obligation to ensure that spectrum is used efficiently.[779] Consequently, the Commission added Section 21.303(d) to Part 21.[780]

310. The plain language of the rule prohibited an MDS station from being non-operational for more than twelve consecutive months.[781] The Commission in *San Diego MDS* stated "it was clearly unreasonable . . . to believe that the periodic broadcasting of signals that nobody received constituted 'service' within the meaning of the rule. Such an interpretation is unreasonable; in order to provide a service a provider would, at a minimum, need a customer or other person to serve."[782] Furthermore, the Commission noted that the underlying purpose of ensuring that spectrum is used efficiently and effectively, to prevent spectrum warehousing, would be frustrated if a MDS licensee's transmission of test signals or color bars constituted authorized service.[783] This same rationale applies today to BRS and EBS spectrum. Consequently, we affirm that the transmission of test signals and/or color bars by a BRS/EBS licensee or lessee does not constitute substantial service.

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[779] *Id.* at 5724 ¶ 82.

[780] 47 C.F.R. § 21.303(d) (1988) stated:

> (d) If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed, under circumstances that do not fall within the provisions of paragraph (a), (b) or (c) of this section, or, if removal of equipment or facilities has rendered the station not operational, the licensee shall, within thirty days of the end of such period of nonuse:
>
> (1) Submit for cancellation the station license (or licenses) to the Commission at Washington, DC 20554;
>
> (2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or
>
> (3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.
>
> If any frequency authorization is cancelled under this paragraph, the Commission will declare by public notice the frequency (or frequencies) vacated.

[781] *Id.*

[782] *San Diego MDS,* 23120, 23124 ¶ 10.

[783] *See San Diego MDS,* 23120, 23124 ¶ 10 (citing *Part 21 R&O*), and 23126-27 ¶ 14.

2. Licensing Unassigned and Untransitioned Spectrum in the Band

a. How to Assign Available Spectrum –

311. *Background.* In the *FNPRM,* the Commission sought comment on how best to license unassigned EBS and BRS spectrum, as well as how to manage spectrum not transitioned to the new band plan by timely-filed Initiation Plans. With respect to such untransitioned spectrum, the Commission set forth an alternative transition proposal that included issuing new licenses for such spectrum and sought comment on all aspects of the proposal, as well as on any alternatives that commenters might suggest.

312. Unassigned EBS and BRS spectrum is comprised of spectrum never previously assigned, as well as previously assigned spectrum returned to the Commission for any reason. EBS spectrum, formerly ITFS spectrum, has been extensively, but not exhaustively, subject to site-based licensing. Given the nature of site-based licensing, there are geographic areas where no license currently authorizes use of the spectrum. In addition, in some areas, less than all of the frequencies formerly allocated to ITFS may have been licensed. The Commission exhaustively licensed spectrum formerly allocated to MDS, now BRS, by assigning geographic area licenses based on the results of Auction No. 6. Those geographic area licenses overlay extensive pre-existing site-based licenses. In some instances, cancellation of prior licenses may have returned to the Commission spectrum subject to previously assigned licenses. However, there is limited unassigned EBS and BRS spectrum, given the pre-existing site-based licenses and the exhaustive licensing of spectrum allocated to MDS, even taking into account subsequently cancelled licenses. Given that Initiation Plans address specified geographic areas, the alternative transition proposal addressed analogous geographic areas. The proposal contemplated that, in the absence of a transition to the new band plan in the given area, the Commission would issue new licenses that in the aggregate would cover the full band in such areas. The Commission proposed granting incumbent licensees rights that would protect the value of their spectrum access while clearing the band for new licensees. However, any given incumbent could become a new licensee, in part by using the value of their existing spectrum access. Cleared spectrum provides the Commission with a wider array of licensing options with respect to geographic areas and frequency blocks. Moreover, new licensees with rights to cleared spectrum may have substantially greater flexibility and possibilities to put the spectrum to use.

313. *Discussion.* We conclude that we should not make any decisions regarding how to assign unassigned spectrum at this time. The Commission's alternative transition proposal contemplated issuing new licenses that, collectively, would offer access to the complete EBS/BRS band in geographic areas that did not transition to the new band plan pursuant to a proponent-filed Initiation Plan. However, our decision in this order to adopt a "self-transition" option in areas not subject to a proponent's Initiation Plan makes it less certain how much unassigned spectrum will be available for alternative licensing mechanisms. Depending on the number and extent of licenses that are "self-transitioned," self-transition could transform a potentially "clear" area into a heavily encumbered area, with available spectrum predominantly comprised of previously unassigned or returned spectrum. Moreover, because the self-transition period will occur after the initial transition period, there will be a longer time before the availability of unassigned spectrum can be determined. Accordingly, we conclude that it would be premature to make specific decisions regarding unassigned spectrum until we see the extent to which markets are transitioned, either through the proponent-based process or self-transitioning.

b. Eligibility to Apply for New Licenses.

314. *Background.* The Commission proposed to assign by auction any new licenses for spectrum in the band, with any auction being open to all parties, both incumbents and new entrants,

potentially eligible to hold the licenses offered. The Communications Act determines whether we must resolve mutually exclusive applications for licenses by competitive bidding.[784] We proposed to open any auction of new licenses to all parties potentially eligible to hold the licenses.

315. *Discussion.* The few commenters addressing the question of who should be eligible to participate in any such auction agreed that it should be open to all potential licensees.[785] An auction is most likely to assign the license to the qualified licensee that most highly values it if the auction is open to all potentially qualified licensees. It follows that licenses with restricted eligibility, such as EBS licenses, may be bid on only by parties potentially meeting all the restrictions on licensees. Accordingly, we conclude that any future auction of unassigned spectrum will be open to all eligible bidders.

c. When to Assign New Licenses

316. *Background.* The Commission sought comment regarding when to issue any new licenses. The Commission observed that a single auction of licenses for all available spectrum in the band would enable all potentially interested parties to participate in a single, simultaneous auction offering transparent price information regarding substitutable or complementary licenses in the band. The Commission noted that, in areas subject to Initiation Plans, previously unassigned spectrum might be primarily, or even exclusively, of interest to incumbent licensees in the area. Accordingly, the Commission also sought comment on whether to conduct auctions in areas subject to transition plans prior to the completion of the time for filing Initiation Plans.

317. Commenters presented a range of opinions on when to assign new licenses in the band, ranging from as soon as possible to after the end of the period for filing Initiation Plans. Many commenters support making licenses available at auction as soon as possible.[786]

318. As the comments reflect, however, there is some question as to precisely how soon it would be possible for applicants to participate effectively in an auction of unassigned spectrum, particularly EBS spectrum.[787] Several commenters, including EBS licensees and some commercial licensees, assert that new licenses for EBS spectrum should not be made available until after the period for voluntary transitions to the new band plan is complete. These commenters argue that "EBS licensees will be occupied with other matters over the next three years, including transitions to the new band plan,

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[784] *See* 47 U.S.C. §309(j). A few commenters expressed the view that there may be only one applicant for any given license for previously unassigned spectrum, given the substantial amount of the spectrum already assigned to incumbent licensees. CTN/NIA Comments at 15; HITN Reply Comments at 6; IMWED Comments at 10. In such circumstances, the Commission would not conduct competitive bidding.

[785] CTN/NIA Comments at 10; HITN Comments at 4.

[786] Clearwire Comments at 5 ("Clearwire urges the Commission to expeditiously identify all fallow EBS and BRS spectrum and, as soon as is reasonably practicable, auction all such spectrum[.]"); WCA Comments at 20 ("[A]uctions of available BRS/EBS spectrum should be conducted as quickly as possible in order to promote the most rapid introduction of service to the public[.]")

[787] *E.g.*, *compare* WCA Comments at 20-21 (proposing including EBS "white space" in an auction held as soon as possible after the adoption of new rules resolve issues raised in the *Further Notice*) and WCA Reply Comments at 21 (suggesting the Commission "conduct the EBS white space auction approximately one year after" resolution of the issues raised in the *Further Notice*); *see also* Sprint Reply Comments at 10 ("Upon further consideration of . . . this issue, Sprint believes that it is unnecessary to put off auctioning the EBS white space[.]")

spectrum lease negotiations, and critically, the development of educational service plans that focus on new technologies tailored to the revised band plan and rules."[788] Other commenters argue that while "EBS eligibles[] may require some lead time to prepare for an EBS white space auction, a delay of three or more years is not justified or necessary[.]"[789] Some EBS licensees note that the formerly ITFS white space has lain dormant for an extended period, as the Commission has addressed rules for the service, and indicate an interest in expediting access to this spectrum.[790]

319. In addition, commenters disagree about whether licensing previously unassigned EBS spectrum will help or hinder transitions to the new band plan. Some commenters contend that an early auction of EBS white space need not complicate transitions, so long as new licensees were not entitled to any rights under the old band plan and therefore not entitled to any rights pursuant to any transition plan.[791] Other commenters express concern about the existence of new licensees complicating the efforts of existing licensees to manage their own interests during transitions, irrespective of rights the new licensees may or may not have.[792]

320. *Discussion.* We conclude that it is premature to make available unassigned spectrum until the transition period is completed. When to make new licenses available in these bands turns on several factors. First, as noted at the outset, the amount of previously unassigned spectrum in these bands is limited. It appears that the unassigned spectrum available for new licenses consists predominantly of previously unassigned EBS spectrum.[793] As noted above, many, though not all, parties with an interest in EBS spectrum support waiting until after the transition to the new band plan to make new licenses available.[794]

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[788] CTN/NIA Comments at 10. *See* Joint Reply Comments of EBS Parties in Support of Joint Comments and Petition for Reconsideration of Catholic Television Network and National ITFS Association (EBS Parties Reply Comments) at 7 (supporting CTN/NIA position). *See* IMWED Reply Comments at 8 (supporting CTN/NIA position); *see also* Nextel Reply Comments at 9 (early auctions of EBS white space "would often leave EBS licensees unable to consolidated holdings across channels and geographic areas, precluding their near-term development of a more robust service.")

[789] Clearwire Reply Comments at 15.

[790] *See* C&W Reply Comments at 3. DBC Reply Comments at 3; WDBS Reply Comments at 3; SpeedNet Reply Comments at 3.

[791] *See* WCA Comments at 21; Clearwire Reply Comments at 15.

[792] *See* Nextel Reply Comments at 9.

[793] Considering spectrum returned to the Commission due to cancellation of prior MDS or ITFS licenses together with previously unassigned spectrum does not alter this conclusion. Defaults on installment payments of winning bids for MDS licenses offered in Auction No. 6 are the primary reason that previously assigned spectrum in these bands has returned to the Commission. The number of defaults is limited. In addition, pending requests for relief with respect to some defaults may make it premature for the Commission to issue new licenses for the subject spectrum. Finally, the licenses assigned based on Auction No. 6 were for available "white space." Thus, even where a license issued following Auction No. 6 cancelled, there still may be significant numbers of incumbent site-based licensees in the area. The cancellation of a geographic license does not mean that there are no BRS licensees in the area capable of proposing an Initiation Plan.

[794] *See* CTN/NIA Comments at 10; EBS Parties Reply Comments at 7 (supporting CTN/NIA position); IMWED Reply Comments at 8 (supporting CTN/NIA position); *see also* Nextel Reply Comments at 9.

321. Second, while it may be possible to make new licenses available in a way that does not interfere with potential transitions to the new band plan, the limitations that might need to be imposed on such new licenses may make them of little immediate use. For example, several commenters suggest that we preclude operations pursuant to the old band plan while incumbents continue such operations. Such limitations are intended to prevent new licensees from imposing new costs on Initiation Plan proponents. However, there appears to be little benefit from issuing such licenses before the transition is complete. In any event, it appears highly unlikely that any new licensee will construct and offer service pending the completion of a transition.

322. Moreover, we believe that all potential licensees, including incumbents and potential new entrants, will be better able to assess their need for, and the value of, new licenses, after existing incumbents complete their transition to the new band plan. The completion of the transition will clarify the landscape of existing and potential uses of new licenses and therefore permit a more effective assignment of those licenses in the first instance.

323. Third, an open market making available all new licenses benefits both licensees, who will have much better information regarding the market value of spectrum access and the availability of alternative spectrum access, and the public, which is more likely to recover a portion of the market value of the underlying public spectrum resource. The relationship between BRS and EBS spectrum makes the availability of spectrum allocated to either service relevant to the other. While only certain parties will be eligible to hold EBS licenses, BRS licensees – and other commercial entities -- may access spectrum subject to EBS licensees through leases with EBS licensees. Thus, parties interested in access to this spectrum likely will be interested in both available BRS and EBS spectrum, notwithstanding the restrictions placed on parties eligible to hold EBS licenses.

324. Finally, the significance of having all available licenses in a single auction only will be increased in the event that additional spectrum is returned to the Commission, whether pursuant to a transition process such as that proposed by the Commission or by other means. While we defer taking any action today with respect to spectrum in areas not fully transitioned by incumbent licensees, the possibility that additional spectrum will be returned to the Commission in the event that incumbent licensees do not complete the transition voluntarily only makes it even more prudent to wait to make new licenses available in these bands.

d. Additional New License Issues.

325. *Background.* Commenters addressed a variety of other issues regarding potential new licenses to be made available in these bands, including the geography and frequencies to be covered by such licenses; the application of the Commission's standard competitive bidding rules; and the availability of bidding credits for applicants seeking new licenses in competitive bidding. Commenters presented a variety of views with respect to such issues. For example, while most commenters argued in favor of issuing licenses that cover BTAs, some commenters supported the Commission's proposal for large area licenses in the low power Lower Band and Upper Band segments of the band plan and others argued, in some contexts, for areas as small as counties.[795] Further, some commenters support splitting previously linked LBS/UBS channels and MBS channels while others contend that the legacy linkage

[795] *See, e.g.*, WCA Comments at 24 (advocating BTAs); HITN Comments at 5 (supporting MEAs); School Board of Miami Dade County Florida Further Comments at 3 (advocating licenses limited to counties in areas not transitioned pursuant to an Initiation Plan).

should be preserved in any new licenses.[796] While there is little dispute about the application of the Commission's general auction procedures, commenters vigorously dispute whether bidding credits should be provided for EBS licensees, and, if so, on what basis.[797] One commenter asserts that "the Commission should require that EBS bidders pay for spectrum from their own funds, without using money obtained from third parties" at all.[798] Numerous commenters strongly object to any such proposal.[799]

326. *Discussion.* Resolution of any of these issues is premature prior to the completion of voluntary incumbent transitions. Until that time, the precise scope of the spectrum subject to new licenses will be unclear, either with respect to geography or frequencies. In addition, it will be unclear whether existing licensees are developing systems that make it practicable to continue licensing low power Upper and Lower Band segment frequencies together with high power Middle Band segment frequencies, or whether the two should be offered separately (subject, of course, to consolidation by licensees in the Commission's auction or in the secondary market). Finally, until the relationship between EBS eligible licensees and their lessees becomes clearer in the context of the new band plan and new service rules, it is premature to attempt to resolve the disputes regarding what resources to consider when determining whether to grant bidding credits to EBS applicants bidding for new licenses.

e. Alternative Transitions to the New Band Plan and New Licenses.

327. *Background.* In the *Further Notice of Proposed Rulemaking*, the Commission detailed a specific proposal for transitioning spectrum in areas that were not transitioned by proponents' Initiation Plans.[800] The proposal was intended to clear current spectrum assignments from the band while preserving the incumbents' ability to access spectrum comparable in value to their prior assignments. Pursuant to the proposal, incumbents would receive modified licenses to enable them to continue current operations, for the duration of the license, so long as those operations did not conflict with new licensees' plans to utilize the spectrum pursuant to the new band plan.[801] Moreover, incumbents would be issued bidding offset credits to enable them to obtain spectrum licenses comparable in value to their

[796] *See, e.g.*, Clearwire Comments at 11 (supporting separate licenses for LBS/UBS and MBS); CTN/NIA Comments at 13 (same); Pace Comments at 3 (the Commission should auction the spectrum "as currently licensed in channel groups as opposed to dividing them into LBS, MBS or UBS licenses"); HITN Reply Comments at 5 (same).

[797] *See* C&W Comments at 2 (proposing "unprecedented discounts" for EBS licensees that forego agreements with third-parties to use the spectrum); Pace Comments at 2 (identical language); DBC Comments at 3 (nearly identical, proposed "extremely competitive discounts of 50% or more"); SpeedNet Comments at 2 (nearly identical, proposed "50% or more discounts"); WDBS Comments at 2 (identical language). *See* CTN/NIA Comments at 15-16 (urging the Commission not to adopt bidding credits in auctions for licenses covering EBS white space). *See also* WCA Reply Comments at 31 (arguing that, while the Commission should not adopt bidding credits, if it does so, it should base credits on factors other than the revenues available to bidders).

[798] IMWED Comments at 11.

[799] *See, e.g.*, CTN/NIA Reply Comments at 12; BellSouth Reply Comments at 16; Sprint Reply Comments at 14.

[800] *See, generally, FNPRM*, 19 FCC Rcd 14165, 14272 ¶¶ 289-319.

[801] This portion of the proposal would not apply to licenses for operations on BRS Channels No. 1 and 2/2A, which would be subject to the separate clearing procedures for that spectrum. However, the remaining element of the proposal, issuing bidding offset credits, would apply to licensees for BRS Channels No. 1 and 2/2A.

original licenses. The proposal called for new licenses consistent with the new band plan to be assigned by an auction open to all potentially qualified licensees. Those new licenses would include spectrum not previously assigned, as well as spectrum not transitioned by an incumbent's Initiation Plan. In addition, the Commission sought comment on whether to permit licensees subject to Initiation Plans the option of exchanging their licenses for modified licenses and bidding credits. If such an option were provided, the spectrum subject to exchanged licenses also would be included in the auction of new licenses consistent with the new band plan. Licenses with restricted eligibility, such as EBS licenses, could be bid on only by parties potentially meeting all the restrictions on licensees. Incumbents could use their bidding offset credits to obtain licenses comparable in value to their original licenses in any auction of new BRS or EBS licenses or any other Commission auction. Finally, this alternative transition process proposal included a limited "opt-out" option for incumbents who prefer to preserve current high-power operations to the extent possible on a frequency block in the MBS, rather than to pursue the wider options available under the new band plan. New licensees whose licenses cover spectrum made available by the relocation of such opt-outs would be required to pay the incumbent's costs of relocating its operations, including any upgrade to digital transmission.

328. Commenters presented various views on the Commission's proposal and specific aspects of it. Some noted that that they have no objection to the Commission's proposed alternative transition mechanism, provided a "self-transition" option is provided first.[802] Others strongly oppose the Commission's proposal.[803] A common objection to the proposal was that current incumbents may not be able to "regain their operating rights" pursuant to new licenses, which may cover a much larger geographic area than current licenses.[804]

329. The Commission proposal provided an opportunity for incumbent licensees to maintain existing services in geographic service areas based on the protected service area provided by existing licenses. The Commission proposal for an alternative transition provided an opportunity for incumbents to "opt-out" of the transition to preserve current high-power operations to the extent possible on a frequency block in the MBS, rather than to pursue the wider options available under the new band plan.[805] However, the Commission's "opt-out" proposal called for a reduction of bandwidth because the new band plan provides only one six megahertz block for high-power operations in the MBS for each original license in the band.

330. Only a few commenters directly addressed the opt-out feature of the Commission proposal. BloostonLaw, reflecting the interest any incumbent would have in retaining as much of its original bandwidth as possible, proposed that licensees opting-out receive new licenses for 12 to 18 megahertz.[806] In reply, however, Nextel noted the lack of additional high-power licenses under the new band plan to provide more than six megahertz of bandwidth to such licensees. Moreover, "a conversion

[802] *See* Nextel Comments at ii ("Nextel would consider not opposing the proposed alternative transition mechanism if the Commission permits licensees to transition their own facilities"); WCA Comments at 22.

[803] *See* CTN/NIA Reply Comments at 11 ("vigorously oppos[ing] the whole alternative/auction process for transitioning to the new band plan").

[804] *See, e.g.*, Stanford University Reply Comments at 6.

[805] *FNPRM*, 19 FCC Rcd 14165, 14280 ¶ 313.

[806] BloostonLaw Comments at 6.

[to digital transmissions] will leave these licensees at least as well off with a 6 MHz MBS channel as they were with four analog channels in the LBS/UBS."[807]

331. *Discussion.* Given the significant differences between the possibility of licensing access to clear spectrum and the possibility of licensing heavily encumbered white space, consideration of potential self-transitions makes it premature to adopt rules governing the licensing of areas not subject to Initiation Plans. In the event that there are large areas that remain untransitioned by either Initiation Plans or self-transitions, the Commission's proposal for an alternative transition still may provide a significant opportunity to achieve the benefits of the new band plan. Alternatively, if most areas are subject to Initiation Plans or extensive "self-transitions" by incumbent licensees, there may be no need to adopt procedures for "clearing" incumbents prior to making available licenses for access to white space.

332. Accordingly, we will monitor the transition process, both pursuant to Initiation Plans and self-transitions, before making further determinations regarding how to license spectrum currently unassigned or that is not transitioned to the new band plan.

3. Grandfathered E and F Channel EBS Stations

333. *Background.* In 1983, the Commission redesignated the E and F Group ITFS channels from the ITFS service to MDS usage.[808] The Commission took this action in an effort to spur the development of MDS to promote effective and intense utilization of the spectrum leading to its highest valued use.[809] As part of its decision, the Commission grandfathered ITFS licensees operating on the E Group and F Group channels subject to the following limitations:

> Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or the application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983.[810]

The Commission stated that "there may be instances where the natural evolution of an ITFS station may reasonably require the addition of receive stations without changing the nature or the scope of the ITFS

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[807] Nextel Reply Comments at 11.

[808] *See* In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Report and Order*, 94 FCC 2d 1203 (1983) (*E and F Group Reallocation Order*).

[809] *Id.* at 1228-29 ¶¶ 61-63.

[810] *See* Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, GN Docket No. 80-112, CC Docket No. 80-116, *Memorandum Opinion and Order on Reconsideration*, 98 FCC 2d 129, 132-33 ¶ 12 (1983) (*E and F Group Reallocation Reconsideration Order*). *See also* 47 C.F.R. § 74.902(c).

operation" that would justify the addition of additional receive sites.[811] In those instances, the Commission stated that the grandfathered ITFS licensee could request a waiver of Section 74.902(c).[812] The Commission's rules provided that "in those areas where Multipoint Distribution Service use of these channels is allowed, Instructional Television Fixed Service users of these channels will continue to be afforded protection from harmful co-channel and adjacent channel interference from Multipoint Distribution Service stations."[813]

334. Commenters in the present proceeding raised the issue of the proper future treatment of grandfathered E and F Group EBS licensees.[814] The Commission noted that if grandfathered E and F Group EBS licensees are not permitted to modify their equipment and BRS licensees must continue operating on a secondary basis, grandfathered E and F Group EBS licensees will cause interference to low-power BRS co-channel licensees in some markets. Put another way, if BRS licensees that are on co-channel frequencies with grandfathered E and F Group EBS licensees must avoid interfering with these frozen licensees, then the deployment of BRS broadband services may be hindered. Additionally, the grandfathered E and F Group EBS licensees will never be able to transition to a low-power cellularized broadband system due to the restriction on modifying their equipment, which is presently contained in our rules.[815]

335. Thus, the Commission sought comment on how to modify its rules concerning grandfathered E and F channel EBS stations in order to equitably allow both BRS and EBS stations to provide advanced broadband wireless services. The Commission inquired whether it makes sense to adopt different approaches to different scenarios, rather than a one-size-fits-all approach.[816]

336. The first scenario that the Commission envisioned is where the PSA of the grandfathered E and F Group EBS licensee almost entirely overlaps the PSA of the co-channel BRS licensee. In this scenario, the Commission sought comment on whether in keeping with the intent and spirit of the Commission's 1983 *E and F Group Reallocation Order* to free up spectrum for BRS,[817] it should require grandfathered E and F Group EBS licensees to operate on a secondary non-interference basis to the co-channel BRS licensee. Alternatively, the Commission sought comment on allowing grandfathered E and F Group EBS licensees to modify their equipment and be given a GSA, while the co-channel BRS operators would have to operate on a secondary non-interference basis.[818] A third approach would be to

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[811] *See E and F Group Reallocation Reconsideration Order*, 98 FCC 2d 129, 132-33 ¶ 12 n.8.

[812] *Id.*

[813] 47 C.F.R. § 74.902(c).

[814] *See* Grand Alliance Comments to *NPRM*; Department of Education Archdiocese of New York Reply Comments (DOEANY Reply Comments) to *NPRM*; Stanford & Northeastern Reply Comments to *NPRM*; Brooklyn Reply Comments to *NPRM*; Coalition Reply Comments to *NPRM*.

[815] *See FNPRM* 19 FCC Rcd 14165, 14290 ¶ 336.

[816] *See id.* at 14290 ¶ 337.

[817] *See E and F Group Reallocation Order*, 94 FCC 2d 1203, 1228-29 ¶¶ 61 - 63.

[818] *See FNPRM* 19 FCC Rcd 14165, 14290 ¶ 339.

rely on voluntary negotiations between the parties.[819]

337. The second scenario the Commission envisioned is where the PSAs of the grandfathered E and F Group EBS licensees overlap to some extent, but not as much as in scenario one. The Commission sought comment on whether, in that situation, it should adopt the same "splitting the football" mechanism it used to separate other overlapping PSAs.[820] The Commission noted that if it adopted that approach, co-channel BRS licensees and grandfathered E and F Group EBS licensees would draw a boundary line through a "football" shaped area where the PSAs intersect, with each licensee agreeing to limit the interference it generates across the boundary and getting a GSA based on its prior PSA. The Commission also sought comment on whether, as suggested by Department of Education Archdiocese of New York (DOEANY) and Region 10, it should continue to afford protection to grandfathered EBS E and F group receive sites that fall outside the new GSAs.

338. Finally, the third scenario the Commission envisioned occurs when the grandfathered E and F Group EBS licensee remains frozen, unable to modify its system, and there is no co-channel BRS licensee. The Commission sought comment on allowing the grandfathered E and F Group EBS licensee to modify and to assign their facilities where there is no co-channel BRS licensee.[821]

339. NY3G, the F Group co-channel BRS licensee in New York City, argues that the problem of conflicting spectrum rights of co-channel licensees appears to be unique to the F group channels in New York City.[822] Thus, it asserts that the situation should be resolved without resort to implementation of new rules of general applicability.[823] NY3G asserts that the problem can be resolved in one of two ways. First, NY3G asserts, the Commission can resolve the New York City situation by enforcing its rules against EBS licensees holding more than four channels.[824] Alternatively, NY3G asserts, the Commission could adopt its proposal to require grandfathered EBS licensees to operate on a secondary, non-interference basis to co-channel BRS licensees where the co-channel licensees continue to have substantial overlapping service areas and where the grandfathered EBS licensee has other EBS channels capable of serving the registered receive sites of its grandfathered facilities.[825] NY3G proposes that BRS licensees would be required to bear the costs associated with relocating EBS licensees to alternative facilities, frequencies, or technologies.[826]

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[819] *See id.*

[820] *See BRS/EBS R&O,* 19 FCC Rcd 14165, 14189-14194 ¶¶ 52-68 for a discussion of splitting of the football and geographic area licensing in general.

[821] *See FNPRM* 19 FCC Rcd 14165, 14291 ¶ 343.

[822] NY3G Comments at 5.

[823] *Id.* at 5-6.

[824] *Id.* at ii. The "Four-Channel Rule" limited a licensee "to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same [channel] Group . . . ." 47 C.F.R. § 74.902(d)(1) (1993). The Commission eliminated the four channel rule post-transition and sought comment on eliminating the four-channel rule in markets that have not yet transitioned. *See BRS/EBS R&O and FNPRM,* 19 FCC Rcd 14165, 14291-92 ¶¶ 344-346. *See also* ¶¶ 355-359 for a discussion of the "Four-Channel Rule."

[825] *Id.* at ii, 7-8.

[826] *Id.* at iii, 7-8.

340. NY3G opposes resolution of this problem by requiring BRS licensees to operate on a secondary, non-interference basis because it believes that this is inconsistent with the Commission's 1983 *E and F Group Reallocation Order* and because this would delay the expeditious deployment of broadband services.[827] NY3G argues that the 1983 *E and F Group Reallocation Order* intended to preserve the ability of EBS licensees to provide programming, not to convey special rights to EBS licensees.[828] NY3G opines that the 1983 *E and F Group Reallocation Order* further makes clear that its underlying purpose was to make room for MMDS.[829]

341. NY3G asserts that the co-channel F group licensees in New York City have been unable to resolve their differences voluntarily for nearly two decades.[830] Thus, NY3G believes reliance on voluntary negotiations can only lead to continued delay in deployment of services.[831] In addition, NY3G opposes using the splitting the football approach to resolve the problem because grandfathered EBS licensees do not have PSAs, and the Commission has never expressed any intention to grant such licensees PSAs.[832] Numerous commenters disagree with NY3G and assert that EBS licensees do indeed have PSAs.[833] NY3G further asserts that applying the split the football methodology would inefficiently require co-channel licensees to serve only half a market.[834] Specifically, NY3G argues, splitting the football in New York City would cause a large exclusion zone to be created where neither co-channel licensee would be able to provide service.[835] NY3G provided maps to show that the exclusion zone created by splitting the football would cover more than seven million people in the following areas: all of Manhattan, the Bronx, and Staten Island, and much of Brooklyn, Queens, Westchester County, and Jersey City.[836] To avoid this situation, NY3G recommends that when the PSAs of the EBS licensee substantially overlaps the PSA of the BRS licensee that would result in an exclusion zone affecting three million people and more than 33 percent of the total population of the combined GSAs of the co-channel licensees, then either of the two co-channel licensees may, during the transition process, elect to divide the channels assignments so that the BRS licensee is assigned the three low-power channels and the EBS licensee is assigned the high-power channel.[837]

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[827] *Id.* at iii.

[828] *Id.* at 16.

[829] *Id.*

[830] *Ex Parte* Letter from Bruce D. Jacobs, Pillsbury Winthrop Shaw Pittman LLP to Marlene H. Dortch, Federal Communications Commission (filed Oct. 17, 2005) at 2 (NY3G *Ex Parte* Letter).

[831] NY3G Comments at iv, 20.

[832] *Id.* at 17-18.

[833] WCA Comments at 26-28; Red New York E Comments at 3; CTN/NIA Comments at 18; TVC Comments at 5; School Board of Miami Dade County, FL (Miami-Dade) Comments at 2; IMWED Reply Comments at 12.

[834] NY3G Comments at 19.

[835] NY3G *Ex Parte* Letter at 2.

[836] NY3G *Ex Parte* Letter at 3 and Attachment A.

[837] *Id.* at Attachment B.

342. TVC, the F Group EBS co-channel licensee in New York City, believes that in the case of substantial overlap, that the Commission should provide a defined period of time for co-channel EBS and BRS stations with GSA overlaps to resolve the transition to the new band plan through settlement.[838] In the event that voluntary settlements do not occur, TVC advocates splitting the football.[839] IIT supports TVC's position.[840] Moreover, if the Commission splits the football to resolve the overlapping PSA of the F Group co-channel New York City licensees, TVC maintains that NY3G would receive a GSA that would cover over 8 million persons, giving it a GSA that is larger than many other BRS licensees in the band.[841] Sprint Nextel's analysis indicates that the worst-case result from applying the "split-the-football" rule would be to affect an area of no more than 0.98 kilometers on either side of the cellular boundary, not the 7.8 kilometers as NY3G claims.[842] Moreover, Sprint Nextel continues, "[t]his worst-case scenario completely ignores the real-world interference mitigation techniques that operators use on a daily basis in the commercial mobile radio service" operating in close proximity to geographic area boundaries.[843] Sprint Nextel maintains that "commonly used low-cost techniques such as carefully selecting tower locations, pointing antenna sectors away from the border, and placing attenuating material on the back of the transmit antenna, will greatly mitigate any interference problems."[844]

343. Red New York E (RNYE), the E Group BRS co-channel licensee in New York City, asserts that even in situations like its own, where the presence of other licensees constricts RNYE's GSA, it is still entirely feasible to provide mobile data/phone service in the GSA without cooperation from adjoining GSAs.[845] While RNYE agrees with NY3G that there is no justification for converting BRS E and F Group licensees into second class status when those licensees have historically been entitled to dominant status, it sides with TVC in supporting the "split-the-football" rule even in cases of significant

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[838] TVC Comments at 16.

[839] *Id.* at 17.

[840] IIT Reply Comments at 14.

[841] *Ex Parte* Letter from Edwin N. Lavergne, Counsel, Trans Video Communications, Inc. to Marlene H. Dortch, Federal Communications Commission (filed Oct. 26, 2005), Attachment at 2.

[842] *Ex Parte* Letter from Lawrence R. Krevor, Sprint Nextel to Marlene H. Dortch, Federal Communications Commission (filed Oct. 27, 2005) at 1 (*citing* engineering statement of Robert Gehman, Jr., P.E.).

[843] *Id.*

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

[845] RNYE Comments at 4. RNYE describes its situation as follows:

> Red New York E's Station WLR500 is located 12.4 miles from co-channel [EBS] Station KRS82 in New York City, and 14.2 miles from co-channel [EBS] Station KRS83 in Yonkers, New York. The next-closest co-channel stations are [EBS] Stations KRS85 in Beacon, New York and KNZ65 in Uniondale, New York. The last-named station is licensed to the Diocese of Rockville Center; the others are licensed to the Archdiocese of New York. KRS85 is 51.8 miles and KRS65 is 70.1 miles from WLR500. The presence of these stations significantly constricts the GSA of Station WLR500, from a circle with a 35-mile radius to a long relatively narrow area that is almost rectangular in shape. Despite these constrictions, it would be entirely feasible, as shown by Attachment A hereto, the Design Study Report of C.J. Hall, to provide a mobile data/phone service in the GSA, even without cooperation from adjoining GSAs . . . . *Id.* (citations omitted).

EBS/BRS MSA overlap.[846] Furthermore, it asserts that periodic disputes on this matter will be resolved.[847] Thus it recommends that the Commission adopt no special technical, interference, or service rules affecting grandfathered E and F channel stations.[848]

344. CTN, NIA, and WCA believe that the Commission should encourage voluntary settlements.[849] In the event that a voluntary settlement cannot be reached, CTN, NIA, Nextel, and WCA recommend that the Commission split the football.[850] CTN and NIA disagree with NY3G that special requirements should be adopted to deal with NY3G's situation in New York City.[851] As a threshold matter, they disagree that NY3G's situation is indeed unique, and further assert that uniqueness is in any case irrelevant inasmuch as the split the football approach offers an equitable solution in all scenarios.[852] IIT agrees.[853] Furthermore, in response to NY3G's assertion that the splitting the football approach would lead to bifurcated service areas that are not conducive to deployment of broadband services,[854] CTN and NIA assert that even when a newly formed GSA is relatively small due to the existence of overlapping PSAs, it is entirely feasible to launch a viable commercial broadband service.[855] The EBS Parties support CTN and NIA's position on this issue.[856]

345. Stanford University and the School Board of Miami Dade County Florida (MDCPS) argue that EBS licensees are to be protected in perpetuity as per the 1983 *E and F Group Reallocation Order*.[857] They assert there is no public interest reason that these stations should not be allowed to transition to the new EBS band.[858] TVC asserts that the Commission should treat grandfathered EBS stations like all other EBS stations for the transition to the new band plan.[859] TVC reasons that such equal treatment will promote efficient spectrum use as many grandfathered licensees have leased excess capacity to commercial partners who expect that such leases will be honored.[860] NY3G replies that the

[846] *Id.* at 5.

[847] *Id.*

[848] *Id.* at 5-6.

[849] CTN/ NIA Comments at 5; WCA Comments at 27.

[850] CTN/NIA Comments at 5; WCA Comments at 26; Nextel Reply at 13.

[851] CTN/NIA Reply Comments at 3.

[852] *Id.*

[853] IIT Reply Comments at 16.

[854] NY3G Comments at 19.

[855] CTN/NIA Reply Comments at 4.

[856] EBS Parties Reply Comments at 6.

[857] Miami Dade Comments at 3-4; Stanford Reply Comments at 2-3.

[858] Stanford Reply Comments at 4.

[859] TVC Comments at 5.

[860] *Id.* at 5-6.

Hazlett study, commissioned by it, demonstrates that making grandfathered stations secondary is supported by sound economic principles as it would save consumers several hundred millions of dollars annually, and that such savings would continue to increase as the number of competitors grows.[861] TVC retorts that this analysis fails to consider the public interest value of providing educational as opposed to commercial services.[862] TVC further asserts that the analysis fails to account for new services that will be provided to TVC and other EBS licensees and commercial lessees.[863]

346. TVC also claims that the purpose of the 1983 *E and F Group Reallocation Order* was to spur the development of competition to cable, which has not materialized, and that grant of primary spectrum rights to MMDS licensees would not be related to this purpose.[864] NY3G replies that contrary to TVC's claim, the 1983 *E and F Group Reallocation Order* did not purport to simply develop competitors to cable; rather, a major goal was to make more efficient use of fallow spectrum.[865] It further asserts that the Commission acknowledged that many other uses were possible including high speed data transmission, and further stated it would permit any kind of communications consistent with the Commission's rules.[866]

347. *Discussion.* We have carefully weighed the comments on grandfathered E and F group EBS licensees and considered the three scenarios the Commission put forth in the *NPRM*: (1) the PSA of the grandfathered E and F Group EBS licensee almost entirely overlaps the PSA of the co-channel BRS licensee; (2) the PSAs of the grandfathered E and F Group EBS licensees overlap to some extent, but not as much as in scenario one, and (3) the grandfathered E and F Group EBS licensee remains frozen, unable to modify its system, and there is no co-channel BRS licensee.[867] We adopt a solution that provides resolution to the three scenarios the Commission envisioned.

348. We first conclude that where there is no overlap between the EBS and BRS licensees, we will free up the grandfathered E and F channel EBS licensees, grant these licensees a GSA, and allow them to modify or assign their license. This change will allow EBS licensees to take full advantage of their EBS spectrum without any corresponding harm to BRS licensees.

349. Next we conclude, in the case where the GSAs of a grandfathered EBS and BRS licensees overlap, but that overlap is 50% or less, we will divide the GSAs by "splitting the football," as we do with other overlapping GSAs.[868] Both the BRS and EBS licensees will be free to add, modify, and remove facilities within their GSAs, consistent with our new technical rules. In addition, the grandfathered EBS facility will be free to assign its license.

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[861] NY3G Reply Comments at 9, citing Hazlett Study at 14-15.

[862] TVC Reply Comments at 7.

[863] *Id.* at 9.

[864] TVC Comments at 11, 14.

[865] NY3G Reply at 8 (citing 1983 *E and F Group Reallocation Order* ¶ 54).

[866] NY3G Reply at 8 (citing 1983 *E and F Group Reallocation Order* ¶¶ 62, 101).

[867] *See supra* ¶¶ 336 - 338.

[868] 47 C.F.R. § 27.1206.

350. In the case of an overlap that is greater then 50% in service areas, we conclude that different treatment is warranted. Where there is a major overlap of service areas, splitting the football may no longer be the best solution for accommodating the needs of both licensees. To encourage a voluntary settlement of this issue between the affected parties, we will establish a ninety-day mandatory negotiation period where both the BRS and EBS licenses have an explicit duty to work to accommodate each other's communications requirements. If, at the end of ninety days the parties cannot reach a mutual agreement, the Commission then will split the football on its own accord. As NY3G indicated, the affected co-channel licensees have had two decades to negotiate a solution to this problem. Because the issues are not new to the effected parties, we believe that a ninety-day period is appropriate. In addition, we also decline to afford protection to grandfathered EBS E and F group receive sites that fall outside the new GSAs. We believe that providing interference protection to receive sites outside the new GSAs could be unduly disruptive to those licensees who have a GSA that encompasses an out-of-area receive site and could hinder the deployment of new services. However, as with receive sites located inside the former PSA but outside the new GSA, we will allow continued service of such receive sites on a secondary, non-interference basis.[869]

351. The solution adopted above is consistent with the comments we received in the proceeding, with the exception of NY3G. For instance CTN, NIA, Nextel, and WCA recommend that the Commission split the football.[870] CTN and NIA disagree with NY3G that special requirements should be adopted to deal with NY3G's situation.[871] Additionally, TVC believes in the case of substantial overlap, that the Commission should provide a defined period of time for co-channel EBS and BRS stations with GSA overlaps to resolve the transition to the new band plan through settlement.[872] In the event that voluntary settlements do not occur, TVC advocates splitting the football.[873] IIT supports TVC's position.[874] The solution we adopt today is also consistent with the 1983 *E and F Group Reallocation Order*, which called for protection of EBS operations in perpetuity because EBS licensees will be able to operate under any of the three scenarios set out above.[875] Importantly, the solution we adopt is consistent with the Commission's statement in 1983 that it expected that the BRS permittees and the EBS users of the reallocated channels would negotiate in good faith to mutually accommodate each others' communications requirements.[876]

352. We reject NY3G's proposal to split the channels and give the LBS and UBS channels to the BRS licensee while limiting the EBS licensee to the MBS channel.[877] We do not believe that limiting

[869] *See BRS/EBS R&O* 19 FCC Rcd 14165, 14194 ¶¶ 66-67.

[870] CTN/NIA Comments at 5; WCA Comments at 26; Nextel Reply Comments at 13; *see also* ¶ 344 *supra*.

[871] CTN/NIA Reply Comments at 3; *see also* ¶ 344 *supra*.

[872] TVC Comments at 16; *see also* ¶ 346 *supra*.

[873] TVC Comments at 17; *see also* ¶ 346 *supra*.

[874] IIT Reply Comments at 14; *see also* ¶ 346 *supra*.

[875] *See E and F Group Reallocation Order*, 94 FCC 2d 1203, 1247-8 ¶ 110; *see also* ¶ 336 *supra*.

[876] *See E and F Group Reallocation Order*, 94 FCC 2d 1203, 1247-8 ¶ 110; *see also* ¶ 336 *supra*.

[877] *See Ex Parte* Letter from Bruce D. Jacobs, Counsel, NY3G to Marlene H. Dortch, Federal Communications Commission (dated Oct. 17, 2005) at Appendix B.

the EBS licensee to one MBS channel is an equitable solution. NY3G's proposal is based on the unwarranted assumption that EBS licensees are unable or unwilling to utilize the LBS and UBS channels. The record in this proceeding convincingly demonstrates that EBS licensees are committed to using the LBS and UBS to provide a variety of educational and other services. Furthermore, we do not believe that restricting grandfathered EBS licensees to one six megahertz channel is consistent with the Commission's prior commitments to protect EBS operations in perpetuity.

353. We also reject NY3G's argument that splitting the football would not work in the New York market because it would create a large "exclusion zone" where neither the BRS nor the EBS licensee could provide service.[878] NY3G defines its exclusion zone based upon its assumption that a base station could not be located any closer than 7.8 kilometers from a GSA border.[879] In fact, the record demonstrates that even without cooperation between the parties, a base station could be located as close at 0.61 miles from the border of a GSA and 0.9 miles from another base station in compliance with our new technical rules.[880] Indeed, if the parties cooperate with each other and use engineering techniques such as beam tilt and antenna shielding, base stations could be located even more closely together.[881] The problems NY3G points out with respect to splitting the football are not unique to grandfathered E and F EBS stations that overlap with co-channel BRS stations. No other party, however, has suggested that the splitting the football methodology adopted by the Commission cannot work. Indeed, RNYE believes splitting the football is a viable approach in New York City although its GSA is more constrained than NY3G's GSA.[882] By NY3G's own calculations, splitting the football would provide NY3G with an exclusive GSA covering over 8 million people.[883] We believe this exclusive GSA is a major benefit to NY3G.

354. The solution we adopt today permits grandfathered E and F channel EBS licenses, which have been providing service for many years, to modernize their systems to better serve the public. For instance, EBS licensees will be able to transition to low-power cellularized operations. Granting this type of flexibility is consistent with the *BRS/EBS R&O's* geographic area licensing and greater flexibility approaches. The solution we adopt today further promotes secondary markets transactions as well as opportunities to obtain funds for education. Additionally, it gives commercial operators more spectrum, thereby moving closer to the goal of achieving the availability of new broadband technologies to all Americans as quickly as possible, while providing licensees with the flexibility to form unique solutions to problems of interference on a case-by-case basis, taking into account the special technological needs of each party. Finally the solution adopted today is an equitable solution that does not favor one class of licensees over another.

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[878] *See* NY3G Reply Comments.

[879] NY3G Reply Comments, Exhibit A at 2-3.

[880] *See, e.g.*, *Ex Parte* Letter from Lawrence R. Krevor, Vice President Government Affairs to Sprint Nextel Corporation to Marlene H. Dortch, Federal Communications Commission (dated Oct. 27, 2005).

[881] *Id.*

[882] RNYE Comments at 4.

[883] NY3G Reply Comments, Exhibit A at 2.

4. Four channel rule

355. *Background.* The Commission's Four-Channel Rule limits an EBS licensee "to the assignment of no more than four . . . channels for use in a single area of operation, all of which . . . should be selected from the same [channel] Group."[884] This rule was enacted to prohibit applicants from reserving additional channels by applying for more channels than they intended to construct within a reasonable time, simply for the purpose of reserving additional channels.[885] In the *FNPRM*, the Commission noted that the continued application of the Four-Channel Rule is inconsistent with the transition rules because licensees wishing to continue high-powered operation may need channels from more than one channel group. Thus, to promote the transition of the 2.5 GHz band and the ability of licensees to "swap" channels in the same geographic region, the Commission eliminated the four-channel restriction post-transition. In addition, the Commission sought comment on whether the four channel restriction should be eliminated pre-transition as well.

356. Most commenters who commented on this issue recommend that the Commission remove the four-channel restriction pre-transition.[886] Generally, they indicate that the continued application of the four-channel rule does not benefit the public.[887] They argue that removing the four-channel restriction would further the transition by enabling EBS licensees to "swap" channels in a particular geographic area and permit an EBS licensee to obtain more than one MBS channel.[888] Commenters further argue that lifting the restrictions would further the transition by permitting EBS licensees to assign their licenses to other EBS licensees. They indicate that this furthers the transition in those instances in which an EBS licensee does not wish to go through the transition process assigns its license to another EBS licensee in the same geographic area that is willing to go through the transition process.[889] They also indicate that removing the four-channel restriction will enable EBS licensees to obtain as much spectrum as they need to provide broadband and high-powered video service to their students.[890]

357. NY3G and BellSouth oppose lifting the four-channel restriction.[891] Specifically, NY3G maintains that the Commission should retain the rule because it promotes diversity of programming and

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[884] 47 C.F.R. § 74.902(d)(1) (2004).

[885] *Id.*

[886] *See* CTN/NIA PFR at 21-22; HITN PFR at 9; HITN Comments at 9-10; C&W Comments at 5; Pace Comments at 5; DBC Comments at 5; SpeedNet Comments at 5; WDBS Comments at 5; Clearwire Comments at 7; IMWED Comments at 13.

[887] IMWED Comments at 13.

[888] *See* CTN/NIA PFR at 22.

[889] *See* C&W Comments at 5; Pace Comments at 5; DBC Comments at 5; SpeedNet Comments at 5; WDBS Comments at 5.

[890] *See* C&W Comments at 5; Pace Comments at 5; DBC Comments at 5; SpeedNet Comments at 5; WDBS Comments at 5.

[891] NY3G Comments at iv. Procedurally, NY3G notes that this proposal is improperly raised in petitions for reconsideration, as the rule question was only raised in the *FNPRM*. NY3G PFR at 8.

ownership.[892] Moreover, NY3G argues that the Commission may waive the rule for those licensees that need more than one channel group in a particular geographic location and modify the current rule to permit an EBS licensee to have more than one MBS channel.[893] BellSouth notes that the Commission has described the limitation as a useful way "to provide as many educators as possible with the opportunity to operate EBS systems that meet their educational needs,"[894] and suggests that this objective will be more important as the range of services available on EBS spectrum expands.[895] BellSouth contends, however, that the limit should not apply where an EBS licensee with a GSA desires to acquire co-channel spectrum in the surrounding "white area," and also that an existing EBS licensee should not be prohibited from acquiring a co-channel license where a "main station transmitter" or base station is located within the same "area of operation" as the surrounding "white area."[896]

358. *Discussion.* In light of the record on this issue, we agree with IMWED that retaining the rule pre-transition is not in the public interest. The purpose of the rule has been "to provide as many educators as possible with the opportunity to operate [EBS] systems that meet their educational needs."[897] While EBS was limited to video broadcast uses at the time the rule was established, given the wider range of services for which EBS can now be used and the changes to our leasing rules, we believe, along with the overwhelming majority of commentators, that the four-channel rule may unduly limit the ability of educational institutions and organizations to take full advantage of the potential of EBS. We agree with C&W, Pace, DBC, SpeedNet, and WDBS that educational entities that are interested in acquiring such spectrum are likely to seek to develop services using such spectrum, which will keep such spectrum from lying fallow. We also agree with commenters such as CTN, NIA, and HITN that retention of the rule could undermine transition planning, which in certain instances may require licensees to swap MBS for UBS/LBS channels or vice versa. At the same time, to the extent that EBS spectrum is likely to be sold or auctioned, eliminating the four-channel rule pre-transition will allow the spectrum to go to its highest value use. In addition, as HITN noted, hisortically, the Commission has frequently waived the four-channel rule for licensees "showing a modest desire, if not documented need, for additional channels within a market."[898]

359. We appreciate the point raised by NY3G and BellSouth that the four-channel rule was designed in part to promote diversity of programming and ownership. In seeking comment in the *FNPRM*, however, the Commission asked commenters supporting retention to "explain why they believe the rule is appropriate and necessary given the current market and regulatory conditions."[899] We do not

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[892] NY3G Comments at 21; NY3G PFR at 8.

[893] NY3G Comments at 21.

[894] BellSouth Reply Comments at 15, citing *FNPRM* at ¶ 346.

[895] BellSouth Reply Comments at 15.

[896] *Id.*

[897] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd 2907, 2914 ¶ 39 (1995).

[898] HITN Comments at 9.

[899] *FNPRM*, 19 FCC Rcd 14165, 14292 ¶ 346.

believe, nor have NY3G and BellSouth demonstrated, that elimination of the rule, already planned for markets that have transitioned, will limit diversity of programming or ownership. Indeed, as noted above, programming diversity could well be enhanced by elimination of the rule. Moreover, both NY3G and BellSouth admit that continued exceptions and waivers of the rule will likely be necessary, a process we believe is best avoided in this context. NY3G and BellSouth have not demonstrated that, in the context of the current market and regulatory conditions, maintaining the four-channel rule is necessary or in the public interest. Accordingly, in today's action we have revised Section 27.5(i)(3) of the Commission's rules as requested by CTN, NIA, and HITN.[900]

5. Wireless Cable Exception

360. *Background.* In 1991, as part of the Commission's effort to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace, the Commission adopted a proposal to allow wireless cable entities to be licensed on vacant EBS channels if certain requirements were met.[901] These requirements were designed to ensure that wireless cable use did not have a negative impact on EBS.[902] Thus, a commercial operator could be licensed on EBS channels if at least 8 EBS channels remain available in the community;[903] there are no co-channel EBS stations within 50 miles of the proposed system;[904] and an EBS applicant has not applied for the same channels.[905] In the *FNPRM*, the Commission concluded that the wireless cable exception would not apply post-transition, that existing licensees should be grandfathered, and that grandfathered licenses may continue to be renewed and assigned.[906] In addition, the Commission sought comment on whether the restriction should be removed pre-transition.[907]

361. CTN, NIA, EBS Parties, WDBS, and WCA concur with the proposal to eliminate the wireless cable exception and grandfather existing licensees.[908] They assert that the exception is irrelevant because it is clear that no new EBS channels will be available or needed for future commercial video use

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[900] CTN/NIA PFR at 22; HITN PFR at 9; HITN Comments at 9.

[901] Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz bands Affecting Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Cable Television Relay Service, Gen. Docket No. 90-54, *Second Report and Order*, 6 FCC Rcd 6792 at ¶ 4 and ¶¶ 42-58 (1990) (*2.1 and 2.5 GHz Second Report and Order*); *see also 2.1 and 2.5 GHZ Second Report and Order* at Appendix C; 47 C.F.R. § 74.990 (1991).

[902] 47 C.F.R. § 74.990.

[903] 47 C.F.R. § 74.990(a).

[904] *Id.*

[905] 47 C.F.R. § 74.990(e).

[906] *FNPRM*, 19 FCC Rcd 14165, 14293 ¶¶ 349-350.

[907] *FNPRM*, 19 FCC Rcd 14165, 14293 ¶ 350.

[908] CTN/ NIA Comments at 18-19; WCA Comments at 30; EBS Parties Reply Comments at 5-6; WDBS Reply Comments at 4.

in this manner, whether prior to or after transitions in particular markets.[909] HITN asserts that the wireless cable exception was created to address the significant blocks of EBS spectrum that remained unlicensed.[910] Inasmuch as this condition no longer exists, the exception should be eliminated.[911] HITN similarly surmises that the remaining blocks of vacant EBS spectrum are not sufficient both to permit commercial use and to meet the requirement that eight vacant EBS channels remain available in a market.[912]

362. Choice, DBC, Nextel, and Clearwire oppose the elimination of the wireless cable exception because they believe that commercial licensees still need access to EBS spectrum.[913] Choice, an entity with demonstrated need for more spectrum as well as an expansion plan, maintains that elimination of the wireless cable exception would severely limit Choice's ability to develop new services and provide additional programming. Clearwire maintains that the wireless cable rule is necessary for new entrants that do not have nearly enough spectrum to deploy wireless broadband services.[914] Furthermore, Choice, Clearwire, and Sprint maintain that the right to obtain vacant EBS channels under the wireless cable exception was included in the bundle of rights that BRS BTA licensees acquired at auction.[915] Choice asserts that large swaths of EBS spectrum have remained unused in certain areas for more than 10 years and the wireless cable exception permits the spectrum to be used instead of laying fallow.[916]

363. BloostonLaw asks the Commission to clarify that grandfathering existing commercial EBS licenses including license transfers and modifications.[917]

364. *Discussion*. We agree with the commenters who argue that the continued application of the wireless cable exception is unnecessary in geographic areas that have not transitioned, and thus, we eliminate it pre-transition. We disagree with commenters who maintain that they need the wireless cable exception to gain access to spectrum. We believe that the changes we have made to our rules, especially the inclusion of BRS and EBS in our secondary market rules, provide commercial operators with sufficient access to BRS spectrum. Moreover, we do not believe, in light of the fact that EBS licensees have been unable to apply for new stations since 1995, that there will be sufficient spectrum available that will meet the requirements of the wireless cable exception. Nor do we believe, due to changes in technology, that commercial licensees need access to EBS spectrum to provide wireless cable service. Finally, we further note that the wireless cable exception could be difficult to apply in the context of

[909] CTN/NIA Comments at 19; WCA Comments at 30.

[910] HITN Comments at 10.

[911] *Id.*

[912] *Id.*

[913] DBC Reply Comments at 3; Nextel Reply Comments at 11.

[914] Clearwire Comments at 21.

[915] Choice Reply Comments at 2-3; Clearwire Comments at 21-22; Sprint Reply Comments at 16.

[916] Choice Reply Comments at 2.

[917] BloostonLaw Comments at 7.

geographic licensing. If, in the future, it becomes apparent that elimination of this rule is preventing entities from putting fallow spectrum to use, we reserve the right to determine whether this rule should be reinstituted.

365. With regard to the rights of BTA auction winners, we disagree with commenters who claim that BTA auction winners bought the right to obtain vacant EBS channels under the wireless cable exception. Instead, we agree with the analysis presented by IMWED.[918] BRS BTA authorization holders bought the right to forfeited BRS spectrum. Thus, they did not buy the right to EBS channels under the wireless cable exception because the vacant channels are not BRS channels. Vacant EBS channels, as IMWED correctly points out, revert to EBS white space and are not converted to BRS. We also reject WCA's recommendation to reclassify the facilities of grandfathered commercial EBS licensees as BRS. Should a commercial EBS licensee forfeit its license, the spectrum reverts to EBS white space. Thus, the facilities of commercial EBS licensees remain EBS facilities and not BRS facilities.

366. As we stated in the *FNPRM*,[919] we will grandfather existing licenses granted pursuant to these rules, and such licenses may continue to be renewed and assigned. In response to BloostonLaw's concerns, we note that transfers of control of such licenses will be permitted, as well as modifications to these licenses.

6. Regulatory Fees

367. *Background.* In the *FNPRM*, the Commission sought comment on a new methodology to assess regulatory fees based on the scope of a BRS licensee's authorized spectrum use rather than the current approach of assessing a flat fee per call sign.[920] The Commission also sought comment on its tentative conclusion to apply this updated methodology to EBS licensees to the extent they were not statutorily exempt from regulatory fees because of their status as governmental or nonprofit entities.[921] Specifically, the Commission sought comment on a proposed fee methodology that would account for the benefits of an EBS or BRS spectrum authorization based on metrics, such as covered population (MHz/pops) or area (MHz/km^2), to account for the bandwidth and the potential population or area that could be served.[922]

368. With regard to EBS licensees, commenters argue that it is neither lawful nor reasonable for the Commission to assess regulatory fees on EBS licensees.[923] Specifically, they argue that because the Commission has not changed the eligibility standards for EBS licensees, Section 9(h) of the Act[924] prohibits regulatory fees from being charged against governmental entities or nonprofit entities (apart

[918] *See* IMWED Reply Comments at 11.

[919] *FNPRM*, 19 FCC Rcd 14165, 14293 ¶ 350.

[920] *FNPRM*, 19 FCC Rcd 14165, 14295-14297 ¶¶ 355-359.

[921] *Id.* at 14295 ¶¶ 355.

[922] *Id.* at 14296-14297 ¶¶ 358-359.

[923] *See* CTN/NIA Comments at 19-20; HITN Comments at 11-12; WCA Comments at 31; C&W Reply Comments at 3; DBC Reply Comments at 3; SpeedNet Reply Comments at 3; WDBS Reply Comments at 4.

[924] 47 U.S.C. § 159(h).

from certain few grandfathered wireless cable entities which obtained EBS licenses pursuant to the old wireless cable exemption).[925]

369. With regard to BRS licensees, commenters recommend that the Commission adopt a formula based on MHz/pops, adopt a sliding scale similar to the Commission's scale for broadcast television stations, or assess a flat fee per call sign. Commenters supporting a formula based on MHz/pops argue that such a formula will ensure that similarly situated licensees will be similarly treated.[926] These commenters recommend, however, that if the Commission were to adopt a formula based on MHz/pops, the Commission should also establish clear standards to ensure that BRS licensees can readily determine the population within their GSA.[927] In this connection, WCA recommends that licensees be required to maintain sufficient information in ULS so that GSA boundaries can be ascertained and that the Commission use the results of the 2000 U.S. Census to determine population counts.[928] Nextel and BellSouth maintain, however, that if the Commission does not clearly define a licensee's GSA boundary and establish a common measure to determine population, they would not support a formula based on MHz/pops, but instead would support the current procedure of assessing a regulatory fee based on call signs.[929]

370. Grand Wireless recommends that the Commission adopt a sliding scale, similar to the Commission's scale for annual fees for broadcast television stations, though with fewer categories.[930] Grand Wireless maintains that such a system would be more equitable to rural operators than a formula based on population.[931] WCA maintains that the sliding scale approach is not more equitable because there are too few broadcast categories, only five, and the sliding scale approach fails to account for the fact that different licensees are authorized to utilize different amounts of spectrum.[932]

371. C&W, DBC, SpeedNet, and WDBS argue that regulatory fees for BRS stations should be paid per call sign to simplify the payment process.[933] WCA maintains, however, that under this system a licensee authorized to use a single 6 MHz channel usually pays the same regulatory fee as a licensee of a 24 MHz channel group because both are generally covered by a single call sign.[934]

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[925] CTN/NIA Comments at 19-20; HITN Comments at 11-12, *citing* 47 U.S.C. § 159(h).

[926] *See* Choice Comments at 2-3; WCA Comments at 32; Clearwire Reply Comments at 20.

[927] Choice Reply Comments at 3; Nextel Comments at 11; WCA Comments at 32-33; BellSouth Reply Comments at 19; Clearwire Reply Comments at 20.

[928] WCA Comments at 33; WCA PFR at 52-53.

[929] Nextel Comments at 12; BellSouth Reply Comments at 19.

[930] Grand Wireless Comments at 2.

[931] *See id.*

[932] WCA Reply Comments at 37.

[933] C&W Reply Comments at 3; DBC Reply Comments at 3; SpeedNet Reply Comments at 3; WDBS Reply Comments at 4.

[934] WCA Reply Comments at 37.

372. Finally, WCA recommends that the Commission not adopt a formula based on MHz/km^2, it would force rural licensees to pay regulatory fees disproportionate to the number of persons actually served.[935]

373. *Discussion.* With regard to EBS licensees, we agree with commenters that we should not impose regulatory fees on EBS licensees. We note that governmental entities are statutorily exempt from fees under Section 8 of the Communications Act,[936] and both governmental entities and nonprofit entities are statutorily exempt from Section 9 fees.[937] EBS licensees by definition fit within these statutory exemptions, with the exception of entities licensed pursuant to the wireless cable exception.[938]

374. With regard to BRS licensees, we conclude that the regulatory fee structure for BRS should be changed as proposed in the *FNPRM* to reflect the scope of a licensee's authorized spectrum use and the benefits it receives under its spectrum authorization.[939] We believe that the record supports our conclusion to adopt a formula based on simple calculations and that fixed variables should be used as much as possible.[940] Thus, the actual fee owed will be easily discernible.[941] Furthermore, we believe that the public interest would be better served by assessing BRS regulatory fees based on the scope of a licensee's authorized spectrum use and the benefits they receive under their spectrum authorization, rather than pursuant to the current approach of assessing a flat fee per call sign. Although the current methodology is simple, we agree with WCA that under such a system a licensee that is licensed to use a 6 MHz channel pays the same regulatory fees as a licensee that is licensed to use a 24 MHz channel group because both are licensed under one call sign.[942] Moreover, we believe that the current methodology for assessing regulatory fees is particularly onerous for rural operators because, on a per population basis, the fees can amount to multiple times that of fees paid by urban licensees.

375. Commenters are nearly unanimous in recommending adoption of a MHz-based formula, specifically a MHz/pops metric. We note, however, that several commenters indicated that clear standards need to be established so that BRS licensees may readily and in a consistent manner determine the population in their covered areas, as well as ascertain these areas' boundaries.[943] In view of this, we

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[935] WCA Comments at 32.

[936] 47 U.S.C. § 158(d)(1).

[937] 47 U.S.C. § 159(h).

[938] *FNPRM*, 19 FCC Rcd 14165, 14294-14295 ¶¶ 354-355.

[939] *Id.* at 14296 ¶ 357.

[940] *Id.* at 14295-14296 ¶ 356.

[941] If the total amount of regulatory fees that Congress requires us to collect varies each year, which in the past has increased on average by no more than 11.2 percent, this would be the only variable that would be less predictable. This average does not reflect the fee increase from FY 1994 to FY 1995. The FY 1994 fees covered a partial year and the percentage increase in fees from FY 1994 to FY 1995 – 84.76 percent -- was therefore atypically high.

[942] *See* WCA Reply Comments at 37.

[943] *See, e.g.*, Choice Reply Comments at 3; Nextel at 11; WCA Comments at 32-33; BellSouth Reply Comments at 19; Clearwire Reply Comments at 20.

find significant advantages to the alternative proposal suggested in the *FNPRM*,[944] and supported by Grand Wireless,[945] that we adopt a sliding scale for fees, similar to the scale for annual fees for broadcast television stations based upon population, but simplified compared with the number of broadcast television categories. Clearly under such a system the necessary calculations would be simpler than having to use a MHz/pops formula. Furthermore, establishing a tiered formula by market size would eliminate the difficulties involved in making the calculations necessary pursuant to a MHz/pops formula. Such a system would clearly meet our desire for a methodology that utilizes simple calculations and fixed variables. Moreover, we believe a sliding fee would more equitably distribute fees than a formula based on MHz/pops.

376. We shall adopt, therefore, a MHz-based formula with tiered fees by markets, similar to our annual scale for broadcast television stations, but on a somewhat more simplified scale. Annual fees will be charged on a per-megahertz basis based upon the size of the BRS licensee's BTA.[946] For a BRS licensee licensed by GSA, its BTA is the BTA where the geographic center point of its GSA is located. We shall assess a per-megahertz fee in three categories, BTA ranked by population size those ranked 1-60 paying the highest fee, those ranked 61-200 paying a lesser fee, and those ranked 201-493 paying the lowest fee.[947] We believe that, WCA's objections notwithstanding, that the benefits of such a MHz formula tiered by markets, which eliminates the difficulties and complexities involved in determining and calculating populations, would better serve all operators, while mitigating impact on rural operators, already stretched thin by low population density.

7. Gulf of Mexico Proceeding

377. *Background.* In the *NPRM*, the Commission incorporated the docket of the ongoing Gulf of Mexico proceeding, wherein the Commission proposed to establish a GSA in the Gulf of Mexico known as the "Gulf Service Area," subject to the same rules as the service areas established in the *BRS/EBS Report and Order*, with certain limitations.[948] This rulemaking was initiated by Gulf Coast MDS Service Company ("Gulf Coast"), which sought to have the Gulf of Mexico treated as one service area with BRS and EBS licenses assigned by competitive bidding.[949] PetroCom License Corporation

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[944] *FNPRM*, 19 FCC Rcd 14165, 14296-14297 ¶ 359.

[945] *See* Grand Wireless at 2.

[946] See *supra* ¶ 62 for a discussion of BTAs.

[947] BTAs ranked 1-60 generally have a population greater than 1 million, BTAs ranked 61-200 generally have a population 250,000 to 1 million, and BTAs ranked 201-493 generally have a population of less than 250,000.

[948] Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking*, WT Docket No. 02-68, 17 FCC Rcd 8446 (2002) (*Gulf NPRM*). That proceeding was incorporated alongside the matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Services in the 2150-2162 and 2500-2690 MHz Bands. *NPRM*, 18 FCC Rcd 6722, 6759 ¶ 91. *See Gulf NPRM*, 17 FCC Rcd at 8447 ¶ 2.

[949] Petition for Rulemaking of Gulf Coast MDS Service Company (Gulf Coast Petition) (May 21, 1996). *See also NPRM*, 18 FCC Rcd 6722, 6759 ¶ 91. *See also* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 9589, 9608-17 ¶¶ 34-55 (1995) (*MDS Report and Order*).

("PetroCom"), Gulf Coast's successor in interest, requested that the Commission establish a service area in the Gulf of Mexico using the *Report and Order* as a model.[950]

378. The Commission noted in the *NPRM* that the Gulf Service Area does not have a significant population center and is based primarily on the geographic confines of the Gulf and on the likely commonality of commercial interests among the potential users in the Gulf.[951] At the time of the *NPRM*, the Commission adopted a proposal to create a Gulf Service Area.[952] While the Commission proposed to create the Gulf Service Area for MDS services, it also proposed in the *Gulf Notice* to exclude all EBS channels from licensing in the Gulf service area.[953] The Commission's proposal was based on the fact that EBS licensees had not expressed an interest in seeking licenses to operate in the Gulf of Mexico, the area most likely had little need for educational service, and the requested commercial use did not require the full bandwidth available in the 2500-2690 MHz band.[954] The Commission, in the *NPRM*, sought comment on this proposal and on whether we should consider unlicensed uses in the Gulf of Mexico.[955] The Commission did not receive comment on these proposals, and therefore renewed its request for feedback on these issues in the *FNPRM*.[956]

379. BellSouth takes the position that there is no need to delay establishing the boundaries of the Gulf Service Area and interference standards that protect incumbent operators.[957] BellSouth proposes, first, that the GSA of any land-based BRS and EBS station must be grandfathered.[958] BellSouth notes that when the Commission auctioned MDS BTAs in 1996, incumbent site-specific licensees were afforded interference protection from holders of BTA authorizations,[959] and argues that the same principle should restrict licensees in the Gulf Service Area from suppressing the size of incumbent GSAs, and that adopting such a rule now will enable incumbent land-based licensees to

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[950] *See* Amended Petition for Rulemaking of PetroCom License Corporation at 4 (Nov. 23, 1998). "In the *MDS Report and Order*, the Commission adopted a licensing plan under which it assigned, through a simultaneous multiple round bidding process, one MDS authorization for each of the 487 BTAs and six additional geographic areas" as defined in Rand McNally's 1992 *Commercial Atlas and Marketing Guide*. *NPRM*, 18 FCC Rcd 6722, 6759 ¶ 89, n.190 (citing *MDS Report and Order*, 10 FCC Rcd at 9608-09 ¶¶ 34-37). BTA authorization holders may construct facilities to provide service over any usable MDS channel within the BTA, although, such channels are only usable subject to the Commission's interference standards. *MDS Report and Order*, 10 FCC Rcd 9589, 9608-18 ¶¶ 34-55.

[951] *See NPRM*, 18 FCC Rcd 6722, 6761 ¶ 95.

[952] *See id.* at 6760-6761 ¶ 93.

[953] *See Gulf NPRM*, 17 FCC Rcd 8446, 8450 ¶ 13. *See also NPRM*, 18 FCC Rcd 6722, 6761 ¶ 94.

[954] *See Gulf NPRM*, 17 FCC Rcd 8446, 8450 ¶ 13.

[955] *See NPRM*, 18 FCC Rcd 6722, 6761 ¶ 94.

[956] *See FNPRM*, 19 FCC Rcd 14165, 14298 ¶ 362.

[957] BellSouth Comments at 16.

[958] *Id.* at 17.

[959] BellSouth Comments at 17 (citing 47 C.F.R. § 21.938(b)(2)).

develop business plans that incorporate coastal waters lying within the GSA.[960] Second, BellSouth agrees with the Commission's earlier proposal to adopt the same boundary definitions the Commission adopted in establishing the WCS service.[961] As applied to BRS, BellSouth states that the borders of BTA authorizations would extend to the limit of the U.S. territorial waters in the Gulf of Mexico: 12 nautical miles from the coastline.[962] BellSouth contends that this boundary definition will afford land-based BRS and EBS licensees greater flexibility in locating base stations for broadband services, absent which land-based incumbents would be forced to position their base stations at inferior sites, which could preclude service to certain areas.[963] BellSouth further contends that such service could be delivered sooner under existing land-based authorizations than under authorizations which the Commission may, at some future date, award by auction.[964] In cases in which the BTA boundary does not extend to the 12-mile distance, BellSouth states that it supports WCA's proposal to create a Gulf Coastal Zone between the BTA boundary and the Gulf Service Area boundary that could be served by both the adjacent land-based BTA licensee as well as any Gulf Service Area licensee the Commission may authorize, subject to applicable interference protection standards.[965]

380. HITN supports the issuance of EBS frequency authorizations serving the waters of the Gulf of Mexico, provided that coastal EBS licensees are not prejudiced by the introduction of such new authorizations.[966] BellSouth, in reply to HITN, retorts that HITN has failed to justify a need for EBS licensing in the Gulf.[967] BellSouth argues that: (1) there are no educational institutions located in the Gulf; (2) there is no demonstrated need for institutions in the Gulf; and (3) there is no reason why other spectrum, such as satellite or BRS, could not serve such a need if it were to arise in the future. Without responding to these threshold issues, BellSouth asserts that the Commission should not make EBS available in the Gulf of Mexico.[968]

381. WCA argues that, because no party has provided any indication that there is any demand for use of the 2.5 GHz band in the Gulf waters, the Commission should refrain from deciding at this juncture how much spectrum in the 2.5 GHz band to license in the Gulf or when to conduct an auction for such spectrum.[969] WCA contends, however, that the Commission should adopt rules to govern operations in the Gulf and land areas near the Gulf, because such rules are essential to provide land-based licensees with the certainty they need to design and implement wireless broadband systems.[970] WCA

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[960] BellSouth Comments at 17.

[961] BellSouth Comments at 17, (citing *FNPRM* at ¶ 363, *WCS Order*, 12 FCC Rcd at 10816).

[962] BellSouth Comments at 17.

[963] *Id.*

[964] *Id.*

[965] *Id.* at 17-18.

[966] HITN Comments at 11.

[967] BellSouth Reply Comments at 18-19.

[968] *Id.*

[969] WCA Comments at 33-34.

[970] *Id.* at 35.