educational service.[605] IMWED maintains that 15-year lease terms are pro-competitive because new entrants will be able to obtain a constant supply of spectrum as leases expire.[606] IMWED claims that Sprint Nextel has entered into perpetual leases and noted Sprint Nextel's dominant position in the 2.5 GHz band.[607] IMWED argues that perpetual leases are analogous to reallocation of EBS spectrum to commercial use.[608] IMWED notes that *de facto* transfer leases are opaque with respect to the actual length of the lease.[609]

255. Media Access Project and NY3G support IMWED's position.[610] The Media Access Project maintains that because licensees have no guarantee of renewal, there is no merit to the argument that lessees will only invest in equipment if they have the certainty of leases longer than the license term.[611] Moreover, Media Access Project maintains that because the life expectancy of the network equipment is much shorter than 15 years, any commercial entity will receive more than adequate return from a 15-year lease.[612] Media Access Project further maintains that allowing leases longer than 15 years undermines the Commission's decision declining to permit EBS licensees to sell their licenses to commercial entities.[613] Media Access Project also asserts that EBS licensees cannot claim that the Secondary Markets rules introduced greater flexibility because the EBS rules remain intact.[614] NY3G Partnership asks that the Commission (1) prohibit "rights of first refusal" or rights of automatic renewal in EBS lease agreements, where such rights could extend the cumulative lease term beyond ten years; (2) require existing EBS lease agreements to be conformed to these restrictions; and (3) require EBS lease agreements to be filed with the Commission for public inspection.[615]

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[605] *Id.*

[606] *Id.* at 2-3.

[607] *Id.* at 3. Prior to their merger, Sprint and Nextel were the two largest holders of rights to spectrum in the 2.5 GHz band. Sprint held spectrum rights in 190 BTAs, on average 26.8 MHz licensed and 57.7 MHz leased in each BTA. Nextel held spectrum rights in 281 BTAs, on average 35.7 MHz licensed and 53.7 MHz leased in each BTA. In most cases, the spectrum holdings did not significantly overlap. The merger combined Sprint and Nextel's holdings into a virtually nationwide footprint in the 2.5 GHz band (nearly 85 percent of the pops in the top 100 markets). Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14021 ¶ 147 (2005).

[608] IMWED *Ex Parte* at 2.

[609] *Id.*

[610] *See Ex Parte* Letter from Harold Feld, Senior Vice President to Media Access Project to Marlene H. Dortch, Federal Communications Commission (dated Jan. 30, 2006) at 1 (Media Access *Ex Parte*). *See Ex Parte* Letter from Bruce D. Jacobs, Counsel to NY3G Partnership to Marlene H. Dortch, Federal Communications Commission (dated Dec. 9, 2005) at 1 (NY3G Partnership *Ex Parte*).

[611] Media Access *Ex Parte* at 1-2.

[612] *Id.* at 2.

[613] *Id.*

[614] *Id.*

[615] NY3G Partnership *Ex Parte* at 1.

256. Although CTN and NIA and state that the 15-year lease limitation furthers the educational purposes of EBS by ensuring an opportunity for educators to re-evaluate their changing educational needs, spectrum requirements, and technologies on a periodic basis, they indicate that certain changes to the lease term limit may be in the public interest to ensure that investment will be made in support of wireless broadband deployments.[616] CTN and NIA believe that lease-term limitations are appropriate because if the Commission permitted leases to continue indefinitely or for very long terms, leases will be transformed into outright purchases of the spectrum for commercial purposes, in contravention of the Commission's public interest determination to retain EBS eligibility restrictions.[617] CTN and NIA, however, disagree on the conditions under which long lease terms should be permitted.

257. Specifically, NIA states that a 20-year term would probably be sufficient to ensure that investment can and will support the 2.5 GHz band.[618] NIA, states, however, that it is willing to support a 25-year lease term, subject to the following conditions: (1) that the limit is strictly adhered to (*i.e.*, lease terms to evade the limit, such as penalties for non-renewal would not be permitted); (2) all existing EBS excess capacity leases with terms longer than 25 years be required to conform to the new 25-year limit; and (3) sufficient information be filed with the Commission to ensure compliance with the lease term limit.[619] CTN supports a maximum lease term of up to 30 years if the Commission adopts a rule that provides EBS licensees the ability to review their educational use requirements every 5 years beginning on the 15th year of the lease.[620] They state that a right of periodic review is important because it is impossible for any educator to predict now what its educational, technological, and spectrum needs will be decades from now.[621] WCA supports CTN's position.[622] Clearwire asks that the Commission

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[616] In their joint petition for reconsideration, CTN and NIA sought clarification of the 15-year term limitation because the *BRS/EBS R&O* indicated that the Commission was retaining the 15-year limitation, but that limitation was not codified in new Section 27.1214 of the BRS/EBS Rules. *See* CTN/NIA PFR at 20. During the course of this proceeding, however, CTN and NIA changed their original position with regard to the length of EBS leases and now support longer terms under certain conditions. *See Ex Parte* Letter from Edwin N. Lavergne, Counsel, Catholic Television Network and Todd D. Gray, Counsel, National ITFS Association to Marlene H. Dortch, Federal Communications Commission (dated Mar. 17, 2006) at 1.

[617] *Ex Parte* Letter from Edwin N. Lavergne, Counsel, Catholic Television Network and Todd D. Gray, Counsel, National ITFS Association to Marlene H. Dortch, Federal Communications Commission (dated Mar. 28, 2006) at 1-2.

[618] *Ex Parte* Letter from Edwin N. Lavergne, Counsel, Catholic Television Network and Todd D. Gray, Counsel, National ITFS Association to Marlene H. Dortch, Federal Communications Commission (dated Mar. 17, 2006) at 1-2.

[619] *Id.* at 1-2.

[620] *Id.* at 2.

[621] *Id.*

[622] *Ex Parte* Letter from Edwin N. Lavergne, Counsel to the Catholic Television Network and Paul Sinderbrand, Counsel to WCA to Marlene H. Dortch, Federal Communications Commission (dated Apr. 5, 2006) at 1 (*WCA/CTN April 5 Ex Parte*). Before WCA reached an agreement with CTN on April 5, 2006, WCA had advocated that the Commission apply the Secondary Markets rules and policies to EBS leases. *See* WCA PFR Opposition at 31. During the course of the proceeding WCA had submitted economic analyses supporting their original position. *See Ex Parte* Letter from Paul Sinderbrand, Counsel to WCA to Marlene H. Dortch, Federal Communications Commission (dated Feb. 17, 2006), attachment "Phoenix Center Policy Bulletin No. 15." *See* (continued....)

"grandfather" all leases that complied with applicable lease terms limits, including automatic renewal provisions, in effect at the time in which they were entered.[623]

258. Madison Dearborn Partners, Inc., a private equity investment firm, states that if the Commission imposes a lease term limit of less than 30 or 40 years or includes provisions that require periodic re-assessment of the lease terms as a condition to long-term leases, insufficient capital will flow to businesses that want to develop EBS spectrum for intensive broadband use.[624] Madison Dearborn Partners further states that proposals to "re-evaluate" the terms and conditions of a lease at periodic intervals after an initial 15-year term are not different from a lease with an abbreviated term.[625]

259. Several schools and universities have written that as long as they continue to meet the educational needs of their students and remain in compliance with the Commission's rules, they do not believe that a regulatory restriction on lease terms is necessary.[626] These licensees insist that they have substantial experience with leasing their excess capacity and can decide for themselves the type of lease that meets the needs of their individual institutions.[627] Moreover, they note that during lease negotiations with commercial operators they have learned that spectrum lessees are willing to pay considerably more for a longer lease because it gives the commercial lessee greater certainty that they will realize a return on their substantial investment in constructing wireless broadband facilities.[628] They argue that long-term leases provide a "win-win" for both sides: the higher lease payments advance their educational mission, while the longer lease term enable the lessee to develop a viable business model for its broadband service.[629] HITN argues that limiting the maximum duration of usage by a commercial operator will create further uncertainty for an industry that is attempting to achieve long term use of EBS spectrum to deliver new and innovative services to consumers, as well as non-profit and educational

(Continued from previous page)
also Ex Parte Letter from Paul Sinderbrand, Counsel to WCA to Marlene H. Dortch, Federal Communications Commission (dated Mar. 10, 2006), attachment "Declaration of Dr. Michael D. Pelcovits."

[623] *Ex Parte* Letter from Terri B. Natoli, Clearwire to Marlene H. Dortch, Federal Communications Commission (dated Apr. 4, 2006) at 1.

[624] *Ex Parte* Letter from James N. Perry, Jr., Managing Director for Madison Dearborn Partners, LLC to Marlene H. Dortch, Federal Communications Commission (dated Mar. 31, 2006) at 1.

[625] *Id.*

[626] *Ex Parte* Letter from Kemp R. Harshman, President to Clarendon Foundation to Marlene H. Dortch, Federal Communications Commission (dated Dec. 5, 2005) at 1(Clarendon Foundation *Ex Parte*). The following schools, universities, and religious institutions have submitted letters requesting that the Commission not limit EBS lease terms: Concordia University; Diocese of Rockville Centre; Pearsall Independent School District; School District of Clay County; HITN; Patoka Community Unit School District No. 100; Morrisonville C.U.S.D. #1; Abilene Christian University; Evangeline Parish Schools; Diocese of Lafayette; Dana College; Heritage Church & Christian Academy; and Franciscan Canticle, Inc.

[627] *Ex Parte* Letter from Father Jim Vlaun, President & CEO to Diocesan Television Operations (Diocese of Rockville Centre) to Marlene H. Dortch, Federal Communications Commission (dated Dec. 6, 2005) at 1 (Rockville Centre *Ex Parte*).

[628] *Id.*

[629] Rockville Centre *Ex Parte* at 1.

users.[630]

260. George Mason University Instructional Foundation, Inc. (GMUIF), an operator of one of the most extensive 2.5 GHz systems in the United States, operating since 1981, strongly opposes the proposals by CTN and NIA to restrict the maximum permissible term of EBS spectrum leases.[631] GMUIF argues that the overwhelming majority of EBS licensees in the United States would not be able to provide any educational service without the financial and operational support generated through excess capacity leasing.[632] GMUIF further argues that there is no evidence that a mandated maximum lease term of less than 30 years, or of 30 years with Commission imposed restrictions, will attract the billions of dollars in capital needed to roll out new broadband services at 2.5 GHz.[633] GMUIF encourages CTN and NIA to launch a campaign to educate their constituents about leasing issues such as the need to consider future needs when negotiating spectrum lease agreements.[634]

261. NextWave Broadband Inc. (NextWave) argues that the Commission should continue to apply the Secondary Markets rules and policies to EBS leases and that the adoption of other rules applicable to EBS leases would create uncertainty in the EBS leasing marketplace.[635] Contrary to the arguments of CTN and NIA, NextWave maintains that allowing flexible, secondary markets leasing for EBS spectrum is not equivalent to a sale or a reallocation of spectrum for a commercial purpose because only educators can be licensed on EBS spectrum.[636] Moreover, NextWave continues, as the Commission indicated in the *Secondary Markets Order*, the Commission does not consider *de facto* spectrum leases as outright purchases.[637] NextWave also argues that there has been no 15-year lease limitation since January 10, 2005, when the Secondary Markets rules became effective for EBS leases and that it would be unconstitutional to impose new EBS lease term limitations on previously approved EBS lease agreements.[638]

262. The School District of Clay County and the Heritage Baptist Church & Christian Academy note that they have entered into leases with commercial operators that are longer than 15

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[630] *Ex Parte* Letter from Rudolph J. Geist, Counsel to HITN to Marlene H. Dortch, Federal Communications Commission (dated Dec. 16, 2005) at 1.

[631] *Ex Parte* Letter from Michael R. Kelley, Ph.D., President of George Mason University Instructional Foundation, Inc. to Marlene H. Dortch, Federal Communications Commission (filed Mar. 30, 2006) at 1.

[632] *Id.*

[633] *Id.* at 2.

[634] *Id.* at 2-3.

[635] *Ex Parte* Letter from George Alex, Chief Financial Officer to NextWave Broadband Inc. to Marlene H. Dortch, Federal Communications Commission (filed Apr. 3, 2006) at 1.

[636] *Id.* at 2.

[637] *Id.*

[638] *Id.* at 1.

years.[639] They indicate that they are permitted to do so under the Commission's Secondary Markets rules governing *de facto* leasing, which they say, permits spectrum leasing parties to extend the spectrum leasing arrangement beyond the term of the license authorization if the license is renewed.[640]

263. BellSouth also urges the Commission to reject the efforts to revive the fifteen-year limit on EBS leases,[641] noting that, in 1998, the Commission, in extending the maximum lease term from ten to fifteen years, acknowledged that a longer lease term would help place wireless cable on a more equal footing with its competitors, and that EBS licensees would gain greater certainty from the assurance of long-term, stable maintenance and operational support offered by a longer lease term.[642] Luxon argues that restricting the lease term would contravene the Commission's recent decisions promoting flexibility and market-based transactions, and would require the Commission to expend unnecessary administrative resources to supervise individual EBS leasing relationships.[643]

264. Nextel argues that there is no legitimate rationale for a regulatory prohibition against automatic renewal provisions.[644] Nextel maintains that the Commission should not presume that EBS licensees are incapable of protecting their own interests and that an across-the-board regulatory prohibition is preferable to individual marketplace negotiations.[645] Nextel states that the Commission can help encourage this large investment and the resulting new and innovative services by allowing parties to negotiate renewal terms in EBS leases, which flexibility will allow lessees to bargain for extended leases that will provide certainty and help justify the capital investment they will be making, as well as providing regulatory parity.[646] Sprint Nextel argues that the Commission should ensure regulatory parity between EBS licensees and other licensees subject to the *Secondary Markets Order*.[647]

265. In response to these oppositions to its proposal, IMWED argues that these attacks are an indication that the industry plans to use leasing practices to marginalize education in the 2.5 GHz band –

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[639] *Ex Parte* Letter from Alisa Jones, Supervisor of Instructional Support Services to Clay County School District to Marlene H. Dortch, Federal Communications Commission (filed Feb. 3, 2006) at 1 (Clay County *Ex Parte*). *Ex Parte* Letter from Melisse S. Kager, Principal to Baptist Church & Christian Academy to Marlene H. Dortch, Federal Communications Commission (filed Feb. 3, 2006) at 1 (Baptist Church & Christian Academy *Ex Parte*).

[640] Clay County *Ex Parte* at 2 and n. 6. Baptist Church & Christian Academy *Ex Parte* at 2 and n. 6. Both *citing* 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, 17572 at ¶ 151 (2004) (*Secondary Markets Second Report and Order*).

[641] BellSouth PFR Opposition at 11.

[642] BellSouth PFR Opposition at 11, citing *Two-Way Order* at 19183.

[643] Luxon PFR Opposition at 3, citing *Secondary Markets Order*.

[644] Nextel PFR Opposition at 18.

[645] *Id.*

[646] *Id.* at 19.

[647] *Ex Parte* Letter from Lawrence R. Krevor, Vice President to Sprint Nextel to Marlene H. Dortch, Federal Communications Commission, Attachment at 1. (dated Dec. 5, 2005).

in effect to obtain a *de facto* ownership through leasing – though the public interest mandates that EBS be preserved as an educational service.[648] In opposition to WCA's contention that IMWED seeks Commission micro-management of the EBS service, IMWED states that it asks the Commission to impose concrete requirements and to maintain public data about what the Commission's rules identify as the primary purpose of the EBS service.[649] IMWED notes that the Commission has long limited the length of EBS (formerly ITFS) excess capacity lease terms, and maintains that although EBS is being transformed through the advent of wireless broadband, the service has a long history of regulation that supports its educational mission, as well as a continuing obligation to deliver educational service.[650] Accordingly, maintains IMWED, standard Secondary Markets procedures are inadequate as they pertain to EBS.[651] IMWED believes that it would be helpful, though not absolutely necessary, to include a 15-year limit in the EBS rules, but that in light of the record in this proceeding, the Commission must make an unambiguous policy statement that the limit continues to apply.[652]

266. *Discussion.* The comments we have received on this issue demonstrate the need to clarify the Commission's intentions as they relate to the length of EBS leases and the validity of automatic renewal provisions in such leases. First, as CTN and NIA correctly point out, in paragraph 180 of the *BRS/EBS R&O,* the Commission concluded that leases entered into prior to the effective date of the new EBS rules would be grandfathered under the then-existing EBS leasing framework, thus, such leases would be subject to the existing 15-year lease limitation.

267. With the exceptions noted below, spectrum leasing arrangements entered into after the effective date of the new EBS rules, however, are subject to the Commission's Secondary Markets rules. With respect to the Secondary Markets rules, we must distinguish between restrictions on the terms in any lease agreement between the parties, and the length of any spectrum leasing arrangement that the licensee and spectrum lessee have filed with Commission under our Part 1 rules. Under our Secondary Markets rules and policies, "no spectrum manager lease notification or *de facto* transfer lease application can propose a lease term that extends beyond the term of the license authorization itself."[653] This limitation is necessary "because spectrum lessees cannot have any greater right to the use of licensed spectrum than the licensee."[654] We see no reason to depart from this rule here because the Commission's interest in making sure that spectrum lessees do not acquire greater rights than the licensee is fully applicable in EBS. On the other hand, our Secondary Markets rules and policies ordinarily do not restrict the parties' ability to enter into a lease agreement with a term longer than the license term, so long as the license is renewed.[655] Based upon the record, we must determine whether to establish a rule that limits

[648] IMWED PFR Reply at 4.

[649] *Id.*

[650] *Id.* at 5-8.

[651] *Id.* at 8.

[652] *Id.*

[653] *Secondary Markets Second Report and Order,* 19 FCC Rcd at 17572 ¶ 151.

[654] *Id.*

[655] *Id.*

the term of any lease contract entered into by an EBS licensee.

268. After further consideration, we conclude that EBS licensees may enter into a lease with a maximum term of thirty years, subject to conditions designed to ensure that EBS licensees have a fair opportunity to re-evaluate their educational needs. We are persuaded by the analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration. We agree with WCA and CTN, however, that EBS licensees must have a mechanism to ensure that their educational, technological, and spectrum needs are being met. Therefore, we adopt a requirement for all EBS leases with a term of fifteen years or longer to include a right to review the educational use requirements of their leases every five years starting at year fifteen of the lease agreement. We agree with WCA and CTN that a spectrum leasing arrangement may include any mutually agreeable terms designed to accommodate changes in the EBS licensee's educational use requirements and the commercial lessee's wireless broadband operations.[656]

269. With regard to EBS leases entered into between the effective date of the existing BRS/EBS rules (January 10, 2005) and the effective date of the amended rules adopted today, however, we clarify those leases were governed by the Secondary Markets rules and policies that did not restrict the parties' ability to have lease agreements with terms longer than the license term. Thus, the length of EBS leases entered into between January 10, 2005 and the effective date of the amended rules adopted today was not limited under the Commission's Rules.

270. Although we will not permit automatic renewal of an EBS lease beyond 30 years, we will maintain the Commission's existing policy of allowing EBS licensees to afford lessees a right of first refusal, as well as allowing agreements to grant the EBS licensee (but not a lessee) the unilateral right to extend a lease. That is, at the end of any particular EBS lease term, the EBS licensee must retain the ability to re-evaluate the use of their licensed spectrum to identify new educational uses, and to renegotiate such leases as they relate to the licensee's current needs. We agree with IMWED that EBS licensees' educational needs change over time, and thus, leasing arrangements that result in automatic renewals eliminate the flexibility needed to respond to changing circumstances. Conversely, we disagree with commenters like WCA and Nextel who believe that marketplace negotiations that result in automatic renewal provisions are preferable and will help encourage investment and services.[657] Although the Commission does generally encourage marketplace negotiations and solutions, the unique nature of EBS, as well its importance, must not be overlooked here. The Commission has taken numerous steps to increase the flexibility of EBS licensees because such flexibility is crucial to ensuring that the educational mission is accomplished, and we believe that any action that can perpetually bind an EBS licensee to an agreement that might cease to serve its interests, without the opportunity to renegotiate the terms thereof, would be seriously detrimental to the educational mission. Thus, for all EBS leases, we continue to permit renewal options or rights of first refusal for lessees, while prohibiting automatic renewal provisions that do not afford licensees the opportunity to renegotiate their leases at the end of the lease term.

d. Other Leasing Issues

271. *Background.* CTN/NIA points out that our new rules do not correctly incorporate the

[656] *WCA/CTN April 5 Ex Parte.*

[657] Nextel PFR Opposition at 19; WCA PFR Opposition at 30-31.

Commission's policy regarding the acquisition of equipment at the end of the lease.[658] Specifically, CTN/NIA notes that new Section 27.1214(c) only affords EBS licensees the right to purchase or lease EBS equipment in the event that the spectrum leasing arrangement is terminated as a result of action by the spectrum lessee while the Commission's actual policy on equipment recapture for EBS licensees is much more expansive and applicable to both dedicated and common equipment. C&W, DBC, and WDBS oppose mandating in EBS excess capacity leases a provision for an option to purchase equipment upon termination of a lease.[659] Likewise, WCA strenuously opposes expansion of the circumstances under which a lessee must sell equipment to the lessor upon conclusion of the leasing relationship.[660]

272. *Discussion.* We agree with CTN/NIA that, as currently written, our rules do not accurately reflect the Commission's established policy with regard to an EBS licensee's right to purchase or lease equipment at the end of the lease. In 1993, the Commission held that EBS leases must include a provision that affords EBS licensees the right to purchase or lease EBS equipment in the event that the spectrum leasing arrangement is terminated as a result of action by the spectrum lessee.[661] Five years later, in the *Two-Way Order,* the Commission expanded that holding to afford EBS licensees the right to access all equipment necessary for continued distribution of its signal consistent with that during the lease term.[662] This policy has remained in effect since that time. We continue to believe, as stated in the *Two-Way Order*, that such a policy is necessary to ensure that service over the licensee's system is not interrupted in the event that the leasing relationship should end. Furthermore, the Commission's failure to codify this long-standing policy in Section 27.1214(c) was merely an oversight and was not a deliberate attempt to retreat from this policy. Therefore, we will amend Section 27.1214(c) to reflect that EBS licensees retain the right to purchase or lease dedicated or common equipment regardless of whether the relationship terminates as a result of action by the lessee.

273. CTN and NIA note that two of the EBS substantive use requirements, (iv) and (v) listed above and which the Commission indicated in the *BRS/EBS R&O* apply to EBS leases, are not appropriate under the *de facto* transfer model.[663] CTN and NIA explain that EBS licensees may not want to retain responsibility for compliance with rules regarding station construction and operation.[664] Moreover, CTN and NIA explain, an EBS licensee may not want to have all station modification applications submitted through the EBS licensee, particularly for leased capacity that under the new band plan would be used for low-power cellularized two-way services.[665] We agree with CTN and NIA that

[658] CTN/NIA PFR at 20.

[659] C&W PFR Reply at 5-6; DBC PFR Reply at 3-4; WDBS PFR Reply at 5.

[660] WCA PFR Opposition at 31.

[661] *See Turner Independent School District,* 8 FCC Rcd 3153, 3155 (1993).

[662] *Two-Way Order,* 13 FCC Rcd at 19178.

[663] CTN/NIA PFR at 20-21. Substantive use number (iv) states "that the ITFS licensee must retain responsibility for compliance with FCC rules regarding station construction and operation" and substantive use requirement (v) states that "only the ITFS licensee can file FCC applications for modifications to its station's facilities," *See supra* ¶ 243 for a list of the EBS substantive use requirements.

[664] CTN/NIA PFR at 21.

[665] *Id.* at 21.

substantive use requirements (iv) and (v) are not applicable to *de facto* transfer of EBS leases for the reasons cited by CTN and NIA. Also, as recommended by CTN and NIA, we amend Section 27.1214(b) of our rules to reflect that EBS stations in the two-way data environment may not always be used for in-classroom instruction.[666] Thus, as recommended by CTN and NIA, we amend the first sentence of Section 27.1214(b)(1) to indicate that EBS licensees must reserve a minimum of 5 percent of the capacity of its channels for educational uses consistent with Sections 27.1203(b) and (c) of our rules.

C. *BRS/EBS Second Report and Order*

1. Performance Requirements

a. Use of Substantial Service

274. *Background.* In the *NPRM*, the Commission sought comment on what performance requirements should be applicable to MDS BTA authorization holders and site-based MDS and ITFS licensees.[667] In the *FNPRM*, the Commission tentatively concluded that it would adopt substantial service requirements for BRS and EBS,[668] but it sought comment on specific safe harbors that would satisfy the substantial service requirements tentatively adopted for BRS and EBS services.[669]

275. WCA, C&W, Pace, DBC, WDBS, Sprint, and SpeedNet support the adoption of substantial service performance requirements and safe harbors as used in Part 27 for other wireless services.[670] Clearwire, on the other hand, suggests that the former MDS build-out standard, contained at former Section 21.930 of the rules, could form a basis for future performance requirements. That rule provided that "within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals... that are capable of reaching at least two-thirds of the population of the applicable service area."[671] Clearwire takes the position that if coverage to two-thirds of the population was achievable under the former regulatory regime, then it should be achievable under the new regulatory regime.[672] Clearwire, however, suggests modifying this standard to specify that the signal must be of a quality that can provide reliable broadband service.[673] Clearwire reasons that otherwise a licensee could meet its construction requirement simply by erecting a tower or installing equipment that may not be strong enough to provide "sound, favorable, and substantially above

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[666] *Id.* at 20 n.37.

[667] *See NPRM*, 18 FCC Rcd 6722, 6799-6804 ¶¶ 190-198.

[668] *FNPRM*, 19 FCC Rcd 14165, 14283 ¶ 321.

[669] *See FNPRM*, 19 FCC Rcd 14165, 14282-14283 ¶ 321.

[670] WCA Comments at 2-3; C&W Comments at 2; Pace Comments at 2; DBC Comments at 2; WDBS Comments at 2; Sprint Comments at 7; SpeedNet Comments at 2. *See also* BloostonLaw Reply Comments at 2-3

[671] 47 C.F.R. § 21.930(c)(1).

[672] Clearwire Comments at 15.

[673] *Id.* at 17.

mediocre" service to subscribers.[674]

276. *Discussion.* We believe that construction benchmarks focusing solely on population served or geography covered may not necessarily reflect the most important underlying goal of ensuring public access to quality, widespread service.[675] This, however, should not be interpreted to suggest that build out requirements that follow fixed milestones are not an important tool in certain circumstances to ensure the public receives a requisite level of service. For example, in the *Sprint/Nextel Merger Order* the Commission deemed fixed milestones an appropriate tool to ensure service to the public. We reiterate that the conditions in the *Sprint/Nextel Merger Order* still apply to Sprint/Nextel in addition to our decision today to adopt a substantial service standard.[676] Construction benchmarks focusing solely on population served or geography covered may not take into account qualitative factors important to end-users, such as reliability of service, and the availability of technologically sophisticated premium services.[677] While it may be argued that market forces ensure a requisite level of quality in the services

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[674] *Id.* at 17.

[675] *See NPRM,* 18 FCC Rcd 6722, 6803 ¶ 195 ("[F]ocusing solely on the population served via stations authorized pursuant to a particular license hardly tells the story as to whether the licensee is providing adequate service to the public."). *See also* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Proposed Rulemaking,* 18 FCC Rcd 20802, 20820 ¶ 35 (2003) (*Rural NPRM*) ("[G]iven the unique characteristics and considerations inherent in constructing within rural areas, we believe that applying an inflexible construction standard that is based upon coverage of a requisite percentage of an area's population may be an inappropriate measure of levels of rural construction.").

[676] *See* Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14028-14029, ¶¶ 163-166 (2005) (*Sprint/ Nextel Merger Order*). We note that in the *Sprint /Nextel Merger Order* the Commission conditioned our grant of the Application on Sprint Nextel's commitment to meet the following two milestones. "First, within four years from the effective date of [the *Sprint/ Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to a population of no less than 15 million Americans. This deployment will include areas within a minimum of nine of the nation's most populous 100 BTAs and at least one BTA less populous than the nation's 200th most populous BTA. In these ten BTAs, the deployment will cover at least one-third of each BTA's population. Second, within six years from the effective date of [the *Sprint/Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to at least 15 million more Americans in areas within a minimum of nine additional BTAs in the 100 most populous BTAs, and at least one additional BTA less populous than the nation's 200th most populous BTA. In these additional ten BTAs, the deployment will cover at least one-third of each BTA's population. Accordingly, based on the four and six year commitments, within six years of the effective date of this Order applicants will offer service in the 2.5 GHz band to at least 30 million American in at least 20 BTAs, at least two of which are rural communities outside of the nation's top 200 most populous BTAs. The deployment in each of the twenty BTAs will cover at least one-third of each BTA's population." *Id.* at ¶¶ 164-166.

[677] *See, e.g.*, Nextel Reply Comments to *NPRM* at 15-16 ("[A] substantial service standard will provide licensees greater flexibility to determine how best to implement their business plans based on criteria demonstrating actual service to end users, rather than on a showing of whether a licensee passes a certain portion of the relevant population."). *See also*, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order*, 10 FCC Rcd 6884, 6898-6899 ¶ 41 (1995) (*900 MHz Second Report and Order*) ("We also conclude that a showing of "substantial service" is appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services.").

reaching consumers, this is not always the case. For this reason we sought input on factors that can be used as indicia to satisfy safe harbors under substantial service.[678]

277. In some instances, fixed construction requirements may not easily permit the Commission to measure the deployment of service by a licensee. As the Commission noted in the *FNPRM*, merely satisfying such benchmarks does not necessarily demonstrate adequate deployment in rural areas, to niche markets, or to discrete populations or regions with special needs.[679] We believe that a standard based on substantial service is an alternative that may better be able to respond to these various concerns. We agree with commenters and believe that a shift towards a substantial service standard will help encourage licensees to provide the best possible service and avoid "construction...solely to meet regulatory requirements rather than market conditions."[680]

278. We believe that establishing a substantial service standard with safe harbors will "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . .promote investment in and rapid deployment of new technologies and services."[681] Additionally, substantial service will promote the availability of broadband to all Americans, including broadband technologies for educators. We also believe that substantial service will encourage the highest valued use of radio licenses and promote the economic viability of services in this band by ensuring that the spectrum is as fungible, tradable, and marketable as possible. Thus, in order to accomplish these goals, we believe a market-oriented approach to spectrum policy that utilizes a substantial service standard to meet build out requirements best ensures actual deployment of wireless facilities and broader provision of wireless services.[682] Economic forces will guide competing providers to innovate and broaden deployment of services. To this end, we believe that substantial service provides licensees flexibility "to tailor the use of their spectrum to unique business plans and needs."[683] We believe that establishing more flexible rules will result in ubiquitous, high-quality service to the public and at the same time encourage investment by increasing the value of licenses. Further, we believe flexible rules will make licensees more economically viable and will provide incumbents with reasonable opportunities to continue their current uses of the spectrum. Additionally, we believe flexible rules will

[678] *See FNPRM*, 19 FCC Rcd 14165, 14282-14283 ¶¶ 321- 323.

[679] *See FNPRM* 19 FCC Rcd 14165, 14284 ¶ 324; *see also* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078, 19118-19126 ¶¶ 73-74 (2004) (*Rural Order*); Coalition Proposal at 45.

[680] SBC asserts that construction requirements "likely would result in the construction of facilities solely to meet regulatory requirements rather than market conditions," possibly causing facilities to be "constructed inefficiently, and guided more by regulatory necessity than the need to provide least-cost service to consumers." *See* SBC Reply Comments to *NPRM* at 11. SBC says the consequence would be unnecessarily high rates. *See* SBC Reply Comments at 11. Finally, SBC argues that fixed construction benchmarks would be inconsistent with the pro-competitive policies of the Act, handicapping new entrants into the broadband services market. *See* SBC Reply Comments to *NPRM* at 11. We acknowledge that one of our goals is to encourage competition in wireless broadband by creating new opportunities for new entrants. Thus, SBC supports a substantial service standard for these primary reasons. *See* SBC Reply Comments to *NPRM* at 12.

[681] 47 USC §309(j)(4)(B).

[682] *See Rural Order*, 19 FCC Rcd 19078, 19122 ¶¶ 77-78.

[683] *See id.* at ¶ 76.

also facilitate speedier transition and deployment in the band.

279. "'Substantial service" is defined in Part 27 of our rules as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."[684] The Commission has implemented substantial service requirements for other wireless services.[685] By adopting a substantial service standard, with safe harbors, for BRS and EBS services we stabilize the regulatory treatment of similar spectrum-based services by creating regulatory parity between these services and other wireless services.[686] "While the definition of substantial service is generally consistent among wireless services, the factors that the Commission will consider when determining if a license has met the standard vary among services."[687] As noted in the *FNPRM*, we believe that within a substantial service framework, refined measures may be adopted to suit any challenges that BRS and EBS licensees face in development and deployment,[688] *e.g.*, specific safe harbors for EBS licensees, or whether there should be rural-specific safe harbors within the substantial service framework to encourage rural build out.[689]

280. We disagree with Clearwire that the former Section 21.930 of the Commission's rules provides a basis for BRS and EBS performance requirements. The former Mass Media Bureau recognized that there were difficulties in implementing and applying the standard, and those difficulties played a significant role in the decision to postpone the original 2001 deadline for demonstrating substantial service.[690] We also agree with the former Mass Media Bureau's observation that "it would be

[684] 47 C.F.R. § 27.14(a).

[685] *See, e.g., Rural NPRM*, 18 FCC Rcd 20802, 20819 ¶ 34 ("In more recently adopted rules for wireless services, such as our Part 27 rules for private services, Lower and Upper 700 MHz, 39 GHz, and 24 GHz, the Commission established the substantial service standard as the only construction requirement."). *See also* Coalition Proposal at 44. ("There is ample precedent for [a substantial service] approach as the Commission has adopted this very same requirement for operation at 2.3 GHz, the Upper 700 MHz band, the Lower 700 MHz band, the paired 1392-1395 MHz and 1432-1435 MHz bands or the unpaired 1390-1392 MHz, 1670-1675 MHz and 2385-2390 MHz bands.").

[686] *See Rural Order*, 19 FCC Rcd 19078, 19122 ¶ 76; *see also 24 GHz Report and Order*, 15 FCC Rcd 16934, 16951 ¶ 37.

[687] *See Rural R&O*, 19 FCC Rcd 19078, 19118 ¶ 73. For example, in some wireless services, the Commission indicated that licensees providing niche, specialized, or technologically sophisticated services may be considered to be providing "substantial service." *See, e.g.*, Amendment to Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Report and Order*, 10 FCC Rcd 6884, 6898-99 ¶ 41 (1995). In other services, the Commission has indicated that licensees providing an offering that does not cover large geographic areas or population (*e.g.*, point-to-point fixed service), but nonetheless provides a benefit to consumers, also may meet the standard. *See, e.g.*, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-522, *Third Report and Order* and *Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11017-18 ¶ 158 (1998). *Id.* at n. 226.

[688] *See FNPRM*, 19 FCC Rcd 14165, 14283 ¶ 322.

[689] *See id.* at 14287 ¶¶329-330.

[690] Mass Media Bureau Seeks Comment on Extension of the Five-Year Build-Out Period for BTA Authorization Holders in the Multipoint Distribution Service, DA 01-1072, *Public Notice*, 16 FCC Rcd 8884, (rel. April 25, 2001).

inequitable to require authorization holders to follow build-out criteria applicable to rules governing wireless cable operations since many of them are now providing high-speed broadband services."[691]

b. Safe Harbors

281. WCA, C&W, Pace, DBC, WDBS, Sprint, and SpeedNet support the adoption of substantial service performance requirements and safe harbors as used in Part 27 of the rules for other wireless services.[692] BellSouth notes the Commission has established safe harbors for other fixed and mobile wireless services[693] and that subsequent to the adoption of the *BRS/EBS R&O,* extended the application of substantial service to a number of other wireless services.[694] BellSouth, among others,[695] urges renewal of a license if one of the following safe harbors is met:

- Construction of four permanent links per one million people for licensees providing fixed point-to-point services; [696]
- Coverage of at least 20 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;[697]

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[691] *Id.*

[692] WCA Comments at 2-3; C&W Comments at 2; Pace Comments at 2; DBC Comments at 2; WDBS Comments at 2; Sprint Comments at 7; SpeedNet Comments at 2. *See also* BloostonLaw Reply Comments at 2-3.

[693] BellSouth Comments at 5 citing [Amendment of Parts 2 and 25 of the Commission's rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order,* 17 FCC Rcd 9614 (2002) *(MVDDS Order);* Amendments to Parts 1, 2, 87 and 101 of the Commission's rules to License Fixed Services at 24 GHz, 15 FCC Rcd 16934 (2000) (24 *GHz Order);* 218-219 *MHz Flex Order;* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0GHz Bands, *Report and Order and Second Notice of Proposed Rule Making,* 12 FCC Rcd 18600 (1997) (39 *GHz Order);*Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking,* 12 FCC Rcd 12545 (1997) *(LMDS Order);* and Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order,* 12FCC Rcd 10785 (1997) *(WCS Order)*].

[694] BellSouth Comments at 5 citing [Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004) *(Rural Order)* at ¶ 25 (applying "substantial service" standard, alongside existing service-specific construction benchmarks, to licensees in the 30 MHz broadband PCS, 800 MHz SMR (Blocks A, B and C), 220 MHz (with some exclusions), LMS and 700 MHz public safety services)].

[695] *See, e.g.* BellSouth Comments at 3; BloostonLaw Reply Comments at 2-3; C&W Comments at 2; CTN/NIA Comments of at 7-8; Clearwire Comments at 12; Nextel Comments at 2; Sprint Comments at 5; WCA Comments at 2; Choice Reply Comments at 4.

[696] *See, e.g., WCS Order,* 12 FCC Rcd 10785, 10844 ¶ 113; *LMDS Order*, 12 FCC Rcd 12545, 12660-61 ¶¶ 268-272; *MVDDS Order,* 17 FCC Rcd 9614, 9684-85 ¶¶ 176-77. *See also* BellSouth Comments at 6; WCA Comments at 8; Nextel Reply Comments at 4.

[697] See, e.g., *WCS Order*, 12 FCC Rcd at 10844 ¶ 113; *LMDS Order*, 12 FCC Rcd 12545, 12660-61 ¶ 268-272; Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, (continued....)

- Service to "rural areas" and areas with limited access to telecommunications services:
  - Where providing mobile service, coverage of at least 75% of the geographic area of at least 20% of the rural areas within its service area.
  - If providing fixed service, it has constructed at least one end of a permanent link in at least 20% of the rural areas within its licensed area;[698]
- Provision of specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; [699]
- Service to niche markets or areas outside the areas served by other licensees; [700] and
- Demonstration of other public interest reasons.[701]

282. In contrast, Clearwire proposes that the Commission adopt a modified version of the former BTA build-out standard as a safe harbor where licensees are required to construct signals that can provide reliable broadband service and are capable of reaching at least two-thirds of the population in the applicable service area. Specifically, Clearwire proposes that "[w]ithin five years of the effective date of the *BRS/EBS R&O*, each authorization holder must construct EBS or BRS stations on each channel group subject to the authorization that will provide signals that are capable of providing reliable broadband service to two-thirds of the population in the geographic service area." According to Clearwire, prior satisfaction of existing benchmarks (i.e., the build-out requirements of Section 21.930), should be counted for substantial service only if service continues into the next measurement period. It asserts that prior deployments that have been discontinued should not be counted as part of the substantial service demonstration at the relevant five-year measurement point as it would condone warehousing of spectrum.

283. Clearwire is opposed to the fixed (four permanent links per one million people)[702] and mobile (20 percent of the population of the licensed service area)[703] standards supported by other commenters because Clearwire argues that they are too lenient, will not facilitate rapid deployment, and are unjustifiably different from past standards.[704] Clearwire also asserts that there is no justification for

(Continued from previous page)
Report and Order, 15 FCC Rcd 1497, 1538 ¶ 70 (1999) (*218-219 MHz Order*). *See also* BellSouth Comments at 6; WCA Comments at 8; Nextel Reply Comments at 4.

[698] WCA Comments at 9; Nextel Reply Comments at 4; BellSouth Reply Comments at 4. This safe harbor incorporates and quotes the definition recently adopted in the *Rural Order*. *See Rural Order*, 19 FCC Rcd 19078, 19123 ¶ 79.

[699] *See WCS Order*, 12 FCC Rcd 10785, 10844, ¶ 113; *LMDS Order* at 12660 ¶ 270. *See also* BellSouth Comments at 7. IIT specifically supports this safe harbor. IIT Reply Comments at 12.

[700] *See WCS Order*, 12 FCC Rcd 10785, 10844, ¶ 113; *LMDS Order* 12545, 12660 ¶ 270. *See also* BellSouth Comments at 8. IIT specifically supports this safe harbor. IIT Reply Comments at 12

[701] BellSouth Comments at 10.

[702] *See, e.g., WCS Order*, 12 FCC Rcd 10785, 10844 ¶ 113; *LMDS Order*, 12 FCC Rcd 12545, 12660-61 ¶¶ 268-272; *MVDDS Order*, 17 FCC Rcd 9614, 9684-85 ¶¶ 176-77.

[703] *See, e.g., WCS Order*, 12 FCC Rcd 10785, 10844 ¶ 113; *LMDS Order*, 12 FCC Rcd 12545, 12660-61 ¶ 268-272; *218-219 MHz Order*, 15 FCC Rcd 1497, 1538 ¶ 70.

[704] Clearwire Comments at 15.

different standards for fixed and mobile services offered over EBS and BRS spectrum.[705] Clearwire suggests that the Commission should consider the following factors in its substantial service analysis:

- whether the licensee's operations serve niche markets, rural areas, discrete populations, remote areas and regions with special needs;
- whether the licensee serves those with limited access to telecommunications services;
- a demonstration that a significant portion of the population or land area of the licensed area is being served; and
- whether the licensee offers specialized or technologically sophisticated premium service that does not require a high level of coverage to benefit customers.[706]

284. WCA asserts that Clearwire is incorrect in asserting that a safe harbor based on fixed service links would be inappropriate because BRS and EBS spectrum will not be used to provide backbone support.[707] WCA states that while Clearwire may not be contemplating use of BRS and EBS spectrum to interconnect base stations with each other and with a broader network, other system operators have expressed significant interest in the possibility within a variety of WCA forums and elsewhere.[708] As such, WCA believes that the application to BRS and EBS of the fixed service safe harbor traditionally applied to other Part 27 flexible use services remains appropriate here.

285. IMLC asserts that the standard adopted must reflect that the industry has been in regulatory stasis since 2001, which has made it impossible for licensees to make effective use of the spectrum and that it will remain so until the transition process is complete.[709] IMLC further asserts that the straightforward use of one link for 250,000 pops is problematic since in many cases spectrum will be used as part of a consolidated spectrum mélange of different licensees and different services.[710] IMLC therefore suggests four touchstones for renewal expectancy if a licensee has:

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[705] *Id.*

[706] Clearwire Comments at 19 citing [*WCS Order,* 12 FCC Rcd 10785, 10844 ¶ 113 (citations omitted) ("[T]he [FCC] may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets or focus on serving populations outside of areas served by other licensees."); *see also LMDS Order*, 12 FCC Rcd 12545, 12660-61 ¶¶ 21-24; Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, 15 FCC Rcd 10456, 10470-71 ¶¶ 27-28 (2000) (*Narrowband PCS Order*); *Chasetel Licensee Corp.*, 17 FCC Rcd 9351, 9354-55 ¶¶ 8-11 (2002) (A substantial service showing may include the provision of residential, cutting-edge niche services to "campus" populations (business and educational) that are sparsely populated after normal school or work hours.); 47 C.F.R. § 101.1413(b) (Three factors to be considered in acting upon a substantial service showing are: (1) whether the licensee's operations serve niche markets, rural areas, or those outside the service areas of other licensees; (2) whether the licensee serves those with limited access to telecommunications services; and (3) a demonstration that a significant portion of the population or land area of the licensed area is being served.).

[707] WCA Reply Comments at 7 citing (Clearwire Comments at 16 n.30).

[708] WCA Reply Comments at 7.

[709] WCA Comments at 10; IMLC Comments at 7.

[710] IMLC Comments at 7.

- provided service for 20% of its license term;
- entered into a spectrum lease with an unaffiliated entity for 20% of its license term;
- provided service to one link per 250,000 pops;
- at the 10 year mark has constructed facilities providing coverage to 20% of the population of its potential service area.[711]

IMLC asserts the above standard must also apply proportionally to licensees who have not held their licenses for the full ten year license term.[712]

286. *Discussion.* We agree with WCA, Bell South, and the other commenters that it is appropriate to use the type of safe harbors applied to other fixed and mobile services to BRS and EBS. Our new rules give licensees the flexibility to use these services to provide a wide variety of services. Consequently, we believe it is vital to establish safe harbors that encompass licensees' potentially disparate business and service deployment plans. We also believe, however, that it is appropriate to establish safe harbors that are predicated upon an appropriate showing by the licensee that it has made notable progress in deploying service. We agree with Clearwire that the traditional safe harbors associated with other Part 27 services are too lenient given the particular circumstances of BRS and EBS. The safe harbors we adopt today give licensees offering a variety of services ample opportunity to meet at least one safe harbor while ensuring that these frequencies are used to provide an appropriate level of service.

287. We believe that distinctive characteristics of this band support setting safe harbors for these services that are more stringent than those proposed by WCA, BellSouth and others. First, as noted below, licensees have approximately five years from the release of this item to demonstrate substantial service. Most of the existing licenses in the band were issued at least ten years ago, and proposals to reshape the band have been under discussion within the industry since at least 2002, when the Coalition developed the White Paper. Accordingly, we believe that licensees and/or their predecessors have had a more than adequate opportunity to develop plans for rapidly instituting service pursuant to our new rules.[713] We, therefore believe, that licensees should only be permitted to rely on a safe harbor to meet the substantial service requirement if they can show significant service deployment. We, therefore, adopt safe harbors that require licensees to make a stronger showing of service deployment than that proposed by WCA, BellSouth and others.

288. In determining the precise level of service to be required in order to meet a safe harbor, we must also ensure that we do not place an undue burden on licensees. These standards will apply to EBS licenses and small rural operators as well as large carriers. Furthermore, the past difficulties licensees have faced in this band do place some limit on the amount of service we can expect licensees to provide. We, therefore, agree with commenters that urge us to establish safe harbors that encompass

[711] IMLC Comments at 7. BellSouth notes that at least two of IMLC's safe harbors differ from those proposed by it. However, BellSouth does not object to IMLC's touchstones so long as it also adopts the traditional Part 27 safe harbors put forth by BellSouth. BellSouth Reply at 4 n.10.

[712] IMLC Comments at 8.

[713] Most of the BRS BTA authorizations were originally granted in 1996. The last window for filing new EBS authorizations was opened in 1995.

both fixed and mobile service deployments and recognize efforts to serve specialized or niche markets.[714] After full consideration of all the relevant factors, we adopt the following safe harbors:

- Constructing six permanent links per one million people for licensees providing fixed point-to-point services;
- Providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;
- Providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or
- Providing service to niche markets or areas outside the areas served by other licensees.

289. Additionally, in an effort to provide maximum flexibility for licensees in satisfying the safe harbors, we agree with Sprint and BloostonLaw that a licensee will be deemed to satisfy a safe harbor through lease agreements when such arrangements satisfy the conditions set forth in the *Secondary Markets 2nd R&O,*[715] and the lessee is actually providing the level of service required by a licensee that would be deemed to satisfy one of the safe harbors that we adopt today for BRS/EBS licensees.[716]

290. Finally, in response to WCA's and Clearwire's concern that the Commission does not plan to make substantial service determinations on a case by case basis, we explain how we expect the substantial service review process will work. If a licensee meets a safe harbor established by the Commission, we will deem the licensee to have offered substantial service with that license. If the licensee does not meet a safe harbor, we will review the showing on a case-by-case basis. We emphasize that a licensee will not be required to meet a safe harbor if it can otherwise demonstrate substantial service to the public. As recognized in the Commission's own precedent, the primary advantage of the substantial service standard is that it is tied to the individual circumstances of each licensee.[717] In general, there is broad support for the adoption of a substantial service performance standard that provides for case-by-case showings of substantial service coupled with safe harbors.[718]

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[714] We also note that "demonstration of other public interest reasons" as put forth by BellSouth is not a safe harbor that we adopt for satisfying the substantial service standard. Rather, demonstration of the public interest is a factor that we will consider when evaluating whether substantial service has been satisfied on a case-by-case basis.

[715] Sprint Comments at 8 citing (Promoting 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) (*Secondary Markets 2nd R&O*); BloostonLaw Reply Comments at 4.

[716] *See infra* ¶¶ 308- 309.

[717] WCA Comments at 6; WCA Reply Comments at 8; *See also* NIA/CTN Comments at 9-10

[718] *See, e.g.*, Sprint Comments at 5-10; WCA Comments at 2-17; CTN/NIA Comments at 7-10; BellSouth Comments at 5-15; Nextel Comments at 2-5; Grand Wireless at Comments 1; WDBS Comments at 2; DBC Comments at 2; Pace Comments at 2; C&W Comments at 2; SpeedNet Comments at 2.

c. Additional Safe Harbors for EBS Licensees

291. *Background.* CTN/NIA and IMWED propose an EBS licensee should be deemed to be providing substantial service if it satisfies either of the following two tests during the immediately preceding license period:

- Safe Harbor No. 1: An EBS licensee should be deemed to be providing substantial service with respect to all channels held by the licensee if:
  - it is using its spectrum (or spectrum to which the licensee's educational services are shifted) to provide educational services within the licensee's GSA;
  - the services provided by the licensee are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and
  - the level of service provided by the licensee meets or exceeds the minimum usage requirements specified in the Commission's rules; [719] or

- Safe Harbor No. 2: In situations where an EBS licensee leases its spectrum for commercial services and is otherwise in compliance with the Commission's rules (including the EBS programming requirements in Section 27.1203), the licensee should be deemed to be providing substantial service with respect to all channels held by the licensee (even if certain channels are not leased and/or certain channels are not actually used by the commercial system at the time of renewal) if the Commission finds that the wireless system operated by the commercial lessee is providing substantial service pursuant to the criteria applicable to commercial service providers.[720]

In general, BellSouth supports the additional flexibility above for EBS as does WCA, EBS Parties,[721] and IIT.[722]

292. *Discussion.* We agree with the commenters and believe that EBS licensees should be given additional flexibility to satisfy the substantial service standard. With respect to the first safe harbor proposed by CTN and NIA, we believe that this safe harbor properly takes into account the special circumstances EBS licensees and provides EBS licensees with flexibility while ensuring that they are providing educational services. With respect to the second safe harbor proposed by CTN and NIA, we

[719] CTN/NIA Comments at 9; IMWED Comments at 7-8.

[720] CTN/NIA Comments at 9; IMWED Comments at 7-8.

[721] A group of over forty public and private colleges, universities and university systems, state and county boards or offices of education, school districts, community colleges, consortia of educators engaged in distance learning, public broadcasters, and governmental or non-profit educational telecommunications entities.

[722] BellSouth Reply Comments at 5 n.12. BellSouth, notes however, IMWED claims that the "common wireless performance requirements. . . are inapposite for EBS." IMWED Comments at 6. BellSouth opines that to the extent that IMWED's proposal can be construed to mean that the traditional safe harbors should not apply to EBS, it disagrees with this position. *See also* WCA Reply Comments at 13 and ¶ 296 *infra*; EBS Parties Reply Comments at 3; IIT Reply Comments at 11.

have established above that both EBS and BRS licensees have the flexibility to meet the substantial service standard through leasing.[723] In light of this, we agree that EBS licensees can meet the substantial service standard through leasing but we decline to adopt CTN's and NIA's second safe harbor proposal that a lease agreement can be used to meet a safe harbor standard on a system-wide basis regardless of the number of channels leased or in use. As discussed in greater detail below, we apply the safe harbors to both BRS and EBS licensees on a license-by-license basis.[724]

d. Service to Rural Areas

293. *Background.* With respect to safe harbors for rural areas, Grand Wireless believes it would be reasonable for the Commission to adopt rural definitions already established by the Rural Utilities Service (RUS).[725] C&W, Pace, and WCA believe the new safe harbors set forth in the *Rural NPRM* should also be used.[726] Choice urges the Commission to extend the rural safe harbors to remote and underserved areas, such as the Virgin Islands.[727] Gila River Telecommunications Inc (GRTI) proposes reversing the rural safe harbors and believes substantial service standards should be service of 50%, as compared to 75%, of the geographic area of at least 20% of the rural counties within its licensed area.[728] GRTI argues that buildout of the proposed 75% recommendation would create financial hardships, and the 50% threshold is more representative of those entities and tribal inhabitants of such areas who can likely pay for wireless broadband or advanced wireless services.[729] BellSouth does not object to adoption of this standard for "rural areas" or for tribal lands such as those GRTI serves. BellSouth, however, further explains that because the Commission now has a definition of "rural area," it does not make sense to use the more restrictive definition used by the RUS, as suggested by Grand Wireless.[730] Nextel sees no reason for the Commission to adjust its standard Part 27 safe harbors and thus argues the Commission should not adopt GRTI's proposal.[731]

294. *Discussion.* We agree with BellSouth and adopt the definition of "rural area" used in

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[723] *See supra* ¶ 289.

[724] *See infra* ¶¶ 295-298 for a discussion of applying substantial service on a per license, per channel group, or per system basis.

[725] Grand Wireless Comments at 2.

[726] C&W Comments at 2; Pace Comments at 2; WCA Comments at 9.

[727] Choice Reply Comments at 5.

[728] GRTI Comments at 4.

[729] GRTI Comments at 4. BellSouth does not object to adoption of this standard for "rural areas" or for tribal lands such as those GRTI serves. BellSouth argues that because the Commission now has a definition of "rural area," it does not make sense to use the more restrictive definition used by the Rural Utilities Service, as suggested by Grand Wireless. *See* Grand Wireless Comments at 2.

[730] BellSouth Reply Comments at 4 n.9. WCA takes the position that to the extent that Gila River is proposing that this change apply to rural counties that include tribal lands, WCA has not objection to adoption of Gila's proposal. *See also See* Grand Wireless Comments at 2.

[731] Nextel Reply Comments at 5 n.13.

the *Rural Order* for BRS/EBS. The Commission in the *Rural Order* established a baseline definition of "rural area" as those counties (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data.[732] We conclude that this standard is appropriate for these services. For the reasons mentioned above with respect to general safe harbors, we believe it is appropriate to impose more stringent requirements than those proposed by WCA, BellSouth and others on BRS and EBS licensees that seek to take advantage of a safe harbor. We therefore adopt modified versions of the safe harbors adopted by the Commission in the *Rural Order*.[733] Specifically, we adopt the following safe harbors:

- Providing service to "rural areas" (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services:
    - For mobile service, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or
    - For fixed service, where the BRS or EBS licensee has constructed at least one end of a permanent link in at least 30% of the rural areas within its licensed area.

e. Demonstration of Substantial Service – Per License vs. Per Channel Group v. System wide

295. *Background.* BellSouth, Sprint, Nextel, WCA, DBC, among others, all are in favor of a finding of substantial service where any licensee on the system provided substantial service.[734] According to BellSouth, this would acknowledge that:

- "operators are likely to utilize BRS and EBS channels from various sources within a given market;"[735]
- "[m]easuring substantial service on a per call sign or per channel basis may also result in a finding that a licensee has not diligently deployed service when, in fact, a large number of consumers in a given geographic area have access to the service the licensee offers."[736]
- Some licensed spectrum may be used as "guardband to shield other BRS and EBS licensees on the system from interference."[737]
- An operator may not have a "current use" for all channels and may desire to set aside spectrum

[732] *See Rural Order,* 19 FCC Rcd 19078, 19085-19088 ¶¶ 9-12.

[733] *See Rural R&O,* 19 FCC Rcd 19078, 19123 ¶ 79.

[734] BellSouth Comments at 14-15; Nextel Comments at 4; Sprint Comments at 8-9; DBC Reply Comments at 2. BellSouth points out that both the Nextel and Sprint refer to a multi-channel system, when in fact BellSouth believes that Nextel and Sprint mean multi-license system because most licenses cover multiple channels and some H authorizations may cover only one channel. BellSouth Reply Comments at 7 n. 26.

[735] Sprint Comments at 8-9.

[736] Nextel Comments at 5.

[737] BellSouth Comments at 14; *See also* WCA Comments at 11-12.

for future growth.[738]

BellSouth asserts that these examples are illustrative of why the Commission should review substantial service on a market-wide basis rather than simply looking at the services provided by a single licensee.[739] Clearwire, on the other hand, argues that the substantial service standard should be applied on a per channel group basis, as opposed to system wide.[740]

296. WCA, among others, asserts that Clearwire's proposal that the Commission require substantial service to be evaluated on a channel group-by-channel group basis is flawed.[741] WCA, Sprint, Nextel, among others, proposed in response to the *FNPRM* that the Commission establish a safe harbor that would deem any call sign to have provided substantial service if the licensee demonstrates that its spectrum is licensed to or leased by the operator of a multichannel system comprising spectrum licensed under multiple call signs and the multichannel system, taken as a whole, satisfies the substantial service test or any safe harbor related thereto.[742] Sprint states that "in putting their systems together, operators are likely to utilize BRS and EBS channels from various sources within a given market, and may be required in some circumstances to utilize some of this licensed spectrum as guard bands or as reserve to meet future expansion. Assessing performance compliance upon the individual channels that make up the system, thus, may not tell the story of whether the channel is being utilized to provide service."[743] WCA further points out that the Commission has recognized that where spectrum lays unused, there is a significant opportunity cost imposed on the licensee.[744] WCA argues the Commission should focus on the overall service that a system is providing, continue its long-standing view that "market forces, not government regulation, will ensure the provision of services to the public" and retain licensee flexibility rather than force licensees to respond to an artificial channel usage requirement.[745]

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[738] BellSouth Comments at 14; *See also* WCA Comments at 12-13.

[739] BellSouth Reply Comments at 8.

[740] Clearwire Comments at 18.

[741] Clearwire Comments at 12. Additionally, WCA, Nextel, and Sprint also argue that that similarly flawed is the proposal by DBC for the Commission to require a separate substantial service evaluation for each MBS. *See* ¶ 302 *infra*. WCA states DBC's proposal is particularly harsh because of the substantial challenges that many licensees will face in putting their MBS channels to productive use for cellular technology given that high-power, high-site applications can continue in the MBS. WCA further notes the Commission has recognized in refusing to impose channel-by-channel performance requirements in other contexts, licensees will have every economic incentive to make the best use of their MBS channels, whether by using them directly or by leasing them in the secondary market to DBC or others. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order and Order on Reconsideration*, 14 FCC Rcd 17556, 17568 (1999) (*800 MHz MO&O*). *See* WCA Comments at 12 n.28; Nextel Reply Comments at 7 n.17; Sprint Reply Comments at 7 n.20.

[742] WCA Comments at 11-13. *See also* Sprint Comments at 8-9; Nextel Comments at 5; Nextel Reply Comments at 3; BellSouth Comments at 14-15; IMLC Reply Comments at 4.

[743] Sprint Comments at 8-9.

[744] WCA Reply Comments at 12 n.30 citing (*800 MHz MO&O*, 14 FCC Rcd 17556, 17568).

[745] WCA Reply Comments at 13 n.32 citing (*800 MHz MO&O*, 14 FCC Rcd 17556, 17568).

297. *Discussion.* We conclude that substantial service should be individually demonstrated for each license. We believe that requiring demonstration of substantial service on a per license basis best prevents spectrum warehousing and will help to ensure actual deployment of wireless facilities and broader provision of wireless services.[746] A licensee that holds several licenses will have to demonstrate substantial service for each license. To the extent that each license is an essential part of a system that is providing service, each licensee should be able to make a substantial service showing. In particular, we disagree with those commenters who believe that licensees should indefinitely be able to hold spectrum in reserve for possible future use. The public interest in ensuring that this spectrum is placed in use outweighs a licensee's private interest in reserving spectrum for possible future use.

298. While Clearwire proposes that licensees demonstrate substantial service on a per channel group basis, we believe it is more appropriate to require demonstration of substantial service on a per license basis. BRS BTA authorization holders will often be unable to operate on some of their channel groups because of the requirement that they protect incumbent licensees. Moreover, separating out specific channel groups from a BTA authorization and awarding those channel groups to another licensee could hinder development of the band and make it more difficult for the various licensees to use the spectrum. Accordingly, in determining whether a licensee has demonstrated substantial service, we believe it is appropriate to consider the licensee's overall efforts with respect to the license as a whole.

f. Deadline for Demonstrating Substantial Service

299. *Background.* BellSouth, WCA, Nextel, Sprint, CTN/NIA, DBC, IIT, among others, propose that where a licensee's term would expire in 5 years following completion of transition, the Commission should allow a permittee or licensee to obtain a renewal of its license conditioned upon demonstrating substantial service within five years following the post-transition notification date.[747] BellSouth argues this will prevent a licensee from needlessly building stations to meet construction deadlines that are irrelevant to post-transition service.[748] With respect to EBS licensees, CTN/NIA and IMWED request that the Commission not penalize EBS licensees at renewal for failing to meet substantial service performance requirements during the transition process.[749] Specifically, they state in situations where an EBS license expires before a market has been transitioned for at least five years, and the licensee is unable to demonstrate substantial service at renewal, the licensee should be granted automatic renewal conditioned upon a demonstration of substantial service no later than five years after the filing of a post-transition notification in the licensee's market pursuant to the Commission's rules.[750]

300. Clearwire proposes that licensees should be required to demonstrate substantial service for the first time on the five-year anniversary of the effective date of the new rules, January 10, 2010 (as

[746] *See Rural NPRM*, 18 FCC Rcd 20802, 20819 ¶ 34.

[747] BellSouth Comments at 12; Nextel Comments at 3-4; Nextel Reply Comments at 6; WCA Comments at 14-16; Sprint Comments at 8-10; CTN/NIA Comments at 8; DBC Reply Comments at 2; IIT Reply Comments at 10; IMWED Comments at 8.

[748] BellSouth Comments at 12.

[749] CTN/NIA Comments at 8-9; IMWED Comments at 8. Commenters cite to ¶ 233 of the *EBS/BRS R&O*.

[750] CTN/NIA Comments at 8-9; IMWED Comments at 8. Commenters explain that the five year period should begin running from the date of filing of a post-transition notification applicable to the EBS licensee pursuant to 47 C.F.R. § 27.1235.

compared to 5 years after transition) regardless of when they are transitioned to the new band plan or when their licenses are up for renewal.[751] Clearwire also asks that the Commission not give credit for prior, discontinued service.[752] WCA, accompanied by the majority of commenters, notes that Clearwire is the only party suggesting that licensees have less time to establish substantial service, advocating that all licensees be required to demonstrate substantial service by January 10, 2010.[753] Nextel further points to the fact that Clearwire's hard date of January 10, 2010,[754] would offer BRS/EBS licensees whose transition period ends at the last possible date –October 2009- only three months after that period to establish the requisite level of broadband service.[755] WDBS and other commenters who oppose Clearwire's proposal noted that "different markets will require different build-out strategies and timeframes and such [stringent] requirements [as proposed by Clearwire] would merely hinder business planning."[756] CTN/NIA argue that Clearwire's proposal offers the false prospect that canceling licenses after five years and auctioning them to other potential licensees will somehow result in earlier service to the public, when in reality this would cause substantial build-out delays.[757]

301. HITN believes a special safe harbor should be created for licensees whose renewal comes due following the effective date of the new rules but prior to January 2015.[758] This concern stems from the various difficulties HITN believes EBS licensees could experience due to the transition process.[759] Pursuant to HITN's proposal, such EBS licensees would automatically be granted a short renewal for those facilities until January 2015, which would provide a five year service period from 2010 that would be sufficient to amass the needed service history for renewal evaluation in 2015.[760] Nextel and BellSouth note that in instances where transition occurs sooner, a licensee may have seven years or more to provide substantial service, which is unnecessarily long.[761] BellSouth, therefore asserts that its proposal to grant licensees five years from the end of the transition to provide substantial service is more responsive to the timing of the actual transition in a market, thereby giving each licensee the same post-

[751] Clearwire Comments at 9.

[752] Clearwire Comments at 12, 18. Similarly, C&W Enterprises does not support allowing the Commission to consider past operation of a station in meeting its substantial service requirements if such operation has been permanently discontinued. C&W Comments at 2.

[753] WCA Reply Comments at 15; Clearwire Comments at 20-21; Sprint Reply Comments at 6-7.

[754] Clearwire Comments at 20-21.

[755] Nextel Reply Comments at 7.

[756] Sprint Reply Comments at 4 (citing WDBS Comments at 2.) *See also* DBC Comments at 2; C&W Comments at 2; Pace Comments at 2; SpeedNet Comments at 2.

[757] CTN/NIA Reply Comments at 10.

[758] HITN Comments at 3.

[759] *Id.*

[760] *Id.* at 3-4.

[761] Nextel Reply Comments at 8; BellSouth Reply Comments at 6.

transition compliance period.[762]

302. DBC asks the Commission to require a licensee to forfeit its MBS channel if that channel is not place[d] in operation" by January 10, 2010, five years after the effective date of the rules adopted in the *BRS/EBS R&O.*[763] BellSouth argues that because the BRS authorization will include both LBS/UBS channels and an MBS channel, it does not make sense to have a different substantial service deadline for each.[764] Additionally, according to Bellsouth, some transitions may require installation of digital equipment for MBS channels, which can take a significant time to install and make ready for service.[765]

303. *Discussion.* After reviewing the various proposals above for the deadline to meet substantial service requirements, we conclude that licensees must satisfy the substantial service standard by May 1, 2011, which is the date that BRS site-based incumbent renewal applications are due. We believe that providing licensees with a period of five years from completion of transition (which could be as late as 2015) to comply with the substantial service standard is inconsistent with our goal of facilitating the rapid deployment of service in this band. No party has offered any convincing rationale as to why a licensee would need five years after the transition takes place in a market to provide substantial service. WCA's argument that deployment of new services will be postponed if BRS and EBS licensees have to focus their resources on preserving legacy services because of the January 10, 2010 deadline is unsupported speculation.[766] We note that once the transition takes place, many licensees will have already abandoned the legacy services they had previously provided.

304. On the other hand, as Nextel points out, the January 2010 deadline advocated by Clearwire could give licensees as little as three months after the transition to demonstrate substantial service. In certain situations, that could leave licensees with insufficient time to effectuate the transition and commence providing service. We believe that a May 1, 2011 deadline for demonstrating substantial service strikes the appropriate balance between ensuring that the band is promptly placed in use and giving licensees a fair opportunity to transition their facilities. This deadline will give licensees over five years after the establishment of final transition rules and almost nine years since the Coalition Proposal first proposed reorganization of the band. To the extent that licensees are concerned about their ability to meet that deadline, we strongly encourage licensees to begin their transition and business planning now in order to meet that deadline. The May 1, 2011 date will also allow site-based BRS licensees to file their substantial service showing with their renewal applications. Finally, we agree with Nextel that it would be inappropriate to establish different deadlines for the MBS channels and reject DBC's proposal to establish a different deadline for the MBS channels.

g. Credit for Discontinued Service

305. *Background.* BellSouth notes that Clearwire is the only party to take the position that a

[762] BellSouth Reply Comments at 6; Nextel Reply Comments at 8.

[763] DBC Comments at 2.

[764] BellSouth Reply Comments at 7.

[765] *Id.*

[766] WCA Reply Comments at 16.

licensee should not receive any benefit from prior service unless it complied with former Section 21.930, continued providing "valuable" service, and met the "substantial service" requirement five years after the effective date of the new rules. Under this proposal, any licensee that took advantage of the Commission's decision to discontinue service as part of the transition would face that precise consequence the Commission said it would not impose - loss of its license. BellSouth argues that in effect Clearwire is asking the Commission to reconsider its decision to permit licensees to discontinue their obsolete service.[767] WCA, along with virtually every other commenter, takes the position that the record developed in response to the *NPRM* and the *FNPRM* supports adoption of the proposal by WCA that with respect to the first application for renewal submitted after the effective date of the rules adopted in response to the *BRS/EBS R&O*, the Commission should make a finding of substantial service where the licensee demonstrates that it met a safe harbor at any time during the license term, as opposed to just at renewal time.[768] With respect to EBS licensees, IMWED argues that EBS licensees that delivered educational video service were doing what the Commission's rules specified they do and the fact that the 2.5 GHz band has evolved toward wireless broadband does not devalue the years of prior educational service performed by these licensees. As such, according to IMWED, neither should EBS licensees be dissuaded from swapping MBS channels for UBS or LBS channels because that would mean that their video service would be considered discontinued and thus meaningless in qualifying for a safe harbor.[769]

306. WCA argues that the Commission's goals in this proceeding will be compromised if the next BRS/EBS renewals are based only on a substantial service "snapshot" taken when those renewal applications are filed – licensees will be reluctant to discontinue legacy services and start the process of inaugurating advanced wireless services for concern that they will be unable to demonstrate substantial service at renewal.[770] WCA asserts that Clearwire fails to acknowledge the record developed in response to the *NPRM* in support of affording such credit.[771] WCA points to the comments of EarthLink as an example, in which EarthLink takes the position that "a substantial service test that encourages licensees to continue their obsolete video services until after current licenses are renewed ultimately serves neither EarthLink's interest nor the public interest. [EarthLink asserted] [t]he better approach is that suggested by the Coalition – afford a renewal expectancy to any licensee that has provided substantial service

[767] BellSouth Reply Comments at 12. We note that SpeedNet in its reply comments does not support allowing the Commission to consider past operation of a station in meeting its substantial service requirements if such service has been permanently discontinued. SpeedNet Reply Comments at 2.

[768] WCA Comment at 10 n.23 citing (Comments of EarthLink, WT Docket No. 03-66, at 9 (filed Sept. 8, 2003)[EarthLink NPRM Comments]. *See also* Reply Comments of BellSouth *et al.*, WT Docket No. 03-66, at 22 (filed Oct. 23, 2003)[BellSouth NPRM Reply Comments]; Comments of BellSouth *et al.*, WT Docket No. 03-66, at 31-33 (filed Sept. 8, 2003)[BellSouth NPRM Comments]; Comments of Independent MMDS License Coalition, WT Docket No. 03-66, at iii (filed Sept.8, 2003)[IMLC NPRM Comments]; Comments and Reply Comments of Network for Instructional TV, Inc., WT Docket No. 03-66, at 8 (filed Oct. 16, 2003)[Network for Instructional TV NPRM Comments]; Comments of Sprint, WT Docket No. 03-66, at 18 (filed Sept. 8, 2003)["Sprint NPRM Comments"]); IMLC Reply Comments at 4-5; Polar Reply Comments at 4.

[769] IMWED Reply Comments at 5. IMWED further notes that Clearwire, a BRS licensee and BTA holder, takes a position with respect to BTA buildouts that would qualify it for safe harbor credit for having met legacy BTA construction requirements. IMWED Reply Comments at 6 citing (Clearwire Comments at 18).

[770] WCA Comments at 9.

[771] WCA Reply at 9-10 n.23 citing (EarthLink NPRM Comments). *See also* BellSouth NPRM Reply Comments; IMLC NPRM Comments; Network for Instructional TV NPRM Comments; Sprint NPRM Comments.

during its license term, and thereby encourage licensees to immediately commence the transition to broadband regardless of whether they will be sufficiently along in the transition process to qualify for license renewal under the traditional substantial service test."[772] WCA takes the position that if the Commission adopts a restrictive substantial service requirement to promote rapid deployment, the unintended consequence may well delay the deployment of new low power, highly-cellularized services until after the substantial service evaluation has been made.[773]

307. *Discussion.* We agree with the majority of the commenters that prior service, even if discontinued, should be a factor that we take into account when making a determination as to whether substantial service has been met. We have considered prior, discontinued use in other services.[774] We, however, decline to adopt a rule stating that a licensee will have deemed to have provided substantial service if it met a safe harbor at any point during the license term. The most significant consideration in a substantial service evaluation is the licensee's current service. If the current operations are sufficient to support a finding of substantial service, no further evaluation is needed. If the current service does not support a finding of substantial service, we will look at the licensee's overall record during the prior license term.

h. Provisioning of Service to Customers and Students

308. Importantly, we note that in order for a BRS/EBS licensee or lessee to provide substantial service, it must be providing service to customers or students. We therefore conclude that the transmission of test signals and/or color bars by a BRS/EBS licensee or lessee that has no customers or students does not constitute substantial service.[775]

309. As far back as 1987, the Commission released the *Part 21 Report and Order* revising then Part 21 of the Commission's rules, which governed the construction, licensing, and operation of common carrier domestic fixed radio facilities, including the former MDS, which through this proceeding has become the present day BRS.[776] In the *Part 21 Report and Order*, the Commission expressly changed Commission policy regarding unused licenses in the domestic public fixed radio services. Before the *Part 21 Report and Order* was released, the Commission did not require licensees to submit an unused license for cancellation.[777] In changing this policy, the Commission stated that "[t]he comments have failed to convince us that requiring a licensee to submit an unused license for cancellation is, in and of itself, unreasonable."[778] The Commission further explained that while it did not desire to discourage risk taking in the development of new technologies, it had, at the same time an

[772] WCA Reply Comments at 10 citing (EarthLink NPRM Comments).

[773] WCA Reply Comments at 11.

[774] *See, e.g.*, 47 C.F.R. § 101.17(a)(2) (39 GHz).

[775] *See* San Diego MDS Company, *Memorandum Opinion and Order*, 19 FCC Rcd. 23120, 23123-23127 ¶¶ 7-14 (2004) (*San Diego MDS*).

[776] *See* Revision of Part 21 of the Commission's Rules, *Report and Order*, CC docket No. 86-128, 2 FCC Rcd 5713 (1987) (*Part 21 Report and Order*).

[777] *Id.* at 5724 ¶ 82.

[778] *Id.* at 5724 ¶ 83.