

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc.
Consolidated Opposition To Petitions For Reconsideration**

Respectfully submitted,

THE ITFS/2.5 GHz MOBILE WIRELESS
ENGINEERING & DEVELOPMENT
ALLIANCE, INC.

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July 29, 2008

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EXECUTIVE SUMMARY

The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. (“IMWED”), hereby opposes certain Petitions for Reconsideration of the *Fourth MO&O*, filed by the Wireless Communications Association International, Inc. and Gateway Access Solutions, Inc. Contrary to assertions of Petitioners, the policies limiting pre 2005 leases to 15 year terms measured from the date of their execution, and prohibiting leases of potentially perpetual duration, were based on numerous clearly enunciated decisions, including policies adopted as part of the Commission’s two way proceeding.

The Commission need not and must not retreat from the Conclusions reached in its Fourth MO&O, because to do so, would perpetuate outmoded one way analog video leases, as well as leases tied to an obsolete band plan and a high powered site specific licensing scheme that has been substantially replaced as part of this and previous dockets. The more than 780 such leases that operators now seek to perpetuate, are ill suited for the low power and mobile broadband services that operators will soon be launching, and therefore any further perpetuation of such leases would have a major negative impact on the deployment of new services on such leased capacity.

Continued grandfathering of such leases will also allow potentially perpetual warehousing of valuable spectrum by existing Lessees, effectively excluding new entrants and potential competitors. A reversal of the Commission’s position on such leases would also undermine the purposes underlying the Commission’s leasing policies of promoting broader use of the spectrum while preserving and ensuring the growth of the dedicated educational service on this band, in part through periodic lease negotiations to allow leasing educators to adjust for their own changing educational spectrum needs. Accordingly, the Commission need not and must not grant Petitioners’ requested relief.

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The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED"), pursuant to Section 1.429 of the Commission's Rules, hereby submits its Consolidated Opposition to the Petitions for Reconsideration filed in response to the Fourth MO&O in the above-referenced docket by the Wireless Communications Association International, Inc. ("WCAI") and Gateway Access Solutions, Inc. ("Gateway")(collectively "Petitioners").¹

In its Reply to Oppositions concerning reconsideration of the *Third MO&O*², IMWED urged the Commission to consider arguments raised by Clarendon Foundation ("Clarendon") and Hispanic Information and Telecommunications Network ("HITN"), regarding the possible

¹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, 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*, 23 FCC Rcd 5992 (2008), 73 Fed. Reg. 26032 (May 8, 2008) ["*Fourth MO&O*"]. On June 9, 2008, both Gateway and WCAI filed Petitions seeking partial reconsideration of the *Fourth MO&O*. This Opposition is being timely submitted with 15 days of Federal Register Notice concerning the filing of such reconsideration requests. See 73 Fed. Reg. 40348 (July 14, 2008).

² *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 Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606 (2006) ["*Third MO&O*"].

interpretation of the Commission's Rules to allow for perpetual leases and the captious positions taken by commercial entities concerning analog, video only, wireless cable era leases that would have the effect of forestalling broadband service. IMWED advocated that such action was possible, not in the context of the adjudications of private lease disputes, but on the basis of a clear enunciation of a regulatory policy regarding issues of vital public interest. IMWED applauds the Commission for having done just that in its *Fourth MO&O*.

Petitioners on reconsideration of the *Fourth MO&O* now seek to overturn that pronouncement and thereby perpetuate such leases, including as many as 780 grandfathered leases held by Sprint and Clearwire, as well as an undetermined number of such leases held by other operators. The sheer number of potentially affected leases, and the degree of operator interest in supporting the reconsideration request, make it clear that this is no small matter. These leases, which are tied to an obsolete band plan and an outmoded site specific high powered transmission service, are ill suited for the low power and mobile broadband services facilitated within this Docket and which these operators are now seeking to launch. All such Leases were grandfathered under old lease term limitation policies, and their perpetuation based on unspecified start dates would contravene the purpose of those term limitation policies and condone the significant continued warehousing of spectrum and practices which the Commission stated have given it reason for concern.³ Accordingly, the Commission must not reconsider its determination that, under prior term limit policies, lease terms were limited to no more than 15 years, as measured from the execution of the lease.

³ See *Fourth MO&O*, 23 FCC Rcd 5992 at ¶ 137 (2008). Such practices, raised by HITN on reconsideration of the *Third MO&O* and discussed by the Commission, include the intentional continued warehousing of spectrum under obsolete one way analog video leases, as well as the use of impending substantial service deadlines to pressure EBS licensees that want to want to take advantage of the new broadband services into unfavorable lease renegotiations. *Id.* at ¶¶ 131, 137 & nn. 394-396.

I. The Relief Requested Would Result in a Significant Adverse Impact.

As mentioned above, in pending transfer of control applications, Sprint and Clearwire have proposed to merge their 2.5 GHz license and lease portfolios into a new wireless broadband company. In exhibits to those applications, the operators disclosed that they presently hold no fewer than 780 leases, a full 46 percent of their combined lease portfolio, which were negotiated under former Commission rules and policies in effect before January 10, 2005.⁴ This fact should give the Commission pause that the relief being sought by Petitioners is no small bookkeeping matter, and if granted could have significant impact on the industry and the future availability of spectrum.

With the large scale abandonment of wireless cable (except in the small number of cases where opt outs were requested), the reconfiguration of the 2.5GHz band presently underway, and the rule changes adopted as part of this docket to facilitate the development of mobile wireless broadband services on these frequencies, such grandfathered leases have become largely irrelevant to the provision of actual services by an operator. Some of those grandfathered leases, negotiated before the adoption of the two-way rules, allow for the use of the spectrum only in connection with outmoded analog one way video wireless cable systems, while others, negotiated following the adoption of two way rules, are simply tied to high power, high site, fixed broadband services on a band plan and a site based licensing scheme that soon will no longer exist for this service. Thus, any interpretation that the limited terms of such grandfathered

⁴ See *Application of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer of Control of Licenses and Authorizations, WT Docket 08-94, In re FCC File Nos. 0003462540, 0003368272 et al.*, Description of the Transaction and Public Interest Statement at p.6 nn.5 & 6 (2008). Therein, the parties reveal that Sprint holds 374 grandfathered leases and 400 de facto transfer leases and sub leases, while Clearwire holds 406 grandfathered leases, 486 de facto transfer leases and sub leases and 9 manager style leases. Accordingly these parties reveal that a full 46% of the combined company's lease portfolio are still be comprised of old grandfathered style leases.

leases may be measured from some unspecified date, which may not have occurred (and which conceivably might never occur), rather than from the execution of the agreement, will simply prolong the life of such largely unusable leases.

Contrary to the assertions of Petitioners, such relief would do little to provide certainty of the availability of spectrum for future broadband services, but rather would simply facilitate the continued useless warehousing of valuable excess capacity EBS spectrum. The continuation of such leases perhaps in perpetuity, will allow current lease holders to exert negative control over usable excess capacity spectrum in the 2.5Ghz band, effectively excluding new entrants and potential competitors. Further, as suggested previously by HITN, continued warehousing of such spectrum may be providing existing lease holders with increasing leverage, as the 2011 substantial service showings approach, in connection with the renegotiation of such leases.⁵

II. The Relief Sought on Reconsideration is Contrary to the Commission's Goals of Facilitating Service on the Band and Protecting the Educational Purpose of EBS Spectrum.

The interpretation requested by Petitioners would result in the warehousing of EBS spectrum and lease terms in excess of Commission policy limits, without requisite periodic educational needs review, and would therefore subvert the purposes underlying the Commission's EBS band leasing policies. When the Commission first allowed for the Leasing of EBS excess capacity spectrum by commercial operators in 1983, it did so to facilitate two public interest benefits. The first was to benefit the public by promoting the "broader use of the spectrum."⁶ The second stated purpose was to generate "new revenue sources ... in order to give

⁵ See *Fourth MO&O*, 23 FCC Rcd 5992 at ¶¶ 131, 137 & nn. 394-396 (2008). (discussion of issues raised by HITN and deemed a cause for concern).

⁶ *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules and Regulations in regard to Frequency Allocation in the Instructional Television Fixed Service, and the Private Operational Fixed Microwave Service, Report & Order in General Docket 80-112, 94 FCC 2d 1203, at ¶¶ 115 (1983) ["1983 Leasing Order"]*.

ITFS every chance to grow and succeed.”⁷ A grant of Petitioners’ request would undermine both of these fundamental goals.

As discussed above, allowing leases to extend for periods in excess of existing or prior Commission lease term policies, by allowing them to begin on unspecified dates, which may or may not occur, will promote warehousing of spectrum based on outmoded leases not suitable for mobile broadband services. Warehousing of this spectrum would not allow for its immediate productive use by operators for new WiMAX services, nor would it make it available for use by new competitive commercial entrants. Essentially, a reversal of the Commission’s clear statement regarding the duration and measurement of grandfathered leases from the date of their execution would undermine the Commission’s principal leasing goal of promoting the broader use of the spectrum in the public interest.

In evaluating leases and permissible lease term limits since their adoption in 1983, the Commission has unflinchingly held to its original opinion that it must balance the availability of excess capacity for commercial uses against the important requirement that the dedicated purpose of this scarce resource be preserved and allowed to grow and succeed, in part through reasonable periodic lease renegotiation to allow for the reassessment of educational needs in response to changing demands. The Commission has noted that it is “unlikely that [EBS] licensees can reliably forecast their [EBS] needs beyond a certain number of years.”⁸ For this reason, the Commission has always required that EBS licensees be able to renegotiate lease

⁷ Id.

⁸ See *Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, Memorandum Opinion and Order in MM Docket 83-523*, 59 RR 2d 1355 at ¶ 50 (1986)[“1986 MO&O”]. (“The Commission has allocated the scarce spectrum resource for a particular, valuable service, and has the responsibility to ensure its proper use. It seems unlikely that ITFS licensees can reliably forecast their ITFS needs beyond a certain number of years. It is not obvious that the prospective Lessor is any more likely to lose income from its necessity to renegotiate terms periodically than to gain income from its ability to renegotiate terms periodically. What definitely is gained is the ITFS licensee’s ability to respond to changing demand.” Id.).

terms regularly in order to ensure that they can “adjust to changing educational needs, particularly in the absence of the right to readily adjust its use of airtime beyond specific narrow limits within the lease term.”⁹ Even when adopting its current 30 year lease term in this docket, the Commission permitted such longer lease terms only “subject to conditions designed to ensure that EBS Licensees have a fair opportunity to re-evaluate their educational needs”¹⁰

Petitioners’ interpretation that grandfathered lease term limits under former FCC policy can run from unspecified dates would allow for leases of potentially unlimited duration and therefore would completely undermine the fundamental Commission directive designed to preserve the allocated purpose of this spectrum. For example, a lease executed in 1990, with a term that would have begun upon the launch of commercial video services in the year 2000, would conceivably have tied an EBS licensee to the terms of a lease for a period of as much as 25 years without re-evaluation of educational needs, a period 15 years longer than the term limit policy in place before 1995 and a full ten years longer than that permitted under the Commission’s 1995 15 year lease policy.¹¹

While the Petitioners might argue that a licensee is not encumbered until a lease term commences, the fact is that after execution of a lease, but before the so-called term would begin, an EBS licensee is subject to most of the terms of the lease. In most cases such leases stated that the agreement commenced on execution, but that the “Term” and any payments would run from another date. In such instances, prior to the commencement of the lease Term, licensees would

⁹ *Amendment of Parts 21, 43, 74, 78 and 94 of the Commission’s Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Band, Report and Order in Gen Docket 90-54*, 5 FCC Rcd 6410, 6416 (1990)[“1990 Wireless Cable Order”].

¹⁰ *Third MO&O*, 21 FCC Rcd 5606, ¶268 (2006).

¹¹ In this regard, a lease that has not yet started, could conceivably encumber spectrum indefinitely or at least for a period in excess of the Commission’s present 30 year maximum lease term.

not be free to lease their excess capacity to others, modify their facilities or provide consents for the modification of neighboring stations without the consent of their operators. Essentially, pending the commencement of the “Term”, the EBS spectrum would be warehoused.

Accordingly, as the Commission accurately stated in its *Fourth MO&O*, any interpretation that “would permit the warehousing of valuable spectrum for decades” would be “contrary to the underlying purpose of the rule.”¹² The Commission must not now retreat from that position, for to do so would permit the indefinite warehousing of spectrum without the required periodic educational needs reassessment or a broader more efficient use of the spectrum in the public interest. In short a grant of the Petitioners’ request would undercut both purposes underlying the Commission’s EBS leasing policies.

III. Contrary to Petitioners’ Claims, the Commission’s Prior Lease Term Limitations are Founded on Clearly Stated Policy.

Contrary to Petitioner’s assertions, there is ample precedent that the Commission’s policies were established to maintain an absolute time limit on leases.¹³ The Commission has had a long history of limiting the length of lease terms as a safeguard to the EBS service and has been hesitant to increase such limits. In 1985, as a protection to the dedicated purpose of the EBS spectrum, the FCC limited lease terms to ten years.¹⁴ In revisiting the permissible lease term issue in 1986, the Commission continued the ten year limited term as a fair balancing

¹² *Fourth MO&O*, 23 FCC Rcd 5992 at ¶ 137 (2008).

¹³ See *WCAI Petition* at pp. 2, 3, 6 & 7-8; *Gateway Petition* at p. 2. (Arguing that the Commission never enunciated a policy that EBS leases run from the date of execution, and had a policy of reviewing and approving leases with a start date tied to other future events like modification grants and service commencement).

¹⁴ See *Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service, Second Report and Order*, 101 FCC 2d 50 at ¶ 104 (1985) [“1985 Leasing Order”].

between commercial needs and the preservation of a flexible scarce educational resource.¹⁵ In 1990, the Commission again elected to preserve the ten year lease limitation, stating that ten years was a sufficient time for wireless operators to establish their systems.¹⁶ It is also clear that until 1995, no EBS lease could extend beyond the term of the EBS License.¹⁷ However, in 1995 the Commission decided to revise its policy to permit an educator, “if it chooses, to execute a ten year lease agreement without regard to the duration of the educator’s current license term.”¹⁸

If the Commission’s policy had always allowed for a term commencing on some unspecified date in the future, rather than the date of lease execution, then presumably a commercial lessee would have been free to execute a lease prior to 1995 which would commence at some time following the renewal of an EBS license and have a term of ten years. However, in its 1995 decision, the Commission makes clear that such was not the case. Therein, the Commission stated:

Our existing policy does not authorize an educator to execute a lease agreement, the term of which extends beyond the end of the educator’s license term. Consequently depending on how many years remain in the term, there may be situations in which our policy would prohibit a lease agreement to extend beyond one or two years. At most, MDS operators can have contractual access to ITFS Channels for no more than ten years, the length of a full license period.¹⁹

¹⁵ See *1986 MO&O*, 59 RR 2d 1355 at ¶ 50 (“The ten year maximum lease term will also be continued.... The period chosen appears to be a reasonable compromise between the needs of the lessee and the responsibility of the lessor/licensee. *Id.*”)

¹⁶ See *1990 Wireless Cable Order*, 5 FCC Rcd 6410, 6416 (“We continue to believe that a ten year term provides the wireless cable operator with sufficient time to establish its system and permits the ITFS licensee to adjust to changing educational needs, particularly in the absence of the right to readily adjust its use of airtime beyond specific narrow limits within the lease term.” *Id.*)

¹⁷ See *1986 MO&O*, 59 RR 2d 1355 at ¶ 50 & n. 36.

¹⁸ See *Experimental, Auxiliary and Special Broadcast and Other Program Distribution Services; ITFS Filing Window, Report and Order in MM Docket 93-24*, 10 FCC Rcd 2907, at ¶ 38 (1995)[“1995 Filing Window Order”]

¹⁹ *Id.* at ¶ 36.

Thus, the Commission's policy prior to 1995 clearly was to be measured from the date of execution and not from some future date like a service start date or application approval date.

While Petitioners discuss the *1995 Filing Window Order*, and numerous orders that followed it, nowhere do they reference an explicit stated Commission departure from a policy of measuring leases from the date of execution. In fact, as the Commission plainly states, the *Two-Way Order* limited the term of EBS leases to 15 years from the date they are executed between the parties.²⁰

IV. The Commission Properly Interpreted its Limited EBS Lease Grandfathering Policy Adopted in The Two-Way Proceeding, and Therefore The Requested Reconsideration Should be Denied.

The Commission in the *Fourth MO&O* properly stated the basis for its limited duration grandfathering of certain existing leases as part of its prior Two-Way proceeding, and any retreat from that position would increase the likelihood of a delay in the development of broadband services, curtail the entry of new competitors, perpetuate leases that do not comply with current Commission rules and policies, and increase the potential for the warehousing of valuable spectrum.

The Commission's goal in its two-way proceeding was to provide for a smooth transition to two-way operations, while avoiding the requirement for immediate, burdensome and potentially unfair renegotiations.²¹ In this regard, the Commission stated:

²⁰ See *Fourth MO&O*, 23 FCC Rcd 5992, at ¶ 137 (2008), citing *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, 13 FCC Rcd 19112, ¶ 130 (1998) [*"Two-Way Order"*].

²¹ *Two-Way Order*, 13 FCC Rcd 19112, ¶ 131 (1998); 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, Report and Order on Reconsideration*, MM Docket 97-217, 14 FCC Rcd 12764, ¶ 60 (1999) [*"Two-Way Reconsideration Order"*].

We seek to ensure a transition as smooth as possible to two-way operations, and we believe that effectively requiring amendment of numerous existing leases could prove unduly burdensome to ITFS Licensees and Wireless Cable operators who did not anticipate such changes.

The Commission was not particularly concerned with inconvenience or impact on the existing leases of Operators that had the ability to anticipate such changes. While the Commission was obviously free to require that all leases be brought into compliance immediately, it instead balanced the need for rapid compliance against the burden of mass lease renegotiations and the potential unfairness of such a requirement on operators that had not yet had an opportunity to realize the benefit of their negotiated leases. In the end, the Commission elected to provide grandfathering relief for a limited period to allow such leases to be renegotiated over time and brought into compliance gradually. The Commission, concerned with pre March 31, 1997 leases remaining out of compliance for more than 15 years from the grandfathered cut-off date, originally refused to continue to grandfather leases during any renewal terms that commenced after March 31, 1997, but later consented when it was pointed out that the total term of such leases with extensions would remain inside the overall lease term restriction.²² The Commission specifically stated:

Petitioners now argue that the class of leases for which they were seeking grandfathering could only have a total term of ten years. Because the leases cannot continue without end we will grant the requested relief.²³

Thus, the Commission correctly observed in the *Fourth MO&O*, that any lease based on an unknown start date, and therefore of potentially perpetual duration, is contrary to the

²² *Two-Way Reconsideration Order*, 14 FCC Rcd 12764, ¶ 61; but see *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, Report and Order on Reconsideration*, MM Docket 97-217, 15 FCC Rcd. 14566, 14569-70 ¶ 11 (2000)[“*Two-Way Further Reconsideration Order*”]

²³ *Two-Way Further Reconsideration Order*, 15 FCC Rcd. 14566, 14569-70 ¶ 11 (2000).

specifically stated rules and policies adopted by the Commission in the *Two-Way Order*.²⁴ Based on a review of its two-way proceeding, and based on its original intent to provide limited relief and avoid undue burden, the Commission correctly concluded that its intent had been to grandfather 15 year leases measured from their execution date in conformity with prior stated policy, and noted that “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.”²⁵

Petitioners argue that the Commission does not have the authority to invalidate or prematurely terminate existing leases.²⁶ While the Commission no doubt would agree, the plain fact is that the Commission has often taken actions that affect the utility, compliance and relevance of existing contracts. Further, most EBS leases contain clauses requiring continued compliance with Federal State and local laws and regulations, which cause rule and policy changes to flow directly and promptly into existing leases. In the two-way proceeding, the Commission could simply have required that all leases to be brought into compliance with the modified two-way rules. In fact it had originally elected not to grandfather any leases negotiated, renewed or extended after March 31, 1997, which would have rendered many noncompliant leases useless and irrelevant.²⁷ While in the end, the Commission elected to

²⁴ *Fourth MO&O*, 23 FCC Rcd 5992, at ¶ 137 (2000). What is certain is that a lessee of any pre March 31, 1997 lease, that has not yet commenced, has had notice of the two-way rules for over ten years and has had ample time to revise such lease and therefore, like lessees who had knowledge of the upcoming rule changes in 1997, must be deemed outside the grandfathering relief provided for by the Commission in the two-way proceeding.

²⁵ *Id.*

²⁶ *WCAI Petition* at p. 14; *Gateway Petition* at p. 2-3.

²⁷ While Petitioners are quick to point out that the interpretation of private contractual agreements is best left to the individual state courts, the plain fact is that the Commission has often taken actions that affect the utility, compliance and validity of existing contracts. In this very Docket the Commission’s implementation of a restructuring of the 2.5 GHz Band, to require low power operations on certain channels has dramatically affected the

grandfather leases renewed after March of 1997 whose total term remained within the absolute term limit, it left out any lease that either would not comply with such limit or which was negotiated after that date, without regard to the impact such decision would have on existing private agreements. Additionally, in this very Docket the Commission's implementation of a restructuring of the 2.5 GHz Band, to require low power operations on certain channels and to truncate existing service areas, have dramatically affected service areas available to existing lessees and the utility of certain analog only video leases that were entered into long before anyone ever contemplated two-way much less mobile broadband operations on such channels.

Petitioners are quick to point out that the interpretation of private contractual agreements is best left to the individual state courts. However, Petitioners only cite to a single case, *Nextwave Broadband, Inc. v. Saint Rose Church Schools* as an example, arguing that EBS licensees be forced into the courts to establish that the purpose of one-way analog video only leases have been frustrated by the two-way rules, the transition, and the new mobile broadband service rules.²⁸ What Petitioners fail to mention is that the Saint Rose preliminary court order represents perhaps the only instance in the past 20 years where a small educational entity took on its well heeled commercial operator in court. Because of the expense of such cases, and the limited likelihood that captive lessees will resort to litigation, Petitioners no doubt see it as a more advantageous venue to discuss such issues. However the fact remains that the Commission has already spoken clearly to this issue in the two-way proceeding and need not retreat from that position.

utility of certain analog only video leases that were entered into long before anyone ever contemplated two-way much less mobile broadband operations on such channels.

²⁸ *WCAI Petition* at p. 14, citing *Nextwave Broadband, Inc. v. Saint Rose Church Schools, Order, Superior Court of New Jersey, Mercer County Chancery Division*, Docket No. C-53-06 (June 16, 2006).

V. The Commission's Clear Policy Decision Should not be Reversed Based on Predictions That Wholesale Renegotiation of Leases at this Point will Unduly Prejudice Operators and Delay WiMAX Service to the Public

The Commission should not be swayed by Petitioners' current pleas that a failure to grant the requested relief will subject the industry to wholesale lease renegotiations at a delicate juncture, and work an undue burden on the industry, potentially delaying the implementation of planned mobile broadband service rollouts.²⁹ These arguments are the same ones advanced more than decade ago by their wireless cable predecessors. The relief provided by the Commission during the two-way proceeding has allowed operators up to 15 years to benefit from their grandfathered leases, and has provided them with a more than generous period of time in which to bring such leases into compliance.³⁰ The fact that Sprint and Clearwire, not to mention other smaller operators may continue to hold substantial numbers of antiquated grandfathered leases reveals that such time has not been productively spent. Following a near complete demise of the wireless cable business, grandfathered leases were acquired in large numbers by these wireless broadband operators, and following a protracted proceeding resulting in the adoption of additional rules to allow for the deployment of low power mobile broadband services, as well as a multi-year nationwide bandplan transition, operators continue to lobby the Commission for a

²⁹ *WCAI Petition* at pp. 16-17; *Gateway Petition* at p. 3-4. (warning of potential litigation and a delay in the deployment of broadband services if the Commission fails to reverse its position).

³⁰ In its Petition Gateway argues that alternative start dates grew out of interminable Commission delays in granting needed modifications, and that it should not be prejudiced as it has not yet had the full benefit of its delayed start leases. See *Gateway Petition* at p. 2. As the Commission knows full well, many such licensees, at the request of their operators, filed for numerous successive construction extension requests, while awaiting the launch of commercial services predicated on an ever changing business plans. The Commission was quite clear in its two-way decisions and should not take responsibility for the fact that such operators, for their own business reasons, failed to timely launch and operate wireless cable systems, and further failed to use the past ten years to renegotiate their outmoded non-compliant leases.

favorable interpretation that would allow them to perpetuate outdated one way analog video only leases, completely ill suited for the businesses they intend to launch.

Any decision granting further relief at this point would only promote the continued warehousing of valuable EBS spectrum through largely unusable outmoded grandfathered EBS leases. The amendment, or termination and renegotiation of these leases at this point would further the Commission's goal of bringing such leases into compliance with current rules and would increase the likelihood that such spectrum will be integrated into wireless broadband systems in a timely fashion, as such systems are launched over the next several years. Further, requiring such renegotiations at this point will reduce warehousing by requiring Operators to squarely address their true spectrum needs, thereby potentially freeing up unwanted spectrum capacity for potential new competitive entrants.

VI. Conclusion

Several Petitioners have concocted an argument to alter the Commission's prior lease term limitation policy and the carefully considered grandfathering of certain leases to extend such leases well into the future. IMWED believes that the Commission has properly stated such policies in its *Fourth MO&O* and therefore opposes the reconsideration requests of WCAI and Gateway.

Respectfully submitted,

THE ITFS/2.5 GHz MOBILE WIRELESS
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July 29, 2008

CERTIFICATE OF SERVICE

I, Evan Carb, hereby certify that copies of the foregoing "The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. Consolidated Opposition To Petitions For Reconsideration" were served this 29th day of July, 2008 on the following parties via first class mail of the United States Postal Service, postage prepaid, at the following addresses:

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A handwritten signature in black ink, appearing to read "Evan Carb", written over a horizontal line.