

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 Fixed)	WT Docket No. 03-66
and Mobile Broadband Access, Educational and Other)	RM-10586
Advanced Services in the 2150-2162 and 2500-2690 MHz)	
Bands)	
)	
Review of the Spectrum Sharing Plan Among Non-)	
Geostationary Satellite Orbit Mobile Satellite Service)	IB Docket No. 02-364
Systems in the 1.6/2.4 GHz Bands)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution)	RM-9718
Service and in the Instructional Television Fixed Service for)	
the Gulf of Mexico)	

CONSOLIDATED OPPOSITION AND COMMENTS

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August 18, 2006

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EXECUTIVE SUMMARY

The Commission should adopt the BAS repacking proposal advanced by SBE to promote the ability of BRS licensees being involuntarily relocated from 2150-2156 MHz to effectively use the 2496-2500 MHz band without the threat of interference from itinerant BAS operations. Both broadcast and BRS interests have recognized that BRS and BAS cannot coexist in the 2496-2500 MHz band without interference to BRS. The transient nature of BAS operations subject BRS licensees and their subscribers to an unacceptable risk of interference. And, because of that transient nature, there is nothing that BRS licensees can do to protect themselves from interference. The SBE proposal, under which BAS licensees would repack their usage to just the 2450-2486 MHz band through digitization, is the most effective solution to the problem.

For similar reasons, the Commission should adopt BellSouth's proposal to modify the power flux density limits imposed on MSS licensees in the 2496-2500 MHz band. The United States has determined in preparing for WRC-07 that the current limits are inadequate to protect terrestrial operations, and that the more restrictive limits advocated by BellSouth better protect terrestrial users.

The Commission should expedite auctions for forfeited BRS BTA authorizations and EBS white space. The public interest will be far better served by auctioning that fallow spectrum and getting it into the hands of those prepared to deploy new services now rather than awaiting for the end of the transition process. By making clear that those winners of the EBS auction are not entitled to new downconverters or migration of programming by the proponent, the Commission can assure that early auctions do not deter or delay transitions. However, WCA disagrees with Nextwave's proposal for auctioning just one EBS white space license per BTA, and instead urges the Commission to auction spectrum based on existing channel groupings, with the LBS/UBS channels auctioned separate from the MBS channel (*i.e.* channels A1, A2 and A3 would be auctioned together, and channel A4 would be auctioned separately).

HITN's call for reconsideration of the *2006 Order's* affirmation of the dismissal of pending MXed applications not subject to a settlement agreement should again be rejected. The Commission's decision to dismiss pending applications when it substantially revised the EBS regulatory regime is fully consistent with Commission precedent and Court decisions affording the Commission discretion in similar cases.

Other than by adopting WCA's proposal for mandatory use of great ellipses in calculating GSA boundaries, the Commission should not alter its rules and policies governing the definition of GSAs. Ad Hoc's proposal for departing from the standard approach to "splitting the football" among BRS channel 2/2A licensees should be rejected on the grounds that it will unnecessarily Balkanize the spectrum and likely will result in slivers of underutilized spectrum. In addition, the Commission should reject HITN's untimely argument for revisiting the allocation of territory when an application for a new station pending on January 10, 2005 is later dismissed. The Commission has recognized that a pending application for a new license presents different equities than a pending application for modification of an existing license, and has adopted reasonable approaches to each scenario.

Efforts by HITN and Clarendon Foundation to interject the Commission into private contractual disputes should be rejected. Their petitions each seek to have the Commission effectively abrogate existing agreements. The Commission has consistently refused to do so in the past, and they present no policy grounds why the Commission should do so here. Indeed, grant of their requests would undermine the Commission's *Secondary Markets* initiative and would exceed the Commission's legal authority.

The Commission should neither revisit its decision to delete the Gulf of Mexico service area nor address for the first time the creation of Atlantic and Pacific service areas. With respect to the former, API has failed to meet its burden under Section 1.429(b) to justify its untimely claim that there is a demand for BRS/EBS service in the Gulf. Moreover, API has failed to demonstrate either that there is a demand, or that whatever demand may exist cannot be met through other authorized services. And, API's contention that the current BRS/EBS rules will protect land-based facilities is just plain wrong – those rules were not designed to account for the ducting conditions that arise in the Gulf. Were the Commission to license the Gulf, new rules along the lines WCA has proposed are necessary to assure that land-based operations are not prejudiced. Moreover, consideration of rules to govern licensing and operation of BRS/EBS facilities in the Atlantic and Pacific Oceans is well beyond the scope of this proceeding, and even API concedes that there is no immediate demand for service in those areas.

The Commission should affirm its decision to restrict self-transitions to the period following the deadline for filing initiation plans. Adoption of the proposal by Broward to permit licensees to engage in self-transition activities before that deadline would hamper the efforts of proponents to transition markets and increase the costs that ultimately will be borne by all commercial users of the spectrum.

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CONSOLIDATED OPPOSITION AND COMMENTS

The Wireless Communications Association International, Inc. (“WCA”), by its attorneys and pursuant to Section 1.429(f) of the Commission’s Rules, hereby submits its consolidated opposition to and comments regarding the petitions seeking reconsideration of the *Order on Reconsideration, Third Memorandum Opinion and Order and Second Report and Order* (the “2006 Order”) in these proceedings.¹

I. THE COMMISSION SHOULD ADOPT PROPOSALS BY BELL SOUTH AND THE SOCIETY OF BROADCAST ENGINEERS TO PROMOTE BRS USE OF THE 2496-2500 MHZ BAND.

As the Commission is well aware from WCA’s previous filings in IB Docket No. 02-364, the wireless broadband industry is greatly troubled by the Commission’s failure to clear the

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606 (2006) [“2006 Order”].*

Broadcast Auxiliary Service (“BAS”) and the Mobile Satellite Service (“MSS”) from the 2465-2500 MHz band that has been designated as the replacement spectrum for Broadband Radio Service (“BRS”) channel 1 licensees being involuntarily relocated from 2150-2156 MHz.² Subscribers to wireless services generally expect a consistent, ubiquitous offering, and a service that is not free from interference likely will not succeed in the marketplace. For that reason, WCA supports adoption of the proposals advanced in the petitions for reconsideration submitted by the Society of Broadcast Engineers, Inc. (“SBE”) and BellSouth Corp, *et al.* (“BellSouth”) that are designed to reduce the levels of interference that BRS channel 1 licensees will face once they are involuntarily relocated from the 2150-2156 MHz band to 2496-2502 MHz.³

A. *RELOCATION OF BAS CHANNEL A10 FROM THE 2496-2500 MHz BAND IS ESSENTIAL TO ASSURE THAT BRS CHANNEL 1 LICENSEES CAN PROVIDE RELIABLE BROADBAND SERVICES TO THE PUBLIC.*

In response to the Petition for Reconsideration submitted by SBE, the Commission should require that BAS licensees repack their current analog use of the 2450-2500 MHz band into the 2450-2486 MHz band by compressing BAS operations into three 12 MHz digitized

² See, e.g., Letter from Paul J. Sinderbrand, Counsel to WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 02-364 (filed April 3, 2006); Letter from Paul J. Sinderbrand, Counsel to WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 02-364 (filed Oct. 19, 2005); Letter from Paul J. Sinderbrand, Counsel to WCA, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 02-364 (filed July 27, 2005).

³ Sprint Nextel Corp. (“Sprint Nextel”) has filed a Petition for Review of the 2006 Order with the United States Court of Appeals for the District of Columbia Circuit urging reversal of the *Order on Reconsideration* in IB Docket No. 02-364 and the Commission’s earlier *Report and Order* in that docket on the grounds that the Commission’s decision to require BRS to share the 2496-2500 MHz band is arbitrary, capricious and otherwise contrary to law. See *Sprint Nextel Corporation v. Federal Communications Commission*, Docket No. 06-1278 (D.C. Cir. filed July 21, 2006). WCA supports that filing, and its endorsement of BellSouth’s proposal for sharing the 2496-2500 MHz band between MSS and BRS should be read for what it is – attempting to make the most of a bad situation. There is no doubt that even if MSS is limited to the power flux density limits proposed by BellSouth, there will be interference to BRS and thus BRS channel 1 licensees will be harmed.

channels.⁴ BRS cannot reasonably be expected to share the 2496-2500 MHz band with BAS, and SBE's repacking plan is the most efficient and effective means for avoiding interference between BAS and BRS (as well as between BAS and the MSS Ancillary Terrestrial Component ("ATC")).

The 2006 Order's retention of the *status quo* is mystifying, given that BAS and BRS interests have presented the Commission with extensive, unrefuted evidence that, particularly in light of the highly-transient nature of BAS, the current rules leave BRS channel 1 operations highly vulnerable to interference from BAS.⁵ Unfortunately, it appears that the Commission simultaneously has underestimated the potential threat to BRS, and overestimated the ability of BRS licensees to protect themselves from that threat.

Although the 2006 Order appears to take comfort in the fact that there are "only" 77 television pickup ("TVPU") licenses, 11 television relay licenses and 1 Local Television Transmission Service license,⁶ SBE correctly notes that the TVPU licenses authorize an unlimited number of transient transmitters, and thus the number of potential interferers to BRS

⁴ WCA has previously established that the costs of this digitization should be borne by the AWS and MSS licensees who will benefit directly from the clearing of the 2486-2500 MHz band for terrestrial use. *See, e.g.*, Petition of Wireless Communications Ass'n Int'l, Inc. for Reconsideration, IB Docket No. 02-364, at 19 (filed Sept. 8, 2004) ["WCA Sharing Petition"]; Reply of Wireless Communications Ass'n Int'l, Inc. for Reconsideration, IB Docket No. 02-364, at 8-10 (filed Nov. 8, 2004) ["WCA Sharing Reply"]. The Commission should note that in WCA's pending petition for reconsideration of the *Ninth Report and Order* in ET Docket No. 00-258, it has also proposed that the Commission require the winners of the AWS F Block license to fund the repacking of 2.4 GHz band operations. *See* Petition of Wireless Communications Ass'n Int'l, Inc. for Reconsideration, ET Docket No. 00-258, at 24-25 (filed June 23, 2006).

⁵ *See, e.g.*, WCA Sharing Petition at 16-19, Attachment B; Petition of Sprint Corp. for Partial Reconsideration, IB Docket No. 02-364, at 7-8 (filed Sept. 8, 2004); Letter from Trey Hanbury, Director, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 02-364 (filed March 17, 2006) (reporting on joint oral *ex parte* presentation made with SBE).

⁶ 2006 Order, 21 FCC Rcd at 5627, 5628-29.

may be significantly higher than the FCC projects.⁷ In addition, because of their highly transient nature, a wide-area licensing, facilities can be deployed virtually anywhere. As SBE has previously alerted the Commission:

The heaviest use of grandfathered TV BAS Channel A10, on a co-primary, indefinitely grandfathered basis, is by broadcast network entities (BNEs) and cable network entities (CNEs), such as ABC Sports and ESPN. . . . It appears that the Commission believes that grandfathered TV BAS operations on Channel A10 are relatively minor, but this is most definitely not the case. TV BAS Channel A10 is heavily and regularly used by the TV Pickup licensees with grandfather rights.⁸

And, as the Commission concedes, the TVPU facilities can be deployed in moving aeronautical platforms, such as blimps or helicopters.⁹ As a result, these TVPU operations will often have a direct, unobstructed line-of-sight to one, if not more, BRS base stations and untold numbers of BRS subscriber units, making some interference to BRS almost a foregone conclusion.

As such, WCA believes the *2006 Order* is wrongly critical of the engineering study presented by WCA, contending that because it assumes what the Commission calls “worst-case” conditions, “separation distances claimed by the study may, in fact, be substantially shorter than those claimed.”¹⁰ While it is true that conditions studied by WCA will not occur in all cases where a BAS transmitter operates in a BRS market area, the transient nature of BAS transmitters and the fact that they are often transmitting from antennas located high above ground makes

⁷ See Petition of the Society of Broadcast Engineers, Inc. for Reconsideration, IB Docket No. 02-364 *et al.*, at 2 (filed May 22, 2006) [“SBE Petition”].

⁸ Petition of Society of Broadcast Engineers for Reconsideration, IB Docket No. 02-364, at 3 (filed Sept. 8, 2004) [“Initial SBE Petition”].

⁹ *2006 Order*, 21 FCC Rcd at 5627 n.86. See also Initial SBE Petition at 2 (“Channel A10 is routinely used from blimp platforms, when covering baseball and football games, as well as when covering X (extreme) sports and NASCAR races.”).

¹⁰ *2006 Order*, 21 FCC Rcd at 5629.

virtually every BRS base station and subscriber unit vulnerable to the risk that it will face exactly the scenario portrayed by WCA at some time or another. Whether the minimum separation distance is 10 miles or 1, BAS will inevitably deploy too close to BRS. A BRS licensee and its subscribers should not be subject to the risk that interference from BAS will occur, particularly since that risk can be entirely eliminated through the simple expedient of adopting SBE's BAS repacking proposal.

The Commission suggests a series of measures that BAS licensees can take to avoid interfering with BRS – such as using other channels outside the 2496-2500 MHz band or carefully selecting receive locations to avoid interference to BRS.¹¹ However, SBE indicates that these solutions may not always be available,¹² and in any event *the Commission's Rules do not require BAS licensees to implement any of the specified techniques for mitigating interference*. Particularly since, as discussed below, SBE appears to believe that BAS licensees will have no obligation to protect BRS licensees from interference once the latter are relocated to 2496-2500 MHz from the 2.1 GHz band, BRS licensees can take no comfort in the availability of such non-mandated mitigation techniques.

¹¹ See *id.* at 5628-29.

¹² See SBE Petition at 3-4 (“The Order also mistakenly concludes that in the face of real-world conditions that broadcasters can simply abandon their grandfathered use of TV BAS Channels A10 and use the nine other 2 and 2.5 GHz TV BAS channels.”). See also Initial SBE Petition at 3 (“many individual TV stations hold TV Pickup licenses with Channel A10 grandfather rights, and rely heavily on the availability of a third TV BAS channel at 2.5 GHz to make frequency coordination possible.”). Although not noted by SBE, it is worth noting that the Commission's suggestion that BAS can select receive sites judiciously “knowing the location of BRS operations” (see *2006 Order*, 21 FCC Rcd at 5628-29) is based on a faulty predicate – except in rare cases, the location of BRS facilities are not maintained by the Commission under the geographic licensing system that went into effect on January 10, 2005. See 47 C.F.R. § 27.1209 (2005). Moreover, even if the BAS licensee knows where BRS base stations are located, the portable and mobile nature of BRS subscriber equipment makes it impossible for BAS licensees to design around BRS operations in a market.

Compounding the problem, there is virtually nothing that the BRS licensee can do to protect itself against BAS interference. The *2006 Order* urges BAS licensees to provide BRS licensees with information regarding their receive sites to the extent that information is not publicly available, and suggests that with such information, BRS licensees can somehow design their networks around the potential for interference.¹³ However, even assuming that the BAS licensees do voluntarily share their receive site information, there is nothing that a BRS licensee can do with that information to protect itself from interference given that the interfering BAS transmitters are transient and can be located anywhere. It is, after all, the BAS transmitter (not the receiver) that will cause the interference. BAS mobile electronic news gathering facilities go on a real-time basis where the news is occurring, and it is just not possible for a BRS licensee to predict every possible BAS transmission location and design its network to avoid interference.

If the Commission again fails to adopt the SBE repacking plan, it must reject with crystalline clarity any suggestion by SBE that BRS is effectively a secondary service relative to BAS.¹⁴ Although SBE's argument is directed, on its face, to the relationship between BAS and MSS ATC operations, a logical extension of the argument being made by SBE is that BRS is secondary to BAS because all of the grandfathered BAS stations in the 2496-2500 MHz band were licensed before BRS was relocated to the band. If accepted by the Commission, this line of argument would effectively force BRS licensees to shut down service to the public wherever a BAS licensee chooses to operate facilities that might otherwise suffer interference and to accept

¹³ See *2006 Order*, 21 FCC Rcd at 5628-29.

¹⁴ See SBE Petition 4-5 (SBE asks the Commission to declare that "between co-equal services, the newcomer service must protect the preexisting, earlier-in-time service.").

any interference suffered at the hands of transient BAS facilities. Such a result would turn the *2006 Order* on its head, as it would eliminate any incentive that BAS licensees have to employ the interference mitigation techniques the Commission presumed BAS would use in concluding that BAS/BRS sharing of the band is possible.¹⁵ Moreover, it would be fundamentally unfair to BRS licensees, who are being involuntarily forced to relocate to 2496-2502 MHz from the spectrum at 2150-2156 MHz allocated on a primary basis for BRS channel 1 more than 30 years ago.

Instead, absent adoption of SBE's repacking proposal, the Commission should specify that before operating transient BAS facilities from a given location, the BAS licensee must coordinate with the local BRS channel 1 licensee (who can be identified from the Commission's Universal Licensing System) to avoid interference to operating BRS facilities. In this way, the Commission can make certain that transient BAS operations will not interfere with important broadband services being offered over BRS.

B. THE POWER FLUX DENSITY LIMITS ADOPTED IN THE 2006 ORDER ARE INADEQUATE TO PROTECT BRS CHANNEL 1 OPERATIONS AND MUST BE REVISED AS PROPOSED BY BELL SOUTH.

In addition to ordering the migration of BAS out of the 2496-2500 MHz band, the Commission should modify Section 25.208(v) of the Commission's Rules as proposed by BellSouth.¹⁶ Unfortunately, the record before the Commission is clear that even the more restrictive power flux density ("PFD") limits that BellSouth has proposed are not fully protective

¹⁵ *2006 Order*, 21 FCC Rcd at 5628-29.

¹⁶ See Petition of BellSouth Corp. *et al.*, for Partial Reconsideration, WT Docket No. 03-66, at 6-10 (filed July 19, 2006) ["BellSouth Petition"].

of terrestrial operations.¹⁷ However, adoption of BellSouth's proposal will provide significant additional protection to BRS operations in the 2496-2500 MHz band and thus should be adopted.

With the *2006 Order*, the Commission has required MSS licensees operating at 2496-2500 MHz to reduce their signal levels to no more than those levels set forth in ITU-RR App. 5, Annex 1.¹⁸ Certainly, WCA is gratified that the Commission recognizes the potential for MSS to interfere with BRS and has sought to protect BRS operations. However, the fundamental problem with the Commission's approach is that even if a MSS licensee restricts its transmissions to those PFD levels, it will cause debilitating interference to the types of BRS facilities that will be deployed at 2496-2500 MHz.¹⁹ Thus, as BellSouth correctly notes, the Commission's decision to restrict MSS operations in the 2496-2500 MHz band to the PFD limits that were initially established by the International Telecommunications Union ("ITU") as coordination thresholds for the 2.5 GHz band is fundamentally unsound.²⁰

¹⁷ See *infra* note 27.

¹⁸ See *2006 Order*, 21 FCC Rcd at 5624-25.

¹⁹ See Petition of Wireless Communications Ass'n Int'l, Inc., IB Docket No. 02-364, at 8-10 (filed Sept. 8, 2004). It should be noted that there is absolutely no evidence in the record to support the Commission's contention that "manufacturers can design BRS equipment such that BRS can reliably operate" under the PFD limits presently found in Section 25.208(v). *2006 Order*, 21 FCC Rcd at 5626. To WCA's knowledge, it would not be possible to design cost-effective equipment that could provide consistent, ubiquitous fixed, portable and mobile BRS wireless broadband service in the 2496-2500 MHz band in the presence of a cochannel MSS signal operating at the PFD limits now permitted.

²⁰ The *2006 Order* takes issue with WCA's prior analysis of interference because it did assume the source of the interference was static, and did not address the percentage of time that no interfering signal would be received by a BRS facility. See *2006 Order*, 21 FCC Rcd at 5626. What this ignores, however, is that wireless broadband subscribers anticipate ubiquitous "always on" service. As such, subscribers will not tolerate MSS interference that disrupts BRS service for any period of time, and thus it is of no moment whether the interference lasts five hours or five minutes.

That these values are inadequate to provide full protection to cochannel, co-coverage BRS operations is a matter of record as a result of the Commission's efforts to prepare United States positions regarding Agenda Item 1.9 of the 2007 World Radiocommunication Conference ("WRC-07"), which is examining sharing of the 2500-2690 MHz band between terrestrial services and MSS. WCA participated in the United States' efforts to develop positions in advance of WRC-07 and, most importantly, actively participated in Informal Working Group 3 ("IWG-3"), which has been tasked with developing recommended positions for the United States regarding Agenda Item 1.9. Although the 2496-2500 MHz band is not subject to Agenda Item 1.9, the sharing issues driving Agenda Item 1.9 are equally applicable to 2496-2500 MHz.

The United States is not unfamiliar with the issues raised by Agenda Item 1.9 and the difficulties associated with efforts to share the same spectrum between terrestrial services and satellite services serving the same geographic area. Indeed, just earlier this year the Commission affirmed on reconsideration its earlier elimination of the unused Fixed Satellite Service ("FSS") and Broadcast Satellite (Sound) Service ("BSS") allocations in the 2500-2690 MHz band.²¹ In so doing, the Commission made the determination "that deleting the BSS/FSS allocation would serve the public interest by preventing the potential disruption of Educational Broadband Service ("EBS") and BRS across the country, as well as by avoiding imposing high costs on terrestrial

²¹ See *Amendment of Parts 2, 25, and 87 of the Commission's Rules to Implement Decisions from the World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, ET Docket No. 02-305, Order On Reconsideration, FCC 06-62 (rel. May 8, 2006) ["BSS/FSS Allocation Suppression Reconsideration Order"]; *Amendment of Parts 2, 25, and 87 of the Commission's Rules to Implement Decisions from the World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Report and Order, 18 FCC Rcd 23426, 23445 (2003).

licensees to mitigate harmful interference from BSS and FSS services to terrestrial services.”²²

This was hardly a surprise, and was just the latest in a series of Commission determinations regarding the difficulties of sharing between satellite and terrestrial services.²³

In preparing the United States’ position on Agenda Item 1.9, IWG-3 (an often contentious group comprised of terrestrial and satellite interests) recommended unanimously that the United States press for the very same hard PFD limits that BellSouth is now proposing.²⁴

That proposal was subsequently endorsed by the Commission’s WRC-2007 Advisory

²² *BSS/FSS Allocation Suppression Reconsideration Order* at ¶ 10 (citation omitted).

²³ *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order, 18 FCC Rcd 1962, 1991 (2003) (in authorizing MSS operators to provide an Ancillary Terrestrial Component, the Commission rejected suggestions that the MSS spectrum could be used by operators unrelated to the MSS licensee to provide domestic terrestrial services because “same-band, separate operator sharing is impractical and ill-advised.”); *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222, 17227-28 (2001) (rejecting efforts by satellite interests to secure an allocation of the 2500-2520/2670-2690 MHz bands for MSS, concluding “that sharing between terrestrial and satellite systems in the 2500-2520 MHz worldwide MSS downlink (space-to-Earth) band and in the 2670-2690 MHz worldwide MSS uplink (Earth-to-space) band . . . was not feasible), *cited in Amendment of Parts 2, 25, and 87 of the Commission’s Rules to Implement Decisions from World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Report and Order, 18 FCC Rcd 23426, 23443-44 (2003); *Amendment of Parts 2, 25, and 87 of the Commission’s Rules to Implement Decisions from the World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, Notice of Proposed Rulemaking, 17 FCC Rcd 19756, 19773 (2002). *See also Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Notice of Proposed Rule Making and Order, 16 FCC Rcd 596, 624-25 (2001) (“[s]haring between terrestrial and satellite systems would present substantial technical challenges in that band”). The Commission’s findings were fully consistent with the conclusion being reached within the ITU regarding the infeasibility of cochannel sharing between satellite and terrestrial services. For example, Report ITU-R M.2041, which is titled “Sharing and adjacent band compatibility in the 2.5 GHz band between the terrestrial and satellite components of IMT-2000,” concludes that “[w]hen considering the sharing of the same frequency band between the terrestrial component of IMT-2000 and the MSS, the detailed analysis . . . shows that such sharing is not feasible over the same geographical area.” Consequently, Radiocommunication Study Group 8 came to the conclusion that co-frequency sharing is not feasible for networks operating in the same geographical area. ITU-R Study Group 8, “Sharing and adjacent band compatibility in the 2.5 GHz band between terrestrial and satellite components of IMT-2000,” Report ITU-R M.2041, at 8 (2003).

²⁴ *See* Document IWG-3/WRC-07/Proposal/Doc.8r4.

Committee.²⁵ And, as BellSouth points out, on June 7, 2006 – just six weeks after the *2006 Order* was released by the Commission – the U.S. Government submitted a Draft Proposal for the Work of the Conference for Agenda Item 1.9 to CITELE in preparation for WRC-07 that included the very same PFD limits for MSS that BellSouth has proposed.²⁶

As WCA has made clear throughout the WRC-07 preparatory process, WCA supports those limits somewhat reluctantly, since the proposed PFD limits do not fully protect operations within the United States. Studies conducted by WCA members establish that, in fact, MSS systems operating even at the more stringent PFD limits can cause interference to terrestrial 2.5 GHz band operations in the United States.²⁷ Nonetheless, WCA recognizes that the PFD levels required to protect US operations in the 2.5 GHz band are not likely to be adopted at WRC-07, and it has become clear during the proceedings leading to WRC-07 that the United States must compromise here. As the Commission recognized in the *BSS/FSS Allocation Suppression Reconsideration Order*, the current Radio Regulations provide scant protection to US terrestrial operations in the 2.5 GHz band, and the hard PFD limits proposed by the United States are vastly superior.²⁸

²⁵ See Document WAC/101(27.04.06).

²⁶ See BellSouth Petition at 8. While the Commission has suggested that WCA's earlier analysis of BRS/MSS sharing was "inconsistent with the analysis used by the international community," (*2006 Order*, 21 FCC Rcd at 5626) the PFD limits the United States is advocating initially were based on submissions by WCA to IWG-3 and based on a methodology for analysis developed by Joint Task Group 6-8-9.

²⁷ See, e.g. Comments of the Wireless Communications Ass'n Int'l, Inc. on Documents WAC/101 and WAC/102, IB Docket No. 04-286, at 4 (filed May 26, 2006).

²⁸ As such, the United States' embrace of these PFD limits should not be read as suggesting that the Commission can revisit its decisions to preclude any satellite use of the 2.5 GHz band domestically. WCA would strongly oppose any domestic effort to allocate spectrum in the 2500-2690 MHz band to MSS because MSS satellites operating within the United States at the hard PFD limits specified clearly would interfere with domestic terrestrial operations

Finally, BRS licensees can take no comfort in the Commission's assertion "[w]e anticipate that . . . MSS will utilize primarily the spectrum below 2495 MHz, where it is entitled to interference protection in delivering service to those areas, and use the 2495-2500 MHz band to deliver service to areas where BRS is not yet operating."²⁹ MSS licenses are under no obligation to cease transmitting into areas that are served by BRS, and have no incentive to do so. Thus, the PFD limit set forth in Section 25.208(v) is BRS's sole source of protection against cochannel interference from MSS.

Adoption of the BellSouth proposal on reconsideration thus will not only provide much needed protection to BRS channel 1 licensees from domestic MSS operations, but will send an unmistakable message to the rest of the world that the United States is committed to its position on Agenda Item 1.9.

II. THE COMMISSION SHOULD EXPEDITE AUCTIONS FOR FORFEITED BRS BTA AUTHORIZATIONS AND EBS WHITE SPACE.

In its petition for reconsideration of the *2006 Order*, Nextwave Broadband Inc. ("Nextwave") calls upon the Commission to "immediately auction all available and unassigned BRS and EBS spectrum instead of postponing auctions for unassigned [] spectrum until 2010 when the transition has concluded."³⁰ The record developed in response to the *Further Notice of Proposed Rulemaking* ("FNPRM") evidenced that the public interest in expediting the deployment of wireless broadband services will best be served by promptly auctioning the

in the band and impose upon wireless broadband service providers the very interference mitigation expenses that the *BSS/FSS Allocation Suppression Reconsideration Order* sought to prevent.

²⁹ *2006 Order*, 21 FCC Rcd at 5625.

³⁰ Petition of Nextwave Broadband Inc. for Partial Reconsideration, WT Docket No. 03-66, at ii (filed July 19, 2006) ["Nextwave Petition"].

Commission's inventory of BRS and EBS spectrum, rather than awaiting the conclusion of all transitions to the new 2.5 GHz bandplan.³¹

At the outset, the *2006 Order* appears to underestimate the amount of BRS spectrum that could be auctioned immediately. For example, WCA understands that there are approximately 70-75 forfeited BRS Basic Trading Area ("BTA") authorizations that could be reaucted.³² With approximately 15% of the initial BRS BTA authorizations having been forfeited, WCA cannot agree with the *2006 Order's* conclusion that "the unassigned spectrum available for new licenses consists predominantly of previously unassigned EBS spectrum."³³ The inventory of BRS spectrum held by the Commission is substantial and making it available now, before completion of the transition process, could substantially improve the prospects for bringing wireless broadband service to the residents of the affected BTAs.

WCA recognizes that in isolated cases there may be theoretical economic benefit to conducting a single auction that includes all forfeited BRS BTA authorizations, all EBS white space, and whatever spectrum is freed should any licensee elect not to transition to the new

³¹ See, e.g., Comments of Wireless Communications Ass'n Int'l, Inc., WT Docket No. 03-66, at 20-22 (filed Jan. 10, 2005) ("auctions 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.") ["WCA FNPRM Comments"]; Comments of Sprint Corp., WT Docket No. 03-66, at 3 (filed Jan. 10, 2005); Comments of Clearwire Corp., WT Docket No. 03-66, at 7 (filed Jan. 10, 2005); Reply Comments of Wireless Communications Ass'n Int'l, Inc., WT Docket No. 03-66, at 19-21 (filed Jan. 10, 2005) ("the record evidences substantial support for the proposition that the first 2.5 GHz auction under the new regulatory regime should offer bidders the opportunity to acquire forfeited BRS BTA authorizations, and that this auction occur as soon as possible.") ["WCA FNPRM Reply Comments"].

³² Although the Commission suggests that "pending request for relief with respect to some defaults may make it premature for the Commission to issue new licenses for the subject spectrum" (*see 2006 Order*, 21 FCC Rcd at 5739 n.793), the pendency of such challenges can be noted in the ULS prior to any re-auction, and winning bidders can be reimbursed their payments if the BTA authorization is returned to its initial licensee.

³³ *Id.* at 5739.

bandplan.³⁴ However, any arguable benefit pales in comparison to the substantial benefits that American consumers will realize by promptly re-auctioning all currently available spectrum and getting that spectrum into the hands of those ready, willing and able to deploy much needed wireless broadband services. It seems strange that in a proceeding where the Commission has held the industry's proverbial "feet to the fire" to provide substantial service, the Commission itself is warehousing spectrum.

WCA appreciates the Commission's concern that transitions to the new 2.5 GHz bandplan not be delayed by adding additional licensees, but believes that there are means available to the Commission for avoiding delay. Because BRS licensees are responsible for their own transition, it is highly unlikely that any winner of a re-auctioned BRS BTA authorization could frustrate a transition.³⁵ Moreover, the Commission can assure no new EBS licensee deters or delays a transition by the simple expedient of ruling that those participating in the EBS white space auction will not be entitled to replacement downconverters at receive sites within the

³⁴ *Id.* at 5740. WCA respectfully submits that in advocating a delay in the auction until after the transition, the Commission is over-estimating the number of licensees that will not transition to the new bandplan and instead return their authorizations to the Commission. *Id.* Given that the *2006 Order* has changed the geographic area of transitions from Major Economic Areas to BTAs, has afforded those licensees not covered by an initiation plan the right to self-transition, and has failed to specify what recompense, if any, those who do not transition will receive. WCA seriously doubts that more than a handful of licensees will return their licenses to the Commission. The costs of transitioning are so low in comparison to the value of post-transition licenses that there is no economic benefit to not transitioning.

³⁵ *See* 47 C.F.R. § 1233(c). Indeed, the record illustrates that BRS BTA license holders are the most likely proponents for a given BTA and that re-auctioning forfeited BTA licenses will tend to promote the most rapid transition of those BTAs. *See, e.g.,* WCA FNPRM Comments at 21 ("BRS BTA authorization holders are among the most likely entities to serve as proponents, re-auctioning the handful of licenses that have been forfeited or cancelled now will promote transitions and the funding of EBS's migration to the new bandplan. Indeed, it is probably fair to assume that anyone bidding on a BRS BTA authorization in the coming environment will do so with the intention of serving as a proponent if the market is not otherwise transitioned."). The *2006 Order* correctly notes that the fact that a BRS BTA authorization has been forfeited "does not mean that there are no BRS licensees in the area capable of proposing an initiation plan." *2006 Order*, 21 FCC Rcd at 5739 n.793. While that is true, it is also true that in many areas, there may be no likely proponent, and the winner of the re-auctioned BRS BTA authorization will be the only likely filer of an initiation plan.

auctioned EBS white space or to migration to the Middle Band Segment (“MBS”) of program tracks as part of the transition or self-transition process.³⁶ While the *2006 Order* recognizes that such a ruling might limit the utility of some EBS licenses until after the transition,³⁷ there will inevitably be some lead time between the end of the auction and the launching of new service by the auction winners. The sooner the auction is conducted, the sooner the auction winners will be able to begin planning their deployments to take place as soon as practical following the transition. Moreover, most markets will transition long before the Commission’s October 20, 2010 deadline for completing all transitions, and thus an expedited auction, even if use of the spectrum is subject to completion of the transition, will result in earlier deployments than possible under the approach of the *2006 Order*.

Although WCA generally agrees with the arguments advanced by Nextwave in support of an expedited auction of the EBS white space, it believes that the Commission must move carefully to assure that the rules governing that auction is fundamentally fair to the educational community. To achieve that goal, the Commission should not adopt Nextwave’s proposal that a single EBS white space license be issued for each BTA, covering all EBS spectrum not previously assigned to an incumbent licensee.³⁸ The record developed in response to the *FNPRM* evidenced substantial benefits to educators by auctioning the first three channels in each existing channel group as a package (*e.g.*, channels A1, A2 and A3 as one package, channels B1,

³⁶ See WCA FNPRM Comments at 21; Comments of Nextel Communications, WT Docket No. 03-66, at 8 n.14 (filed Jan. 10, 2005) [“Nextel FNPRM Comments”].

³⁷ See *2006 Order*, 21 FCC Rcd at 5740. However, given the frequency agility of today’s data equipment, EBS data services can readily be deployed even if transition assistance is not available.

³⁸ See Nextwave Petition at 10.

B2 and B3 as another, etc.), and auctioning the fourth channel (*e.g.*, A4, B4, etc.) separately.³⁹

The former group of three channels represents the channels that will reside in the Lower Band Segment (“LBS”) and Upper Band Segment (“UBS”) following the transition, while the latter channels comprise the MBS and thus after transitions have occurred, the two proposed groupings are likely to be used by licensees to meet very different objectives. Licensees of spectrum in the LBS/UBS may have no need for MBS spectrum, and *vice versa*.⁴⁰ By separating auctions for the future LBS/UBS and MBS channels, the Commission will minimize the possibility that auction participants will be forced to bid on channels in which they have no interest and, conversely, will maximize the likelihood that the LBS/UBS and MBS channels will be awarded to the bidders to whom they have the highest value.

³⁹ See, *e.g.*, “A Proposal For Revising The MDS And ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586, at 42 (filed Oct. 7, 2002) [“Initial Coalition Proposal”] (By holding *auctions* on a group-by-group basis, the Commission will best serve the needs of incumbent [EBS] licensees – the most likely participants. Particularly as portable, nomadic and mobile commercial and educational applications develop, wide-area coverage will be required, which means that many incumbent licensees are going to be interested in expanding use of their current channels beyond the borders of their current GSA. Conducting auctions on a group-by-group basis will allow incumbents to secure the rights to their current channels in a larger area, without having to purchase spectrum they are not interested in utilizing.); WCA FNPRM Comments at 25-26; Comments of National ITFS Ass’n and Catholic Television Network, WT Docket No. 03-66, at 12-14 (filed Jan. 10, 2005) [“NIA/CTN FNPRM Comments”]; Comments of WCA, NIA and CTN, WT Docket No. 03-66, at 98-100 (filed Sept. 9, 2003); NIA/CTN FNPRM Comments at 13 (“[b]y structuring the auction in this manner, the Commission will increase the likelihood of effective use of these new licensed areas, by allowing bidders to treat the white space as extensions of their existing service areas, while at the same time, allowing bidders to focus on the particular technologies they want to deploy.”); Nextel FNPRM Comments at 9-10; Comments of BellSouth *et al.*, WT Docket No. 03-66, at 15-16 (filed Jan., 10, 2005); Comments of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, WT Docket No. 03-66, at 9 (filed Jan. 10, 2005); Reply Comments of Sprint, WT Docket No. 03-66, at 12-13 (filed Feb. 8, 2005).

⁴⁰ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165, 14280 (2004) [“2004 BRS/EBS R&O” or “FNPRM”] (“Existing licensees that only want to continue current high-power operations solely in their limited PSA/GSA may not find new licenses suitable for such uses.”).

III. HITN'S CALL FOR RECONSIDERATION OF THE 2006 ORDER'S AFFIRMATION OF THE DISMISSAL OF PENDING MIXED APPLICATIONS NOT SUBJECT TO A SETTLEMENT AGREEMENT SHOULD BE REJECTED.

In the *Notice of Proposed Rulemaking* (“*NPRM*”) that commenced this proceeding, the Commission tentatively concluded that it would clear the way for conversion to geographic licensing by dismissing all site-based EBS applications that were pending as of the April 2, 2003 release date of the *NPRM*, except for those that were subject to a filed settlement agreement that comported with the Commission’s rules.⁴¹ Although objected to by Hispanic Information & Telecommunications Network, Inc. (“HITN”) at the time, that tentative conclusion was affirmed in the *2004 BRS/EBS R&O*, where the Commission stated “[w]e disagree with HITN, and note that with regard to pending applications in other services that have been converted to geographic area licensing, the Commission has dismissed the pending mutually exclusive applications at bar.”⁴² HITN and others sought reconsideration, but the Commission again found that:

[o]ur precedent of dismissing pending mutually exclusive applications when converting to geographic area licensing is well established. The public interest is served by an efficient transition toward geographic licensing, and dismissing mutually exclusive applications in the current instance further that public interest goal.⁴³

Once again, however, HITN has sought reconsideration.⁴⁴ And once again, the Commission should affirm its dismissal of those applications.

⁴¹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking, 18 FCC Rcd 6722, 6813-14 (2003) [“*BRS/EBS NPRM*”].

⁴² *2004 BRS/EBS R&O*, 19 FCC Rcd at 14265.

⁴³ See *2006 Order*, 21 FCC Rcd at 5703-04 (citations omitted).

⁴⁴ See Petition of Hispanic Information & Telecommunications Network, Inc. for Further Reconsideration, WT Docket No. 03-66, at 3-6 (filed July 19, 2006) [“HITN Petition”].

The Commission's decision represents a reasonable determination that the most efficient mechanism for moving to EBS geographic licensing and the auctioning of unlicensed EBS white space is to wipe the slate as clean as possible. In finding that "[t]he public interest is served by an efficient transition towards geographic licensing" and that "dismissing mutually exclusive applications in the current instance further that public interest goal," the Commission had to balance a variety of competing interests. While HITN cites several interests that might have weighed somewhat in favor of preserving the pending applications,⁴⁵ HITN conveniently ignores the discretion the Commission has to managing its own application processes through determinations of general applicability.⁴⁶ Indeed, HITN wrongly cites Congress' directive that the Commission utilize auctions in awarding EBS licensees to suggest the Commission is under a legal compulsion to conduct an auction among the applications that were pending on April 2, 2003.⁴⁷ That is absurd. The Commission clearly understands that in accordance with the Balanced Budget Act of 1997 it must utilize competitive bidding in the EBS white space auction.

⁴⁵ See, e.g., *id.* at 4-5. Indeed, although HITN cites these factors as differences between the current situation and other situations in which the Commission has dismissed pending site-based applications when moving to geographic licensing, the Commission has implicitly recognized that these differences do not change the result.

⁴⁶ See, e.g., *Ranger Cellular v. FCC*, 333 F.3d 255, 256 (D.C. Cir. 2003) (affirming FCC decision to dismiss pending lottery applications for initial cellular licenses and auction licenses with open eligibility), *cert. denied*, 541 U.S. 987 (2004); *Bachow Comms., Inc., et al. v. FCC*, 237 F.3d 683, 688-691 (D.C. Cir. 2001) (affirming FCC's decision to dismiss applications when changing system for awarding licenses in the 39 GHz band from a comparative hearing process to a public auction); *Benkelman Telephone Company, et al. v. FCC*, 220 F.3d 601, 603-04 (D.C. Cir. 2000) (affirming decision to replace site-specific licensing regime for paging with geographic area licensing system that included transitional licensing freeze and dismissal of pending applications); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995) ("It is because the Commission has this authority – to establish rules of general applicability, . . . that the . . . argument that the Commission should have conducted individual adjudications under sections 308 and 309 before modifying existing cellular licenses fails."); *Kessler v. FCC*, 326 F.2d 673, 688 (D.C. Cir. 1963) ("Until the rule making proceedings are concluded and new standards, if there are to be any, for allocation of stations are crystallized, the question of whether the granting of a particular application . . . would serve the public interest under those standards can hardly be determined.").

⁴⁷ See HITN Petition at 4 n.6.

However, nothing in that legislation can reasonable be read to suggest the Commission cannot do as it has done here and dismiss pending site-based applications to clear the way for auction of geographic licenses.

Finally, the Commission needs to consider that more than just a handful o f HITN applications are at issue here – if the Commission grants HITN’s petition, it will be legally obligated to return to pending status every mutually-exclusive application that was dismissed pursuant to the *2004 BRS/EBS R&O*. In most cases, these mutually-exclusive applications were still pending when the *NPRM* was released for one reason – the mutually-exclusive applicants were locked in adversarial proceedings before the Commission that could not be settled. Thus, grant of HITN’s petition will again place the Commission in the midst of battles that had proved sufficiently vexing that they were still pending years after the applications were first filed. Thus, it is hardly realistic to assume that reinstatement of the mutually-exclusive applications will result in getting spectrum available for service any time soon. The Commission had it right in the *2004 BRS/EBS R&O* and the *2006 Order* – dismiss these applications and the underlying adversarial proceedings and start anew with auctioned geographic service areas.

IV. THE COMMISSION SHOULD NOT ALTER ITS RULES AND POLICIES GOVERNING THE DEFINITION OF GEOGRAPHIC SERVICE AREAS.

A. AD HOC’S PROPOSAL FOR DEPARTING FROM THE STANDARD APPROACH TO “SPLITTING THE FOOTBALL” AMONG BRS CHANNEL 2/2A LICENSEES SHOULD BE REJECTED.

In the initial *2004 BRS/EBS R&O*, the Commission adopted two important elements of the Coalition Proposal, affording both BRS channel 2 and BRS channel 2A licensees a full 6 MHz replacement channel under the new 2.5 GHz bandplan and providing for exclusive

Geographic Service Areas (“GSAs”) to be created by “splitting the football” in those cases where multiple licensees had overlapping Protected Service Areas (“PSAs”) under the former Part 21 and Part 74 Rules.⁴⁸ Although Ad Hoc MDS Alliance (“Ad Hoc”) did not seek reconsideration of the *2004 BRS/EBS R&O*, it now urges the Commission to adopt a convoluted exception to the general rules for “splitting the football” to apply where the PSA of a BRS channel 2 licensee overlaps that of a BRS channel 2A licensee.⁴⁹

The fundamental flaw under Ad Hoc’s proposal is that it would establish separate and distinct GSAs for the 2618-2622 MHz portion and the 2622-2624 MHz portion of BRS channel 2. Where a BRS channel 2 PSA overlaps a BRS channel 2A PSA, Ad Hoc would have the GSAs determined using the normal “splitting the football” rules for the 4 MHz segment at 2618-2622 MHz, but would award the entire overlap area for the 2 MHz segment at 2622-2624 MHz to the

⁴⁸ See *2004 BRS/EBS R&O*, 19 FCC Rcd 14192-84.

⁴⁹ See Petition of Ad Hoc MDS Alliance for Reconsideration, WT Docket No. 03-66, at 4-5 (filed July 19, 2006) [“Ad Hoc Petition”]. Although not discussed specifically in the *2004 BRS/EBS R&O*, the Commission’s decision to afford both channel 2 and channel 2A a full 6 MHz channel under the new 2.5 GHz bandplan was consistent with the position that WCA had espoused throughout ET Docket No. 00-258 -- that upon migration to new spectrum, the Commission should lift the limitation on usage of the full BRS channel 2 in just “fifty large markets”. The Commission adopted that limitation over 30 years ago out of concern that the larger markets were the only geographic areas where BRS usage of the 2160-2162 MHz band would not cause harmful interference to point-to-point microwave services in the 2 GHz band. *Amendment of Parts 1, 2, 21, and 43 of the Commission’s Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 619-620 (1974). That concern, WCA argued in ET Docket No. 00-258, would no longer be relevant once BRS channel 1 and 2/2A licensees are relocated out of the 2150-2162 MHz band. And, WCA stressed, unless the BRS channel 2A licensees outside the “fifty large markets” were permitted use of the 2 MHz in junction with their 4 MHz allocation, that sliver likely would not be utilized, as it is too small to support independent use. See, e.g. Comments of Wireless Communications Ass’n Int’l, Inc., ET Docket No. 00-258, at 7 n.12 (filed Oct. 22, 2001); Letter from Andrew Kreig, President, Wireless Communications Ass’n Int’l, Inc., *et al.* to Hon. Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258, at 4 n.11 (filed April 7, 2004). Thus, leaving aside the fact that Ad Hoc’s complaint should have been submitted by the January 10, 2005 deadline for petitioning for reconsideration of the *2004 BRS/EBS R&O*, there is no merit whatsoever to the suggestion by Ad Hoc that the Commission’s decision in the *2004 BRS/EBS R&O* to afford BRS channel 2 licensees a full 6 MHz channel is not in the public interest. See Ad Hoc Petition at 3 n.7.

BRS channel 2 licensee.⁵⁰ Creating two separate GSAs for BRS channel 2 licensees will further Balkanize the 2.5 GHz band, which is already hampered by a crazy-quilt of authorized service areas that often vary substantially from channel-to-channel even within a single market.

Moreover, adoption of Ad Hoc's proposal likely will result in underutilized, if not completely stranded, spectrum. The revised 2.5 GHz band bandplan provides every channel with a minimum of 5.5 MHz of bandwidth, and it is reasonable to expect that most equipment for the band and service offerings will be designed accordingly. If the Commission were to adopt Ad Hoc's proposal, there will be areas in which the BRS channel 2 licensee can utilize just 2 MHz, and the BRS channel 2A licensee can utilize just 4 MHz. Thus, the net effect of adoption of Ad Hoc's proposal may be that BRS channel 2 in these areas cannot readily be integrated into broadband services offerings, to the ultimate detriment of consumers.

B. THE COMMISSION SHOULD REJECT HITN'S ARGUMENT REGARDING THE ALLOCATION OF TERRITORY WHEN AN APPLICATION FOR A NEW STATION PENDING ON JANUARY 10, 2005 IS LATER DISMISSED.

In its petition for reconsideration of the *2004 BRS/EBS R&O*, WCA urged the Commission to adopt a series of policies to provide licensees with clarity as to how their GSA boundaries will be drawn where events occurring after January 10, 2005 (the effective date of the rules governing GSAs) might cause uncertainty as to the GSA boundaries.⁵¹ WCA's proposals were unopposed, and the *2006 Order* adopted them in full.⁵²

⁵⁰ See *id.* at 4-5.

⁵¹ See Petition of Wireless Communications Ass'n Int'l, Inc. for Partial Reconsideration, WT Docket No. 03-66, at 48-49 (filed Jan. 10, 2005) ["WCA Petition"].

⁵² See *2006 Order*, 21 FCC Rcd at 5694-95.

Although HITN participated extensively in the reconsideration phase surrounding the 2004 BRS/EBS R&O, it never expressed any dissatisfaction with WCA's proposals for defining GSA boundaries.⁵³ Without explaining its failure to earlier object to WCA's proposal, HITN now seeks reconsideration of the Commission's determination that where there was pending on January 10, 2005 an application for a new incumbent station with a PSA that overlapped that of a licensed incumbent station, the GSA of the incumbent station was created on January 10, 2005 by "splitting the football" and, if the pending application is subsequently dismissed or denied, the territory covered by the GSA of the applied-for station reverts to the BRS BTA holder (if a BRS application) or to EBS white space (if an EBS application).⁵⁴

Apparently, HITN would prefer that if the pending application is dismissed or denied, the territory in issue (*i.e.* the one-half of the overlap area that was awarded to the pending applicant) should go to the incumbent, not the BRS BTA holder or the applicable future EBS white space licensee. Although HITN can cite to nothing inherently wrong or unlawful with the Commission's policy, it contends that the Commission's approach is "internally inconsistent" with the policy adopted to handle those cases where a modification application is pending as of January 10, 2005 that, if granted, would impact the boundaries of GSAs.⁵⁵

⁵³ See Consolidated Comments of Hispanic Information & Telecommunications Network, WT Docket No. 03-66 (filed Feb. 22, 2005); Letter from Rudolph J. Geist, Counsel to Hispanic Information & Telecommunications Network, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Dec. 16, 2005); Letter from Rudolph J. Geist, Counsel to Hispanic Information & Telecommunications Network, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed April 4, 2006); Letter from Rudolph J. Geist, Counsel to Hispanic Information & Telecommunications Network, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed April 5, 2006).

⁵⁴ See HITN Petition at 7-9.

⁵⁵ *Id.* at 8.

There is no such internal inconsistency, as the two scenarios are quite different. Where a modification application was pending on January 25, 2005, the GSAs are calculated by “splitting the football” based on January 10, 2005 authorizations of the stations, and if the modification is subsequently granted, the GSAs are immediately redrawn to “split the football” based on the modifications. In this case, two incumbent licensees are involved and territory is not being forfeited – the only question is where to “split the football” as between the two incumbents when the size and location of the overlap area is subject to change if and when the modification application is granted. The Commission’s approach is reasonable – it creates GSAs based on the January 10, 2005 authorizations that will remain in effect if the modification application is dismissed or denied, while keeping open the possibility of adjustment between the two licensees if the modification is granted.

By contrast, the policy that HITN objects to addresses a very different situation, since it involves an application for a new incumbent station, not a modification application. Here, the question presented is how to allocate the overlap territory when a pending application for an initial license is dismissed, and the legitimate interests of the BRS BTA authorization holder or the applicable future EBS white space licensee come into play for the first time. The Commission’s approach in this case also is a reasonable one – rather than allow the incumbent licensee to reap a windfall if the overlap application is eventually dismissed, the overlap territory reverts to the relevant overlay geographic licensee.

In short, the *2006 Order* adopted reasonable approaches to two very different situations, and HITN’s attempt to create an inconsistency is nonsense.

V. EFFORTS BY HITN AND CLARENDON FOUNDATION TO INTERJECT THE COMMISSION INTO PRIVATE CONTRACTUAL DISPUTES SHOULD BE REJECTED.

The Commission should reject entreaties by HITN and Clarendon Foundation (“Clarendon”), two non-local, non-accredited EBS entities, who seek to have the Commission insert itself into private leasing disputes best left for judicial resolution.⁵⁶

HITN’s argument is just the latest chapter in its on-again, off-again crusade to have the Commission extricate HITN from spectrum lease agreements that HITN clearly now regrets. However, the Commission should not fall for HITN’s implication that the Commission acted unlawfully in failing to address the issue in the *2006 Order*. As HITN acknowledges, although HITN raised this issue in its October 23, 2003 reply comments in connection with the *NPRMI*,⁵⁷ the Commission did not grant the requested relief in the *2004 BRS/EBS R&O*. Yet, for reasons that HITN has never explained, it did not seek reconsideration. Indeed, it was not until the first week of April 2006, almost 15 months after the deadline for seeking reconsideration of the *2004 BRS/EBS R&O* and just days before the Commission released its sunshine agenda for the *2006 Order*, that HITN again sought to be freed from its contractual obligations by raising the issue in *ex parte* filings.⁵⁸ Although HITN now complains that “the Commission neglected to

⁵⁶ *See id.* at 6-7 (asking the FCC to void provisions of certain contracts that contain provisions for extending the lease term to the maximum permitted by the FCC from time to time); Petition of Clarendon Foundation for Limited Clarification of EBS Lease Term Limits, WT Docket No. 03-66 (filed July 19, 2006) (seeking “clarification” as to the implications on lease agreements that contain provisions for extending the lease term of the Commission’s 2004 decision to eliminate the 15 year maximum EBS lease term and its decision in the *2006 Order* to impose a 30 year maximum term on future EBS leases).

⁵⁷ *Id.* at 6 n.11.

⁵⁸ *Id.*

specifically address” the argument advanced in those *ex parte* filings, the Commission was under no obligation to do so given HITN’s failure to seek reconsideration by the applicable deadline.

Turning to the substance of the HITN and Clarendon filings, although both attempt to cloak their petitions in a broader public interest debate, the issues they present involve nothing more than the interpretation of private contracts. Clearly, HITN and Clarendon both are unhappy with the contractual language they negotiated setting the term of their spectrum leases, and now would have the Commission free them from their obligations. The Commission should not do so – rather, the Commission should direct HITN and Clarendon to the civil courts just as it has so often done when parties have sought to interject the Commission in contractual matters.

The Commission has routinely recognized that the judiciary is the best place to interpret private contracts.⁵⁹ Indeed, in an earlier phase of MM Docket No. 97-217, HITN advised the Commission that agreements had been negotiated:

for the limited provision of one-way wireless cable video programming services. *These leases have been privately negotiated and therefore it should be left to the parties to determine whether to modify existing agreements* to contemplate either any additional usage of excess ITFS capacity not expressly defined in the agreements or any additional services or channel digitization technologies permitted by the Commission at the conclusion of this proceeding.⁶⁰

⁵⁹ See, e.g., *Hazel-Tone Communications, Inc.*, Order, 16 FCC Rcd 21211, 21213 (2001) (The Commission “has determined that parties should resolve contractual disputes in court and that the Commission is not the proper forum to adjudicate these disputes”) citing *Airtouch Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9430 (1999) (citing *Listener’s Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987)); *Applications of PCS 2000, L.P.*, Memorandum Opinion and Order, 12 FCC Rcd 1681, 1691 (citing *Milford Broadcasting Co.*, Hearing Designation Order, 8 FCC Rcd 680 (1993); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982); *United Telephone Company of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 732 (1977); *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950)). See also Consolidated Opposition of Nextel Communications to Petitions for Reconsideration, WT Docket No. 03-66, at 23-24 (filed Feb. 22, 2005); Consolidated Opposition of Wireless Communications Ass’n Int’l, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, at 44-45 (filed Feb. 22, 2005).

⁶⁰ Comments of Hispanic Information & Telecommunications Network, Inc., MM Docket No. 97-217, at 7 (filed Jan. 8, 1998) (emphasis added). HITN’s position here is particularly disingenuous in light of the fact that it had

HITN later advised the Commission in that proceeding that “[t]o the extent spectrum has been leased to a wireless cable operator for the provision of one-way video programming services, questions of contract interpretation should not be resolved explicitly or implicitly through the FCC rulemaking process.”⁶¹

HITN was clearly correct in its position, and those comments were cited by the Commission with approval in the *Report and Order* in that proceeding, where the Commission reiterated that “construction of existing agreements is a matter of contract law.”⁶²

HITN makes no effort to reconcile its current position with that it previously conveyed to the Commission, and both of the HITN and Clarendon petitions are silent as to why reference to the judiciary of the contractual interpretation issues they raise is inappropriate here. That failure is startling, particularly since HITN even cites a recent decision by the New Jersey Superior Court where the judiciary addressed a contractual matter not dissimilar to that raised by HITN here.⁶³ Given the wide range of lease agreements that are in existence today, which contain a variety of different provisions governing their term, a blanket ruling by the Commission without regard to the specific facts and circumstances surrounding a particular agreement would be most inappropriate. Certainly, there may be cases where a fair reading of the agreement and full consideration of the facts and circumstances under

recommended to the Commission that capacity leased under an existing lease may not be used for any purpose other than the delivery of one-way wireless cable video programming services, unless expressly provided for in the lease agreement. *See id.* at 9. Having sought to restrict lessees to only utilizing leased spectrum for one-way video distribution, HITN should not be permitted to complain, as it does now, that licensees are not making use of the leased spectrum. If HITN were truly concerned about spectrum laying fallow, it would simply waive any “video-only” restrictions in its lease agreements and allow broadband services to flourish.

⁶¹ Reply Comments of Hispanic Information & Telecommunications Network, Inc., MM Docket No. 97-217, at 2 (filed Feb. 9, 1998).

⁶² *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, 19183 (1998) (citation omitted).

⁶³ *See* HITN Petition at 7 n.12.

which it was entered will lead to the result HITN and Clarendon seek. However, there are many agreements in existence where a reviewing court is likely to reach some other conclusion. The key here is that these are individualized agreements that require individualized scrutiny. The blanket determination HITN and Clarendon seek will inevitably lead to the wrong result in many cases, and should be avoided.⁶⁴

Also, it would be unwise as a matter of policy for the Commission to be seen as flip-flopping on its “hands off” approach to private contractual disputes. The Commission has adopted its *Secondary Markets* rules to apply marketplace concepts and eliminate barriers in the development of secondary markets for spectrum.⁶⁵ It has repeatedly affirmed both that the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts⁶⁶ and that the Commission must “remov[e] regulatory uncertainty and establish[] clear policies and rules concerning ‘spectrum leasing’ arrangements.”⁶⁷ For the Commission to reverse course and even consider nullifying long term EBS spectrum leases that comply with the Commission’s rules will signal the marketplace that it cannot rely on the Commission’s stated intention to embrace free market principles such as the enforceability of freely negotiated, arms-length contracts.

⁶⁴ This is particularly true because in many instances, the EBS licensee negotiated significant concessions to be performed by the lessee in the initial stages of a long-term lease, such as upfront payments of money or purchases of expensive equipment to be used by the EBS licensee. Because such upfront costs can only be recovered by the lessees over the life of the contract, nullification of any long-term lease will certainly be problematic, as the commercial operators that made the upfront expenditures will find themselves without the consideration they bargained for.

⁶⁵ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers in the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

⁶⁶ See, e.g., *Ryder Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603, 13613-14 (2003).

⁶⁷ *Id.* at 13603.

Finally, the Commission's authority to abrogate private contracts is very limited and, as WCA, NIA and CTN have previously demonstrated to the Commission, would not extend to situations such as that presented by HITN and Clarendon involving EBS spectrum lease agreements.⁶⁸ In the interest of brevity, and in light of the clear Commission policy against interfering with private agreements, WCA will refrain from repeating those arguments and instead incorporates them by reference for consideration by the Commission if necessary.

VI. THE COMMISSION SHOULD NEITHER REVISIT ITS DECISION TO DELETE THE GULF OF MEXICO SERVICE AREA NOR ADDRESS FOR THE FIRST TIME THE CREATION OF ATLANTIC AND PACIFIC SERVICE AREAS.

Despite never having participated in this proceeding, the American Petroleum Institute ("API") has filed a petition for reconsideration in which it belatedly asks the Commission to license BRS/EBS spectrum in the Gulf of Mexico.⁶⁹ Also, and again for the first time, API asks the Commission to go even further and adopt rules for licensing BRS/EBS along the outer continental shelf in the Atlantic and Pacific Oceans.⁷⁰ As shown below, API's Petition should be dismissed as procedurally defective. Should, however, the Commission nonetheless choose to revisit the licensing of BRS/EBS in the Gulf of Mexico, the Commission should adopt the licensing and technical rules for the Gulf proposed in WCA's prior filings in this proceeding.⁷¹ Unlike the suggestions offered in API's poorly conceived submission, WCA's proposals remain

⁶⁸ See Reply Comments of the Wireless Communications Ass'n Int'l, Inc., Catholic Television Network and National ITFS Ass'n, WT Docket No. 03-66, at 69-71 (filed Oct. 23, 2003).

⁶⁹ See Petition of the American Petroleum Institute for Reconsideration, WT Docket No. 03-66 *et al.*, at 6-16 (filed July 19, 2006) ["API Petition"].

⁷⁰ *Id.* at 17.

⁷¹ See WCA FNPRM Comments at 38-43; WCA FNPRM Reply Comments, at 37-42.

the best solution for licensing BRS/EBS spectrum in the Gulf without exposing land-based BRS/EBS operations to harmful interference.

A. *ADOPTION OF RULES TO GOVERN LICENSING AND OPERATION OF BRS/EBS FACILITIES IN THE ATLANTIC AND PACIFIC OCEANS IS BEYOND THE SCOPE OF THIS PROCEEDING.*

As an initial matter, the Commission can readily dismiss API's requests for the adoption of BRS/EBS service areas in the Atlantic and Pacific Oceans and for licensing and service rules to govern those areas, since API's proposals are far beyond the scope of this proceeding. At no time in this proceeding, or in any other proceeding, has the Commission proposed or even suggested the possibility of licensing BRS/EBS spectrum in the Atlantic and Pacific Oceans, and the single page of argument that API devotes to the subject does not demonstrate otherwise.⁷² And, in any case, API concedes that "there currently is little need for [BRS/EBS] licensing" in the Atlantic and Pacific Oceans.⁷³ API's remedy is to petition the Commission for a rulemaking on the subject, where the Commission can fully evaluate whether API's proposal warrants consideration.

⁷² See *Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990) ("If the petitioners want the [Federal Communications] Commission to reconsider the rationale underlying its use of the prime rate for [Allowance for Funds Used During Construction] AFUDC generally, then they must petition the agency to initiate a rulemaking in the usual manner. The petitioners cannot require the Commission to expand the scope of its proceeding through a petition for reconsideration. For the court to countenance the petitioners' attempt to secure review of a policy mentioned only tangentially, in a proceeding that does not comprehend the possibility of changing that policy, would be to join in a procedural entrapment too clever by half. The result would be a novel form of judicial review unbounded by facts or record . . .").

⁷³ See API Petition at 17.

B. API HAS FAILED TO MEET ITS BURDEN UNDER SECTION 1.429(B) TO JUSTIFY ITS UNTIMELY FACTUAL SUBMISSION.

API acknowledges that it has never filed any comments on the Gulf of Mexico issue, even though the matter has been before the Commission *for 10 years*. As API concedes, the issue of BRS/EBS licensing in the Gulf was first raised in a Petition for Rulemaking filed by Gulf Coast MDS Service Company (“GCMDS”) on May 21, 1996.⁷⁴ The 10 year history of the Commission’s consideration of licensing BRS and EBS facilities in the Gulf of Mexico is set forth in detail in the *2006 Order* and need not be repeated here.⁷⁵ Suffice it to say that the *NPRM* in WT Docket No. 03-66 asked interested parties to comment on licensing in the Gulf⁷⁶ and, after receiving no comments on the issue, the Commission again opened the matter for comment in the *FNPRM*.⁷⁷ Yet, *not a single party filed any comments expressing any interest in deploying new BRS/EBS facilities in the Gulf*.⁷⁸ Not surprisingly, then, the *2006 Order* found that “refraining from determining how much [BRS/EBS] spectrum to license in the Gulf of Mexico and when to do so is the prudent course of action. The record does not demonstrate a demand for BRS or EBS operations in the Gulf of Mexico at this time.”⁷⁹

⁷⁴ *Id.* at 3, n.3 *citing* Petition for Rulemaking of Gulf Coast MDS Service Company, RM-9718 (May 21, 1996). GCMDS sought to have the Gulf treated as a single service area, and to have the associated BRS and EBS licenses would be assigned by competitive bidding. *See 2006 Order*, 21 FCC Rcd at 5759.

⁷⁵ *Id.* at 5759-62.

⁷⁶ *See BRS/EBS NPRM*, 18 FCC Rcd at 6761.

⁷⁷ *See FNPRM*, 19 FCC Rcd at 14298.

⁷⁸ *See WCA FNPRM Reply Comments* at 38.

⁷⁹ *2006 Order*, 21 FCC Rcd at 5762.

Only now, after ten years of silence, does API even attempt to present the Commission with facts purporting to establish a need for BRS/EBS licensing in the Gulf. The Commission's position is clear: "[t]he Communications Act, [the Commission's] rules, and the need for administrative orderliness require petitioners to raise issues in a timely manner."⁸⁰ Hence, under Section 1.429(b) of the Commission's rules, a petition for reconsideration which relies on facts not previously presented to the Commission cannot be granted unless (1) the petition is based on circumstances that have changed since the petitioner's last opportunity to present them to the Commission, (2) the facts were unknown to the petitioner until after its last opportunity to present them to the Commission, or (3) the Commission determines that consideration of the facts relied on is in the public interest.⁸¹ API's Petition, however, is virtually barren of any showing, and what little API has to offer on the subject borders on the absurd. For instance, API would have the Commission believe that "[t]hroughout much of this proceeding, many in the oil and gas industry viewed the 2.5 GHz band as available primarily for the transmission of video."⁸² That claim is rather remarkable given that in 1998 the Commission adopted rules to provide for the routine licensing of the 2.5 GHz band for data applications,⁸³ and that the *NPRM*

⁸⁰ *Implementation of the AM Expanded Band Allotment Plan*, Memorandum Opinion and Order, 13 FCC Rcd 21872, 21874 (1998).

⁸¹ See 47 C.F.R. § 1.429.

⁸² API Petition at 4.

⁸³ See *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions*, Notice of Proposed Rulemaking, 12 FCC Rcd 22174 (1997).

in this proceeding made clear that the Commission intended to accelerate the 2.5 GHz industry's movement into broadband services.⁸⁴ Thus, API's excuse just is not credible.⁸⁵

Moreover, while API assert that there is a need for BRS/EBS licensing in the Gulf, it provides no quantification of any unmet demand, nor any evidence that whatever demand for communications services exists cannot be met by other available services. Given this state of the record, it therefore would be a waste of the Commission's resources for the agency to throw aside its findings on the Gulf issue and reopen the matter in this proceeding solely on the basis of API's poorly documented, eleventh-hour filing. If, in fact, the need for BRS/EBS licensing in the Gulf is as pressing as API contends, one would assume that API and a myriad of others would have made the Commission aware of it well before now – it is beyond the pale for API to argue that the exigency only became apparent since its last opportunity to file comments less than 18 months ago.⁸⁶ And, in any case, the Commission has not permanently foreclosed the possibility of BRS/EBS licensing in the Gulf – API remains free to petition the Commission for a

⁸⁴ See *BRS/EBS NPRM*, 18 FCC Rcd at 6724. See also *2006 Order* at 5609-10 (“Our actions in this proceeding are designed to provide both incumbent licensees and potential new entrants in the 2495-2690 MHz band with greatly enhanced flexibility to encourage the efficient use of spectrum domestically and internationally, and the growth and rapid deployment of innovative and efficient communications technologies and services. . . Moreover, we facilitate the development of wireless broadband systems in this band that could offer consumers another choice for broadband access”) (footnote omitted).

⁸⁵ Likewise, it is difficult to reconcile API's purported lack of knowledge about the 2.5 GHz band with API's assertion that its constituency has substantial experience with wireless technology and in fact relies on it for critical services in the Gulf. See, e.g., API Petition at 9-10 (“API's Telecommunications Committee is supported and sustained by licensees that are authorized by the Commission to operate, among other telecommunications facilities, various types of communications in the Gulf of Mexico. . . API's members utilize a wide variety of systems, including point-to-point, point-to-multipoint microwave and two-way mobile radio systems, in the Gulf of Mexico to serve a variety of vital telecommunications requirements”).

⁸⁶ API's last opportunity to file comments was the reply comment deadline for the *FNPRM* in this proceeding, i.e., February 8, 2005.

new rulemaking on BRS/EBS licensing in the Gulf.⁸⁷ However, the Commission need not and should not re-reverse its findings in the *2006 Order* to achieve that result – to do so would open the door for any party to perpetuate Commission rulemakings indefinitely simply by making generic claims that they need more spectrum.⁸⁸

If, however, the Commission should decide to revisit the matter notwithstanding the absence of any proven demand for BRS/EBS spectrum in the Gulf, WCA once again urges the Commission to adopt the licensing and technical rules WCA has proposed for the Gulf in its earlier filings in this proceeding.⁸⁹ Significantly, no one save for API has opposed WCA's proposed rules, and in fact those rules have received substantial support from others in the industry.⁹⁰

⁸⁷ See *2006 Order*, 21 FCC Rcd at 5762 (“We will entertain recreating a Gulf Service Area, for BRS and EBS, once parties demonstrate an interest in providing service in the Gulf. . . . We reserve the right to revisit the Gulf Service Area issue for BRS and EBS should further circumstances warrant.”).

⁸⁸ API is simply wrong when it suggests that failure to establish a Gulf Service Area now will preclude BRS/EBS service there in the future. See API Petition at 11. As an initial matter, land-based BRS/EBS incumbents clearly are the ones at risk here – absent carefully crafted interference protection rules, BRS/EBS operations in the Gulf could easily decimate land-based operations with harmful interference, thus laying to waste the millions of dollars that land-based incumbents have invested towards providing service in the region. In any event, even if API's concerns about preclusion of service in the Gulf were plausible, adoption of WCA's proposals would ensure that anyone interested in providing BRS/EBS service in the Gulf could do so without trampling over the legitimate interference protection rights of neighboring BRS/EBS licensees.

⁸⁹ See WCA FNPRM Comments at 39-43; WCA FNPRM Reply Comments at 38-42.

⁹⁰ See Reply Comments of BellSouth Corp. *et al.*, WT Docket No. 03-66, at 17-19 (filed Feb. 8, 2005). Indeed, the only party to propose an approach not consistent with WCA's was HITN. HITN appeared to be proposing that the Gulf Service Area commence 35 miles from the shoreline, that incumbent EBS licensees retain their GSAs extending into the Gulf Coast, and that any area between the existing GSAs and the new Gulf Service Area boundary be considered EBS white space and auctioned. See Comments of the Hispanic Information and Telecommunications Network, WT Docket No. 03-66, at 11 (filed Jan. 10, 2005). As WCA demonstrated in its reply comments, HITN's proposal was ill-conceived, would unnecessarily complicate an already complex interference mitigation problem, and should be rejected. See WCA FNRPM Reply Comments at 40-41.

WCA's core concern remains as before: interference protection rules applicable to Gulf operations must be carefully crafted to assure that facilities serving the miniscule number of persons in any new Gulf Service Area not jeopardize service to the millions of people who reside in the BTAs that border the Gulf of Mexico. Indeed, in the cellular radio service, the Commission has struggled for years to modify its rules so that land-based carriers can serve the dense population centers at or near the coastline without interference from those providing service in the Gulf.⁹¹ The problems encountered in the cellular service can and should be avoided here, notwithstanding API's self-serving arguments to the contrary.

The record before the Commission in this proceeding has already highlighted how difficult it is to craft rules that prevent interference among cochannel operations near service area boundaries. WCA believes that, if the proposals advanced by WCA in its petition for reconsideration of the *2006 Order* are adopted, the Commission will have made significant strides to minimize such interference between land-based systems. However, that hardly means that application of the rules and policies governing terrestrial operations can be applied to Gulf facilities as API proposes.⁹² What API conveniently ignores is that due to the unusual RF propagation characteristics in the Gulf that result from the phenomenon of "ducting" the

⁹¹ See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Report and Order, 17 FCC Rcd 1209 (2002) ["*Gulf CMRS Order*"]; *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Order on Reconsideration, 18 FCC Rcd 13169 (2003) ["*Gulf CMRS Reconsideration Order*"].

⁹² See API Petition at 9-10.

difficulties that will be faced by land-based systems would be compounded significantly if Gulf facilities are authorized.⁹³

The challenge here is not a new one -- former Section 21.902(c)(1)(ii) of the Rules, which governed BRS licensing in the site-based licensing era, imposed special interference protection obligations where signals will propagate over large bodies of water, and the Commission reiterated its concerns over potential interference in the *Gulf NPRM*:

[T]he overriding issue with respect to possible interference from, and to, Gulf systems is the matter of signal propagation, specifically, the propagation of signals over large bodies of water. . . . Unfortunately, the propagation of signals over large bodies of water can differ markedly from signal propagation over land and no comparably acceptable and standardized model is available for calculating over-water propagation. The principal difference involved, at least with respect to Gulf waters, is the presence of “ducting” along the signal path. . . . Ducting of signals, including MDS/ITFS microwave signals, enables these signals to travel relatively unattenuated for distances far greater than would occur without the presence of the duct.⁹⁴

The Commission thus found that there was a “*certainty* that ducting will occur between Gulf and land-based stations,” that this ducting will cause interference over much greater distances than caused by land-based systems, and that Gulf-based systems must therefore comply with interference protection requirements that are more stringent than those imposed on land-

⁹³ As noted by the Commission: “[D]ucting is a phenomenon whereby a radio signal is trapped within and between stratified layers of the atmosphere which have non-uniform refractivity indexes. This layering is caused by climatological processes such as subsidence, advection, surface heating and radiative cooling and the ducts created due to these factors can extend for distances of tens to hundreds of miles.” *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, 17 FCC Rcd 8446, 8463 (2002) [“*Gulf NPRM*”].

⁹⁴ *Id.* at 8463-4. API’s failure to even acknowledge the ducting issue is reason enough to reject its technical arguments out of hand. Indeed, API suggests that the Commission should simply ignore the problem, “adopt essentially the same service rules in the Gulf as are used for BTA licensees elsewhere,” and rely on BRS/EBS licensees in and around the Gulf to negotiate the problem away via interference consent agreements. See API Petition at 9-10. It apparently is of no moment to API that its proposed approach would leave land-based BRS/EBS licensees permanently exposed to a risk of destructive interference from Gulf-based operations, and is tantamount to asking the Commission to abandon its fundamental responsibility to protect licensees from such interference.

based facilities.⁹⁵ The Commission also found that “it will be virtually impossible for current licensees to achieve [full coverage of the population along the Gulf coast] if they must afford full interference protection to Gulf of Mexico systems.”⁹⁶ Ultimately, the Commission concluded that:

Given the much greater population density of the land-based relative to Gulf systems, the steps taken to modify one land-based main or booster station so that it can fully protect a very few Gulf stations might mean the loss of service to hundreds or thousands of households in the urban or suburban area the main or booster station was designed to serve. We believe this tradeoff would be unacceptable and we are therefore proposing that land-based stations be allowed to provide a lesser degree of protection to Gulf stations than Gulf stations must provide to land stations.⁹⁷

Contrary to API’s suggestion, the rules governing BRS and EBS cannot merely be applied to Gulf stations. Under the rules adopted in 2004 to govern operation of land-based facilities, cochannel interference protection is afforded through two different mechanisms. First, a licensee must restrict the potential for cochannel interference by meeting a 47 dB μ V/m limit on signal strength at the GSA boundary.⁹⁸ Were this rule applied as API suggests to require land-based systems to meet this standard at the shoreline notwithstanding the potential for ducting, then service to the highly-populated areas near the Gulf coast will be seriously jeopardized.

Second, the record before the Commission firmly established that the potential for cochannel interference exists even where the proposed signal strength limit at the boundary is

⁹⁵ *Gulf NPRM*, 17 FCC Rcd at 8465-66 (emphasis in original) (footnotes omitted).

⁹⁶ *Id.* at 8467.

⁹⁷ *Id.*

⁹⁸ *See BRS/EBS NPRM*, 18 FCC Rcd at 6777.

met.⁹⁹ Thus, the Commission adopted a “height benchmarking” system that provides protection whenever one neighbor constructs a base station at a height that will give it line-of-sight to the victim’s base stations. This approach is highly-effective in preventing interference given propagation over land (where line-of-sight is an effective indicator of interference potential). With respect to stations in the Gulf, however, ducting can result in the reception of signals far beyond the line-of-sight prediction under the height-benchmarking formula, and thus the safe harbor formula will not provide the requisite protection.

Thus, API is wrong and the Commission cannot merely rely on its newly-adopted rules to control cochannel interference between operations on land and in the Gulf. For that reason, WCA again proposes that the Commission adopt the following requirements for BRS/EBS operations in any new Gulf service area.

First, as proposed in the *Gulf NPRM*, the service area of any Gulf auction winner should exclude the circular 35 mile radius GSAs of any incumbent BRS or EBS licensees, just as the service area awarded to any land-based BRS BTA auction winner excluded the protected service area of an incumbent pursuant to former Section 21.933(a) of the Rules (a rule carried forward as Section 27.1206(a)(2)).¹⁰⁰ As pointed out in WCA’s prior filings, there is no justification for allowing any new Gulf auction winner to encroach upon existing BRS/EBS service areas.

Second, the Commission should reaffirm that BRS BTA authorizations for areas bordering the Gulf extend at least to the boundaries of the counties that comprise the BTA, including areas that are within counties but beyond the coastline. The Commission has

⁹⁹ See Initial Coalition Proposal at 27-28.

¹⁰⁰ See *Gulf NPRM*, 17 FCC Rcd at 8448-49.

reaffirmed that broadband PCS service areas, which are based on BTAs as well, extend into the Gulf to the full extent of county boundaries under applicable state law.¹⁰¹ There is absolutely no basis for interpreting the rights acquired by BRS BTA authorization holders at auction as anything less, and API has not even attempted to offer a rationale to support its call for boundaries to be established at the shoreline.¹⁰²

Third, to assure that operations in the Gulf not hamper the provision of service on land, WCA urges the Commission to adopt the proposal in the *Gulf NPRM* and draw the innermost boundary of a new “Gulf Service Area” at the limit of the territorial waters of the United States in the Gulf, which is approximately 12 nautical miles from the coastline.¹⁰³ As noted in the *Gulf NPRM*, this is the same boundary that was used in another flexible use service – the 2.3 GHz band Wireless Communication Service.¹⁰⁴ In fact, since the release of the *Gulf NPRM* the Commission has consistently employed that same boundary in adopting rules for new flexible use services regulated under Part 27, including the upper 700 MHz band,¹⁰⁵ the 700 MHz

¹⁰¹ See *Gulf CMRS Reconsideration Order*, 18 FCC Rcd at 13181.

¹⁰² The Commission’s holding in the *Gulf CMRS Reconsideration Order*, which expressly acknowledges that BTA boundaries extend well into the Gulf of Mexico (*see id.* at 13180 n.68), is particularly significant because it illustrates the fallacy in arguments that the BTA boundary occurs at the land-water line. Indeed, given the Commission’s recent acknowledgement that defining the boundary for cellular at the coastline created a situation in which “land-based carriers seeking to cover shore areas...were unable to site transmitters close to the shoreline without incurring substantial engineering costs to avoid their signals being transmitted over water,” it would be bizarre for the Commission to repeat its mistake and adopt a similar boundary here. *Gulf CMRS Order*, 17 FCC Rcd at 1211.

¹⁰³ See *Gulf NPRM*, 17 FCC Rcd at 8452-53.

¹⁰⁴ *Id.* at 8453.

¹⁰⁵ See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, First Report and Order, 15 FCC Rcd 476, 500 n.137 (2000); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Errata, 15 FCC Rcd 25495 (2000).

guardband,¹⁰⁶ the 1390-1392 MHz band,¹⁰⁷ and the 1392-1395/1432-1435 MHz bands.¹⁰⁸ API has presented the Commission with no meaningful rationale for a different approach here.

Fourth, the Commission should follow the approach taken in its recent proceedings regarding cellular service in the Gulf and establish a “Gulf Coastal Zone” that would extend from the boundaries of the BTAs bordering the Gulf to the limit of the territorial waters of the United States (*i.e.*, the inner boundary of the new Gulf Service Area). Within the Gulf Coastal Zone, the holder of either the adjacent BTA authorization or the Gulf Service Area authorization could provide service, so long as it meets the new cochannel interference protection requirements at the other’s service area boundary.¹⁰⁹ The Commission has recognized “there are no offshore oil and gas drilling platforms on which to site cellular facilities” and there is “no likelihood of such platforms being constructed in the Eastern Gulf any time in the near future.”¹¹⁰ Thus,

¹⁰⁶ *Id.* at 25495.

¹⁰⁷ *See Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980, 9988-90 (2002).

¹⁰⁸ *Id.* at 9990-91. API opposes adoption of the 12-mile boundary, recommending instead that the Commission establish the boundary “at the shoreline at high mean tide.” API Petition at 11. Notably, API does not explain why the 12-mile boundary is appropriate for the other wireless services identified above but not BRS. Further, while API boldly claims that “[i]mplementation of a 12-mile limit will not prevent interference” it neither explains why this is so nor provides any technical data to support its claim. *Id.* at 12. Also wrong is API’s contention that the interference issue is moot to the extent that land-based BRS/EBS licensees are already receiving interference from neighboring licensees who are providing service within 12 miles of the coast. *Id.* at 13. Again, API provides no examples of what it is talking about, and in any case land-based BRS/EBS systems are not required to “tolerate” any interference from neighboring systems that is prohibited under the Commission’s rules. It is plainly absurd for API to suggest that land-based BRS/EBS licensees are encouraging interference from Gulf-based operations when they are merely asking that the Commission apply the same 12-mile boundary that it has already applied to other wireless services.

¹⁰⁹ In other words, a land-based BTA authorization holder would be required to meet the signal strength limit at the boundary of the Gulf Service Area, while the holder of the Gulf Service Area authorization would be required to meet the signal strength limit at the boundary of the BTA.

¹¹⁰ *Gulf CMRS Order*, 17 FCC Rcd at 1210, 1214.

WCA's approach provides the only vehicle for the provision of service at least 12 nautical miles into the eastern Gulf by land-based licensees – the only possible service providers.¹¹¹ With respect to the western portion of the Gulf, this approach will promote the negotiation of market-based solutions between the holders of BTA authorizations and the holder of the Gulf Service Area authorization. Such an approach is similar to that adopted recently for cellular licensing in the Gulf (albeit modified to reflect significant differences in the current status of the two services – particularly the lack of any BRS/EBS facilities in the Gulf Coastal Zone). As the Commission has found, “the best way to achieve reliable, ubiquitous service in the Western Gulf is to encourage further reliance on negotiation and market-based solutions to the fullest extent possible.”¹¹²

Fifth, subject to the proposals set forth above, operations in any new Gulf Service Area can generally be subject to the rules applicable to the LBS/UBS or MBS, as appropriate. More specifically, Gulf operations should be required to comply with the signal strength limit at the boundary of the GSAs of incumbent BRS/EBS licensees and BTA authorization holders and should not be excused even if non-compliance is caused by ducting.¹¹³ While the licensee of any land-based operation should be required to comply with the signal strength limit at the boundary of the Gulf Service Area,¹¹⁴ consistent with the *Gulf NPRM* it should not be required to cure any

¹¹¹ Of course, the many licensees along the Gulf coast with PSAs that extend farther into the Gulf will be able to meet marketplace needs to the geographic limit of their PSAs.

¹¹² *Gulf CMRS Order*, 17 FCC Rcd at 1218.

¹¹³ For purposes of the cochannel height benchmarking rule, the distance to the border used in the formula $D^2/17$ should be the distance to the border of the BTA in issue.

¹¹⁴ For purposes of the cochannel height benchmarking rule, the distance to the border used in the formula $D^2/17$ should be the distance to the border of the Gulf Service Area.

non-compliance if it can demonstrate using the Epstein/Peterson propagation model that its operations are predicted to comply with the signal strength limit in the absence of ducting.¹¹⁵

In sum, WCA's proposals are the only ones that enjoy significant support in this proceeding, and are carefully designed to accommodate the unique interference environment in the Gulf. API's proposals are neither and should be rejected.

VII. THE COMMISSION SHOULD AFFIRM ITS DECISION TO RESTRICT SELF-TRANSITIONS TO THE PERIOD FOLLOWING THE DEADLINE FOR FILING INITIATION PLANS.

In their prior filings, WCA, NIA, CTN and others recommended that the Commission afford EBS licensees a right to transition themselves to the new 2.5 GHz bandplan, provided, *inter alia*, that no licensee would be permitted to self-transition before the deadline by which proponents must file their initiation plans with the Commission.¹¹⁶ The rationale for this approach is straightforward: proponent-driven transitions are by far the most efficient means of migrating EBS licensees to the new bandplan, and thus self-transitions should be available only as a last resort where no proponent has stepped forward to transition a market.¹¹⁷ The

¹¹⁵ See *Gulf NPRM*, 18 FCC Rcd at 8463-67.

¹¹⁶ See, e.g., WCA Petition at 33-35; Consolidated Reply of Wireless Communications Ass'n Int'l, Inc. to Oppositions to Petition for Reconsideration, WT Docket No. 03-66, at 14-15 (filed March 10, 2005) ["WCA Consolidated Reply"]; WCA FNPRM Comments at 18-19; Petition for Reconsideration of the Catholic Television Network and the National ITFS Ass'n, WT Docket No. 03-66, at 5-6 (filed Jan. 10, 2005); Consolidated Reply of the Catholic Television Network and the National ITFS Ass'n Joint Comments of the Catholic Television Network and the National ITFS Association, WT Docket No. 03-66, at 17-18 (filed Jan. 10, 2005); Comments of Sprint Corporation, WT Docket No. 03-66, at 5 (filed Jan. 10, 2005); Petition of Clearwire Corporation for Partial Reconsideration, WT Docket No. 03-66, at 2 n.2 (filed Jan. 10, 2005); Reply Comments of BellSouth Corporation *et al.*, WT Docket No. 03-66, at 12-13 (filed Feb. 8, 2005).

¹¹⁷ See, e.g., WCA Consolidated Reply at 14 ("The procedures governing self-transitions will have to be carefully developed so that self-transitions occur on a coordinated basis that minimizes interference Such coordination is essential to avoid massive interference among licensees because every licensee will operate following the transition on spectrum licensed to some other licensee today. As the record developed in response to the *BRS/EBS NPRM* reflects, one of the critical roles a proponent plays is coordinating the transition[] activities so that all of the affected licensees convert to the new bandplan simultaneously.") (footnote omitted).

Commission has agreed, and thus self-transitions are permitted only after the 30-month filing deadline for initiation plans (*i.e.*, January 19, 2009).¹¹⁸ Significantly, the Commission found that “allowing licensees to self-transition before 30 months after the effective date of the amended rules would negatively affect the incentives for proponents to transition their BTAs. While we endorse the concept of self-transitions, *we believe that a proponent-driven transition will more quickly and efficiently transition the 2.5 GHz band.*”¹¹⁹

Under the guise of a “Request for Clarification,” The School Board of Broward County Florida (“SBBC”) stands alone in asking the Commission to reverse field and permit EBS licensees to self-transition ahead of the filing deadline for initiation plans.¹²⁰ SBBC asks the Commission to permit premature self-transitions “in a few situations,” one of which, apparently, would permit SBBC’s to transition its EBS video operations to the MBS before a proponent files an initiation plan for SBBC’s market.¹²¹

SBBC’s proposal is an obvious attempt to force commercial BRS/EBS operators in its market to pay for the digitization of SBBC’s video operations in the MBS with the equipment of SBBC’s choice, regardless of whether digitization is even necessary or that equipment is cost-effective. Here SBBC completely ignores a primary benefit of a proponent-driven transition, *i.e.*, the proponent’s ability to create a BTA-wide solution in which it is both possible and more cost-efficient to accommodate an EBS licensee’s need for multiple program streams by putting the

¹¹⁸ *See 2006 Order*, 21 FCC Rcd at 5671.

¹¹⁹ *Id.*

¹²⁰ *See Request for Clarification of The School Board of Broward County Florida*, WT Docket No. 03-66 *et al.* (filed July 19, 2006) [“SBBC Request”].

¹²¹ *Id.* at 4-5.

licensee's video programming on multiple existing analog channels in the MBS, or by digitizing the licensee's operations with equipment less costly than that which the licensee might choose itself.

That, however, appears to be precisely what SBBC is afraid of. Under SBBC's proposal, SBBC could select its own digital equipment, unilaterally digitize its video operations in the MBS and still demand reimbursement from the proponent, thereby eliminating any possibility that the proponent might achieve the same result more efficiently (and thus with greater fairness to other BRS/EBS licensees in the market) by assigning SBBC multiple analog channels in the MBS or digitizing SBBC's operations with different equipment.¹²² In other words, SBBC is asking the Commission to bless the very sort of preemptive behavior that the agency sought to avoid in prohibiting self-transitions before the filing deadline for initiation plans, and nothing in SBBC's request provides any justification for the Commission to retreat from that decision.¹²³

¹²² SBBC believes that this should be of no moment to the Commission since, in SBBC's view, the issue of who pays for digitization is a matter of negotiation in any case, either between the proponent and the EBS licensee or, where the EBS licensee transitions itself, between the EBS licensee and the commercial operators who each bear a pro rata share of the licensee's transition costs. *Id.* at 3 n.4. This argument is absurd. Nothing in the Commission's rules requires a proponent to accede to the digitization of an EBS licensee's facilities and then negotiate reimbursement after the fact. Rather, Section 27.1232(a) establishes a 90-day Transition Planning Period that is specifically designed to afford the proponent and all affected licensees an opportunity to discuss transition-related issues of mutual interest, including digitization. A proponent is required to circulate its Transition Plan to all affected licensees before it becomes effective and, if the proponent submits a Transition Plan that is not reasonable, Section 27.1232(c) empowers SBBC or any other EBS licensee to submit a counterproposal that, if not accepted by the proponent, will be referred to dispute resolution. In other words, the Commission's rules contemplate an inclusive process in which the merits of digitization are given a full hearing before a Transition Plan is finalized and the proponent is obligated to pay any licensee's transition costs. The Commission has never endorsed SBBC's "digitize first, pay later" paradigm and should not do so now.

¹²³ SBBC attempts to softpedal the problem by claiming that premature self-transitions "would reduce the amount of planning and labor that a proponent would otherwise need to undertake to complete a marketwide transition . . ." *Id.* at 3. Here again, SBBC fails to consider the possibility that what is best for SBBC may not be best for the other BRS/EBS licensees in its market(s) who need to be transitioned to the new bandplan. Rather clearly, SBBC's proposal limits a proponent's options and thus increases a proponent's burden in cases where digitization of SBBC's channels or use of SBBC's digital technology is not the most efficient solution for transitioning a market *as a whole*.

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Respectfully submitted,

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August 18, 2006

Accordingly, it is disingenuous for SBBC to claim that its proposal “would not deter a commercial licensee from acting as the proponent.” *Id.*

CERTIFICATE OF SERVICE

I, Lauren Boyd-Ellis, do hereby certify that the foregoing Opposition to Petitions for Reconsideration was served this 18th day of August, 2006 by delivering true and correct copies thereof, first class postage prepaid, to the United States Postal Service, addressed as follows:

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