

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 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 2500-2690MHz Bands)	WT Docket No. 03-66 RM-10586
)	
Part 1 of the Commission's Rules-Further Competitive Bidding Procedures)	WT Docket No. 03-67
)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico)	WT Docket No. 02-68 RM-9718
)	
Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands)	IB Docket No. 02-364
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems)	ET Docket No. 00-258
)	

**PETITION FOR PARTIAL RECONSIDERATION
OF GATEWAY ACCESS SOLUTIONS, INC.**

Gateway Access Solutions, Inc. ("Gateway"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission for partial reconsideration of the *Third Order On Reconsideration And Sixth Memorandum Opinion And Order And Fourth Memorandum Opinion And Order And Second Further Notice Of*

Proposed Rulemaking and Declaratory Ruling, FCC 08-83 (rel. March 20, 2008) in the above-referenced proceeding (the “*Third Order*”).

The *Third Order* provides that pre-2005 video-only EBS leases are now to be interpreted as limited to a term of fifteen years *from the date of execution*, regardless of the actual language of the contract or the intent of the parties regarding the start date or the length of the initial term, so that leases executed more than fifteen years ago will now be deemed to have expired.¹ As a commercial lessee under such leases, Gateway is adversely impacted by the Commission’s action.

In support of its position, the Commission states that certain of its previous decisions in this area had set the start date for such leases as the date of execution. That is simply not the case. Moreover, under the site based licensing system in place before 2005, often years would pass between the filing of an application and the issuance of an authorization, with the commercial operator/lessee typically responsible for the costs and expenses associated with obtaining the authorization. As a result, lease start dates routinely were tied to a date other than the date of execution, such as the date of grant of the authorization, the filing of a construction certification, or the commencement of services. These agreements were required to be filed with and specifically approved by the Commission. The Commission has time and again approved lease agreements that commenced on a date other than execution.

It is well established, and the Commission has long acknowledged, that the interpretation of contracts should be left to the courts.² In fact, the FCC in the *Third*

¹ *Third Order* at ¶¶ 136-137.

² See, e.g. *Hazel-Tone Communications, Inc.*, 16 FCC Rcd 21211, 21213 (2001) (finding that parties should resolve contractual disputes in court and that the Commission is not the proper forum to adjudicate these

Order specifically acknowledges that lease term issues should not be resolved by the FCC interpreting private contracts and that the Commission does not have the authority to void contracts executed by two private parties³, yet that is precisely what the Commission has done. The FCC attempts to side-step these limitations by suggesting that the leases in question are contrary to past Commission determinations limiting lease terms to fifteen years *from the date of execution*. As noted above, the Commission has never made such a determination. To the contrary, the Commission has routinely approved leases that commenced on other than the date of execution.

Declaring an entire class of leases expired or set to expire sooner than anticipated based on a generalized interpretation of one selective provision of a lease is fundamentally and grossly unfair and harmful, as well as contrary to due process, as it deprives the parties of the benefits they negotiated, fails to give due consideration to other contract provisions that might bear on the issue at hand,⁴ and undermines current business plans. Indeed, with the term of leases being a critical component of any wireless business, the uncertainty created by the Commission's ruling could disrupt business plans, discourage investment and retard broadband deployment, in addition to encouraging speculative activities

Granting extra-judicial relief also contravenes the FCC's long standing and proper refusal to inject itself into contractual matters, encourages other licensees to seek similar regulatory relief from the Commission, and likely will discourage parties from entering

disputes) *citing Airtouch Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9430 (1999).

³ *Id.*

⁴ The Commission fails to consider that there are hard dates or trigger events other than the date of execution that can be used to determine the overall term of a lease, and that lease provisions regarding the length of the initial term or renewal terms can also provide certainty regarding the overall term of an agreement.

into secondary market transactions in this and other bands. The Commission cannot reasonably expect to promote a viable secondary market for spectrum assets if it rewrites previously approved lease arrangements in the narrowest and most penal possible manner.

The Commission's unilateral finding that all pre-2005 leases must be interpreted as running only from the date of execution is not supported by precedent, is contrary to past Commission action in this area, is fundamentally unfair, and will likely impede the development and deployment of wireless broadband facilities as well as the development of secondary markets for spectrum. For these reasons, Gateway respectfully requests that the Commission immediately reconsider its determination that the term of all pre-2005 leases must be interpreted to run from the date of execution.

GATEWAY ACCESS SOLUTIONS, INC.

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