

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Amendment of Parts 1, 21, 73, 74 and 101 of the ) WT Docket No. 03-66  
Commission's Rules to Facilitate the Provision of ) RM-10586  
Fixed and Mobile Broadband Access, Educational )  
and Other Advanced Services in the 2150-2162 )  
and 2500-2690 MHz Bands )

To: The Secretary, FCC  
Attention: The Commission

**PARTIAL OPPOSITION TO PETITION FOR RECONSIDERATION**

The National EBS Association ("NEBSA")<sup>1</sup>, pursuant to Section 1.429 of the FCC's rules, hereby opposes in part the Petition for Reconsideration filed June 9, 2008 in this proceeding by the Wireless Communications Association International, Inc. ("WCA").

The WCA Petition makes two points, the first of which is of interest to NEBSA.<sup>2</sup> WCA takes issue with Paragraphs 136 and 137 of the Fourth Memorandum Opinion and Order.<sup>3</sup> In those paragraphs, the Commission states that, according to its prior decisions, terms of EBS leases prior to

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<sup>1</sup> The National EBS Association was formerly known as the National ITFS Association ("NIA").

<sup>2</sup> WCA's second issue relates to the transition of BRS channels 1 and 2 to the new band plan. This is not an issue of significance to EBS licensees, and therefore NEBSA does not address it here. NEBSA does not, however, object to the relief that WCA seeks in that respect.

<sup>3</sup> *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*, Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second

January 10, 2005 (the effective date of the new rules) were limited to 15 years from the date they were executed, and therefore that video-only leases executed more than 15 years ago have expired.

WCA argues that the Commission has not in the past required that EBS lease terms run from the date of execution of the lease, and that the Commission has approved leases drafted to say that the lease term runs from the occurrence of some future event. WCA requests that the Commission withdraw Paragraphs 136 and 137.

NEBSA opposes the outright withdrawal of Paragraphs 136 and 137. NEBSA does not take issue with WCA's analysis of the Commission's pre-2005 requirements relating to lease terms. NEBSA also realizes that the Commission does not have the authority to declare a private agreement expired or terminated in contravention of the provisions of the agreement. However, those considerations are not the end of the matter. There are difficult public policy issues raised by old EBS leases, and the Commission should not concede that these issues are beyond its purview.

As an initial matter, but to be clear, NEBSA believes there is no question that the Commission can and should insist that leases entered into prior to January 10, 2005, be limited to terms specified in such leases, and in any event no greater than 15 years. As reflected below, however, the

Commission need not resolve, as a matter of contract law, when lease terms were required to begin to run.

As to old leases in general, the public interest concerns that motivated the Commission's action in Paragraphs 136 and 137 are clear. While WCA may have managed to find some old leases the terms of which have finally begun to run, and that appear to have resulted in benefits to the licensee and the public, NEBSA believes that there are many other old EBS leases that do not pass such a smell test. These leases, including many that were signed in the years leading up to the October, 1995 filing window for applications for new EBS stations, specify "start dates" that run from construction of the contemplated video facilities by the commercial operator, or commencement of commercial video service by the commercial operator, in situations where, for 10 or 15 years or more now, no such construction or commercial service has ever occurred. Therefore, on their face, the specified 10 or 15 year terms have not yet begun to run. Worse, given that these leases contemplated wireless cable service over the leased excess capacity, and it's now obvious that no such construction of facilities or commencement of service will *ever* occur, the lease terms *never* will begin to run.

The result of such agreements has been and continues to be merely to warehouse spectrum and prevent the EBS capacity to be used by the licensee itself or a lessee that can and will provide service to the public. Unfairly, these agreements also hold EBS licensees to deals that, contrary to their expectations, have typically resulted in no tangible benefit to the licensees.

Indeed, in most of these cases, licensees have received no educational services and no money whatsoever to support their educational endeavors. Licensees also have no bargaining power – they are at the mercy of a lessee who may, at such time as it may find suitable, in a completely non-competitive environment, offer new lease terms on a “take it or leave it” basis. Surely, allowing these leases to run forever is not in the public interest.

Furthermore, while the Commission may not have the authority to abrogate any private agreement, it does have the authority, NEBSA believes, to revisit its decision to grandfather old leases that do not comply with the current lease requirements under the Secondary Markets regime. The leases may still be in effect as a matter of state contract law, until courts rule otherwise, but that doesn’t mean that the FCC must continue to allow them to serve as a lawful basis for future commercial use of EBS excess capacity. Having the Commission declare offensive old leases to be against public policy and contrary to current applicable leasing requirements would assist licensees in taking steps in the courts to have those leases voided.

NEBSA believes that the Commission inevitably needs to draw a line between those old leases that, so long as they are not extended or amended, will continue to be grandfathered and be allowed to serve as a legitimate basis for the commercial use of excess capacity, and those old leases that no longer should be deemed grandfathered.

NEBSA suggests that the line be drawn as follows: Any EBS lease entered into prior to January 10, 2005 in which the term of the lease was to

commence upon the occurrence of some future event, which event did not occur prior to January 10, 2005, is no longer recognized by the FCC as a grandfathered lease lawfully supporting the use of excess capacity by the lessee, except in cases where *both* parties to the lease support its continuation as a grandfathered lease and make a specific showing of the current or immediately planned provision of communications services over the leased capacity pursuant to such lease.

Respectfully submitted,

NATIONAL EBS ASSOCIATION

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July 29, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Partial Opposition to Petition for Reconsideration of the National EBS Association have been served by First Class Mail this 29<sup>th</sup> day of July, 2008, on the following:

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