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
	)	
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
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	)	WT Docket No. 02-68 RM-9718
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

NEXTWAVE CONSOLIDATED REPLY TO OPPOSITIONS

NextWave Broadband Inc. ("NextWave"), pursuant to Section 1.429(d) of the Federal Communications Commission's ("FCC" or "Commission") Rules, submits this consolidated reply to the oppositions to petitions seeking Commission reconsideration of the *Second Report and Order*.[1]

[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) ("*Second Report and Order*").

I INTRODUCTION

As we reach the end point in this proceeding, it is clear from the copious record that the vast majority of interested parties are in favor of auctioning unassigned Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") spectrum much sooner than the post-transition time table envisioned by the Commission. NextWave believes that it is important to get this much-needed spectrum into the hands of those parties who value it most and who will quickly put it to use. It is equally clear from the record that EBS white space should be auctioned on a channel group-by-channel group, Basic Trading Area ("BTA") basis, with the Middle Band Segment ("MBS") auctioned separately from the Lower Band Segment ("LBS") and Upper Band Segment ("UBS").

NextWave agrees with the Wireless Communications Association International, Inc. ("WCA") that the Commission should reject the proposal of the Hispanic Information and Telecommunications Network, Inc. ("HITN") to reopen mutually exclusive EBS applications that were dismissed by the Commission when it adopted the new BRS/EBS rules. Granting HITN's proposal would further delay EBS white space auctions.

A. The Record Supports Immediate Auctions Of Unassigned BRS Spectrum As Well As Auctions Of EBS White Space As Soon As Practicable; These Auctions Should Occur Before Transitions Are Completed.

In its petition, NextWave argued that the Commission should immediately auction all available and unassigned BRS and EBS spectrum rather than postponing auctions until 2010 (or later) when the BRS/EBS transition has concluded.[2] As NextWave explained, postponing the auction of currently unassigned BRS and EBS spectrum until 2010 would undermine the

[2] In its petition, NextWave argued that, at a minimum, the Commission should immediately re-auction all available BRS BTA authorizations that have been returned to the Commission and are not subject to pending regulatory proceedings.

important policy objectives that have guided this proceeding, and the broader goal of making broadband services accessible to all Americans. NextWave further explained the critical need that new entrants have for obtaining vacant BRS and EBS spectrum in order to establish the kinds of nationwide wireless footprints that have become so essential to competition in the wireless sector.

The record in this proceeding strongly supports NextWave's position that unassigned BRS and EBS spectrum can and should be auctioned immediately, or as soon as practicable.[3] As Sprint Nextel observed, "[b]y placing this much-needed, otherwise unutilized spectrum in the hands of wireless operators who stand ready and willing to put this spectrum to use immediately, the Commission can promote the rapid deployment of wireless broadband services to the public."[4] Indeed, early auctions would facilitate the Commission's specific public interest goals in this proceeding, and the general broadband policy goals of the President of the Untied States, Congress and the Commission. The notion that holding early auctions for unassigned BRS and EBS spectrum might be "premature" is misplaced and is outweighed by the important objectives of encouraging rapid deployment of broadband services.

Moreover, auctioning vacant and unassigned EBS and BRS spectrum now will not affect the transition process in any way. This spectrum does not need to be "transitioned" and can be

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[3] *See* Comments And Consolidated Opposition Of Sprint Nextel Corporation To Petitions For Reconsideration, WT Docket No. 03-66, at 13-15 (filed August 18, 2006) ("Sprint Nextel Opposition"); Consolidated Opposition and Comments of the WCA, WT Docket No. 03-66, at 12-15 (filed August 18, 2006) ("WCA Opposition"); WiMAX Forum Comments On Petitions For Reconsideration, WT Docket No. 03-66, at 5-6 (filed August 18, 2006) ("WiMAX Forum Opposition"); Consolidated Opposition To And Comments On Petitions For Reconsideration of Clearwire Corporation ("Clearwire"), WT Docket No. 03-66, at 3-4 (filed August 18, 2006) ("Clearwire Opposition"). The record leading up to the *Second Report and Order* also supports immediate auctions for BRS and EBS spectrum. *See, e.g.*, Comments of Sprint Corp., WT Docket No. 03-66, at 3 (filed Jan. 10, 2005); Comments of Clearwire, WT Docket No. 03-66, at 4-5 (filed Jan. 10, 2005); Comments of WCA, WT Docket No. 03-66, at 20-22 (filed Jan. 10,2005); and Comments of C&W Enterprises, Inc., WT Docket No. 03-66 (filed Jan. 10, 2005) at 3.

[4] Sprint Nextel Opposition at 14. *See also* Clearwire Opposition at 3-4; WCA Opposition at 13.

put into service as soon as the relevant market is transitioned. As Clearwire and others explained:

> Newly granted licenses would not need to be transitioned, as they are not currently operating. To be sure, such new licenses could be expressly conditioned on operation in a post-transition mode. Moreover, conducting auctions well before the end of the specified Transition period may facilitate Transition as auction winners seeking to rapidly build out such spectrum may initiate the Transition of other licenses within the BTA.[5]

In all events, as WCA explains, "[t]he 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."[6]

Finally, NextWave appreciates the need of educators to have sufficient time to plan for the auction of EBS white space. It will take the Commission some time to establish the competitive bidding rules for the EBS white space auctions, and this time should be used wisely by educators to plan for future auction participation.

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[5] Clearwire Opposition at 4. *See also* WCA Opposition at 14-15 ("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. 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 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.").

[6] WCA Opposition at 15. Even if an EBS licensee had to wait for transition of its facilities to make full use of EBS white space spectrum newly acquired at auction, obtaining that spectrum now would permit both incorporation of this spectrum into the educator's broader spectrum plans, and much faster deployments than postponing the consideration of auctions until 2010 or beyond. Accordingly, ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.'s ("IMWED") contention that there is "no reason to believe that the initiation of widespread service could in any event proceed the completion of transitions" is irrelevant. Consolidated Opposition to Petitions for Reconsideration and Clarification of IMWED, WT Docket No. 03-66, at 4 (filed Jan. 10, 2005). And while NextWave understands that some unassigned BRS BTA licenses cancelled under the default rules are subject to pending relief proceedings, those proceedings can be noted to potential bidders, who can be reimbursed their payments if the BTA authorization is returned to its initial licensee.

B. EBS White Space Should Be Auctioned On A Channel Group-By-Channel Group, BTA Basis.

In its petition, NextWave proposed that the Commission auction EBS white space on a BTA basis, providing EBS auction winners with access to all available EBS spectrum in a given BTA (subject to the rights of EBS incumbents). However, the submissions of other parties addressing this issue demonstrate a clear preference that EBS white space should be auctioned on a channel group-by-channel group, BTA basis, with the Middle Band Segment ("MBS") licensed and auctioned separately from the Lower Band Segment ("LBS") and Upper band Segment ("UBS").[7] As CTN/NIA explained,

> Separating channel groups within a BTA for auction will allow EBS license holders of particular channel groups in nearby areas to extend their services geographically, without having to bid on channel groups that they do not want or need. Likewise, separating low-power LBS/UBS channels from high-power MBS channels allows EBS licensees whose focus is only on two-way data services, or only on video services, to acquire the spectrum they need, without having to bid on spectrum they do not need.[8]

If adopting this auction scheme for EBS white space will facilitate an early auction of such spectrum, then NextWave agrees that when EBS white space is auctioned, it should be auctioned on a channel group-by-channel group, BTA basis with the MBS licensed and auctioned separately from the LBS and UBS.

C. The Commission Should Reject Proposals To Reactivate Dismissed Mutually-Exclusive Applications for EBS Licenses, Which Would Delay EBS White Space Auctions.

NextWave agrees with WCA and others that the Commission should reject HITN's proposal to reactivate mutually exclusive EBS applications that were dismissed by the Commission when it adopted the new BRS/EBS rules. The Commission dismissed these

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[7] *See, e.g.*, WCA Opposition at 12-16; CTN/NIA Opposition at 4.

[8] CTN/NIA Opposition at 4. *See also, e.g.*, WCA Opposition at 16.

applications to make way for geographic licensing of EBS spectrum, consistent with its overhaul of the BRS/EBS band plan and service rules generally.[9] Moreover, as WCA and Sprint Nextel point out, in making this policy decision to reshape the BRS/EBS services to fit current public interest objectives, the Commission was not required to process the pending applications of HITN and others.[10]

As a starting point, it must be noted that HITN already has sought reconsideration of this matter – which the Commission denied in the *Second Report and Order*.[11] Accordingly, HITN's latest request should be procedurally moot. In any event, the reinstatement of any number of dismissed mutually exclusive EBS applications would almost certainly result in substantial delays for an EBS white space auction. In NextWave's view, the Commission should not turn back the clock on all the good work and effort it has expended on clearing out the regulatory underbrush and streamlining the BRS and EBS service rules. Adopting proposals that will result in more delays in the deployment of broadband service to the public over EBS and BRS spectrum is not in the public interest.

II. CONCLUSION

In concluding this proceeding, NextWave requests that the Commission: (i) immediately auction unassigned BRS spectrum; (ii) auction EBS white space spectrum as soon as practicable on a channel group-by-channel group, BTA basis, separating the MBS channel from the UBS or

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[9] *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*").

[10] *See* WCA Opposition at 18 (and cases cited therein); Sprint Nextel Opposition at 24.

[11] *See Second Report and Order* at ¶ 236.

LBS channels; and (iii) reject HITN's proposal to reinstate mutually exclusive EBS applications, which would delay EBS white space auctions.

Respectfully submitted,

/s/ George Alex_____
Chief Financial Officer
NextWave Broadband Inc.
75 Holly Hill Road
Suite 200
Greenwich, CT 06830
(203) 742-2532

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CERTIFICATE OF SERVICE

I, Aaron Eisenberg, certify on this 31st day of August, 2006, a copy of the foregoing CONSOLIDATED REPLY TO OPPOSITIONS has been served via electronic mail and/or first class mail, postage pre-paid, to the following:

Paul J. Sinderbrand
Robert D. Primosch
Nguyen T. Vu
Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128

Lawrence R. Krevor
Vice President, Government Affairs
Trey Hanbury
Director, Government Affairs
Nicole McGinnis
Director, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191
Trey.Hanbury@sprint.com

Kenneth E. Hardman
AD HOC MDS ALLIANCE
2154 Wisconsin Avenue, NW
Suite 250
Washington, DC 20007-2280
Facsimile: (202) 315-3587
kenhardman@att.net

Evan Carb
Rudy J. Geist
RJGLaw LLC
1010 Wayne Avenue Suite 950
Silver Spring, MD 20910
ecarb@rjglawllc.com

Counsel to The School Board of Broward County Florida and HITN and Line of Site, Inc.

Wayne V. Black
Jack Richards
Gregory E. Kunkle
Keller and Heckman, LLP
1001 G Street
Suite 500 West
Washington, DC 20001

Counsel to the American Petroleum Institute

Stephen E. Coran
Rini Coran, PC
1615 L Street, N.W.
Suite 1325
Washington, DC 20036

Counsel to BellSouth Corporation and the BRS Rural Advocacy Group

Bennett L. Ross
BellSouth Corporation
1133 21st Street, N.W.
Suite 900
Washington, DC 20036

Bruce D. Jacobs
Tony Lin
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037-1128

Counsel for NY3G Partnership

Chriss Scherer, CBPE, CBNT
SBE President
Booth, Freret, Imlay & Tepper
14356 Cape May Road
Silver Spring, MD 20904
Christopher D. Imlay, Esq.
General Counsel
Booth, Freret, Imlay & Tepper
14356 Cape May Road
Silver Spring, MD 20904

Dane E. Ericksen, P.E., CSRTE, 8VSB, CBNT
Chairman, SBE FCC Liaison Committee
Booth, Freret, Imlay & Tepper
14356 Cape May Road
Silver Spring, MD 20904

Kemp R. Harshman, President
Clarendon Foundation
4201 31st Street South, Suite 826
Arlington, VA 22206-2187
(703) 598-7265

Joseph A. Belisle
Leibowitz & Associates, PA
One SE 3rd Avenue
Suite 1450
Miami, Florida 33131

Counsel for the School Board of Miami-Dade County, Florida

John B. Schwartz, Director
John Primeau, Director
The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.
P.O. Box 6060
Boulder, CO 80306
(303) 442-2707

Terri B. Natoli
Nadja S. Sodos-Wallace
Clearwire Corporation
815 Connecticut Ave., NW
Suite 610
Washington, DC 20006

Tim Hewitt
Chair, WiMAX Forum Regulatory Working Group
WiMAX Forum
2495 Leghorn Street
Mountain View, CA 94043

William T. Lake
Josh L. Roland
Nathan Mitchler
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

Counsel for Globalstar, Inc.

Edwin J. Lavergne
Fish & Richardson P.C.
1425 K Street, N.W.
11th Floor
Washington, DC 20005
lavergne@fr.com

Counsel to the Catholic Television Network

Todd D. Gray
Dow, Lohnes & Albertson, pllc
1200 New Hampshire Avenue, NW
Washington, D.C. 20036
202-776-2571
tgray@dowlohnes.com

Counsel, National ITFS Association Counsel

/s/ Aaron Eisenberg