

**Before the
Federal Communications Commission
Washington, D.C. 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 and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands)	WT Docket No. 03-66 RM-10586
)	
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands)	IB Docket No. 02-364

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth"), by counsel and pursuant to Section 1.429 of the Commission's Rules, hereby reply to certain of the oppositions to petitions for reconsideration filed in this proceeding.¹ As discussed herein, the Commission should:

- Return to the policy it adopted in the 2004 *BRS/EBS Order*² by affirming that any BRS or EBS licensee that discontinued service but met a "safe harbor" at any time during the license term will be deemed to have demonstrated "substantial service;"
- Reject proposals that would require the Commission to determine the rights of parties to private EBS contracts; and

¹ 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, FCC 06-46 (2006) ("*BRS/EBS Second Order*").

² 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 (2004) ("*BRS/EBS Order*").

- Where the Geographic Service Areas (“GSAs”) of BRS and grandfathered EBS overlap by more than 50 percent, in the absence of an agreement between the licensees, the Commission should assign the E1/F1 and E2/F2 channels to the BRS licensee and the E3/E4 and F3/F4 channels to the EBS licensee.

Discussion

I. WHERE A LICENSEE LEGALLY CEASES PROVIDING SERVICE, IT MAY DEMONSTRATE “SUBSTANTIAL SERVICE” BY SHOWING THAT IT SATISFIED A “SAFE HARBOR” AT ANY TIME DURING THE LICENSE TERM.

In its Petition for Partial Reconsideration, BellSouth asked the Commission to reinstate its earlier decision holding that a BRS and EBS licensee may demonstrate “substantial service” by showing that it met a “safe harbor” at any time during its license term.³ BellSouth observed that, in stating that past service should be merely “a factor” in determining whether a licensee satisfied “substantial service,”⁴ the Commission departed from its prior decision holding that a licensee could cease operations without jeopardizing license renewal.⁵ In addition to showing that the record did not support a change in policy, BellSouth also explained that licensees were entitled to rely on the Commission’s decision in the *BRS/EBS Order* without suffering the adverse consequences that the Commission’s subsequent statement in the *BRS/EBS Second Order* might create.⁶

The Ad Hoc MDS Alliance supports BellSouth’s position, correctly noting that the “vague pronouncements” of the *BRS/EBS Second Order* were “unfair[] to incumbents who have attempted over the years to provide service with the prior licensed stations, and who discontinued operations in good faith in reliance on the Commission’s prior

³ See Petition for Partial Reconsideration of BellSouth, WT Docket No. 03-66, filed July 19, 2006 (“BellSouth Petition”).

⁴ *BRS/EBS Second Order* at 130.

⁵ *BRS/EBS Order* at 90, 92.

⁶ See BellSouth Petition at 4.

acknowledgement that licensees should not be forced to maintain ‘obsolete’ and ‘legacy’ operations during the transition/relocation.”⁷

Only Clearwire Corporation (“Clearwire”) opposes BellSouth’s request, arguing simply that a return to the Commission’s initial decision would allow a licensee that did not provide service following the effective date of the rules adopted in the *BRS/EBS Order* to retain its license following the May 1, 2011 “substantial service” date.⁸

Clearwire does not dispute that BellSouth – as well as other licensees – were entitled to rely on the Commission’s decision that licensees could discontinue service without jeopardizing license renewal. Nor does Clearwire deny that application of the new “a factor” language would lead to arbitrary results. Rather, Clearwire would require licensees either to maintain their obsolete service – a result even the Commission disfavors – or build marginal facilities before May 1, 2011, without regard for the licensee’s provision of “substantial service” to the public at any point during the license term.

The Commission already has spoken to this last point. In *Biztel*,⁹ the Wireless Telecommunications Bureau (“Bureau”) held that a 39 GHz licensee met the “substantial service” test by satisfying a “safe harbor” “during the license term.”¹⁰ At various points during the license term, Biztel operated a sufficient number of microwave paths to demonstrate substantial service, though that was not the case at the time it filed its renewal applications. The Bureau nonetheless held that “although it did not meet the

⁷ Comments on Petitions for Reconsideration of Ad Hoc MDS Alliance, WT Docket No. 03-66, filed Aug. 18, 2006, at 5-6.

⁸ See Consolidated Opposition to and Comments on Petitions for Reconsideration of Clearwire Corporation, WT Docket No. 03-66 (“Clearwire Opposition”), at 8.

⁹ *Biztel, Inc.*, 18 FCC Rcd 3308 (WTB 2003).

¹⁰ *Id.* at 3311.

‘safe harbor’ standard set forth in the *39 GHz R&O* throughout the entire license period, Biztel has demonstrated substantial service in Omaha, Nebraska and San Juan, Puerto Rico during the subject license term.”¹¹

Clearwire has not provided any evidence to contradict the *Biztel* holding that recognizes the public interest benefits offered by licensees that meet “substantial service” at any point during the license term, as opposed to only a “snapshot” taken at renewal time. The Commission should therefore confirm that a licensee that meets a “safe harbor” at any time during its license term should be deemed to have satisfied the “substantial service” standard.

II. THE COMMISSION SHOULD NOT ADJUDICATE THE RIGHTS OF PARTIES TO PRIVATE EBS LEASES.

Two non-local EBS licensees have asked the Commission to “clarify” language in EBS leases that could be construed to result in “perpetual” terms¹² and declare void so-called one-way video leases that have not commenced because the “start date” for leasing activity cannot occur.¹³ These proposals were supported by Clearwire and a few other EBS interests¹⁴ and opposed by others arguing that the Commission should not contravene precedent by selectively adjudicating certain terms of private contracts.¹⁵

¹¹ *Id.*

¹² *See* Petition for Limited Clarification of EBS Lease Term Limits of Clarendon Foundation, WT Docket No. 03-66, filed July 19, 2006, at 7.

¹³ *See* Petition for Further Reconsideration and Request for Clarification of Hispanic Information and Telecommunications Network, WT Docket No. 03-66, filed July 19, 2006 (“HITN Petition”), at 6-7.

¹⁴ *See* Consolidated Opposition to Petitions for Reconsideration and Clarification of the ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc., WT Docket No. 03-66, filed Aug. 18, 2006, at 6; Opposition to Petitions for Reconsideration of the Catholic Television Network and the National ITFS Association, WT Docket No. 03-66, filed Aug. 18, 2006 (“CTN/NIA Opposition”), at 6; Clearwire Opposition at 9.

¹⁵ *See* Comments and Consolidated Opposition of Sprint Nextel Corporation to Petitions for Reconsideration, WT Docket No. 03-66, filed Aug. 18, 2006 (“Sprint Opposition”), at 18-24; WiMAX Forum Comments on Petitions for Reconsideration, WT Docket No. 03-66, filed Aug. 18, 2006 (“WiMAX Comments”), at 6-7; Consolidated Opposition and Comments of the Wireless Communications Association International, Inc., WT Docket No. 03-66, filed Aug. 18, 2006 (“WCA Opposition”), at 24-28.

Consistent with the record and prevailing precedent, BellSouth agrees that the Commission cannot and should not interpret the terms of private EBS leases, and parties should instead either seek renegotiation of the lease or have the lease term adjudicated in a civil court.¹⁶

First, the Commission has consistently held that private contracts should be interpreted by judicial process, and no party offers any support for an exception to this long-standing precedent.¹⁷ HITN itself must recognize this, given its discussion of a New Jersey Superior Court decision interpreting the term of an EBS lease – though HITN makes no effort to explain why the New Jersey court was competent to interpret a contract in one instance but that the Commission must, in a regulatory proceeding, void contracts without any review whatsoever.¹⁸

Second, as the New Jersey decision makes clear, the interpretation of parties' contractual rights depends on a host of factors, such as other terms of the lease and the actions of the parties to construct facilities. For the Commission to declare a contract void on the basis of one selective provision of a lease would deprive the parties of the benefits they negotiated and fail to give proper weight to other contractual provisions, facts and circumstances. To reiterate what WCA has succinctly stated, “individualized agreements . . . require individual scrutiny.”¹⁹

Third, one-way video leases – to the extent leases can even be categorized as such – may not be obsolete, as HITN suggests.²⁰ As Sprint notes, “[i]f there is sufficient

¹⁶ WCA documents HITN's flip-flopping on this issue, even after the Commission cited with approval HITN's previous position *favoring* judicial interpretation of EBS leases. *Id.* at 24-26.

¹⁷ *Id.* at 25, n.59.

¹⁸ See HITN Petition at 7, n.12.

¹⁹ WCA Opposition at 27.

²⁰ See HITN Petition at 7, n.12.

demand for one-way video services, the Commission's rules permit BRS-EBS licensees with the flexibility to provide these applications."²¹ At a minimum, it cannot be disputed that one-way video services will be provided on BRS/EBS spectrum.

No party supporting the extraordinary relief that HITN and Clarendon request provides any evidence countering well-founded Commission precedent that properly cedes determinations of private contractual rights to the courts. The arguments advanced by WCA and Sprint confirm that deviation from this precedent would lead to untenable results. The Commission should reject the HITN and Clarendon proposals – their arguments with respect to specific leases belong in a negotiation with the spectrum lessee or in a civil court competent to adjudicate the terms of such leases.

III. WHERE THE GSAs OF BRS AND GRANDFATHERED EBS STATIONS OVERLAP BY MORE THAN 50 PERCENT, THE COMMISSION SHOULD SPLIT THE CHANNELS INSTEAD OF THE GSAs.

NY3G Partnership (“NY3G”) and NextWave Broadband Inc. (“NextWave”) asked the Commission to reconsider its decision to “split the football” where the GSAs of co-channel BRS and grandfathered EBS licensees overlap by more than 50 percent.²² Instead, NY3G and NextWave propose that the Commission split the channels between the two licensees.²³ NY3G further proposes that the BRS licensee would be assigned two low-power channels and the EBS licensee would be assigned one low-power channel and one high-power channel.²⁴

²¹ Sprint Opposition at 19.

²² See Petition for Reconsideration of NY3G Partnership, WT Docket 03-66, filed July 19, 2006 (“NY3G Petition”); NextWave Petition for Partial Reconsideration, WT Docket No. 03-66, filed July 19, 2006 (“NextWave Petition”).

²³ See NY3G Petition at 3; NextWave Petition at 13.

²⁴ See NY3G Petition at 3. BellSouth does not agree with NextWave's more elaborate proposal to split channels according to a population formula. See NextWave Petition at 13-15. In cases where more than

Line of Site, Inc. (“LOS”) endorses NY3G’s proposal, stating that “[e]nsuring that cities receive full coverage on each channel as originally intended, while protecting the interests of both commercial and educational licensees, strikes the best balance of all interests involved.”²⁵ Two parties oppose NY3G’s and NextWave’s proposals, with CTN/NIA stating only that the existing decision is “fair,”²⁶ and the School Board of Miami-Dade County, Florida asserting that the proposals themselves “inject additional uncertainty [sic] into negotiations.”²⁷

BellSouth agrees with NY3G and LOS that the better solution would be to split the channels instead of the GSAs, with the BRS licensee assigned the E1/F1 and E2/F2 channels and the EBS licensee assigned the E3/F3 and E4/F4 channels. In this manner, each licensee will obtain GSA coverage of an entire market, rather than each having a reduced area to serve.²⁸ This will enable EBS licensees to continue serving protected receive sites within the entire 35-mile area. Further, assigning the E4/F4 channel to the EBS licensee would facilitate the migration of high-power educational video programming to the MBS throughout the market, consistent with the transition objectives.²⁹

However, BellSouth disagrees with LOS’ proposal to require detailed reporting and filing obligations in connection with the brief 90-day period during which licensees

two GSAs overlap, the spectrum should be split *pro rata* with the EBS licensee assigned spectrum in the MBS.

²⁵ Consolidated Opposition of Line of Site, Inc. to Petitions for Reconsideration, WT Docket No. 03-66, filed Aug. 18, 2006 (“LOS Opposition”), at 3.

²⁶ CTN/NIA Opposition at 3.

²⁷ Consolidated Opposition to Petitions for Reconsideration of the School Board of Miami-Dade County, Florida, WT Docket No. 03-66, filed Aug. 18, 2006, at 2.

²⁸ See LOS Opposition at 4 (“the splitting of significant overlaps geographically will in many cases result in divided or fractional services to such key population centers with commercial licensees thereby being excluded from certain geographic areas on valuable commercial channels”).

²⁹ See Section 27.1232(d)(3)(iii). This rule establishes for a shared four-channel EBS group a transition “safe harbor” that assigns the MBS channel to the EBS licensee if it is the only one migrating programming to the MBS.

can negotiate a settlement.³⁰ It is not necessary for the Commission to police private negotiations – they will either succeed because the parties can achieve a better result than the Commission’s default solution, or they will fail because at least one party believes that the Commission’s solution better suits its communications requirements.

Conclusion

In light of the foregoing, BellSouth urges the Commission to take the actions discussed above.

Respectfully submitted,

**BELLSOUTH CORPORATION,
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³⁰ See LOS Opposition at 5.

Certificate of Service

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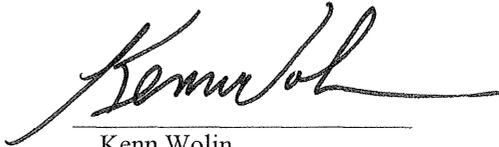
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