131. HITN asks the Commission to void EBS leases for one-way only video services entered into prior to the release of the *Two-Way Order* in 1998.[392] In addition to the boilerplate clause described above, HITN contends that these leases also contain an unknown start date; thus, not only has the lease term been extended in perpetuity, it has not yet begun.[393] As a result of the operation of these two clauses, HITN argues, many operators have warehoused spectrum for more than ten years without providing service to the public or lease payments to the licensees/lessors.[394] And, HITN surmises, lessees intend to continue warehousing spectrum to pressure licensees/lessors who want to take advantage of the new rules into unfavorable lease negotiations or costly litigation.[395] HITN further surmises that lessees are using the May 1, 2011 substantial service deadline to further pressure licensee/lessors to renegotiate their leases within the next few years.[396] HITN requests that, given the present inability of operators to launch and operate new wireless cable video systems on the majority of this spectrum band, the Commission should declare void all legacy video-only leases entered into under pre-1998 rules, the terms of which have never commenced.[397]

132. Clearwire, CTN, NIA, and IMWED support the petitions of Clarendon and HITN and ask that the Commission clarify its position on whether EBS excess capacity leases entered into before January 10, 2005, can be interpreted to run in perpetuity.[398] Clearwire states that although it believes that the Commission should not become involved in the interpretation of terms of commercial agreements such as EBS leases, it strongly agrees with Clarendon that the Commission should declare such an interpretation a violation of public policy.[399] IMWED also supports Clarendon's and HITN's petitions concerning lease limitations.[400]

133. WiMAX, WCA, Sprint Nextel, and BellSouth oppose the petitions and argue that the Commission should not become involved in the interpretation of private contractual agreements.[401] They argue that individualized agreements need individualized scrutiny.[402] BellSouth further argues, as does Sprint Nextel, that one-way video leases may not be obsolete as HITN describes because if there is

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[392] HITN PFR at 6 and 7 n.12.

[393] HITN PFR at 7. HITN states that as perhaps the largest licensee of EBS spectrum, it is duty-bound to bring this situation to the attention of the Commission. Furthermore, HITN states that it is not asking the Commission to extricate it from spectrum leases that it executed. HITN states that it has no leases for any of its 70 stations that contain these one-sided lease clauses. HITN Reply at 8-9.

[394] HITN PFR at 7 n.12. HITN states that these leases have an unknown start date because the initiation of the term is triggered by commencement of wireless cable video services, construction of the wireless cable video system, or service provision of the first wireless cable video subscriber – none of which, in the vast majority of cases, ever occurred, and which now cannot occur. HITN PFR at 7 n.12.

[395] HITN Reply at 9.

[396] HITN Reply at 9.

[397] HITN PFR at 7 n.12.

[398] Clearwire Opposition at 9, CTN/NIA Opposition at 5-6, IMWED Opposition at 6.

[399] Clearwire Opposition at 9.

[400] IMWED Opposition at 6.

[401] WiMAX Opposition at 6-7, WCA Opposition at 24-25, Sprint Nextel Opposition at 18, BellSouth Reply at 4-5.

[402] WCA Opposition at 27, BellSouth Reply at 5, Sprint Nextel Reply at 4.

sufficient demand for these services, the Commission's Rules provide BRS/EBS licensees with the flexibility to provide these applications.[403]

134. *Discussion.* The Commission's policy regarding the length of EBS leases has evolved since it first permitted EBS licensees to lease excess capacity in 1983. Originally, the Commission's policy prohibited an EBS licensee from executing a lease agreement that extended beyond the 10-year license term because such provisions were viewed as inconsistent with the terms of the license.[404] In 1995, however, the Commission changed its policy to permit an EBS licensee to enter into a 10-year lease agreement without regard to the duration of the licensee's license term, but required the lease to note that such an extension was contingent on the renewal of the license.[405] In 1998, in the *Two-Way Order*, the Commission again changed its policy and permitted an EBS licensee to enter into 15-year lease agreement, and again required that the lease specify that such an extension be subject to the renewal of the underlying license.[406] The Commission also grandfathered existing EBS excess capacity leases entered into before March 31, 1997.[407] In 2000, in the *Two-Way Order on Further Reconsideration*, the Commission further grandfathered EBS excess capacity leases entered into before March 31, 1997 that contained an automatic renewal clause that would be effective after March 31, 1997, provided that the total term of the lease did not exceed 15 years.[408]

135. In 2004, in the *BRS/EBS R&O*, the Commission applied the Secondary Markets rules to EBS excess capacity leases executed between January 10, 2005 and July 18, 2006. In 2006, in the *BRS/EBS 3rd MO&O*, the Commission modified the application of the rules and policies of the Secondary Markets proceeding to EBS leases.[409] With regard to EBS leases, the Commission stated that although the rules and policies of the Secondary Markets proceeding applied to EBS leases, EBS licensees may enter into an excess capacity lease agreement for 30 years so long as the lease agreement ensures that EBS licensees retain the right to review their educational use requirements at year 15 and every 5 years thereafter.[410] Moreover, the Commission permitted the use of "rights of first refusal"

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[403] BellSouth Reply at 5-6, *citing* Sprint Nextel Opposition at 19.

[404] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd. 2907,2914 ¶ 38 (1995).

[405] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, *Report and Order*, 10 FCC Rcd. 2907,2914 ¶ 38 (1995).

[406] Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19183-18184 ¶¶ 133-134 (1998) (*Two-Way Order*).

[407] *Two-Way Order*, 13 FCC Rcd at 19181 ¶ 130. *See also* Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd. 12764, 12791 ¶ 59 (2000) (*Two-Way Order on Reconsideration*). The Commission originally declined to grandfather leases subject to automatic renewal after March 31, 1997 because grandfathering these leases could have permitted them to continue in perpetuity under the rules adopted prior to the *Two-Way Order*. The Commission reversed this decision when the petitioners assured the Commission that the leases that would be grandfathered could have a total term of ten years. Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket 97-217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 14566, 14569-14570 ¶ 11 (2000) (*Two-Way Order Further Recon*).

[408] *Two-Way Order Further Recon.*, 15 FCC Rcd at 14569-14570 ¶ 11.

[409] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5715 ¶ 266.

[410] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 268.

clauses, but prohibited the use of automatic renewal clauses.[411] The Commission then clarified that the length of EBS excess capacity leases entered into between January 10, 2005 and July 18, 2006, was not limited because such EBS excess capacity leases were entered into under the Secondary Markets rules and policies.[412] The Commission reaffirmed that EBS excess capacity leases entered into before January 10, 2005 are grandfathered under the "then-existing EBS leasing framework, thus, such leases would be subject to the existing 15-year lease limitation."[413]

136. We first turn to the question of whether EBS excess capacity leases entered into before January 10, 2005 may be interpreted consistent with the Commission's Rules to last indefinitely. We agree with Sprint Nextel, WCA, BellSouth, and WiMAX that we should not resolve this issue by interpreting private contractual agreements. The interpretation of private contractual agreements is best left to the individual state courts and, therefore, we reject the recommendations of Clearwire, IMWED, and Clarendon to find such an interpretation to be a violation of public policy. The resolution of this issue, however, does not depend on the application of that particular principle of administrative law. This issue is resolved by clarifying the rules and policies adopted by the Commission in the *Two-Way Order*, the *BRS/EBS R&O*, and the *BRS/EBS 3rd MO&O*. The Commission stated in the *BRS/EBS R&O*, and reiterated in the *BRS/EBS 3rd MO&O*, that EBS leases executed before January 10, 2005 are limited to a term of 15 years from the date of execution. To the extent that these leases contain an automatic renewal clause, such leases are grandfathered after January 10, 2005 if they have an automatic renewal clause effective after January 10, 2005, only to the extent that such leases do not exceed 15 years in total length (including the automatic renewal period(s)). This decision is consistent with the Commission's decision in the *Two-Way Order on Reconsideration*. Thus, these leases cannot be extended in perpetuity. To further clarify, lease terms for EBS leases entered under the rules and policies of the *BRS/EBS R&O* (those entered into between January 10, 2005 and July 18, 2006) are not limited by the Commission's rules (but are subject to relevant state laws limiting the length of contracts). Leases entered into under the rules and policies of the *BRS/EBS 3rd MO&O* (on or after July 19, 2006) may be up to 30 years in length, so long as the EBS licensee retains the right at year 15 and every 5 years thereafter to review its educational needs.

137. We next turn to the question of whether the Commission should void EBS leases for one-way only video services entered into prior to the release of the *Two-Way Order*. While we are concerned by the situation described by HITN, we do not have the authority to void contracts executed by two private parties under the laws of individual states. We also agree with Sprint Nextel, WCA, WiMAX, and BellSouth, that even if we could void private contracts, such an action would deter private parties from entering into spectrum leasing agreements not only in the 2.5 GHz band (60 percent of which is licensed to EBS entities), but also in other bands as well, thus creating uncertainty among all parties that have entered into or are contemplating agreements under our Secondary Markets rules and policies.[414] We find, however, that the alleged unknown start date is contrary to the rules and policies adopted by the Commission in the *Two-Way Order*, which limited the term of EBS leases to 15 years from the date they are executed between the parties. Any other interpretation of the *Two-Way Order* would permit the warehousing of valuable spectrum for decades and is contrary to the underlying purpose of the rule. Therefore, we conclude that video-only leases executed more than 15 years ago have expired under the terms of the *Two-Way Order*. Aggrieved EBS licensees subject to these one-way only video lease agreements that have not yet expired must renegotiate them or pursue contractual remedies through the State courts or through an alternative dispute resolution process.

[411] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 270.

[412] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5716 ¶ 269.

[413] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5715 ¶ 266.

[414] WiMAX Opposition at 7, WCA Opposition at 27, Sprint Nextel Opposition at 22-23.

2. Equipment on Lease Termination

138. *Background.* In the *BRS/EBS 3rd MO&O*, the Commission amended Section 27.1214(c) to clarify that the EBS licensee/lessor could "purchase or lease dedicated common equipment used for educational purposes in the event that the spectrum leasing arrangement" was terminated by either the EBS licensee/lessor or the lessee.[415] WCA asks that the Commission amend Section 27.1214(c) of the Rules to further clarify that a lessee of EBS spectrum has the option of offering the EBS licensee/lessor either the actual equipment used on its own channels or comparable equipment on termination of the lease.[416] WCA maintains that it appears that the rules adopted in the *BRS/EBS 3rd MO&O* require the lessee to offer the EBS licensee/lessor the actual equipment deployed by the lessee, including equipment shared among multiple licensees within a single system, which is inconsistent with Commission policy.[417] WCA maintains that Commission policy has recognized that lessees of EBS spectrum, by necessity, must cobble together spectrum from multiple licensees and therefore the equipment used in the system will not be devoted to a single licensee.[418] Therefore, WCA asks that the Commission amend Section 27.1214(c) to permit the lessee the option of offering the EBS licensee/lessor either the equipment actually used in the system or comparable equipment on termination of the lease by the EBS licensee/lessor or the lessee.[419] WiMAX, CTN, and NIA support WCA's petition on this issue.[420]

139. *Discussion.* We agree with WCA and the other parties that the proposed rule change is an appropriate modification that reflects the fact that equipment is often shared among multiple licensees. We therefore amend Section 27.1214(c) of our Rules accordingly.

L. Substantial Service

1. Credit for Discontinued Service

140. *Background.* BellSouth asks the Commission to permit a licensee to demonstrate substantial service by showing that it met a safe harbor at anytime during the license term – that is, that licensees be permitted to use past-discontinued service to meet the substantial service standard.[421] BellSouth argues that the Commission's decision in the *BRS/EBS 2nd R&O* to permit past-discontinued service to be considered as just a factor in meeting the substantial service standard is inconsistent with the Commission's decision in the *BRS/EBS R&O* to eliminate the discontinuance of service rules and permit licensees to go dark during the transition.[422] BellSouth also argues that the record supports its position because commenters favored a rule that would acknowledge past-discontinued service as substantial service rather than a rule that looked only at a snapshot taken at a particular point in the term.[423] BellSouth also cites as support a WTB decision where a microwave licensee met the substantial service

[415] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5717 ¶ 272.

[416] WCA PFR at 13-15.

[417] WCA PFR at 13-14.

[418] WCA PFR at 13-14.

[419] WCA PFR at 13-14.

[420] WiMAX Opposition at 14, CTN/NIA Opposition at 4.

[421] BellSouth PFR at 1-2.

[422] BellSouth PFR at 3, 5.

[423] BellSouth PFR at 5.

standard because it satisfied a safe harbor during its license term.[424] BellSouth argues that it relied on the Commission's decision in the *BRS/EBS R&O* by curtailing its legacy wireless cable video services and investing in pioneering technology testing and market trials.[425] BellSouth argues that the Commission cannot achieve its goal of radically changing the services offered in the 2.5 GHz band if licensees are forced to continue legacy operations solely to preserve their authorizations.[426] In supporting BellSouth, Ad Hoc MDS Alliance explains that using prior service as just a factor in a substantial service showing particularly disadvantages BRS Channels 1 and 2/2A licensees because those licensees were in limbo for more than a decade when the Commission announced plans to relocate them from the 2.1 GHz band in favor of AWS.[427] In opposing BellSouth, Clearwire argues that the Commission struck the appropriate balance in the *BRS/EBS 2nd R&O* between spurring broadband deployment at 2.5 GHz and considering prior operations and other factors in adopting substantial service requirements.[428]

141. *Discussion.* In the *BRS/EBS 2nd R&O*, the Commission adopted a substantial service standard, with safe harbors, as the performance requirement for BRS and EBS licensees in the 2495-2690 MHz band and required BRS and EBS licensees to demonstrate substantial service no later than May 1, 2011.[429] In addition, the Commission stated that it would consider prior service, even if discontinued, as a factor in determining whether a licensee met the substantial service standard, but stressed that the most significant consideration in evaluating substantial service demonstrations is the licensee's current service.[430]

142. We decline to grant BellSouth's request to permit past-discontinued service to be used as the sole factor to demonstrate substantial service. The Commission adopted a substantial service standard to ensure the prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, to promote investment in and rapid deployment of new technologies and services, and to facilitate the availability of broadband to all Americans.[431] Permitting licensees to demonstrate substantial service by using past-discontinued service alone would not achieve any of these goals. Nevertheless, the Commission, by permitting the use of past-discontinued service as a factor in the substantial service determination, struck the appropriate balance between encouraging broadband development in the 2.5 GHz band and recognizing that licensees were permitted to discontinue service in anticipation of the transition to the new band plan and technical rules. If we were to adopt BellSouth's recommendation, we would permit licensees to forego providing any service in the 2.5 GHz band from January 10, 2005 (the date licensees were permitted to discontinue service) until beyond May 1, 2011 (the date licensees must demonstrate substantial service under the new rules). Moreover, we note that the Commission gave licensees additional flexibility to meet the substantial service standard by adopting five safe harbors applicable to BRS and EBS licensees (one safe harbor applicable solely to EBS licensees)

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[424] BellSouth Reply at 3, *citing* Biztel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 3308 (WTB/PSPWD 2003).

[425] BellSouth PFR at 4.

[426] BellSouth PFR at 3.

[427] Ad Hoc MDS Alliance Opposition at 6.

[428] Clearwire Opposition at 8.

[429] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5720, 5733 ¶¶ 278, 304.

[430] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5735 ¶ 307.

[431] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5720 ¶ 278.

and a rule that a licensee would be deemed to be providing substantial service if its lessee was providing substantial service.[432]

2. Safe Harbors -- heavily encumbered or highly truncated GSAs and BTAs

143. *Background.* WCA asks that the Commission adopt a special safe harbor to address situations in which a licensee's GSA is either heavily encumbered by incumbent licensees or truncated through the splitting the football process to the point that the licensee cannot be expected to meet current safe harbors and comply with the restrictions on signal level at the GSA border and the height benchmarking requirements.[433] With regard to heavily encumbered BTAs, WCA recommends that the Commission consider deployments within the BTA on all spectrum owned or leased by the BTA authorization holder or its lessee.[434] Specifically, WCA recommends that where a BRS BTA authorization holder's GSA is less than one-half the size of the BTA on every BRS channel included in its BTA license, it should be permitted to invoke a special safe harbor under which all of its lessee's deployments on BRS channels within the BTA will be considered.[435] With regard to highly truncated GSAs, WCA recommends that an incumbent BRS or EBS licensee be deemed to have provided substantial service when the GSA for all of its channels is less than 1924 square miles in size (*i.e.*, is less than one-half of a 35-mile radius circle) and the licensee satisfies one of the safe harbors in Section 27.14(e) of the Commission's Rules (adopted by the Commission in the *BRS/EBS 2nd R&O*) in its former PSA (including areas that are within overlapping co-channel incumbent GSAs licensed to or released by the licensee or its lessee).[436] WiMAX supports WCA's position, and CTN and NIA support WCA's position with regard to EBS licensees.[437]

144. *Discussion.* We agree with WCA that it is appropriate to give some relief to licensees whose GSAs are heavily truncated to remedy a situation created by several factors. First, for BRS BTA licensees, this situation arises because the Commission auctioned a substantial number of BTAs that were so heavily encumbered that it is difficult for the BRS BTA authorization holder to locate a station anywhere in the BTA and provide interference-free service and the necessary interference protection to incumbents' areas.[438] Second, for BRS and EBS site-based licensees, this situation arises in a limited number of situations (particularly among EBS stations that tend to be more closely spaced than BRS

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[432] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5726-5729 ¶¶ 288, 292, 294.

[433] WCA PFR at ii.

[434] WCA PFR at 17.

[435] WCA PFR at 17.

[436] WCA PFR at 18.

[437] WiMAX Opposition at 14, CTN/NIA Opposition at 4-5.

[438] WCA PFR at 15. In auctioning the BRS frequencies the Commission stated:

[W]e realize that a number of BTA service areas may be so encumbered that the winning bidder for such a BTA may be unable to file a long-form application proposing another MDS station within the BTA while meeting the Commission's interference standards as to all previously authorized or proposed MDS and ITFS facilities. The winning bidder's objective in bidding on such a heavily encumbered BTA would likely be to purchase the previously authorized or proposed MDS stations within that BTA, and the bidder's goal in obtaining the authorization for the BTA in which it already had MDS stations would similarly be to preserve full flexibility to make modifications.

Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Report and Order*, MM Docket No. 94-131, 10 FCC Rcd 9589, 9656 ¶ 152 (1995). WCA PFR at 16.

stations) when splitting the football results in a GSA so highly truncated that a licensee cannot be reasonably expected to comply with the restrictions on signal level at the GSA boundary and the height benchmarking rule, and still be able to meet a quantitative safe harbor.[439] According to WCA, in most cases, the neighboring co-channel facilities are likely under common ownership or lease.[440] Third, the Commission's decision in the *BRS/EBS 2nd R&O* to require a licensee to demonstrate substantial service on a per license basis, rather than on a per system basis, makes it impossible in the situations described above for these licensees to meet a substantial service standard without a special safe harbor applicable solely to them.

145. Under those circumstances, we will adopt a rule allowing licensees whose GSA is less than 1924 square miles in size to demonstrate substantial service by combining its GSA with an overlapping co-channel station licensed or leased by the licensee or its affiliate. The licensees would need to demonstrate substantial service with respect to the combined GSAs of both stations. As an example, assume that a licensee offering fixed service intended to meet the six links per million safe harbor, and that licensee had two overlapping co-channel licenses, one of which had a GSA less than 1924 square miles in size. If the combined population within the GSAs was two million people, the licensee could meet the safe harbor by demonstrating that it had 12 active links within the combined GSAs of both stations. For BRS BTA authorization holders, we will adopt a similar rule if the GSA of a BTA authorization holder is less than one-half of the area within the BTA for every BRS channel. While the rule text is different from what WCA proposed, we believe the adopted rule provides the relief that WCA seeks.

M. EBS Eligibility

1. Nonprofit Educational Organizations

146. *Background.* HITN asks the Commission to make minor changes to conform Section 27.1201(a)(3) of the Commission's Rules to the changes made by the Commission in the *BRS/EBS 3rd MO&O*.[441] Section 27.1201(a)(3) permits the following entities to be eligible for EBS licenses: accredited educational institutions; governmental organizations engaged in the formal education of enrolled students; and nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited educational institutions or governmental organizations.[442] Nonprofit organizations must establish eligibility through the provision of services to the enrolled students of another accredited educational institution or governmental entity.[443] Section 27.1201(a)(3) requires these non-profit applicants to provide documentation from proposed receive sites demonstrating they will receive and use the non-profit applicants' educational usage.[444]

[439] WCA PFR at 18.

[440] WCA PFR at 18.

[441] On September 1, 2005, in a separate proceeding, Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. § 610 in response to Public Notice DA-05-1524, HITN submitted comments seeking the same revisions to the EBS eligibility requirements of Section 27.1201(a)(3). HITN notes that these comments are directly related to changes recently made by the Commission in this WT Docket No. 03-66 and requests that the Commission address those comments here. HITN PFR at 9-10. *See also* Letter from Joel D. Taubenblatt, Chief, Broadband Division, WTB, to Rudolph J. Geist, Esquire, RJGLaw LLC (dated Aug. 21, 2006).

[442] 47 C.F.R. § 27.1201(a).

[443] 47 C.F.R. § 27.1201(a).

[444] 47 C.F.R. § 27.1201(a)(3).

Section 27.1201(a)(3) also states that "[n]o receive site more than 35 miles from the transmitter site shall be used to establish basic eligibility."[445]

147. HITN asks that the rule be modified in two respects. First, HITN recommends that the Commission amend Section 27.1201(a)(3) of the Commission's Rules to clarify that an educational institution may receive education-enhancing broadband services, which it intends to use in furtherance of its educational mission.[446] HITN notes that Section 27.1201(a)(3) of the Commission's Rules, as originally crafted, anticipated the provision of letters from accredited schools regarding their intent to receive and use educational video programming.[447] HITN argues that many entities qualifying to operate EBS stations will be contemplating the provision of educational content or education facilitating services that may not include instructional video programming created by, or packaged for delivery by, the EBS licensee.[448] HITN states that in the case of broadband services, an educational institution may be interested in receiving and using any of the following types of services at fixed, temporary fixed, or mobile sites: voice over IP; one or two-way streamed video content; teleconferencing and remote classroom hookups; high speed Internet or data services; and wireless local or wide area networks.[449] Therefore, HITN notes that the requirement letter would recognize the reality that educational content available over the World Wide Web and downloaded at any specific site is essentially user-directed.[450] HITN argues that neither the service provider nor the site's school administrator can preview or make specific advance statements regarding the content that will be accessed.[451] According to HITN, the most that can be said is that the services will be used in the furtherance of the receiving institution's educational mission and will be made available to enrolled students, faculty and staff in a manner and in a setting conducive to such usage.[452]

148. Second, HITN asks that Section 27.1201(a)(3) be changed to reflect the transition of the EBS service from a site-based to a geographic licensing structure.[453] Thus, HITN asks that restrictive language in Section 27.1201(a)(3) regarding the absolute distance from the transmit site for qualified schools supplying letters should be based on distance from the proposed center reference point, and should be further qualified to ensure that such school will be within the proposed geographic service area.[454] Clearwire, CTN, and NIA also support a re-examination and revision of those EBS eligibility and substantive use rules to better reflect the current permitted uses of this spectrum.[455]

149. *Discussion.* We agree with HITN that it is appropriate to update the EBS eligibility rules to reflect the wider variety of services EBS licensees will use and offer. In particular, as written, the rules contemplate video programming where the licensee will know the specific content being offered in advance. With the provision of broadband services, HITN is correct that it will be impossible for the

[445] 47 C.F.R. § 27.1201(a)(3).

[446] HITN PFR at 11.

[447] HITN PFR at 10.

[448] HITN PFR at 10.

[449] HITN PFR at 10-11.

[450] HITN PFR at 11.

[451] HITN PFR at 11.

[452] HITN PFR at 11.

[453] HITN PFR at 11.

[454] HITN PFR at 11.

[455] Clearwire Opposition at 9, CTN/NIA Opposition at 5-6.

licensee to know in advance what content is being accessed. We will adopt the rule changes proposed by HITN, and supported by commenters, in order to reflect the wider variety of services being used by EBS licensees. Furthermore, we agree with HITN that it is appropriate to make its proposed changes to the rule to reflect the advent of geographic area licensing. We will amend our rules accordingly.

2. Commercial EBS Licensees

150. *Background.* WCA asks that the Commission amend paragraph (d) of Section 27.1201 of the Commission's Rules to clarify that commercial EBS licensees are not subject to the educational programming requirements in Section 27.1203(b)-(d) of the Commission's Rules or the special EBS leasing requirement under Section 27.1214 of the Commission's Rules.[456] WCA notes that these changes are necessary to clarify that, although the Commission continues to regulate commercial EBS licensees under the EBS rules, neither the instructional programming requirements nor the special EBS leasing rules apply to commercial EBS licensees.[457]

151. *Discussion.* We agree with WCA that the proposed change accurately reflects our intentions and is consistent with the nature of commercial EBS stations. We therefore amend our rules accordingly.

N. Mutually Exclusive Applications

152. *Background.* HITN asks the Commission to reconsider its decision dismissing six HITN applications to construct new stations as mutually exclusive with other pending new station applications.[458] First, HITN argues that, although it previously sought reconsideration of the dismissal of these applications, the Commission failed to provide a reasoned decision in the *BRS/EBS 3rd MO&O* to HITN's numerous arguments and thus, should again reconsider this issue.[459] Second, HITN claims that the decision to dismiss the mutually exclusive applications was arbitrary and capricious because the Commission failed to give a reasoned explanation of how the dismissals would further the Commission's stated goals, why the Commission is deviating from stated policy, and how the goal achieved justifies the effects of dismissing the applications.[460] Third, HITN argues, the Commission made inconsistent statements regarding the dismissal of the applications, and argues that the Commission should auction these discrete geographic areas to resolve these mutually exclusive applications.[461] HITN also states that it is ready and willing to construct and transition stations in order to provide wireless broadband services immediately.[462] Clearwire seconds HITN's position that the proposed plan to auction the white space after the adoption of auction rules will limit the development of wireless broadband and educational services in the geographic areas where the pending mutually exclusive licenses were dismissed.[463] Clearwire argues that reinstating the applications would facilitate the transition by identifying an operator

[456] WCA PFR at ii and 22-23. *See also* WiMAX Opposition at 14 in support of WCA's PFR.

[457] WCA PFR at ii and 23.

[458] HITN PFR at ii and 3.

[459] HITN PFR at 3.

[460] HITN PFR at 5.

[461] HITN PFR at 3-4.

[462] HITN PFR at 4.

[463] Clearwire Opposition at 5. See also *Ex Parte* Letter from Terri B. Natoli, Clearwire to Marlene H. Dortch, Federal Communications Commission (filed Nov. 7, 2006) at 1.

that would serve as a proponent for that specific geographic area.[464] Clearwire also suggests that if the mutually exclusive pending applications are granted, the licensees should be denied transition rights.[465]

153. Clearwire argues that the public interest would be better served if EBS licensees were given one more chance to demonstrate their intention to provide educational services and to facilitate broadband deployment.[466] Clearwire states that the spectrum would be able to be utilized immediately by educators and commercial broadband operators.[467] Finally, Clearwire argues that reinstating the dismissed mutually exclusive licenses would allow the Commission to fulfill its policy objectives in a more timely fashion.[468]

154. WCA argues that the decision to dismiss mutually exclusive applications "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."[469] WCA accuses HITN of ignoring the Commission's discretion to manage the Commission's processes through doctrines of general applicability.[470]

155. *Discussion.* In the *BRS/EBS 3rd MO&O,* the Commission affirmed its decision not to reconsider the dismissal of pending mutually exclusive applications for new EBS stations.[471] The Commission stated that its decision was supported by well-established Commission precedent (to dismiss pending mutually exclusive applications when converting from a site-based to a geographic area licensing scheme), was in the public interest (to facilitate the transition of the 2.5 GHz band), and resolved long-standing apparently intractable issues.[472]

156. We deny WCA's request that we dismiss HITN's petition as repetitious under Section 1.429(i) of the Commission's Rules.[473] HITN argues that the Commission neither adequately explained why it dismissed the mutually exclusive applications nor responded to the numerous arguments HITN raised in its petition for reconsideration of the *BRS/EBS R&O.*[474] We disagree with HITN's contention and note that this issue has twice been discussed and resolved by the Commission. In the interests of developing a full and complete record on this issue, however, we will not dismiss HITN's petition on procedural grounds, but will instead address HITN's arguments here.

157. We reject HITN's argument that the Commission's dismissal of the mutually exclusive applications was inconsistent with precedent. Specifically, HITN argues that the Commission's decision

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[464] Clearwire Opposition at 6.

[465] Clearwire Opposition at 6.

[466] Clearwire Opposition at 6.

[467] Clearwire Opposition at 6.

[468] Clearwire Opposition at 7.

[469] WCA Opposition at 18.

[470] WCA Opposition at 18.

[471] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5703-5704 ¶ 236.

[472] *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5703-5704 ¶ 236.

[473] 47 C.F.R. § 1.429(i).

[474] HITN PFR at 3.

in the *BRS/EBS 3rd MO&O* was based on the *Maritime Services Order*,[475] (where the Commission froze the acceptance of new applications while changing service rules from site-based licensing to geographic area licensing).[476] HITN argues that the *Maritime Services Order* misconstrued the D.C. Circuit's holding in *Kessler v. FCC*.[477] According to HITN, *Kessler* holds that while the Commission does have procedural rights under the APA to institute application filing freezes in the name of administrative efficiency and convenience, it may not take away substantive rights of which parties are entitled to have applications processed that have been accepted for filing.[478]

158. We disagree with HITN's analysis of *Kessler* and agree with WCA's analysis.[479] In *Kessler*, the D.C. Circuit found that *Ashbacker*[480] procedural rights apply to potential applicants whose applications would have been mutually exclusive but for an application filing freeze.[481] Here, however, the implementation of the filing freeze on April 2, 2003 (the release date of the *BRS/EBS NPRM*) had no effect on the mutual exclusivity of HITN's applications.[482] Those applications had been pending for years, unable to be processed, because the parties could not privately reach a settlement to resolve mutual exclusivity. When the Commission initiated a rulemaking to develop a new, more efficient licensing scheme, it dismissed all mutually exclusive applications that did not have a settlement agreement on file with the Commission by April 2, 2003.[483] The Commission's decision was not only consistent with past Commission decisions -- such as the dismissal of pending mutually exclusive applications when transitioning the paging industry, the maritime industry, and the 39 GHz band to geographic area licensing[484] -- but also was consistent with the D.C. Circuit's decision to uphold the Commission's decision to dismiss pending mutual exclusive applications when the Commission adopted a new licensing scheme for the 39 GHz band.[485]

159. Second, we disagree with HITN's assertion that the Commission's decision was arbitrary and capricious. As detailed above, the Commission's decision was consistent with our policies and with case law. The dismissal of the mutually exclusive applications was necessary because neither the Commission nor the parties could resolve this mutual exclusivity under the then applicable site-based

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[475] Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order*, PR Docket No. 97-257, 12 FCC Rcd 16949 (1997) (*Maritime Services Order*).

[476] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 1.

[477] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 1, *citing Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[478] *Ex Parte* Letter from Rudolph J. Geist, Counsel, HITN to Marlene H. Dortch, Federal Communications Commission (filed Oct. 23, 2006) at 2.

[479] *Ex Parte* Letter from Paul J. Sinderbrand, Counsel, WCA to Marlene H. Dortch, Federal Communications Commission (filed Oct. 30, 2006) at 4-5.

[480] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[481] *Kessler v. FCC*, 326 F.2d at 687-688.

[482] *BRS/EBS NPRM*, 18 FCC Rcd at 6813 ¶ 226.

[483] *BRS/EBS R&O*, 19 FCC Rcd at 14264-14265 ¶ 263.

[484] *See Maritime Services Order*. *See also* Amendment of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997), Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 14 FCC Rcd 12428 (1999).

[485] *See Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

licensing scheme. The dismissal of those applications, therefore, furthers the Commission's goal of developing a licensing scheme that not only resolves issues of mutual exclusivity, but also ensures the efficient use of EBS spectrum by educators. The Commission's decision to license EBS stations on a geographic basis is the first step toward achieving that goal. Today, we take the second step, by releasing a *Second Further Notice of Proposed Rulemaking* in which we seek comment on various options to license EBS spectrum. Permitting mutually exclusive applications to stay in pending status for years does not advance our goal of promoting the efficient use of EBS spectrum by educators, and thus, the Commission dismissed them.

160. Third, we disagree with HITN's assertion that the Commission has made inconsistent statements with regard to dismissing the mutually exclusive applications. Specifically, HITN faults the Commission for concluding that dismissing mutually exclusive applications would allow for a more efficient transition while stating in the *BRS/EBS 3rd MO&O* that, "it may be possible to make new licenses available in a way that does not interfere with potential transitions to the new band plan."[486] We disagree that any inconsistency exists. One reason dismissal of mutually exclusive applications served the public interest is that allowing the mutually exclusive applications to remain on file would create considerable uncertainty for potential proponents who would be uncertain of the ultimate licensee in a market. Resolving that uncertainty would have required the Commission to hold a special auction between applicants that filed their applications over ten years ago that did not reflect the radical changes in technology and rules that had occurred since the filings. In contrast, the statement HITN refers to involves establishing a new process for future applications that could be granted pursuant to the new band plan. The two situations are quite different, and there is no inconsistency. We therefore deny HITN's petition on this issue and affirm the Commission's decision to dismiss the mutually exclusive applications.

V. DECLARATORY RULING – LATE-FILED APPLICATIONS

161. The Wireless Telecommunications Bureau has pending a number of late-filed EBS renewal applications and applications for extensions of construction deadlines. Although these matters have not been considered by the Commission in this proceeding, a number of pleadings before the agency indicate that there is considerable confusion concerning the splitting the football methodology used to divide overlapping protected service areas, as it related to late-filed renewal applications. In particular, Clearwire, CTN/NIA, WCA, NextWave, Sprint Nextel, and Xanadoo (the Joint Commenters) filed a letter proposing clarifications of our splitting the football treatment of reinstated licenses.[487] In addition, four licensees -- Instructional Telecommunications Foundation, Inc. (ITF), New Trier Township, High School District 203 (New Trier), Shekinah Network (Shekinah), Boston Catholic Television Center, Inc. (BCTC) – have asked the Commission to issue a declaratory ruling that their Stations do not have to split the football with overlapping stations whose licenses have been reinstated *nunc pro tunc*.[488] Also, in Clearwire's opposition to petitions for reconsideration in the instant proceeding, it asks the Commission

[486] HITN PFR at 3-4, *citing BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5740 ¶ 321.

[487] Letter from Edwin N. Lavergne, Catholic Television Network, Todd D. Gray, National ITFS Association, Paul J. Sinderbrand, Wireless Communications Association, Inc., Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Government Affairs, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Sep. 28, 2007) (Ex Parte Letter).

[488] Petition for Declaratory Ruling, filed by Instructional Telecommunications Foundation, Inc. (filed Mar. 13, 2007) (ITF Petition); Petition of New Trier Township, High School District 203 for an Expedited Declaratory Ruling (dated Jul. 26, 2007) (New Trier Petition); Request for Declaratory Ruling filed by Shekinah Network (filed Nov. 27, 2007); Boston Catholic Television Center, Inc. Petition for Declaratory Ruling (filed Dec. 14, 2007) (BCTC Petition).

to give leniency to late-filed EBS applicants.[489] As discussed below, we believe the proper vehicle for considering these issues is to adopt a declaratory ruling clarifying our treatment of the splitting the football policy as applied to late-filed renewal applications.

162. *Background.* Clearwire asks the Commission to give these applicants one last opportunity to demonstrate an intent to use their previously licensed spectrum and to cure any defects that may exist with respect to their licenses.[490] Clearwire recommends that, if no such showing is made, those licenses should be cancelled and the resulting white space made available for auction.[491] Clearwire argues that these applications demonstrate that many EBS licensees were left in a difficult situation because of the uncertainties of operating in the 2.5 GHz band, including the following: operators/lessees that went bankrupt or breached their leases; leases that were bought and sold; the Commission's consideration of reallocating the 2.5 GHz band for other uses; and the lengthy development and release of the final rules.[492] If the Commission were to grant these applications, Clearwire argues, educators and commercial broadband operators would be able to immediately use this spectrum and the public interest would be served.[493] Although Clearwire notes that it understands the need for the Commission to clean up its ULS database by resolving these applications so that the EBS white space can be auctioned, it argues that the public interest is better served by giving these EBS applicants this one last opportunity.[494]

163. WCA and Sprint Nextel oppose Clearwire's request.[495] WCA argues that the Commission's adoption of Clearwire's proposal would be counterproductive to the goal of expediting the EBS white space auction.[496] Instead of granting Clearwire's request, WCA recommends that the Commission quickly resolve the pending cases.[497] Sprint Nextel argues that Clearwire has not explained how its proposed "one final opportunity" would be administered or how long the process would take (including resolution of any subsequent requests for reconsideration or what kind of showing former EBS licensees would be required to make in order to reinstate their authorizations).[498] Sprint Nextel further argues that the Commission cannot clarify which EBS spectrum will be available at auction if the former EBS licenses are not removed from the ULS database.[499]

164. An issue related to Clearwire's request involves overlaps between expired licenses and active licenses. The Commission generally uses the splitting the football methodology to divide overlapping protected service areas.[500] Upon the effective date of this new policy, January 10, 2005, all overlapping PSAs would be split, and new geographic service areas would be established for all EBS licensees who had previously experienced an overlap issue. The Commission clarified its split the

[489] Clearwire Opposition at 6.

[490] Clearwire Opposition at 6.

[491] Clearwire Opposition at 6.

[492] Clearwire Opposition at 6.

[493] Clearwire Opposition at 6.

[494] Clearwire Opposition at 6.

[495] WCA Reply at 16, Sprint Nextel Reply at 9-10.

[496] WCA Reply at 16.

[497] WCA Reply at 16.

[498] Sprint Nextel Reply at 9.

[499] Sprint Nextel Reply at 9.

[500] *See* 47 C.F.R. § 27.1206(a)(1); *BRS/EBS R&O,* 19 FCC Rcd 14192 at ¶ 59.

football policy in the *BRS/EBS 3rd MO&O*. Specifically, in response to an unopposed petition from WCA, the Commission ruled as follows:

> Where an incumbent station license was in existence as of January 10, 2005 and caused a splitting of the football, and that incumbent station license is later forfeited, the reclaimed territory reverts to the BRS BTA holder (if BRS spectrum) or to EBS white space (if EBS spectrum) regardless of whether the action/inaction that caused the forfeiture occurred prior to January 10, 2005.[501]

No party sought reconsideration of this specific issue or otherwise opposed it.

165. On January 25, 2007, the Broadband Division of the Wireless Telecommunications Bureau granted waivers *nunc pro tunc* to 41 late-filed EBS renewal applications.[502] One of the licensees granted a waiver pursuant to that order was Eudora Unified School District (Eudora), licensee of EBS Station WLX327. Instructional Telecommunications Foundation, Inc. (ITF), licensee of EBS Station WHR511, whose PSA overlaps with Station WLX327, has requested that the Commission issue a declaratory ruling that Station WHR511 does not have to split the football with Eudora.[503] ITF did not challenge Eudora's late-filed request for reinstatement of its EBS license, but nonetheless argues that it does not have to split the football with Eudora because Eudora's license was expired on January 10, 2005, the date that the footballs were split, notwithstanding the Bureau's later decision to reinstate such license *nunc pro tunc*.[504] ITF argues that if it splits the football with Eudora, it would lose a significant portion of its GSA to Eudora.[505] ITF has leased the excess capacity of WHR511 to a subsidiary of Clearwire which intends to use that capacity for educational purposes as well as for telecommunications services that will benefit the general public.[506]

166. New Trier, which held a license for Station KGZ66, has also filed a request for a declaratory ruling asking the Commission to declare that New Trier does not have to split the football with Station WHR850, licensed to Waubonsee Community College (Waubonsee).[507] New Trier asserts that it has operated on EBS channels since 1967, and now serves approximately 12,000 students.[508] New Trier argues that because Waubonsee's license expired in July, 1997, its license was not "in existence" on January 10, 2005 when the football was split.[509] Therefore, New Trier urges that we declare that it does

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[501] *3rd MO&O & 2nd R&O*, 21 FCC Rcd at 5694-5 ¶ 206.

[502] Forty-one Late-Filed Applications for Renewal of Educational Broadband Service, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB 2007), *recon. pending* (*Order of 41*).

[503] ITF Petition.

[504] *Id.* at 3-4.

[505] *Id.* at 2.

[506] *Id.* at 2.

[507] New Trier Petition. At the time New Trier filed its request for declaratory ruling, the license for Station WHR850 was expired, and Waubonsee did not have a renewal application on file. Subsequently, Waubonsee filed a late-filed renewal application with a request for waiver. *See* File No. 0003186718 (filed Oct. 1, 2007). Also, New Trier withdrew its application for renewal of Station KGZ66 after it failed to respond to a return letter and its license expired. *See* File No. 0003065293 (filed Jun. 11, 2007). New Trier was forced to file a late-filed renewal application with a waiver request. *See* File No. 0003188417 (filed Oct. 3, 2007).

[508] *Id.* at 1-2.

[509] *Id.* at 3-4.

not have to split the football with Waubonsee in the event Waubonsee's license for WHR850 is reinstated.[510]

167. In a similar case, Shekinah has asked that we declare that EBS Stations WLX259 (licensed to Western Nevada Community College), WMX642 (licensed to Spectrum Alliance Harrison F Partnership), and WLX260 (licensed to Chippewa Valley Technical College), all of which expired more than 6 years ago, have not and will not be considered in determining the GSAs of Shekinah's EBS stations.[511] Despite the fact that the Commission sent termination letters to WLX259, WMX642, and WLX260 on October 19, 2007, Shekinah feels that a broader declaratory ruling is necessary to clarify the "significant uncertainty concerning the Commission's GSA-formulation rules."[512]

168. Finally, BCTC requests a declaratory ruling that it is not required to "split the football" with EBS Stations WHR888 and WLX771, formerly licensed to Connecticut Public Broadcasting, Inc. (CPB) and which expired in 1998.[513] BCTC asserts that although the Commission sent termination letters to these licenses on October 19, 2007 and they are not the subject of reinstatement applications, it is nonetheless concerned about the uncertainty of the status of its GSA for its stations WND259 and KLC85.[514]

169. On September 28, 2007, Clearwire, CTN/NIA, WCA, NextWave, Sprint Nextel, and Xanadoo (the Joint Commenters) filed a letter proposing clarifications that they believe represent a consensus position of a majority of the 2.5 GHz industry and that, on balance, most effectively and fairly advance the Commission's 2.5 GHz band goals and objectives.[515] The Joint Commenters ask that we clarify our splitting the football treatment of expired licenses to add the following new rules:

> If an EBS license term expired before January 10, 2005, it was not considered "in existence" and thus was not accorded a protected service area ("PSA") used to split overlapping footballs (i.e., other stations on the same channel(s) that had PSAs which would have overlapped the expired license would not take the expired license into account in determining their GSAs) unless it has been renewed nunc pro tunc to date.
>
> If the FCC grants additional late-filed EBS license-renewal applications that expired before January 10, 2005, the renewed license will be accorded a GSA that does not include any overlapping PSA areas (i.e., the license will be reinstated but not nunc pro

[510] *Id.* at 6-7.

[511] Shekinah Petition at 1-2. Shekinah hold the licenses for EBS Stations WLX919, WLX950, WLX975, WLX978, WLX994, WNC373, WNC407, WNC426, WNC533, WNC552, WNC661, WNC732, WNC767, WNC773, WNC787, WNC798, WNC810, WNC868, WNC892, WNC893, WNC904, WNC956, WND210, WND321, WND329, WND348, WND401, WND465, WND476, WND515, WND581, WND627, and WQFG870. Shekinah Petition at 2.

[512] Shekinah Petition at 3.

[513] BCTC Petition at 1.

[514] BCTC Petition at 3.

[515] Letter from Edwin N. Lavergne, Catholic Television Network, Todd D. Gray, National ITFS Association, Paul J. Sinderbrand, Wireless Communications Association, Inc., Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Government Affairs, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Sep. 28, 2007) (Ex Parte Letter).

tunc for purposes of making it "in existence" as of January 10, 2005) except in cases of manifest Commission error where reinstatement is in the public interest.[516]

170. West Central Illinois Educational Telecommunications Corp.[517] and Waubonsee[518] do not object to the Joint Commenters' proposal. Hempstead Independent School District argues that the Joint Commenters lack standing to request the relief they seek, that the "clarifications" they seek are not consistent with Commission policy, and that it would be impermissible to reinstate licenses without reinstating them *nunc pro tunc*.[519] Texas State Technical College objects to losing over half of its formerly anticipated service area and argues that the proposal is inconsistent with the relief granted to the 41 reinstated licensees.[520] JRZ Associates, Liberty University, and Lois Hubbard argue that the Joint Commenters lack standing, that their request is an untimely petition for reconsideration of the *BRS/EBS 3rd MO&O*, and that adopting a policy under which a license would not exist for a period of time "would seriously and chaotically destabilize" the regulatory regime applicable to BRS and EBS.[521] Burlington College, Champlain College, Norwich University, and Saint Michael's College (collectively, the Vermont Licensees) assert that the proposal would redraw the GSAs of their licenses in a manner that would generally exclude each Vermont Licensee's campus from the resulting license coverage areas.[522]

171. *Discussion.* We deny Clearwire's original request to establish a blanket leniency for late-filed renewal applications. We believe it is appropriate to continue to consider such requests on a case-by-case basis based on all pertinent circumstances.

172. It is apparent, however, that, further clarification and review of our policy of addressing overlaps between active licenses and expired licenses is appropriate. The pleadings before us show that there is considerable confusion concerning our policies and how they apply to expired licenses that are subsequently reinstated *nunc pro tunc*. We believe the proper vehicle for considering these issues is to issue a declaratory ruling clarifying our treatment of such licenses. Section 1.2 of the Commission's Rules allows us to issue a declaratory ruling, either by request or on our own motion, to terminate a controversy or remove uncertainty.[523] We agree with the Joint Commenters that additional certainty surrounding GSAs is imperative, especially given the activity surrounding transition planning and implementation, and buildout of broadband services in this band.[524] We note that several opponents of the Joint Commenters' filing argue that the Joint Commenters have no legitimate interest in opposing

[516] Ex Parte Letter at 3-4.

[517] *See* Motion for Extension of Time, File Nos. 0003014539 and 0003138474 (filed Oct. 4, 2007).

[518] Response to Petition for Declaratory Ruling (filed Oct. 1, 2007).

[519] Response of Hempstead Independent School District to Written *Ex Parte* Presentation (Oct. 5, 2007) (Hempstead Response).

[520] Letter from Paul Woodfin, Vice President, Financial and Administrative Services, Texas State Technical College West Texas, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 19, 2007) (TSTC Opposition).

[521] Opposition to *Ex Parte* Proposal (filed Oct. 5, 2007) (JRZ Opposition).

[522] Letter from Dr. Jane O'Meara Sanders, President, Burlington College, Dr. David F. Finney, President, Champlain College, Dr. Richard W. Schneider, President, Norwich University, Dr. John J. Neuhauser, President, Saint Michael's College, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 15, 2008) (Vermont Licensees' Opposition).

[523] 47 C.F.R. § 1.2.

[524] Ex Parte Letter at 2.

their renewal applications.[525] Although we do not decide today whether Sprint Nextel or any other party has standing to file a petition to deny a late-filed EBS renewal application, we do believe that the Joint Commenters have a legitimate interest in ensuring certainty in the rules for establishing geographic service areas. Accordingly, we will consider their filings, as well as all other relevant filings, including the petitions for declaratory ruling filed by ITF and New Trier.

173. Initially, we agree with New Trier, Shekinah, and BCTC that there is no public interest benefit in requiring an active EBS licensee to "split the football" with a license that was expired as of January 10, 2005, especially where no attempt has been made to resurrect such license by filing a late-filed renewal application.[526] Accordingly, we issue a ruling that an active licensee whose former PSA overlapped with a license that was expired as of January 10, 2005 need not split the football with such expired license if the expired licensee has not had its license reinstated prior to adoption of this order.

174. Second, we deny ITF's request for a declaratory ruling with respect to late-filed renewal applications granted prior to the adoption of this order. While we are sympathetic to ITF's policy arguments, the late-filed renewal applications that have been granted to this point have been granted *nunc pro tunc*.[527] Consistent with established Commission policy,[528] a *nunc pro tunc* reinstatement has the effect of reinstating the license such that there was no interruption in the existence of the license.[529] Thus, when a license that expired prior to January 10, 2005 was subsequently reinstated *nunc pro tunc*, there would be no lapse in the authorization of the license, and such reinstated license was entitled to split the football with any neighboring authorizations with overlapping service areas. We believe it would be inequitable to retroactively change the rules for renewal applications that have already been granted pursuant to an existing Commission policy, especially when most of the late-filed applications that were granted to date were unopposed at the time of grant. We note that the Joint Commenters do not challenge the right of renewal applicants that have been previously granted to split the football.[530] Accordingly, ITF is required to split the football with Eudora because Eudora's license must be considered in existence as of January 10, 2005.

175. With respect to future grants of late-filed renewal applications, however, we agree with ITF and the Joint Commenters that it is appropriate to modify our treatment of overlapping service areas involving licenses that are reinstated *nunc pro tunc*. When a licensee allows its license to expire, the remaining active licensees may reasonably take action based on their expectation that their neighbors had no further interest in maintaining their expired licenses. For this reason, we believe that, even in cases where it is appropriate to grant late-filed renewal applications, it is also appropriate to require licensees who allowed their licenses to lapse to forfeit their rights to areas that overlap with other licensees. Although applicants seeking to reinstate their licenses *nunc pro tunc* have an interest in reacquiring their entire GSA, that interest should not outweigh the interest of licensees who maintained their licenses and

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[525] *See* Hempstead Response at 2, TSTC Opposition at 1-2, JRZ Opposition at 5.

[526] We recognize that New Trier is not currently in this situation because its license has expired and Waubonsee has now filed a late-filed renewal application. We believe it is appropriate to issue this ruling to provide certainty and relief to other licensees in this situation.

[527] *See, e.g., Order of 41.*

[528] *See* Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11486 ¶ 22 (1999) (*ULS MO&O*).

[529] The term *nunc pro tunc*, meaning "now for then," refers to acts allowed to be done after the time when they should be done, with a retroactive effect. *See* BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).

[530] Ex Parte Letter at 3.

may have made plans based on the availability of the entire overlap area. In the future, absent agency error or other unique circumstances, applicants seeking to reinstate their licenses *nunc pro tunc* who receive a waiver will not be allowed to split the football with licensees whose licenses were active on January 10, 2005 and on the date the applicant's late-filed renewal applications is granted.

176. The Vermont Licensees argue that adoption of the Joint Commenters' proposal will have strange and adverse consequences in Vermont as it will prevent these licensees from serving their campuses.[531] As the Joint Commenters recognize, we agree (without evaluating the merits of the arguments made by the Vermont Licensees) that there may be unusual or unique circumstances where it would be unfair to hold that a licensee had forfeited its right to the overlap area.[532] For example, there may be cases where a licensee timely filed a renewal application that was erroneously dismissed. In cases of agency error or other unique circumstances, we direct the Wireless Telecommunications Bureau to rule that the reinstated licensee is entitled to split the football with other active licensees. The Bureau will need to determine in each case whether such circumstances exist. Therefore, notwithstanding our implementation of this proposal, the Vermont Licensees and other affected licensees who believe their circumstances are sufficiently unique to warrant a departure from this new policy will nonetheless retain the ability to have their circumstances evaluated on a case-by-case basis.

177. We note that commenters opposing this approach argue that modifying the policy would be inconsistent with relief granted to previously granted renewal applications.[533] While the opponents are correct that they would be treated differently from previously granted renewal applications, that difference is a result of our analysis and decision that a clarification and modification in policy is appropriate. For the reasons discussed above, we believe the difference in treatment is warranted.

178. Lastly, we note that Hempstead and JRZ *et al* argue that that it would be unfair and contrary to precedent to grant their renewal applications in any way other than *nunc pro tunc*. We agree with Hempstead[534] and JRZ *et al.*[535] that granting renewal applications on a non-*nunc pro tunc* basis would be inconsistent with the policy established in the *ULS MO&O*[536] and would be problematic with respect to any licensees that may have been operating. We also agree that, to the extent we grant waivers in the future to when considering late-filed renewal applications, any future grants of late-filed renewal applications should continue to be on a *nunc pro tunc* basis, subject to our guidance in this order regarding their ability to split the football with other licensees.

179. Accordingly, in response to the petitions for declaratory ruling and other filings we have considered, we issue the following clarifications of our splitting the football policy:

- An active BRS or EBS licensee whose former protected service area overlapped with a co-channel license that was expired on January 10, 2005 need not split the football with such expired license if the licensee has not had its license reinstated.

- If a BRS or EBS license was expired on January 10, 2005, and such license is later reinstated *nunc pro tunc* pursuant to a waiver granted for a late-filed renewal application granted after the adoption date of this *Fourth Memorandum Opinion and*

[531] Vermont Licensees' Opposition at 2.

[532] Ex Parte Letter at 3.

[533] *See* TSTC Opposition at 2, JRZ Opposition at 6.

[534] Hempstead Response at 3.

[535] JRZ Opposition at 8-9.

[536] *ULS MO&O*, 14 FCC Rcd at 11486 ¶ 22.

Order, that licensee's geographic service shall not include any portion of its former protected service area that overlapped with another licensee whose license was in active status on January 10, 2005 and on the date the expired licensee's late-filed renewal application was granted, unless a finding is made that splitting the football is appropriate because of manifest Commission error or other unique circumstances.

VI. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Licensing EBS spectrum in the Gulf of Mexico

180. In the *BRS/EBS 4th MO&O*, we created a Gulf of Mexico Service Area, in part, because API persuasively argued for BRS licensing in the Gulf of Mexico because the Gulf is an underserved area and that the 2496-2690 MHz band is one of the few bands available and adequate for operations in support of off-shore oil and gas facilities. We note that of the 194 megahertz of spectrum available in the 2496-2690 MHz band, 112.5 megahertz is assigned to the EBS, leaving 73.5 megahertz (excluding the 2-four-megahertz guard bands) for commercial licensing in the Gulf of Mexico. Therefore, we seek comment on whether we should license EBS spectrum in the Gulf of Mexico. Commenters should address the issue of whether there is a need in the Gulf of Mexico for the type of educational services that EBS is designed to meet. Because there are no schools or universities in the Gulf of Mexico, we seek comment on whether any changes to our educational use requirements are appropriate for the Gulf of Mexico. In light of the questions we ask below on how to license vacant and available EBS spectrum generally, should we use the same assignment mechanism for EBS spectrum in the Gulf of Mexico? Alternatively, should we use a different assignment mechanism to account for the difference between EBS spectrum in the Gulf and EBS spectrum in the rest of the country? We seek comment on these questions and any other questions relating to licensing EBS spectrum in the Gulf of Mexico.

B. Licensing available and unassigned EBS spectrum

1. Introduction

181. As explained in the *BRS/EBS 4th MO&O*, while the Commission had previously decided to wait for the transition of the 2.5 GHz band to develop rules to auction BRS spectrum, we now believe that the need for commercial spectrum is such that we should promptly auction available and unassigned BRS spectrum.[537] Hence, today we have adopted rules for competitive bidding, designated entities, and small business size standards to enable an auction of BRS spectrum.[538]

182. As also noted in the *BRS/EBS 4th MO&O*, we are seeking further comment on the appropriate licensing scheme for new EBS licenses. We note that the opportunities presented by the new technical rules and band plan create additional demand for EBS spectrum, and that EBS eligible entities have not been able to file applications for new stations since 1995.[539] In 1993, the Commission suspended the processing of EBS applications,[540] except for major change proposals for EBS applications to accommodate settlement agreements among mutually exclusive applicants.[541] Since 1993, the

[537] *See supra* ¶ 14.

[538] *See supra* ¶¶ 26-28.

[539] *See* Notice of Instructional Television Fixed Service Filing Window From October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995).

[540] Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Notice of Proposed Rulemaking*, MM Docket No. 93-24, 8 FCC Rcd 1275 (1993).

[541] *Id.* at 1277 n.13. *See also* Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Order and Further Notice of Proposed Rulemaking*, MM Docket No. 93-24, 9 FCC Rcd

(continued....)

Commission has twice opened filing windows for EBS applications but those windows have been of short duration and applicable only to certain types of applications. For instance, in 1995, the Commission provided a five-day window for the filing of applications for new construction permits and for major changes to existing EBS facilities.[542] In 1996, the Mass Media Bureau announced a sixty-day filing window for a limited class of applications, permitting the filing of EBS modification applications and amendments to pending EBS applications proposing to co-locate with an authorized wireless cable facility, in order to facilitate market wide settlements.[543]

183. The Balanced Budget Act of 1997 (Budget Act) expanded the Commission's competitive bidding authority under Section 309(j) of the Communications Act by adding, among other things, provisions governing auctions for broadcast and other previously exempt services.[544] In a subsequent order, the Commission concluded that the legislation required that mutually exclusive applications for new ITFS stations be subject to auction.[545] The Commission concluded that ITFS did not fall within the exemption from competitive bidding for noncommercial educational broadcast stations.[546] The Commission expressed concern that Section 309(j), as adopted, might not reflect Congress' intent with regard to the treatment of competing ITFS applications.[547] Given the instructional nature of the service and the reservation of ITFS spectrum for noncommercial educational use, the Commission thought it possible that Congress did not intend its expansion of our auction authority in the Budget Act to include that service. Accordingly, the Commission did not proceed immediately with an auction of ITFS applications[548] but sought Congressional guidance with regard to assigning licenses for ITFS by competitive bidding and proposed that Congress exempt ITFS applications from competitive bidding.[549] In 2000, the Commission opened a settlement window to resolve mutual exclusivity between applications by allowing payments to applicants in return for dismissing their applications and permitting agreements providing for the authorization to be awarded to a non-applicant third party.[550]

(...continued from previous page)
3348, 3354 (1994). The Commission reiterated this policy in the *Report and Order* in MM Docket No. 93-24, 10 FCC Rcd 2907, 2911 (1995).

[542] *See* Notice of Instructional Television Fixed Service Filing Window From October 16, 1995, through October 20, 1995, *Public Notice*, Report No. 23565A (rel. Aug. 4, 1995).

[543] Mass Media Bureau Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities with Wireless Cable Operations, *Public Notice*, 11 FCC Rcd 22422 (1996).

[544] 47 U.S.C. § 309(j).

[545] Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, Reexaminiation of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, *First Report and Order*, MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, 13 FCC Rcd 15920, 15999-16001 ¶¶ 197-204 (1998) (*Balanced Budget Act Order*), *recon. denied*, 14 FCC Rcd 8724, *modified*, 14 FCC Rcd 12,541 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

[546] *Balanced Budget Act Order*, 13 FCC Rcd 16000-16001 ¶¶ 200-202. *See* 47 U.S.C. §§ 309(j)(2)(C), 397(6).

[547] *Id.*, 13 FCC Rcd at 16002 ¶ 204.

[548] *Id.*

[549] Section 257 Report to Congress, *Report*, 15 FCC Rcd 15376, 15445 ¶ 183 (2000).

[550] ITFS Mutually Exclusive Applications – Settlement Period, *Public Notice*, 15 FCC Rcd 5916 (2000).

184. In 2003, the Commission reiterated its prior conclusion that mutually exclusive applications for new ITFS stations would be subject to competitive bidding and noted the Commission's attempt to seek Congressional guidance on this issue.[551] It also held that there would be no opportunity to file new ITFS applications, amendments, or modifications of any kind of station (except for applications that involved minor modifications, assignment of licenses, or transfer of control) while the Commission undertook a major restructuring of the 2.5 GHz band plan and technical rules.[552] The Commission also sought comment on potential options for assigning licenses for unassigned ITFS spectrum by competitive bidding.[553] While the Commission later lifted the freeze on modification applications, the freeze on applications for new EBS stations remained in place.[554]

185. In the 2004 *BRS FNPRM*, the Commission proposed to assign new EBS spectrum licenses using competitive bidding.[555] The Commission also sought comment on geographic areas for new licenses, frequency blocks for new licenses, rules for auctions, bidding credits for small businesses and designated entities, and auctioning spectrum as a means of transitioning areas where a proponent has not come forward within the deadline established by the Commission.[556]

186. Although the Commission has attempted to develop an efficient licensing scheme in the *BRS/EBS NPRM* and *BRS/EBS FNPRM*, the record developed to date is insufficient for us to adequately weigh the various options for licensing EBS spectrum, including options that might avoid mutually exclusive applications. In the *BRS/EBS 3rd MO&O & 2nd R&O*, the Commission decided not to adopt auction rules, and instead adopted rules to encourage the transition of the 2.5 GHz band by modifying the transition area size (changing the transition area size from Major Economic Area (MEA) to Basic Trading Area (BTA)) and permitting licensees to self-transition if a proponent had not filed an Initiation Plan for a particular BTA on or before January 21, 2009.[557] The adoption of BTAs as the transition area has apparently been successful as 375 Initiation Plans have been filed with the Commission and 222 Post-transition Notifications have been filed to date. In light of these decisions, we now seek to develop a record on a range of options to license EBS spectrum in the near future, including competitive bidding and other assignment mechanisms, as discussed in the two sections below.

187. Notwithstanding the Commission's prior determinations that applications for initial EBS spectrum licenses are not exempt from competitive bidding under the Communications Act,[558] today, we seek comment on a mechanism for assigning EBS licenses by competitive bidding among applicants, as well as through other means that would avoid mutual exclusivity among applications, obviating any need for competitive bidding. In considering the range of options for licensing unassigned EBS spectrum, we note that many educators otherwise eligible for EBS licenses may not be able to participate in competitive bidding for licenses, which the Communications Act would require before the Commission could grant

[551] *BRS/EBS NPRM*, 18 FCC Rcd at 6734 ¶ 22.

[552] *BRS/EBS NPRM*, 18 FCC Rcd at 6813 ¶ 226.

[553] *BRS/EBS NPRM*, 18 FCC Rcd at 6814-6816 ¶¶ 230-232.

[554] 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, *Second Memorandum Opinion and Order*, 18 FCC Rcd 16848, 16852-16853 ¶¶10-11 (2003).

[555] *BRS/EBS FNPRM*, 19 FCC Rcd at 14265 ¶ 266.

[556] In the *BRS/EBS FNPRM*, the Commission sought further comment on auctioning available and unassigned EBS spectrum. *See BRS/EBS FNPRM*, 19 FCC Rcd at 14265-14280 ¶¶ 264-312.

[557] *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5737 ¶ 313.

[558] *Balanced Budget Act Order*, 13 FCC Rcd at 15999 ¶ 197.

one of multiple pending mutually exclusive applications for an EBS license. For example, public and educational institutions may be constrained from participating in competitive bidding by statutory or institutional constraints, such as mandates regarding budget processes. Indeed, past debate regarding how to correctly assess the relative attributable revenues of potential EBS licensees reflects the fact that such resources may be difficult to quantify.[559] Even if there is no absolute bar to an educational institution or non-profit educational organization participating in a spectrum license auction, educators may be reluctant or unable to devote time, personnel and money to such an auction. Given the benefits that EBS can provide to educators, we believe it is appropriate to evaluate potential alternatives to a licensing scheme based upon competitive bidding.

188. We find that our prior decisions to set aside this spectrum for educators and educational uses makes it appropriate to consider how to license this spectrum in a manner that provides all potential eligible licensees with a full opportunity to access the spectrum. As noted above, given various characteristics of eligible EBS licensees that are unique among potential Commission licensees, a licensing mechanism that depends on competitive bidding to assign licenses may not provide many otherwise eligible EBS licensees with a full opportunity to participate. Accordingly, we seek further comment on the appropriate licensing mechanism for new EBS licenses. We do so without prejudging the appropriate time for issuing new EBS licenses, whether pursuant to competitive bidding or an alternative assignment mechanism.

2. Competitive Bidding

189. We seek comment on several threshold questions involving the possibility of adopting a licensing scheme that provides for mutually exclusive applications and competitive bidding. First, do EBS eligible entities, in general, have the authority to bid for spectrum licenses? Typically, institutions, whether public or private, are limited by charters, constitutions, by-laws, ordinances, or other laws, and we are concerned that large numbers of EBS eligible entities might not be able to effectively participate in a spectrum auction. Second, if EBS eligible entities have the authority to bid for spectrum, do they have the authority to bid for spectrum outside of their respective jurisdictions? Would they have the authority to bid for spectrum in the Gulf of Mexico? In particular, we note that several commenters recommend that we license available and unassigned EBS spectrum by BTA,[560] in order to correspond to the licensing areas for BRS spectrum. We seek comment on whether educational institutions would be able to competitively bid for BTAs, given that school districts are usually smaller than counties, while BTAs can be very large and frequently bisect state boundaries. If EBS eligible entities cannot bid for spectrum outside of their respective jurisdictions, but are otherwise authorized to bid for spectrum, we seek comment on whether educational institutions could form a consortium or some other joint entity to bid for spectrum in areas larger than their respective jurisdictions and as large as a BTA. We note that small rural carriers formed consortia to successfully bid in the AWS-1 auction. We further note that under this option, if viable, members of the consortium could not only pool their financial resources, but also could disaggregate and partition the spectrum to satisfy the spectrum needs of individual members. After the spectrum needs of its members are met, the consortium could also disaggregate and partition any unclaimed spectrum to other EBS eligible entities that are not participating in the consortium. Finally, if the Secondary Markets leasing rules are adopted here, *see discussion infra*, the consortium might be able to lease any unused portions of their license to EBS eligible entities or to commercial entities.

190. Moreover, we seek comment on how we should structure the auction to ensure that licenses are disseminated among a wide variety of applicants. EBS eligible entities are either public or

[559] *BRS/EBS 2d R&O*, 21 FCC Rcd at 5740-41 ¶ 325 and n.797 (citing comments).

[560] CTN NIA Comments (filed Jan. 10, 2005) at 11, IMWED Comments (filed Jan. 10, 2005) at 9, WCA Comments (filed Jan. 10, 2005) at 24.

private educational institutions or non-profit organizations that provide educational and instructional material to educational institutions. Frequently, these non-profit organizations operate throughout the nation. In this connection, we seek comment on whether we should prohibit non-profit educational organizations from participating in an auction and limiting eligible bidders to EBS eligible entities that are publicly supported or privately controlled educational institutions accredited by the appropriate State department of education or the recognized regional and national accrediting organization. Should we permit national non-profit organizations to bid for spectrum in the Gulf of Mexico?

191. In the event that we adopt a licensing framework that results in mutually exclusive applications for licenses, we note that in the *BRS/EBS NPRM,* the Commission proposed to use Part 1, Subpart Q rules to auction geographic area licenses to use spectrum in the 2500-2690 MHz band.[561] We further note that today we adopted the rules set forth in Part 1, Subpart Q to apply to the auction of the available and unassigned BRS spectrum.[562] Therefore, we propose to conduct any auction of the EBS spectrum in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's Rules, consistent with many of the bidding procedures that have been employed in previous auctions.[563] Specifically, we propose to employ the Part 1 rules governing, among other things, competitive bidding design, designated entities, application and payment procedures, collusion issues, and unjust enrichment.[564] Under this proposal, such rules would be subject to any modifications that the Commission may adopt in our Part 1 proceeding.[565] In addition, consistent with current practice, matters such as the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.[566] We seek comment on whether any of our Part 1 rules or other auction procedures would be inappropriate or should be modified for an auction of new licenses in this band.

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[561] *BRS/EBS NPRM*, 18 FCC Rcd at 6816 ¶ 233.

[562] *See supra* ¶ 26.

[563] *See, e.g.,* Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making,* 12 FCC Rcd 5686 (1997); *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order*); *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*recon. pending*) (*Part 1 Recon Order/ Fifth Report and Order* and *Fourth Further Notice of Proposed Rule Making*); *Seventh Report and Order*, 16 FCC Rcd 17546 (2001); *Eighth Report and Order,* 17 FCC Rcd 2962 (2002).

[564] *See* 47 C.F.R. § 1.2101 *et seq.*

[565] *See, e.g.,* Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Second Order on Reconsideration of the Fifth Report and Order*, 20 FCC Rcd 1942 (2005) (*Part 1 Competitive Bidding Second Order on Reconsideration of the Fifth Report and Order*) (adopting modifications to the competitive bidding rules); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, 21 FCC Rcd 891 (2006) (*CSEA/Part 1 Report and Order*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 21 FCC Rcd 4753 (2006) (*Designated Entity Second Report and Order and Designated Entity Second FNPRM*), *petitions for reconsideration pending*; Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Order on Reconsideration of the Designated Entity Second Report and Order*, 21 FCC Rcd 6703 (2006) (*Designated Entity Order on Reconsideration of the Second Report and Order*), *petitions for reconsideration pending.*

[566] *See* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448-49, 454-55 ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the Balanced Budget Act of 1997) (*Part 1 Third Report and Order*).

192. Additionally, we seek comment on whether we should adopt bidding credits and small business size standards in the auction of EBS spectrum. Because entities eligible to hold EBS licenses must be schools, universities, and other non-profit organizations, we seek comment on whether the adoption of bidding credits and small business size standards is applicable. We note, however, that in the *BRS/EBS FNPRM* the Commission proposed to define an entity with average annual gross revenues not exceeding $40 million for the preceding three years as a "small business;" an entity with average gross revenues not exceeding $15 million for the same period as a "very small business;" and an entity with average gross revenues not exceeding $3 million for the same period as an "entrepreneur."[567] The Commission further proposed to provide qualifying "small businesses" with a bidding credit of 15%; qualifying "very small businesses" with a bidding credit of 25%; and qualifying "entrepreneurs" with a bidding credit of 35%, consistent with Section 1.2110(f)(2).[568] We seek comment on these proposals. In addition, we seek comment on whether we should modify our rules on tribal lands bidding credits, as applied to EBS licenses.

193. We also seek comment on the size of the spectrum blocks to be auctioned. Channels A, B, C, D, and G are assigned to the EBS service in a geographic area licensing scheme. Channels A1-A3, B1-B3, C1-C3, and D1-D3 are assigned to the Lower Band Segment (LBS), and channels G1-G3 are assigned to the Upper Band Segment (UBS). The LBS and the UBS are low-power segments of the 2.5 GHz band. Channels A4, B4, C4, D4, and G4 are assigned to the Middle Band Segment (MBS), the high-power segment of the 2.5 GHz band.[569] Some commenters suggest that the EBS spectrum should be licensed by channel group so that the winning bidder would receive both the three low-power channels and the one high-power channel assigned to the group.[570] Other commenters recommend that we auction the high-power channels in the group separately from the low-power channels in the group.[571] Another alternative would be to license all of the available spectrum in the LBS and UBS as one frequency block and all of the available MBS spectrum as a separate frequency block. We note that in auctioning the BRS spectrum, the Commission auctioned all of the available BRS spectrum in the BTA so that the winning bidder won all of the available BRS channel groups in the BTA. Should we adopt the same policy here and license all of the available channel groups in the geographic area to be licensed? We seek comment on these options.

194. With respect to a geographic area licensing scheme, we seek comment on the size of the area to be licensed. As noted above, several commenters recommend that we license available and unassigned EBS spectrum by BTA to correspond to the BRS licensing area. We could, however, assign licenses differently than we did for BRS. For instance, we could assign licenses by State. Because BTAs and States are large, they would overlay incumbent licenses. If we were to license unassigned and available EBS spectrum by BTA or State, the overlay licenses would not provide any rights with respect to areas covered by other licenses, but would simply clarify that any area within the BTA or State not covered by other licensees was subject to the BTA or State license. We also seek comment on whether we should license smaller areas such as cellular market areas. For example, the Commission could divide the United States and its possessions, into cellular market areas ("CMAs"), including 305 Metropolitan Statistical Areas ("MSAs"), 428 Rural Statistical Areas ("RSAs"), and the three licensing areas that we have adopted for the Gulf of Mexico in these bands. If we decide to license the low-power channels separately from the high-power channels, we seek comment on whether we should adopt a different

[567] *BRS/EBS FNPRM*, 19 FCC Rcd at 14271-14272 ¶ 286. *See* 47 C.F.R. § 1.2110(f)(2).

[568] *BRS/EBS FNPRM*, 19 FCC Rcd at 14271-14272 ¶ 286. 47 C.F.R. § 1.2110(f)(2)(i)-(iii).

[569] 47 C.F.R. § 27.5(i)(2).

[570] CTN NIA Comments (filed Jan. 10, 2005) at 13, HITN Comments (filed Jan. 10, 2005) at 6.

[571] WCA Comments (filed Jan. 10, 2005) at 24, Clearwire Comments (filed Jan. 10, 2005) at 11-12.

geographic area for the MBS channels. For instance, we could auction the MBS channels by GSA or by county. We seek comment on this option.

195. We also seek comment on whether special eligibility or spectrum aggregation limits would be appropriate or necessary to provide significant opportunities for public and private educational institutions to bid for spectrum. For instance, we could limit the amount of spectrum for which a single licensee could bid in a given market in order to allow a variety of educational institutions to obtain spectrum. We could also limit eligible bidders to EBS eligible entities physically located in the geographic area to be licensed. We seek comment on these proposals and other possible eligibility or spectrum aggregation limits.

3. Other Assignment Mechanisms

196. If, as a result of the record developed in response to this *BRS/EBS 2nd FNPRM*, we learn that many EBS eligible entities would be precluded from bidding for spectrum, we may find that the public interest in making this spectrum available will lead us to adopt a licensing scheme that does not require competitive bidding. In this connection, we seek comment on all available options for granting geographic area licenses without providing for mutually exclusive applications. Commenters proposing such options should provide a detailed description of how their proposed option would work, describe what they believe the proper geographic area and channel blocks should be for proposed licenses, and explain why they believe their proposed licensing scheme would allow vacant EBS spectrum to be rapidly placed into use by EBS-eligible licensees and meet the educational, spectrum policy, and broadband goals underlying EBS.

197. One option would be to issue one license per state to a State agency designated by the Governor to be the spectrum manager for the entire State.[572] These State licenses would have similarities to the 700 MHz public safety State license.[573] We seek comment from the individual States on whether they would be willing to be an EBS licensee. We note that if we were to apply our Secondary Markets rules and policies and Section 27.1214 of our rules to leases entered into by a State agency, the State could generate revenue by leasing up to 95 percent of its capacity to commercial entities. Thus, we seek comment on whether this option would be an unfunded mandate under the Unfunded Mandate Reform Act of 1995.[574]

198. In connection with this state licensing option, we seek comment on whether any modifications to our Secondary Markets leasing rules would be appropriate for these state licenses. Our Secondary Markets leasing rules authorize two kinds of spectrum leasing arrangements, spectrum manager leasing arrangements[575] and *de facto* transfer leasing arrangements.[576] Under spectrum manager leasing arrangements, the licensee retains *de jure* control of its license and *de facto* control of the leased spectrum that it leases to a spectrum lessee.[577] Under *de facto* transfer leasing arrangements, the licensee

[572] *See* 47 C.F.R. §§ 1.9001-1.980.

[573] *See* 47 C.F.R. § 90.529.

[574] 1995, Pub. L. No. 104-4, 109 Stat. 66. That Act is designed "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding." *Id.*

[575] 47 C.F.R. § 1.9020.

[576] 47 C.F.R. § 1.9030.

[577] 47 C.F.R. § 1.9003.

retains *de jure* control of its license while transferring *de facto* control of the leased spectrum to a spectrum lessee.[578]

199. Under spectrum manager leasing arrangements and *de facto* transfer leasing arrangements, the licensee must meet the eligibility requirements in the Commission's Rules.[579] Thus, the State agency designated by the Governor would have to meet the eligibility requirements of Section 27.1201 of our Rules. Under both spectrum manager leasing and *de facto* transfer leasing arrangements, the EBS spectrum lessee is not required to meet the eligibility requirements of Section 27.1201 of our Rules.[580] Therefore, under both our existing spectrum manager leasing and *de facto* transfer leasing rules, the State agency could lease spectrum to EBS eligible entities or to commercial entities, so long as our minimum educational use requirements are met. In turn, under both *de facto* transfer leasing arrangements and spectrum manager leasing arrangements, the EBS spectrum lessee could sublease to a commercial entity, so long as it meets our educational usage requirements. Normally, a licensee has full discretion as to whether to lease its spectrum to a third party and to whom it should lease its spectrum. We seek comment on whether any restrictions on a state's leasing discretion would be necessary to ensure that the full range of educational entities have access to EBS spectrum.

200. We also seek comment on whether any modifications to our special leasing rules for EBS stations would be appropriate for state licenses. Under Section 27.1214 of our Rules, a licensee must comply with certain educational programming requirements and retain the opportunity to purchase or to lease dedicated or common EBS equipment used for educational purposes or comparable equipment if the lease terminates. In addition, the lease term cannot exceed thirty years and must permit the EBS licensee to review, at year 15 and every 5 years thereafter, its educational use requirements in light of changes in educational needs, technology, and other relevant factors and to obtain access to such additional services, capacity, support, and/or equipment as the parties shall agree upon in the spectrum leasing arrangement to advance the EBS licensee's educational mission.

201. In seeking comment on a State license option, we ask commenters whether a State license could be designed to ensure that the full range of EBS-eligible entities, including educational institutions and non-profit educational organizations unaffiliated with a State, would have sufficient access to EBS spectrum. We also ask whether any special rules would need to be applied to State licensees. We ask whether the application procedures applicable to the 700 MHz public safety state license could be applied to an EBS State license.[581] Finally, we seek comment on alternatives for licensing spectrum in any jurisdiction in which a State fails to apply for a State license or for which the State loses the license by failing to demonstrate substantial service.[582]

202. Another option would adopt a licensing scheme similar to the one we use to license private land mobile radio spectrum. Under this approach, applicants could submit applications for new EBS stations at any time to certified frequency coordinators. The frequency coordinators would review the applications and, in case of conflict, certify the earlier filed application that complies with the Commission's Rules for submission to the Commission. Although frequency coordinators typically coordinate site-based applications, we believe we could adopt rules adapting the use of frequency coordinators to 35-mile GSAs.

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[578] 47 C.F.R. § 1.9003.

[579] 47 C.F.R. § 1.9020(b)(2), 47 C.F.R. § 1.9030(d)(2). *See* 47 C.F.R. § 27.1201 for EBS eligibility requirements.

[580] 47 C.F.R. § 1.9020(d)(2), 1.9030(d)(2).

[581] *See* 47 C.F.R. 90.529(a)(1); Public Safety 700 MHz Band-State License Option to Apply Runs Through December 31, 2001, *Public Notice*, 16 FCC Rcd 3547 (2001).

[582] 47 C.F.R. § 27.14(e) (all EBS licensees must demonstrate substantial service by May 1, 2011).