376</sup>

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<sup>368</sup> WCA PFR at 35.

<sup>369</sup> WCA PFR at 35; BellSouth Opposition PFR at 16; Sprint Reply Comments at 15.

<sup>370</sup> BloostonLaw Comments at 3-4.

<sup>371</sup> *Id.*

<sup>372</sup> BellSouth Reply Comments at 14, n.48.

<sup>373</sup> C&W Comments at 3-4; Pace Comments at 3-4; DBC Comments at 3; SpeedNet Comments at 3-4; WDBS Comments at 3-4.

<sup>374</sup> C&W Comments at 3-4; Pace Comments at 3-4; DBC Comments at 3; SpeedNet Comments at 3-4; WDBS Comments at 3-4.

<sup>375</sup> CTN/NIA PFR at 7.

<sup>376</sup> Specifically, CTN/NIA recommends that the Commission require Two-Way Operators to send a written data request, called an EBS Data Request, to all EBS licensees within twenty miles of the nearest proposed LBS/UBS base station to be constructed by the Two Way Operator. Within 60 days of the receipt of the EBS Data Request, all EBS licensees must provide the location (by street address and geographic coordinates) of every EBS receive site that, as of the date of the EBS Data Request, would be entitled to a replacement downconverter pursuant to Section 27.1233(a) of the Commission's Rules. In the response to the EBS Data Request, the EBS licensee indicates whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure, and specifies the approximate height above ground level of the downconverting antenna.<sup>376</sup> According to CTN/NIA's proposal, any EBS licensee that fails to timely respond to the EBS Data Request would be ineligible to receive upgraded downconverters. On receipt of the responses to the EBS Data Request, the Two-Way Operator has the discretion whether to install replacement downconverters at all MBS receive sites located within 20 miles of the (continued....)

140. IIT's proposal contrasts strongly with CTN/NIA's proposal. IIT argues that because self-transitioning licensees do not realize the same economic benefits as a commercial proponent might realize upon transition, the self-transition should be limited to those minimal changes required to assure that intra-market interference is not caused.<sup>377</sup> Thus, IIT argues self-transitioning licensees should not be required to purchase or install upgraded downconverters.<sup>378</sup> Stanford University also recommends that the Commission permit licensees to self-transition to the LBS, UBS, and MBS channels assigned to them under the new band plan.<sup>379</sup>

141. *Discussion.* We believe that it is necessary to coordinate self-transitions with proponent-driven transitions so that the 2.5 GHz band is transitioned in an orderly and timely manner. To accomplish this goal, we adopt the recommendations of several petitioners. Specifically, licensees in areas that will not be transitioned by a proponent must notify the Commission within 90 days of the date Initiation Plans must be filed with the Commission whether they will self-transition or be subject to whatever alternative transition process the Commission may adopt. Although WCA recommended 60 days, we believe that 90 days will enable EBS licensees to decide whether to undertake a self-transition. Moreover, a 90-day period corresponds to the 90-day Transition Planning Period in a proponent-driven transition. We believe that this notification, in addition to the Initiation Plans filed by proponents, will enable us to assess the state of the transition and provide us with information about the availability of spectrum to be auctioned under the rules set forth in the *Second R&O*.

142. Also, BRS and EBS licensees that seek to self-transition must notify other licensees in the BTA where their licensee's GSA geographic center point is located, as well as other licensees whose GSAs overlap with the self-transitioning licensee, that they will self-transition. We believe that this notification will allow licensees to address interference concerns. In this connection, we conclude that in order to effectuate self-transitions, an adjacent licensee that is not self-transitioning may not object to the

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nearest proposed LBS/UBS two-way base station to be constructed by the Two-Way Operator. CTN/NIA recommends that the Commission establish a deadline requiring all licensees to cease operating high power service on their LBS and UBS channels so that those licensees wishing to operate under the new rules may do so. CTN/NIA PFR at 6-8. WCA asks that the Commission make two modifications to CTN/NIA's proposal. First, WCA recommends that the Two-Way Operator notify any EBS MBS licensee with a GSA that overlaps or is within twenty miles of any of the Two-Way Operator's LBS or UBS base stations. WCA notes that although this proposal requires the Two-Way Operator to notify more licensees than required under CTN/NIA's proposal, this additional paperwork is necessary because with the use geographic area licensing public data is not available regarding the location of EBS facilities. Second, WCA recommends that EBS licensees respond to the EBS Data Request within twenty-one days. WCA PFR Opposition at 23-24.

<sup>377</sup> IIT Reply Comments at 20-21.

<sup>378</sup> IIT's proposal for the transition process is as follows. The licensee who first files a self-transition notice both with the Commission and with those licensees in the market with overlapping GSAs ("Affected Licensees") shall be deemed to have triggered a process whereby all Affected Licensees must cease operations not in conformance with the post-transition frequency assignments and characteristics within 180 days of this notice date, absent a consent to an extension approved by all Affected Licensees (and lasting no more than 180 days). At this time, operations conducted in accordance with the post-transition frequency plan should enjoy primary status as against adjacent market co-channel stations not in conformance with that plan. IIT notes that this would be a compulsory transition that would be deemed concluded when all operations not in conformance with the post-transition frequency plan cease. IIT Reply Comments at 20.

<sup>379</sup> Stanford Reply Comments at 7.

transition. If, however, the adjacent licensee is also self-transitioning, we conclude that the licensees must work out interference issues. It is not necessary for licensees that self-transition to file engineering analyses with the Commission.<sup>380</sup> Licensees may only self-transition to the LBS, UBS, or MBS channels assigned to them under the new band plan, however.<sup>381</sup>

143. Licensees must file modification applications with the Commission to complete the self-transition. Although we agree that licensees should be given a reasonable amount of time to complete the transition, we decline to adopt any of the specific limitations proposed for the self-transition process by any of the petitioners. Instead, we decide to harmonize self-transitions with proponent-driven transitions, which if they followed the timeline prescribed in the rules, without any delays, would conclude 21 months after the Initiation Plans must be filed. Therefore, we conclude that licensees must complete the self-transition on or before 21 months after the Initiation Plans must be filed.<sup>382</sup>

#### **g. Transition Completion Phase**

144. Eighteen months after the Transition Planning Period ends, the transition must be completed, unless it has been stayed pending the resolution of a dispute.<sup>383</sup> During the transition completion phase, the proponent(s) must replace downconverters and migrate video programming tracks for eligible EBS licensees.<sup>384</sup> The replacement downconverters must meet certain technical criteria. At the end of this phase, the proponent(s) and all of the BRS and EBS licensees in the BTA must file a Post-Transition Notice that indicates that the BTA has been transitioned and the licensees are operating according to the new technical rules.

##### **(i) Replacement Downconverters**

145. *Background.* The Commission adopted a rule that required the proponent to install at every eligible EBS receive site a downconverter designed to minimize the reception of signals from outside the MBS.<sup>385</sup> In addition to other criteria, the Commission found that only those receive sites that are within a licensee's thirty-five mile GSA are entitled to replacement downconverters.<sup>386</sup>

146. Several petitioners ask the Commission to require proponents to supply new downconverters to all receive sites of EBS stations located within the stations' old 35 mile protected service areas (PSA).<sup>387</sup> The petitioners note that even though receive sites located outside of the new GSAs will not be entitled to interference protection under the geographic licensing approach, most if not

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<sup>380</sup> See *supra* ¶ 106 where we decided that in a proponent-driven transition that the Initiation Plan does not have to indicate that the proponent has completed an engineering analysis.

<sup>381</sup> See 47 C.F.R. § 27.5(i)(2) for default channel assignments.

<sup>382</sup> IIT Reply Comments at 20.

<sup>383</sup> See 47 C.F.R. § 27.1232(b)(1)(vi).

<sup>384</sup> See 47 C.F.R. § 27.1233(a).

<sup>385</sup> *BRS/EBS R&O*, 19 FCC Rcd 14165, 14205 ¶ 94.

<sup>386</sup> 47 C.F.R. § 27.1233(a)(1)(iv).

<sup>387</sup> EBS Parties Reply Comments at 4; George Mason Reply Comments at 4.

all receive sites that were formerly protected will continue to be used, and will be able to successfully receive signals, if they are provided downconverters that filter out all but the MBS band signals.<sup>388</sup> Petitioners argue that providing new downconverters at these locations will actually result in less interference.<sup>389</sup> In addition, Clearwire asks the Commission to refine the process for identifying receive sites that are entitled to replacement downconverters and require EBS licensees to certify, in writing, that the receive site is, at the time the data request is received, actively being used for EBS distance learning services for the permissible purpose of formal education of fulltime students at accredited schools.<sup>390</sup> Clearwire is concerned that proponents will incur unnecessary transition expenses if they provide replacement downconverters to all receive sites that meet the criteria established in Section 27.1233(a) of the Commission's rules.<sup>391</sup>

147. *Discussion.* We decline to require proponents to replace downconverters in an EBS licensee's PSA but outside its GSA as inconsistent with our decision to adopt GSAs, burdensome to proponents, and likely to slow the transition process. We further decline to adopt Clearwire's recommendation to refine the criteria for eligible receive sites under Section 27.1233(a) of the Commission's rules. We believe that Section 27.1233(a) of the Commission's rules is narrowly tailored to ensure that proponents are replacing only those downconverters that are used to receive educational or instructional programming and that the certification recommended by Clearwire is unnecessary and unduly burdensome to EBS licensees.<sup>392</sup>

#### (ii) Transition deadline

148. *Background.* Under Section 27.1232(b)(1)(vi), the transition must be completed within 18 months of the conclusion of the Transition Planning Period, unless the Transition Planning Period has been stayed pending dispute resolution.<sup>393</sup> At the end of the transition, licensees must be in the new channel locations and operating according to the new technical rules.

149. BloostonLaw, on behalf of rural operators, asks the Commission to allow rural operators to continue providing service under the old band plan until January 10, 2013, which is approximately five years after the end of the transition.<sup>394</sup> BloostonLaw maintains that the additional five years should be adequate to allow most licensees to recoup the cost of their investment in their existing equipment (equipment that would not have to be replaced but for the transition to the new band plan) and allow for its orderly replacement in the ordinary course of business.<sup>395</sup> The MMDS Licensee Coalition asks the

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<sup>388</sup> EBS Parties Reply Comments at 4; George Mason Reply Comments at 4.

<sup>389</sup> EBS Parties Reply Comments at 4; George Mason Reply Comments at 4.

<sup>390</sup> Clearwire PFR Opposition at 11-12.

<sup>391</sup> *Id.* at 12.

<sup>392</sup> *See supra* ¶ 99 for a further discussion of this issue.

<sup>393</sup> 47 CFR § 27.1232(b)(1)(vi).

<sup>394</sup> BloostonLaw PFR at 7.

<sup>395</sup> *Id.*

Commission to delay the effective date of the transition rules until the *FNPRM* is completed.<sup>396</sup> The MMDS Licensee Coalition states that the availability of the proposed alternative process for non-transitioned markets may be attractive for both prospective transition proponents and non-proponent incumbent licensees.<sup>397</sup> Thus, MMDS Licensee Coalition maintains that depending on how the alternative process comes out, it might make sense for prospective operators to use that as a spectrum-clearing or transition-accomplishing mechanism rather than undertaking the complex process of initiating a transition.<sup>398</sup> But licensees will not be able to assess which option to use, the current transition process or an alternative, until the rules for the alternative process are final.<sup>399</sup> MMDS Licensee Coalition further states that because any transition plan will be subject to reasonable objection by potential participants and the final rules governing the transition are not yet known, they therefore cannot rationally sign on to a particular plan.<sup>400</sup>

150. *Discussion.* We believe that any delay in transitioning the 2.5 GHz band would impose extraordinary costs on licensees and the public in terms of delay to new services and deployments denied.<sup>401</sup> Specifically, we believe that the continued operation of high-power, high-site facilities poses a real and present risk of cochannel interference to the base stations of two-way systems operating nearby and would defeat the underlying purpose of segmenting high-site, high-power operations within the MBS and low-site, low-power operations within the LBS and UBS.<sup>402</sup> We further believe that two-way system operators in the vicinity of such non-transitioned systems would be forced to suffer cochannel interference until 2013, interference which might make the deployment of wireless broadband services using the LBS and the UBS spectrum impossible.<sup>403</sup> Furthermore, we believe that the comprehensive transition to the new 2.5 GHz band plan will only work if the plan is truly comprehensive; each additional exception, limitation, or other allowance to the comprehensive plan harms the public interest in effecting a long overdue restructuring of the historically underused 2.5 GHz band.<sup>404</sup> Thus, we retain the transition deadline as adopted in the *BRS/EB S R&O*, i.e., the transition must be completed 18 months after the transition planning period ends. Finally, while complete information about alternative

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<sup>396</sup> MMDS Licensee Coalition at 3-4.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> See Nextel PFR Opposition at 3.

<sup>402</sup> WCA suggests that the best solution for the rural operators is adoption of the *FNPRM* proposal of a system under which a licensee could opt to return its spectrum in the LBS and the UBS and retain just its spectrum in the MBS. WCA notes that in exchange for its costs of migrating operations to the MBS, including the digitization of operations that today utilize analog technology, would be subject to reimbursement by the winner of the auction for the returned LBS/UBS spectrum. Under this approach, WCA maintains, rural markets will be transitioned on the same schedule as all other markets, but those rural operators that desire to continue high-power, high-site operations can do so through the use of digital technology in the MBS, and ultimately will not incur any costs. See WCA PFR Opposition at 10-11. See also Sprint PFR Opposition at 14-15.

<sup>403</sup> See WCA PFR Opposition at 10-11.

<sup>404</sup> See Nextel PFR Opposition at 3.

transitions might assist participants in the transition process, for reasons described in the accompanying *Second Report and Order*, we believe that it is premature to adopt rules governing alternative transitions until the results of the incumbent-driven transitions, particularly given the self-transition option adopted above, become apparent. Consequently, it presently is not possible to provide the complete information sought by the MMDS Licensee Coalition.

### (iii) Post-transition Notification

151. *Background.* After the transition has been completed, the proponent(s) and all affected BRS and EBS licensees must jointly file a post-transition notification with the Commission indicating that the transition has been completed and that the licensees are operating according to the new rules.<sup>405</sup> Nextel asks the Commission to amend Section 27.1235(a) of the Commission's rules to provide that the proponent alone may provide notification to the Commission following the successful completion of the transition.<sup>406</sup> Nextel argues that that the proponent does not have the incentive or ability to mislead the Commission and that a joint-filing requirement is a costly mandate that needlessly forces hundreds or possibly thousands of licensees within any given transition area to produce paperwork for the government without any clear purpose.<sup>407</sup> BellSouth argues that a statement provided by the transition proponent certifying on behalf of the affected licensees that the transition has been implemented would provide the Commission with sufficient notice that a transition has been completed for a given BTA while reducing the paperwork burden for BRS and EBS licensees.<sup>408</sup>

152. *Discussion.* We agree with BellSouth that a statement provided by the proponent certifying on behalf of the affected licensees that the transition has been implemented would provide us with sufficient notice that a transition has been completed for a given BTA, while reducing the paperwork burden for BRS and EBS licensees.<sup>409</sup> We retain the requirement for the proponent to provide all parties to the transition with a copy of the post-transition notification, however. In addition, we note that petitioners have asked that, in order to stay informed about a proponent's actions, the Commission release a Public Notice whenever a proponent files a Post-Transition Notification.<sup>410</sup> We agree and direct the Wireless Telecommunications Bureau to release a Public Notice whenever a proponent files an Initiation Plan or a Post-Transition Notification. We will then require non-proponent licensees that wish to object to a Post-Transition Notification to file any objections with the Secretary of the Commission within 30 days from the time the Post-Transition Notification has been placed on Public Notice.

## h. Transition Costs

### (i) Proponent-driven transitions

153. In the *BRS/EBS R&O*, the Commission adopted rules requiring a proponent to pay certain

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<sup>405</sup> See 47 C.F.R. § 27.1235. See also *BRS/EBS R&O*, 19 FCC Rcd 14165, 14207 ¶ 102.

<sup>406</sup> Nextel PFR at 16-17. See also *WCA PFR Opposition* at 3.

<sup>407</sup> Nextel PFR at 16-17.

<sup>408</sup> See *BellSouth PFR Opposition* at 21.

<sup>409</sup> See *id.*

<sup>410</sup> See *C&W PFR* at 4; *Pace PFR* at 4. See also *WCA PFR Opposition* at 3.

transition expenses of EBS licensees; specifically, the proponent is required to pay for replacing downconverters that meet the requirements of Section 27.1233(a) of the Commission's rules and for migrating video programming and data transmission tracks that meet the requirements of Section 27.1233(b). The Commission also adopted rules requiring BRS licensees to pay for their own transition costs. Finally, the Commission adopted rules requiring BRS licensees operating on LBS or UBS channels to reimburse the proponent(s) a pro rata share of the cost of transitioning the facilities they use to provide commercial service, either directly or through a lease agreement with an EBS licensee.

154. Petitioners ask that the Commission clarify certain issues that were addressed in the *BRS/EBS R&O* and address other issues that were not specifically addressed in the *BRS/EBS R&O*. Specifically, the petitioners ask the Commission to address the following issues: who must share in the cost of transitioning a BTA; how are costs allocated among entities that are required to share costs; how should the reimbursement obligation be calculated for a GSA that overlaps more than one BTA; how should costs be allocated for an adjoining area that must be transitioned for technical reasons; how are costs sharing reimbursements to be handled by co-proponents; what costs are reimbursable; when must a proponent be reimbursed; how long does the reimbursement obligation last; and which EBS receive sites should receive replacement downconverters.

**(a) Who must share in the costs of transitioning a BTA?**

155. *Background.* Petitioners addressed the issue of who, besides the proponent and BRS licensees, must share in the costs of transitioning a BTA. According to WCA, the Commission must clarify this issue to address the "free rider" problem that could result from excluding those who provide commercial service through leased BRS channels or their own EBS channels from the requirement to share the costs of transitioning the 2.5 GHz band.<sup>411</sup> To fix this problem, WCA recommends that the Commission clarify that anyone who uses a licensed or leased BRS/EBS channel for commercial purposes must share in the reimbursement obligation.<sup>412</sup> WCA further recommends that once an EBS licensee offers a [commercial] service that is not used exclusively for educational purposes, a reimbursement obligation should attach.<sup>413</sup>

156. IMWED recommends that the Commission base the reimbursement requirement on the user rather than the use.<sup>414</sup> When the service is offered by a for-profit entity, it should be considered commercial—even if it entails wireless broadband delivery to schools—and the proponent should be reimbursed.<sup>415</sup> When service is rendered by a non-profit EBS licensee, it should be exempt from the reimbursement requirement.<sup>416</sup>

157. *Discussion.* We agree with petitioners that we should clarify who is responsible for reimbursing proponents for the costs of transitioning a BTA, and specifically reject IMLC's argument

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<sup>411</sup> WCA PFR at 21.

<sup>412</sup> WCA PFR at 21. *See also* Sprint PFR at 6-7.

<sup>413</sup> WCA PFR Reply at 11, n. 35.

<sup>414</sup> IMWED PFR Opposition at 11.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

that a non-proponent BRS incumbent should not be required to pay a proportionate share of the cost of the transition because it neither desires nor consents to a modification of its license.<sup>417</sup> We believe that non-proponent BRS licensees and other commercial users of the 2.5 GHz band derive a benefit from contiguous channels and flexible technical rules, and, therefore, they should reimburse the proponent for their pro rata share of the costs of receiving this benefit. The proponent bears a heavy burden in transitioning the 2.5 GHz band and, if the band is to be successfully transitioned, commercial operators must bear their fair share of the burden.

158. We further reject IMWED's recommendation that we adopt a reimbursement requirement based on the user rather than the use of spectrum.<sup>418</sup> We believe that adopting IMWED's recommendation ignores the fact that EBS licensees have for years leased their excess capacity to commercial operators. Moreover, we believe that adopting IMWED's recommendation forces us to make case-specific determinations regarding who is using the spectrum, the licensee or lessee. We further believe that adopting IMWED's recommendation may result in exempting some commercial lessees of EBS spectrum from sharing in the cost of transitioning the 2.5 GHz band, which, in turn, would cause the remaining commercial licensees to bear a disproportionate share of the cost of transitioning the 2.5 GHz band. We agree with Nextel that it is simpler to distinguish commercial operations from non-commercial operations than it is to distinguish commercial users from non-commercial users.<sup>419</sup> Therefore, we adopt the recommendation of WCA to clarify that commercial lessees of BRS channels, entities that lease EBS spectrum for a commercial purpose, and commercial EBS licensees also must share in the financial obligation to transition a BTA. We further clarify that a non-commercial EBS licensee must pay a pro rata share of the cost of transitioning a BTA if the EBS licensee offers a [commercial] service that is not entirely for educational purposes.<sup>420</sup>

**(b) Cost allocation**

**(i) MHz/pops Formula**

159. *Background.* Petitioners urge the Commission to adopt a clear, pre-defined formula to allocate reimbursement expenses among the proponent, commercial operators of EBS spectrum, and other commercial licensees and lessees.<sup>421</sup> By doing so, these petitioners argue, the Commission will minimize administrative overhead, time-consuming disputes, and possible litigation costs.<sup>422</sup> WCA, Sprint, and Nextel strongly urge the Commission to adopt a formula based on MHz/pops.<sup>423</sup> They argue

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<sup>417</sup> See IMLC PFR Opposition at 8-9.

<sup>418</sup> BellSouth, Nextel, and Sprint recommend that the Commission reject IMWED's proposal to exempt non-profit licensees from reimbursement obligations. See BellSouth PFR Reply at 9-10; Nextel PFR Reply at 16-17; Sprint PFR Reply at 7.

<sup>419</sup> See Nextel PFR Reply at 16-17.

<sup>420</sup> MVPD operators that opt-out of the transition are exempt from paying a pro rata share of the costs of transitioning a particular BTA.

<sup>421</sup> See Nextel PFR at 21.

<sup>422</sup> See *id.*

<sup>423</sup> Nextel PFR at 22; Sprint PFR Reply at 5; WCA PFR Reply at 12-13.

that a MHz/pops formula is a widely used measure of coverage in the communications industry and would serve as a comparatively simple means of assigning transition costs.<sup>424</sup> In addition, they argue that a MHz/pops formula distributes expenses among transition beneficiaries roughly in proportion to the transition costs they generate for the proponent,<sup>425</sup> spreads costs among commercial operations in proportion to the benefits received,<sup>426</sup> and accommodates the widely varying size and irregularities of geographic-area licenses within the 2.5 GHz band.<sup>427</sup>

160. IMWED opposes the adoption of a reimbursement scheme based on MHz/pops. IMWED believes that such a scheme does not correlate to transition costs because some transitions will be more expensive than others, based not on the amount of spectrum a licensee has or the population of its GSA or BTA, but based on other factors, such as the number of downconverters to be replaced.<sup>428</sup>

161. *Discussion.* We believe that a formula based on MHz/pops allocates the costs of transitioning a BTA in a manner that is fair, equitable, and straight forward. Thus, we agree with petitioners that in a proponent-drive transition, costs should be allocated among the proponent and commercial licensees and lessees based on a MHz/pops formula. We reject IMWED's recommendations to approximate costs based on other factors as ambiguous and likely to engender disputes, which will slow the transition of the band.

162. Next, we discuss how the MHz/pops formula should be derived. The three petitioners that addressed this issue are in general agreement, and we adopt their recommendations.<sup>429</sup> To determine the pro rata share of a commercial entity, multiply the total amount of spectrum licensed or leased to that entity by the total population of the service area, either GSA or BTA, serviced by the commercial entity. For example, for an individual station, the MHz/pops is the number of MHz (meaning the amount of spectrum covered by a given call sign after the transition, including the LBS/UBS channels, the MBS channel, and the J/K band channels reflected on the license) multiplied by the population in the licensee's GSA (population counts must be based on the 2000 United States Census). The overall MHz/pops is the sum of the MHz/pops for every licensee in the BTA. This formula adopts the recommendations of WCA to further define "MHz" and how the population counts are to be made.<sup>430</sup>

#### (ii) Base computation of costs

163. *Background.* In addition to adopting a clearly-defined reimbursement formula based on MHz-pops, Clearwire recommends that all costs associated with transitioning spectrum in a market should be included in the base computation of costs to be shared and reimbursed, similar to the categories

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<sup>424</sup> See Nextel PFR at 22.

<sup>425</sup> See *id.*

<sup>426</sup> See WCA PFR at 21-22.

<sup>427</sup> *Id.*

<sup>428</sup> IMWED PFR Opposition at 9-10.

<sup>429</sup> See WCA PFR Reply at 12-13; Sprint PFR Reply at 5; Nextel PFR at 21-22.

<sup>430</sup> See WCA PFR Reply at 11, n. 34.

of costs that are included in the PCS cost-sharing rules.<sup>431</sup> Clearwire notes that examples of costs that should be included are equipment, downconverters, costs to digitize program tracks, engineering, installation, system testing, FCC filing costs, disposal of old equipment, spare equipment, project management, legal costs, third party appraisal costs, etc.<sup>432</sup> In response to Clearwire's suggestion, Sprint developed a list of costs that should be included in the base computation.<sup>433</sup> The list developed by Sprint is divided into five categories and includes costs relating to equipment, engineering, labor, and fees.<sup>434</sup> IMLC, however, objects to the development of a list of reimbursable costs. Instead, IMLC recommends that the Commission establish a reimbursement cap of \$75,000 per four-channel group.<sup>435</sup> IMLC argues that such a cap would not only eliminate much bickering about what costs are properly reimbursable, but will also encourage transition proponents to maintain a tight rein on the costs they incur.<sup>436</sup>

164. *Discussion.* We reject as unsupported IMLC's recommendation to establish a cap on the cost of the transition per four-channel group. We believe that the establishment of a cap would not approximate the real cost of a transition. We further believe that the adoption of a cap may discourage proponents from coming forward to transition a BTA if the proponent does not believe that it can recover most of its costs. Instead, we adopt the recommendation of Clearwire to develop a list of costs to be included in the base calculation. We believe that the development of such a list will facilitate the transition by reducing the likelihood of disagreement over which costs are to be shared. We note Sprint was the only petitioner to develop a list of eligible costs. This list is detailed, comprehensive, and well thought-out. Moreover, we believe that the adoption of the list developed by Sprint will achieve our goal of reducing disputes related to the transition. Thus, we adopt the list of eligible costs, developed by Sprint, which is the only list that is before us.

**(c) Cost allocation between two or more proponents**

165. *Background.* Petitioners ask the Commission to adopt rules addressing cost allocation between two or more proponents. The petitioners have identified three situations when this issue arises: first, when two or more co-proponents transition one BTA; second, when a GSA overlaps two or more BTAs; and third, when the proponent must transition licensees in an adjoining BTA to resolve interference issues. Under the first situation, the petitioners request that the co-proponents be permitted to resolve cost allocation reimbursements between themselves by private agreement, with the lead co-proponent receiving reimbursements and apportioning the proceeds to the co-proponent. Under the second situation, WCA recommends that the Commission adopt a rule in which the costs of transitioning the GSA licensee that overlaps more than one BTA be attributable to the BTA that contains the center point of the GSA. Under the third situation, Sprint and Clearwire recommend that the Commission adopt a rule requiring "Proponent B" (of the adjoining BTA) fully reimburse "Proponent A" (of the transitioning BTA) and then seek reimbursement from spectrum holders in its own BTA. Sprint

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<sup>431</sup> Clearwire PFR at 6.

<sup>432</sup> *Id.*

<sup>433</sup> Sprint PFR Reply, Attachment A. *See also* 47 CFR § 27.1238.

<sup>434</sup> Sprint PFR Reply, Attachment A. *See also* 47 CFR § 27.1238.

<sup>435</sup> IMLC PFR Opposition at 11.

<sup>436</sup> *Id.*

recommends that proponent B should reimburse proponent A when proponent B files its Post-Transition Notification.

166. *Discussion.* We agree with petitioners that co-proponents be permitted to agree among themselves on how to share cost allocation reimbursements under the first situation explained above. We do not agree with petitioners' recommendations under the second situation detailed above. Instead, we conclude that the costs of transitioning a GSA that overlaps two or more BTAs should be attributable to each BTA in proportion to the amount of the GSA located in the BTA. We believe that this decision is consistent with our decision to transition by BTA. We agree with the recommendation in the third situation detailed above, which we believe is consistent with our decision to attribute the costs of transitioning facilities to the BTA where the facilities are located. We further adopt the recommendation of Sprint to require Proponent B to reimburse Proponent A when Proponent B files a Post-Transition Notification. We adopt this recommendation because it provides a time certain for the reimbursement to be made to Proponent B. We do not believe that this decision will cause a significant delay in the reimbursement of Proponent A because the transition process contains deadlines that may be tolled only in the event of a dispute resolution process.

**(d) Reimbursements**

**(i) When are reimbursements due?**

167. *Background.* There was much debate among the petitioners over when the proponent should be reimbursed by commercial operators in the BTA. At issue is whether reimbursements should be due from commercial operators when they start commercial service or when the BTA has been transitioned. Clearwire asks that the Commission adopt a rule that would allow the proponent to seek reimbursement after the market is fully transitioned and the proponent has filed the Post-Transition Notification.<sup>437</sup> Moreover, Clearwire asks the Commission to adopt a rule that permits a proponent to submit invoices to the commercial operators within the BTA as soon as the proponent has, through documentation, ascertained the full and accurate cost of the transition.<sup>438</sup> Clearwire then asks the Commission to adopt a rule that would require commercial operators in the BTA to reimburse the proponent within thirty days of receiving the invoice.<sup>439</sup>

168. Clearwire argues that in the PCS rules, the Commission specifically rejected as too difficult and cumbersome a requirement that either the Commission or the PCIA Microwave Clearinghouse ascertain the commercial launch date in order to determine when cost-reimbursements are owed; instead, the Commission required reimbursements due after the Prior Coordination Notification (PCN) has been filed.<sup>440</sup> Clearwire further argues that because the cost-sharing rules apply only to transitions initiated before January 10, 2008, the logical inference is that the reimbursement must be made be made in connection with transitions, not later commercial launch.<sup>441</sup> Clearwire maintains that

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<sup>437</sup> Clearwire PFR at 7.

<sup>438</sup> Clearwire PFR Reply at 4.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 5-6.

<sup>441</sup> *Id.* at 3.

requiring proponents to indefinitely bear all transition costs until other licensees launch commercial service is anti-competitive, financially punitive, and will inevitably result in transition of fewer markets at a slower pace.<sup>442</sup> Other petitioners ask that the Commission reject Clearwire's recommendations and instead require reimbursement when a commercial operator commences commercial service.<sup>443</sup>

169. *Discussion.* The proponent bears a heavy burden in transitioning a BTA. We disagree with WCA that the proponent's burden is outweighed by the benefit of being first to market.<sup>444</sup> In addition to all of its other duties, the proponent, until it is reimbursed by other commercial operators, must totally bear the costs of transitioning EBS licensees because EBS licensees are never required to reimburse the proponent. In this connection, we note that WCA has stated that in many instances, a proponent may never be able to recoup its costs.<sup>445</sup> Thus, we agree with Clearwire that the benefits of being first-in-time are offset by the disadvantage that proponents may suffer by financing the entire spectrum transition for other licensees, without interest.<sup>446</sup> Moreover, we agree with Clearwire that non-proponent commercial operators receive a benefit when they transition to contiguous spectrum and flexible technical rules, and therefore, we disagree with IMLC's argument that they are not benefited until they begin to offer commercial service.<sup>447</sup>

170. Although non-proponent commercial operators may not realize a benefit until they begin commercial service, and thus, may not have a revenue stream from operations in the 2.5 GHz band out of which to pay reimbursement costs, we believe that any licensee's spectrum in the 2.5 GHz band is significantly more valuable after the transition than it was before the transition. Moreover, paying to transition the 2.5 GHz band is part of the cost of being able to deploy new and innovative services that are impossible to offer under the old interleaved band plan and inflexible technical rules. Thus, Sprint's argument that requiring non-proponent commercial operators to reimburse the proponent before it begins to offer commercial service would divert funds from deployment to reimbursement does not persuade us to adopt a different rule.<sup>448</sup> Furthermore, we believe that allowing a licensee to defer paying its reimbursement obligation until it begins providing commercial service could discourage proponents from coming forward because the proponent would have to carry the entire financial burden of transitioning a BTA until its competitors began providing commercial service. Moreover, we believe that the financial burden of transitioning the 2.5 GHz band must be shared earlier rather than later to ensure the rapid transition of the 2.5 GHz band. Therefore, we conclude that reimbursements may be requested by the proponent after the Post-Transition Notification has been filed and the proponent has accumulated the documentation necessary to substantiate the full and accurate cost of the transition. This provides a date certain for both the proponent and the non-proponent commercial operators, which will eliminate disputes over when a licensee has initiated commercial service. We further believe that providing a date

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<sup>442</sup> *Id.* at 5-6.

<sup>443</sup> See WCA PFR Opposition at 17-18; Nextel PFR Opposition at 4; IMLC PFR Opposition at 10; Sprint PFR Opposition at 12.

<sup>444</sup> See WCA PFR Opposition at 17-18.

<sup>445</sup> See WCA PFR Reply at 12, n. 37.

<sup>446</sup> Clearwire PFR Reply at 5-6.

<sup>447</sup> See Clearwire PFR at 7-8. See also IMLC PFR Opposition at 10.

<sup>448</sup> Sprint PFR Opposition at 13-14.