

WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.  
CLEARWIRE CORPORATION  
NEXTWAVE WIRELESS INC.  
SPRINT NEXTEL CORPORATION  
XANADOO, LLC

October 31, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Education and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66 – WRITTEN EX PARTE COMMUNICATION

Dear Ms. Dortch:

On September 28, 2007, the undersigned parties, along with representatives of the Educational Broadband Service (“EBS”) community, filed an *ex parte* letter in the above-referenced proceeding proposing a resolution of differing industry interpretations of the applicable Commission rules and policies for determining the Geographic Service Area (“GSA”) boundaries for EBS licenses.<sup>1</sup> The purpose of this letter is to make clear that the undersigned parties, licensees and operators of Broadband Radio Service (“BRS”) spectrum and their trade association, have consistently shared a common understanding of the rules and policies governing the drawing of BRS GSAs, to set forth the basis for that common understanding based on the Commission’s 2004 *Report and Order* and 2006 *Order on Reconsideration* in this proceeding,<sup>2</sup> and to urge the Commission to confirm that understanding.<sup>3</sup>

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<sup>1</sup> See Letter from National ITFS Ass’n, Catholic Television Network, Wireless Communications Ass’n Int’l, Inc., Clearwire Corp., NextWave Wireless Inc., Sprint Nextel Corp., and Xanadoo, LLC, WT Docket No. 03-66, *et al.* (filed Sept. 28, 2007) [“EBS GSA Joint Letter”].

<sup>2</sup> 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, 14192-94 (2004) [“2004 Report and Order”], *affirmed in part and modified in part*, 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 on Reconsideration”].

<sup>3</sup> This letter addresses only Commission policies and practices concerning BRS. Nothing in this letter is intended to address or apply to, or should be construed to address or to apply to, the policies and practices concerning EBS renewals or EBS GSA formation. Similar to the EBS GSA Joint Letter, the undersigned

Under the rules and policies adopted in the *2004 Report and Order*, exclusive GSAs for BRS licenses were drawn on January 10, 2005.<sup>4</sup> Each GSA generally was drawn to be coterminous with the license's Protected Service Area ("PSA") under the former Part 21 Rules that had governed BRS licensing,<sup>5</sup> except that a process known as "splitting the football" was adopted to allocate exclusively those areas where two or more PSAs had overlapped.<sup>6</sup>

While the debate before the Commission has focused on the drawing of EBS GSA boundaries and the need for Commission clarification as to how these boundaries were drawn, the issues before the Commission in the EBS proceedings are inapplicable to BRS.<sup>7</sup> Thus, to avoid potential differing interpretations regarding BRS GSA boundary formation and out of an abundance of caution, the Commission should confirm that a BRS license that had expired prior to January 10, 2005 was not considered in drawing GSA boundaries unless an application for renewal was timely filed.<sup>8</sup>

The issue of whether a given BRS license was considered in drawing GSA boundaries turns, to quote the language of Paragraph 206 of the *2006 Order on Reconsideration*, on whether the expired license "was in existence as of January 10, 2005."<sup>9</sup>

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parties submit this BRS-related letter to avoid further disruption of existing and currently planned broadband and educational operations at 2.5 GHz and to seek a confirmation that best achieves the Commission's goals and objectives for this band. See EBS GSA Joint Letter, *supra* note 1.

<sup>4</sup> See *2004 Report and Order*, 19 FCC Rcd at 14192-94.

<sup>5</sup> Prior to January 10, 2005, BRS was known as the Multipoint Distribution Service ("MDS") and EBS was known as the Instructional Television Fixed Service ("ITFS"). For simplicity's sake, the current nomenclature generally will be utilized, even when addressing the period prior to January 10, 2005, except where necessary for clarity.

<sup>6</sup> See *2004 Report and Order*, 19 FCC Rcd at 14194.

<sup>7</sup> As is discussed *infra*, the common understanding that an expired BRS license for which no timely renewal application had been filed was not "in existence" on January 10, 2005 derives from the fact that the Commission's Part 21 Rules applicable to MDS prior to January 10, 2005 unambiguously stated that a MDS license is automatically forfeited upon expiration absent a timely-filed renewal application. By contrast, the Part 74 Rules applicable to ITFS prior to January 10, 2005 did not include the same provisions, leading to the current disagreement as to whether an ITFS license that had expired prior to January 10, 2005 without a timely-filed renewal application was "in existence" on that date.

<sup>8</sup> In its *2006 Order on Reconsideration*, the Commission clarified that "[w]here there is pending as of January 10, 2005 an application for review or petition for reconsideration of the forfeiture or cancellation of a license that has a PSA overlapping another station's PSA, that license should not be considered in establishing GSAs. However, the GSAs of licensees with overlapping GSAs will be subject to carving back consistent with the 'splitting the football' rules if the forfeited or cancelled license is reinstated." *2006 Order on Reconsideration*, 21 FCC Rcd at 5694-95. The same approach should be taken with respect to BRS licenses that had expired and automatically cancelled, but for which a petition for reinstatement was pending as of January 10, 2005. Moreover, where an untimely application for renewal was submitted prior to expiration, the Commission has evidenced a willingness to grant a waiver of the requirement that renewal be requested at least thirty days in advance of expiration. See, e.g., *Jonsson Communications Corp*, Memorandum Opinion and Order 17 FCC Rcd 22697, 22699 (PSPWD WTB 2002). Thus, the same approach also should control applications for renewal that were filed prior to expiration, but not more than thirty days prior to expiration as required under the applicable rules.

<sup>9</sup> *2006 Order on Reconsideration*, 21 FCC Rcd at 5695.

Prior to January 10, 2005, Section 21.44(a) of the Commission's Rules governed the cancellation and forfeiture of BRS licenses, providing that "[a] license shall be *automatically* forfeited in whole or in part without further notice to the licensee upon . . . [t]he expiration of the license period specified therein, unless prior thereto an application for renewal of such license has been filed with the Commission."<sup>10</sup> Indeed, that automatic forfeiture policy has applied throughout the thirty-plus year history of BRS.<sup>11</sup> Commission case law under Part 21 (including decisions adopted just months before the January 10, 2005 drawing of the GSAs) clearly established that a BRS license that expired without the filing of a timely renewal application was automatically cancelled without further administrative action by the Commission staff.<sup>12</sup> As of January 10, 2005, BRS became subject to Section 1.955(a)(1) of the Commission's Rules, which continues to provide that "[a]uthorizations *automatically* terminate, without specific Commission action, on the expiration date therein, unless a timely application for renewal is filed."<sup>13</sup> Thus, it cannot reasonably be argued that a BRS license

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<sup>10</sup> 47 C.F.R. § 21.44(a)(2) (2004) (emphasis added).

<sup>11</sup> The automatic forfeiture policy of Section 21.44(a)(2) can be traced back to 1970, prior to the establishment of MDS. Specifically, Section 21.34(b) was adopted in 1970, providing that "[a] license or special temporary authorization shall be automatically forfeited upon the expiration date specified therein unless prior thereto an application for renewal of such license or authorization shall have been filed with the Commission." 47 C.F.R. § 21.34(b) (1971); *Amendment of Part 21 of the Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, Report and Order, 23 FCC 2d 670 (1970). In 1975, the Commission slightly modified Section 21.34(b) to state that "[a] license shall be automatically forfeited upon the expiration date specified therein unless prior thereto an application for renewal of such license has been filed with the Commission." 47 C.F.R. § 21.34(b) (1976); *Amendment of Parts 21 and 43 of the Commission's Rules and Regulations Relative to Various Procedural Requirements for the Domestic Public Radio Service*, First Report and Order, 55 FCC 2d 744 (1975). Section 21.34(b) was redesignated 21.44(b) without change in 1976. See *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other Than Maritime Mobile)*, Report and Order, 60 FCC 2d 549 (1976). In 1987, the Commission adopted a *Report and Order* that revised Section 21.44 and moved the forfeiture language from 21.44(b) to 21.44(a)(2). See *Revision of Part 21 of the Commission's Rules*, Report and Order, 2 FCC Rcd 5713 (1987).

<sup>12</sup> See, e.g., *Superior Broadcasting Corp.*, Memorandum Opinion and Order, 7 FCC Rcd 7543, 7543 (DRB CCB 1992) ("Superior's renewal application should have been filed between March 2 and April 1, 1991. Instead, Superior filed its application for renewal on June 5, 1991. . . . Superior's authorization expired automatically, without further action by the Commission on May 1, 1991."); *Burlington Cablevision, Inc.*, Order on Reconsideration, 13 FCC Rcd 772, 775 (VSD MMB 1998) ("Burlington was required to file an application for renewal of WKR62's station license between March 2 and April 1, 1991. . . . Petitioner failed to file a timely renewal application which resulted in the expiration and automatic forfeiture of its MDS license on May 1, 1991."); *Grand Telephone Company, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 19688, 19689 (BD WTB 2004) ("If a licensee fails to file a timely renewal application, the licensee automatically forfeits the MDS station license as of the expiration date.") (citation omitted); *Orange County Chairman, Board of County Commissioners*, Memorandum Opinion and Order, 19 FCC Rcd 19692, 19693-94 (BD WTB 2004) ("Orange County's licenses for the Stations expired on May 1, 2001 without any action by the Commission as a result of Orange County's failure to submit a timely renewal application. Orange County was required to submit renewal applications for the Stations between March 1, 2001 and April 1, 2001. However, Orange County did not file its renewal applications until December 10, 2003."); *Iowa Rural TV, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 1377, 1379 (BD WTB 2005) ("IRTV's licenses for Stations WLW851 expired on May 1, 2001 without further action by the Commission because IRTV failed to submit timely renewal applications for the stations.").

<sup>13</sup> 47 C.F.R. § 1.955(a)(1) (2004) (emphasis added).

that had expired prior to January 10, 2005 without a timely renewal application being filed still was in existence on January 10, 2005 and should have been considered in “splitting the football” with an unexpired BRS license.

For the reasons set forth above, it is clear that if a BRS license had expired prior to January 10, 2005 without an application for renewal being filed as of that date, that BRS license was not in existence as of January 10, 2005 and was not considered in drawing GSA boundaries as of that date. To provide BRS licensees and system operators with certainty regarding their GSA boundaries, the undersigned parties urge the Commission to unambiguously declare this to be the case.

Pursuant to Sections 1.1206(b)(1) and 1.49(f)(1)(i) of the Commission’s Rules, this written *ex parte* communication is being filed electronically through the Commission’s Electronic Comment Filing System.<sup>14</sup>

Should you have any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

**WIRELESS COMMUNICATIONS  
ASSOCIATION INTERNATIONAL,  
INC.**

By: /s/ Paul J. Sinderbrand

Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037-1128  
(202) 783-4141

**NEXTWAVE WIRELESS INC.**

By: /s/ Jennifer M. McCarthy  
Vice President, Regulatory Affairs

975 F St., NW Suite 520  
Washington, DC 20004  
202-280-6850

**CLEARWIRE CORPORATION**

By: /s/ Terri B. Natoli  
Vice President, Regulatory Affairs  
& Public Policy

815 Connecticut Avenue Suite 610  
Washington, DC 20006  
(202) 429-0107

**SPRINT NEXTEL CORPORATION**

By: /s/ Trey Hanbury  
Director, Government Affairs

2001 Edmund Halley Drive  
Reston, VA 20191  
(703) 433-8525

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<sup>14</sup> In addition, as a courtesy a copy of this letter is being served by mail upon the licensee of every incumbent BRS license that, to our knowledge, had been forfeited prior to January 10, 2005 and that either has been reinstated after that date or that has pending before the Commission a request for reinstatement.

Ms. Marlene H. Dortch

October 31, 2007

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**XANADOO, LLC**

By: /s/ Cheryl Crate

Vice President, Government and  
Public Relations

225 City Line Avenue

Suite 200

Bala Cynwyd, PA 19004

202/262-6839

cc: Fred Campbell  
Joel Taubenblatt  
John Schauble  
Nancy Zaczek  
Attached Service List

## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2007, I caused a true and correct copy of the foregoing Letter to be served by, unless otherwise noted, depositing true copies thereof with the United States Postal Service, first class postage prepaid, addressed as follows:

Satellite Signals of New England, Inc.  
341 Camp Street  
Barre, VT 05641

Rohel Pascual  
1725 Andres Bello, Cupey  
San Juan, PR 00926

Thomas Dougherty  
Kilpatrick Stockton, LLP  
607 14<sup>th</sup> Street, NW, Suite 900  
Washington, DC 20005  
*Counsel for Rohel Pascual*

Lois Hubbard  
Attention: Timothy Sterkel  
1555 Brainard Road, Suite 322  
Lyndhurst, OH 44124

Donald Evans  
Fletcher, Heald & Hildreth  
1300 N. 17<sup>th</sup> Street  
Arlington, VA 22209  
*Counsel for Lois Hubbard*  
*Counsel for JRZ Associates*

Lawrence Behr  
JRZ Associates  
3400 Tupper Road  
Greenville, NC 27834

North Florida MMDS Partnership  
2203 Pasadena Place South  
Gulfport, FL 33707

Bonnie O'Connell  
2203 Pasadena Place South  
Gulfport, FL 33707

Kenneth Hardman  
2154 Wisconsin Ave., NW, Suite 250  
Washington, DC 20007  
Counsel for North Florida MMDS  
Partnership  
*Counsel for Bonnie O'Connell*

Craig Baumann  
370 Golf Brook Circle Apt 204  
Longwood, FL 32779

Stephen Coran  
Rini & Coran  
1615 L Street, NW, Suite 1325  
Washington, DC 20036  
*Counsel for Craig Baumann*

Oklahoma Western Telephone Company  
P.O. Box 399  
Clayton, OK 74536

/s/ Karla E. Huffstickler  
Karla E. Huffstickler