

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	
Commission's Rules to Facilitate the Provision of)	WT Docket No. 03-66
Fixed and Mobile Broadband Access, Educational and)	RM-10586
Other Advanced Services in the 2150-2162 and)	
2500-2690 MHz Bands)	

PETITION FOR LIMITED CLARIFICATION OF EBS LEASE TERM LIMITS

Pursuant to Section 1.429 of the Commission's Rules, Clarendon Foundation ("Clarendon") requests a limited narrow clarification of one aspect of the spectrum leasing rules applicable to the Educational Broadband Service ("EBS"), which is discussed and set forth in the Commission's two most recent Report & Orders, namely (1) the *Report and Order and Further Notice of Proposed Rulemaking, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets: WT Docket No. 03-66, RM-10586, Docket No. 00-230 (rel. July 29, 2004) ("2004 EBS Initial Rules")* and (2) the *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets: WT Docket No. 03-66, RM-10586, Docket No. 00-230 (rel. April 27, 2006) ("2006 EBS Final Rules")*.

Specifically, we ask the Commission to clarify the applicability of the **initial** Secondary Market rules adopted for the EBS band plan in 2004 and **final** EBS rules adopted in 2006 with respect to an automatic renewal provision in a "pre-existing ITFS lease." (The term, "pre-existing ITFS lease" refers to a lease that was entered into prior to

the adoption of the EBS band plan. In support of this request for limited clarification, Clarendon submits the following:

At paragraph 180 of the *2004 EBS Initial Rules*, the Commission states:

We also agree with commenters that **existing leases entered into under our existing ITFS leasing framework should be grandfathered, so long as the leases remain in effect and are not materially changed.** We agree with NIA/CTN that it would be unduly burdensome to force licensees that wish to have their existing leases remain in effect to renegotiate those leases to comply with our Secondary Markets policies and rules. Specifically, **although our Secondary Market rules limit spectrum leasing arrangements to the length of the license term, we will allow pre-existing ITFS leases to remain in effect for up to fifteen years, consistent with our current rules. With respect to future spectrum leasing arrangements entered into pursuant to our Part 27 rules for EBS, however, consistent with our treatment of other services, we believe it is appropriate to limit the spectrum lease term to the length of the license term in question..... Accordingly, we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our *prior leasing policy* and retaining EBS substantive use requirements** (emphasis supplied). *2004 EBS Initial Rules* at ¶ 180-181.

At paragraph 269 of the *2006 EBS Final Rules*, the Commission states that EBS leases that were entered into between January 10, 2005 [the effective date of the 2004 Initial EBS Rules] and the effective date of the final EBS rules [July 19, 2006]:

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 the EBS leases entered into between January 10, 2005 and the effective date of the amended rules adopted today** [April 12, 2006] **was not limited under the Commission's Rules** (emphasis added). *2006 EBS Final Rules* at ¶ 269.

The ITFS "Part 74" rules and EBS "Part 27" rules referenced above appear to create the following scenario: Under the Commission's old Part 74 rules, ITFS leases entered into prior to January 10, 2005 were limited to a maximum of 15 years and could not be automatically renewed. Under the **initial** Secondary Market rules in Part 27

adopted on January 10, 2005 (*2004 EBS Initial Rules*), EBS leases were not limited in duration and could be automatically renewed indefinitely. Under the **final** rules for the EBS band plan (*2006 EBS Final Rules*), EBS leases entered into after July 19, 2006 are limited to a maximum term of 30 years, as long as the lease contains a “relook” provision.

Does the fact that the FCC has grandfathered pre-existing ITFS leases under the Part 74 spectrum leasing framework (with a maximum allowable term of 15 years) invalidate a provision in an ITFS lease that provides for automatic renewals beyond 15 years, if the Commission subsequently amends its rules to allow for longer leases? Or, does the Commission’s adoption of interim or final EBS rules allow a pre-existing ITFS lease to be renewed in perpetuity?

Clarendon, as an EBS licensee, is requesting this clarification, because some of the ITFS leases that it entered into prior to the implementation of the FCC’s *Secondary Markets* rules for the new EBS band plan (*2004 EBS Initial Rules*), contained language that automatically extends the term of those leases if, at some point during the term of the ITFS lease, the Commission changed its rules to permit terms longer than the then maximum 15 years. The ITFS leases in question complied with the FCC leasing rules in effect at the time those leases were entered into (*i.e.*, a 15 year term limit). For example, at least one ITFS lease entered into by Clarendon contains the following provision:

Subject to the provisions for earlier termination contained in Section 10 hereof, this Amended Agreement will extend for: (a) an initial term of five (5) years from the Effective Date (the “Initial Term”); (b) two additional terms of five (5) years each (each a “Renewal Term” and collectively, the “Renewal Terms”) unless [lessee] notifies [lessor] at lease ninety (90) days before the end of the Initial Term or the First Renewal Term, as the case may be, that [lessee] elects not to extend this Amended Agreement for the upcoming Renewal Term; and (c) **should the FCC during the Initial Term or any Renewal Term revise its rules and**

policies to allow the length of leases of ITFS excess capacity to extend beyond fifteen (15) years, such number of additional terms of one (1) year each as are permitted by the FCC...(emphasis added).

In interpreting this ITFS lease provision, we refer to paragraph 266 of the *2006 EBS Final Rules*, where the Commission states as follows:

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** (emphasis added). *2006 EBS Final Rules* at ¶ 266.

Our interpretation is that the ITFS lease provision providing for successive automatic extensions of one year up to the “maximum allowable term” would not be triggered by the rules for EBS spectrum allowing for longer leases, since those new rules do not apply to “leases entered into before the effective date of the new EBS rules.” Even though the Commission adopted rules permitting leases longer than 15 years, those new rules specify that the longer maximum term does not apply to pre-existing ITFS leases. This grandfathered ITFS lease is “subject to the existing 15-year lease limitation,” since it was entered into before January 10, 2005. In other words, the “maximum allowable term” under this ITFS lease provision is 15 years, because the *2004 EBS Initial Rules* only apply prospectively and not retroactively.

Under this interpretation, this ITFS lease can not be automatically renewed for successive one year terms for an additional 15 years (30 years total), even though the FCC adopted a new maximum 30 year term for EBS leases under its *2006 EBS Final Rules*. Thus, the pre-existing ITFS lease with the above referenced automatic renewal provision will nevertheless terminate at the end of the maximum 15 year term originally

provided for in the lease, without extension, even though the Commission has amended its spectrum leasing rules to allow for longer terms.¹

However, there is an alternate interpretation of this lease provision in light of the Commission's statement in paragraph 269 of the *2006 EBS Final Rules* (previously cited on page 2) that could extend the terms of a pre-existing ITFS lease containing this language in perpetuity, subject only to continual automatic one year renewals, as long as the underlying license is renewed. The argument would be that as of the January 10, 2005 date when EBS lease terms were "not limited under the Commission's rules"², the lease term converted from a 15 year term (one initial 5 year term plus two five year renewals) to an unlimited term of mandatory automatic one year renewals. In this respect, it is doubtful whether any ITFS licensee would have considered or expected that the FCC rules regarding the maximum allowable term of a pre-existing ITFS lease could be later interpreted to be unlimited so as to permit such an automatic renewal provision to extend a lease in perpetuity.

Clarendon believes interpreting paragraph 269 of the *2006 EBS Final Rules* to allow for automatic renewals of pre-existing ITFS leases in perpetuity could eliminate the opportunity to address future changes in educational use of the spectrum. Such an interpretation could result in an unintended consequence that is contrary to the public interest, and could potentially undo the careful balance the Commission's policies have sought to achieve between the educational purposes for which EBS spectrum is primarily allocated and the commercial development of Advanced Wireless Services through

¹ The question also arises as to whether such a provision in a lease that was entered into under the *2004 EBS Initial Rules*, and before the adoption of the *2006 EBS Final Rules*, could be extended indefinitely by automatic renewals.

² See *2006 EBS Final Rules* at ¶ 268.

spectrum leasing arrangements.³ Absent the narrow clarification sought herein, certain pre-existing ITFS leases of Clarendon (and we suspect the pre-existing ITFS leases of other EBS licensees) could be interpreted such that the EBS licensee unwittingly and unintentionally gave up its ability to ever change the terms of its pre-existing ITFS leasing arrangement or to have any changes in its educational needs over time accommodated.

Clarendon does not believe the Commission intended this outcome when it sought to clarify in the *2006 EBS Final Rules* that the 15 year maximum term limit in the old Part 74 rules no longer applied as of the date the *Secondary Markets* leasing regime began to apply to EBS spectrum in January 2005.⁴ The evidence on the record before the Commission at the time it made the statement in paragraph 269 indicated only that certain EBS licensees, including Clarendon, in relying on the applicability of *Secondary Markets* to their EBS leases, had entered into ITFS leases with *defined negotiated lease terms* in excess of 15 years—for example 30, 40 or in some limited cases even 50 years. However, in no case is Clarendon aware that the Commission ever contemplated or had knowledge of a scenario whereby a pre-existing ITFS lease could be interpreted to extend in perpetuity. Clarendon is confident that if the Commission had been aware that its rule could be interpreted as supporting automatic extensions beyond 30 years, it would have

³ The Commission has consistently adopted EBS leasing rules that protect the rights of the EBS licensee to meet its educational needs and the ability to reevaluate those needs. The current requirement that now limits EBS leases to a term of 30 years, with a requirement that any lease for a greater than 15 year term contain a provision that allow the EBS licensee to “relook” at the lease is reflective of this fact. *2006 EBS Final Rules* at ¶ 268. Moreover, leases entered into prior to the application of *Secondary Markets* were limited to 15 year terms in order to give the EBS licensee the ability to reassess their needs.

⁴ Pursuant to revised EBS leasing rules adopted in 2004, the Commission applied its *Secondary Markets* policies to leases between EBS licensees and commercial entities, while at the same time determined that the EBS substantive use requirements would continue to apply so as to ensure that the educational nature of EBS spectrum would be preserved. In doing so, the FCC also grandfathered existing EBS leases. *See 2004 EBS Initial Rules* at, ¶ 180-181 (“2004 Report”).

indicated then, as Clarendon requests it do now, that under no circumstance could a pre-existing ITFS lease term be interpreted to extend in perpetuity.⁵

Clarendon, therefore, requests a very narrow and limited clarification that seeks only to make clear that pre-existing ITFS leases with term provisions that contemplate the automatic incorporation of FCC-permitted increases in the lease term -- in excess of the term limit existing at the time the lease was initially executed -- and *which could* be interpreted to result in a perpetual lease term, would not be in the public interest or consistent with the educational use for which ITFS/EBS spectrum is allocated.

To be clear, Clarendon seeks no Commission clarification or determination as to how the parties to such a lease would resolve such a provision consistent with the Commission's current or prior rules. Such resolution is best left to the parties in the context of commercial arrangements. Moreover, Clarendon's petition does not seek clarification with respect to leases entered into after January 10, 2005, in which EBS lease term provisions clearly contemplate or contain a specific lease term consisting of multiple successive renewal terms in excess of 15 years. We understood that any lease entered into after January 10, 2005 is subject to the *Secondary Markets* requirements and, thus, we ensured that those leases meet our educational needs and afford us the ability to continue to meet our educational needs.

In asking this question, Clarendon feels a need to reaffirm its long standing support for long term spectrum leasing arrangements with renewal provisions that will give the wireless operator sufficient security and predictability needed to invest capital

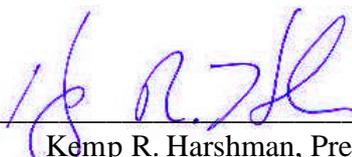
⁵ It is clear that a perpetual EBS lease is not in the public interest. Recently, the Superior Court of New Jersey, Mercer County, found that the provisions of an EBS lease could not be interpreted to give a lessee a perpetual lease. See *Nextwave Broadband, Inc. v. Saint Rose Church Schools*, Order, Superior Court of New Jersey, Mercer County, Chancery Division, Docket No. C-53-06 (June 16, 2006).

and take the risks of constructing and operating wireless broadband access networks. It is the opinion of Clarendon Foundation that the resulting stability of such a legal relationship is absolutely necessary for the introduction of new services and capabilities, such as those offered by wireless broadband access and interactive multimedia services, to the public.

In view of the above, Clarendon respectfully requests that the Commission clarify the application of its EBS lease term rules to reflect that an interpretation of such rules to permit a pre-existing ITFS lease to extend in perpetuity would be contrary to the public interest. We have included as an exhibit a copy of the portions of the Commissions 2004 EBS Interim Rules and 2006 EBS Final Rules pertaining to the maximum lease terms for the convenience of commenters, who may want to respond to this Petition.

CLARENDON FOUNDATION

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July 19, 2006

Exhibit

Adoption of Final Rules Limiting the Length of EBS Leases

FCC 06-46

Before the
Federal Communications Commission
Washington, D.C. 20554

**ORDER ON RECONSIDERATION AND FIFTH MEMORANDUM OPINION AND ORDER
AND
THIRD MEMORANDUM OPINION AND ORDER AND SECOND REPORT AND ORDER**

Adopted: April 12, 2006

Released: April 27, 2006

APPENDIX A

Final Rules

Part 25 and Part 27 of Title 47 of the Code of Federal Regulations are amended as follows:

10. Amend § 27.1214 by revising paragraphs (b)(1) and (c) and adding new paragraph (e) to read as follows:

§ 27.1214 EBS spectrum leasing arrangements and grandfathered leases.

(b) ***

(1) The licensee must reserve a minimum of 5% of the capacity of its channels for educational uses consistent with § 27.1203(b) and (c) of this part, and may not enter into a spectrum leasing arrangement involving this reserved capacity. In addition, before leasing excess capacity, the licensee must provide at least 20 hours per licensed channel per week of EBS educational usage. This 5% reservation and this 20 hours per licensed channel per week EBS educational usage requirement shall apply spectrally over the licensee's whole actual service area. However, regardless of whether the licensee has an educational receive site within its GSA served by a booster, the licensee may lease excess capacity without making at least 20 hours per licensed channel per week of EBS educational usage, provided that the licensee maintains the unbridgeable right to recapture on one months' advance notice such capacity as it requires over and above the 5% reservation to make at least 20 hours per channel per week of EBS educational usage.

(c) All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease dedicated or common EBS equipment used for educational purposes in the event that the spectrum leasing arrangement is terminated.

(e) The maximum permissible term of an EBS spectrum leasing arrangement entered into on or after January 10, 2005 (including the initial term and all renewal terms that commence automatically or at the sole option of the lessee) shall be 30 years. In furtherance of the educational purposes for which EBS spectrum is primarily allocated, any spectrum leasing arrangement in excess of 15 years that is entered into on or after January 10, 2005 must include terms which provide the EBS licensee on the 15th year and every 5 years thereafter, with an opportunity to review its educational use requirements in light of changes in educational needs, technology, and other relevant factors and to obtain access to such additional services, capacity, support, and/or equipment as the parties shall agree upon in the spectrum leasing arrangement to advance the EBS licensee's educational mission.

I. INTRODUCTION

II. EXECUTIVE SUMMARY

III. BACKGROUND

IV. DISCUSSION

B. BRS/EBS 3rd MO&O

6. Leasing Issues

c. Limitation on Length of EBS Leases

254. *Background.* As indicated above, IMWED's Petition requests that the Commission retain the 15-year lease limitation. IMWED argues that retention of this limitation is necessary because EBS licensees' educational needs change over time, and thus leasing arrangements that exceed 15 years eliminate the flexibility needed to respond to changing circumstances.⁶⁰⁰ IMWED states that commercial entities often argue that longer lease terms are required for them to recover their capital investments, but notes that rights of first refusal are not barred in EBS agreements, and thus incumbent lessees can be assured of renewal upon the expiration of a 15-year term.⁶⁰¹ IMWED notes that several EBS licensees have entered into lease agreements that extend beyond 15 years.⁶⁰² IMWED argues that a 15-year limit will not cripple the leasing of EBS excess capacity as argued by several parties.⁶⁰³ IMWED states that it has years of experience in leasing excess capacity of EBS systems and argues that a 15-year term with a

⁶⁰⁰ IMWED PFR Opposition at 15.

⁶⁰¹ *Id.* at 16.

⁶⁰² See *Ex Parte* Letter from John B. Schwartz, Director to IMWED to Marlene H. Dortch, Federal Communications Commission (dated Jan. 10, 2006) at 2 (IMWED *Ex Parte*).

⁶⁰³ *Id.*

“right of first refusal” would give a lessee access to spectrum for 30 years.⁶⁰⁴ IMWED further argues that maximizing revenue should not be the goal of EBS licensees if it is to the detriment of responsive 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

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

⁶⁰⁴ *Id.*

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.

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

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 "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

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 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.

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 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

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.

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.

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 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

⁶³⁶ *Id.* at 2.

⁶³⁷ *Id.*

⁶³⁸ *Id.* at 1.

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.

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 – 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 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

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).

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.*

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 [April 12, 2006], 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 [i.e., 15 years]. Thus, **the length of EBS leases entered into between January 10, 2005 and the effective date of the amended rules adopted today [April 12, 2006] 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.**

⁶⁵⁶ WCA/CTN April 5 Ex Parte.

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

FCC 04-135A1

**Before the
Federal Communications Commission
Washington, D.C. 20554**

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 10, 2004

Released: July 29, 2004

I. INTRODUCTION

II. EXECUTIVE SUMMARY

III. BACKGROUND

IV. DISCUSSION

C. Eligibility Restrictions

3. Leasing and Secondary Markets

177. In 2003, we took significant steps to facilitate the development of Secondary Markets in spectrum usage rights involving our wireless radio services when we adopted our *Secondary Markets Report and Order* and *Further Notice of Proposed Rulemaking*.³³⁴ In the *Report and Order*, we established policies and rules to enable spectrum users to gain access to licensed spectrum by entering into different types of spectrum leasing arrangements with licensees in most wireless radio services.³³⁵ In addition, we streamlined the Commission's approval procedures for license assignments and transfers of control in most wireless radio services.³³⁶ In the *Further Notice*, we proposed several additional steps we could take to facilitate the development of these Secondary Markets.³³⁷ **We also sought comment on whether the spectrum leasing policies should be extended to, inter alia, MDS and ITFS.**³³⁸ Given that we are undertaking a comprehensive examination of the rules relating to these services in this *Report and Order*, and given the close relationship between the leasing rules and other issues raised in this proceeding, we will address in this *Report and Order* the question raised in the *FNPRM* of whether the rules adopted in the *Secondary Markets Report and Order* should apply to the BRS/EBS spectrum.

178. Commenters generally supported extending the spectrum leasing policies adopted in the

³³⁴ See generally Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Secondary Markets Report and Order* and *Further Notice*, respectively) Erratum, 18 FCC Rcd 24817 (2003).

³³⁵ See generally *Report and Order*, 18 FCC Rcd at 20607-82 ¶¶ 1-194.

³³⁶ See generally *id.* at 20682-85 ¶¶ 195-203.

³³⁷ See generally *Secondary Markets Further Notice*, 18 FCC Rcd at 20687-20719 ¶¶ 213-323.

³³⁸ *Id.* at 20708-16 ¶¶ 288-314.

Report and Order to ITFS and MDS leasing.³³⁹ Commenters also recommended grandfathering existing leasing arrangements that have evolved under the distinct leasing model historically applicable to ITFS.³⁴⁰ NIA/CTN also argue that the substantive requirements currently applicable to ITFS leasing should continue to apply to leases entered into under the Secondary Markets spectrum leasing framework.³⁴¹

179. We agree with the commenters that we should extend the rules and policies adopted in the *Secondary Markets Report and Order* to the BRS/EBS spectrum. In the *Secondary Markets Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. These flexible policies continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country. Facilitating the development of these Secondary Markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services, and enable development of additional and innovative services in rural areas.³⁴² We agree with the commenters that there is no reason to deprive licensees in the BRS/EBS spectrum of the benefits of these rules and policies. We also agree with WCA that extending those rules and policies to the BRS/EBS spectrum will establish regulatory parity with other services that may be used to provide broadband services.³⁴³

180. We also agree with commenters that **existing leases entered into under our existing ITFS leasing framework should be grandfathered, so long as the leases remain in effect and are not materially changed.** We agree with NIA/CTN that it would be unduly burdensome to force licensees that wish to have their existing leases remain in effect to renegotiate those leases to comply with our Secondary Markets policies and rules.³⁴⁴ Specifically, **although our Secondary Market rules limit spectrum leasing arrangements to the length of the license term, we will allow pre-existing ITFS leases to remain in effect for up to fifteen years, consistent with our current rules.**³⁴⁵ With respect to future spectrum leasing arrangements entered into pursuant to our Part 27 rules for EBS, however, **consistent with our treatment of other services, we believe it is appropriate to limit the spectrum lease term to the length of the license term in question.**

181. In addition, we agree with NIA/CTN that the substantive use requirements that have historically applied to ITFS must remain in effect in the spectrum leasing context.³⁴⁶ NIA/CTN describes the "most significant" limitations as: "(i) there must be certain minimum educational uses of ITFS spectrum (typically, a minimum of 20 hours per 6 MHz channel per week); (ii) for analog facilities,

³³⁹ See BellSouth Comments at 6-10; NIA/CTN Comments at 1-9 and Reply Comments at 1-3; SBC Comments at 12-13; Spectrum Market LLC Comments at 4-5; Sprint Comments at 4-6; WCA Comments at 1-8. Unless otherwise noted, all comments cited in this section were filed in WT Docket No. 00-230.

³⁴⁰ WCA Comments at 6-7, NIA/CTN Comments at 7-8.

³⁴¹ NIA/CTN Comments at 5-6.

³⁴² See generally *Secondary Markets Report and Order*, 18 FCC Rcd at 20607 ¶ 2.

³⁴³ WCA Comments at 7.

³⁴⁴ NIA/CTN Comments at 7.

³⁴⁵ See *id.* at 8.

³⁴⁶ *Id.* at 5-6.

there must be a right to recapture an additional amount of capacity for educational purposes (typically, 20 more hours per channel per week); for digital facilities, the licensee must reserve at least 5% of its transmission capacity for educational purposes; (iii) **the lease term may not exceed 15 years**; (iv) the ITFS licensee must retain responsibility for compliance with FCC rules regarding station construction and operation; (v) only the ITFS licensee can file FCC applications for modifications to its station's facilities; and (vi) the ITFS licensee must retain some right to acquire the ITFS transmission equipment, or comparable equipment, upon termination of the lease agreement.”³⁴⁷ **As NIA/CTN notes, the purpose behind these limitations was to maintain the traditional educational purposes of ITFS.**³⁴⁸ **We believe that the continued application of these substantial use limitations, as well as the retention of ITFS eligibility requirements in Section C, will facilitate the traditional educational purposes of ITFS. Accordingly, we will apply the spectrum leasing rules and policies adopted in the Secondary Markets proceeding to the BRS/EBS band, while grandfathering existing leases entered into under our prior leasing policy and retaining EBS substantive use requirements.**

³⁴⁷ *Id.* at 4.

³⁴⁸ *Id.*