

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

In the Matter of	)	
	)	
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 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
	)	

To: The Secretary, FCC  
Attention: The Commission

**REPLY COMMENTS OF THE NATIONAL EBS ASSOCIATION**

The National EBS Association ("NEBSA") submits these reply comments in the referenced EBS "white space" proceeding.

In its Comments, NEBSA urged the Commission not to decide now whether and how to license EBS channels in the Gulf of Mexico. After reviewing comments of other parties, NEBSA continues to hold this view.

In its Comments, NEBSA proposed an EBS white space licensing process by which the Commission would first maximize existing licensees' Geographic Service Areas (GSAs) and then accept applications by qualified EBS applicants for new EBS

stations, on a channel group by channel group, BTA by BTA basis, for all remaining 201 BTA-wide white space filing opportunities. After reviewing comments of other parties, NEBSA still generally believes that its approach best serves the public interest, but it also believes that certain suggestions of other commenting parties deserve consideration by the Commission.

### **I. EBS LICENSING IN THE GULF OF MEXICO**

Not surprisingly, only the American Petroleum Institute (API), along with Broadpoint, Inc., a provider of communications services to the oil and gas industries, support licensing of EBS spectrum in the Gulf of Mexico. However, neither is really able to articulate specifically how EBS channels would be used in the Gulf consistent with the authorized purposes of the service, or indeed to serve any other actual need (except perhaps for unspecified “backhaul” of communications traffic, which hardly seems an appropriate use for spectrum whose value now largely lies in being used in cellular configurations for wireless broadband systems). Also, neither API nor Broadpoint are able to show that BRS spectrum already made available in the Gulf, and soon to be licensed there, along with all other spectrum available to the industry (such as OFS microwave spectrum, which seems more appropriate for backhaul links), will not be sufficient to satisfy actual needs.

Ominously, API and Broadpoint propose that the FCC revisit the issue of eligibility for licensing of EBS spectrum, urging that EBS spectrum in the Gulf should be licensed to commercial entities. The only justification for this position, and thus for opening up again the EBS eligibility “can of worms” that was exhaustively and bitterly debated and then closed just a few years ago, is that there are no educational institutions

in the Gulf. Clearly, however, API and Broadpoint completely miss one of the critical realities that underlie the educational reservation of EBS -- that the provision of educational services is and should no longer be limited to the locality of an institution. Learners, including Gulf workers, need to be able to access educational opportunities wherever they may be at any given time. It is thus highly irrelevant to eligibility issues whether educational institutions are located in the Gulf. Institutions located elsewhere, including land areas adjacent to the Gulf, will be able to use EBS to provide educational services to Gulf workers if and when the need is shown.

Thus, no reason has been shown for the Commission to make a determination at this time on EBS licensing in the Gulf. It is unnecessary for the Commission now to entertain divisive and complex issues relating to EBS eligibility, interference protection, service areas and the like. In the event that the Commission determines to proceed with licensing EBS spectrum in the Gulf, however, the spectrum must absolutely be retained in the educational reserve and used for educational purposes.

## **II. WHITE SPACE LICENSING**

NEBSA has reviewed with interest the comments of other parties on the issue of white space licensing, and is gratified that there are, by and large, commonly-held views on at least several principles:

1. The public interest is served by an EBS licensing process that can be implemented quickly, facilitating early and wide deployment of wireless broadband and the resulting benefits to both educators and the public at large – see the Comments of the Catholic Television Network (CTN) at 8, Bellville Independent School District (Bellville ISD) at 15, The Source for Learning at 14, Indiana Higher Education Telecommunication

System (IHETS) at 14, and the Wireless Cable Association International, Inc. (WCA) at 3.

2. The FCC must move quickly, as a first step in any process, to determine what white space is available by resolving outstanding EBS licensing issues and updating the ULS database – See the Comments of Bellville ISD at 3, The Source for Learning at 3, and IHETS at 3.

3. Auctions are not appropriate for resolving EBS licensing matters and the use of auctions should be avoided and/or minimized to the degree possible – See the Comments of CTN at 3, Bellville ISD at 17, Myers Lazrus at 7, Hispanic Information and Telecommunications Network, Inc. (HITN) at 5, and American Association of School Administrators, *et al.* (AASA) at 10.

The comments diverge considerably, however, on how these principles should be pursued. Indeed, other than opposition to the Commission using a traditional application and spectrum auction approach to EBS white space licensing, as noted above, the only other approach put forward by more than a single commenter involves the initial step of service area expansion (either automatically or by application) for existing EBS licenses, which was supported by the Comments of Bellville ISD, Adams Telecom *et al.* (Adams), the Source for Learning, IHETS, HITN, Bridge the Divide Foundation *et al.* (Bridge), and of course NEBSA.

Other white space licensing options suggested by the comments include assignment by a frequency coordinator (Myers Lazrus), private auctions (HITN), single round-sealed bid auctions (Bridge), eligibility restrictions based on the number of students served (CTN), and non-competitive negotiation procedures (AASA).

After reviewing these thoughtful and creative submissions, many of the ideas of which were considered by NEBSA in its own study and deliberations within the EBS community, NEBSA continues to believe that, when measured against the goals NEBSA articulated for this process, the best process for the licensing of white space is the one NEBSA proposed.

Those goals, of course, are having white space efficiently and quickly licensed so as to facilitate the deployment of broadband services, having new white space opportunities clearly identified and made available to all eligible prospective EBS licensees on a non-preferential basis, having such new white space opportunities composed of contiguous and viable geographic areas, avoiding application process waste and abuse, avoiding auctions to the greatest degree possible, and allowing some GSA expansion by existing licensees into contiguous areas.

More specifically to other proposals, NEBSA is unclear about how a frequency coordinator could effectively and lawfully make decisions as to who can obtain an EBS license. In services where the Commission employs such coordinators, the nature of the non-exclusive use of spectrum (typically for microwave paths and other auxiliary purposes) is such that multiple licensees can hold licenses in a given area on a given channel, and the job of the coordinator is to make an engineering determination as to whether a given proposed new path will interfere with an existing licensed path. Licensing is essentially otherwise first-come, first served. Within that context, the coordinator is not put in a position of deciding which among competing applicants deserves a license. This is not a role that a frequency coordinator can play, given that the

Commission cannot delegate its license granting functions to a private person, as well as the statutory requirements relating to auctioning competing EBS applications.

The concept of private auctions is proposed, but never really defined. NEBSA therefore has to speculate about what the concept entails. But while NEBSA does indeed believe that competing applicants should have an opportunity to resolve their mutually exclusive applications prior to conclusive FCC intervention in the form of an auction, NEBSA does not believe that any private interactions can be made compulsory – that is, the Commission cannot and should not lawfully force applicants into a private resolution process.

Proposals carefully delineating eligibility for any given EBS license so as to result in only one possible applicant for any license, and thereby avoiding mutual exclusivity, are intriguing, given NEBSA's strong reluctance to see EBS licensing decisions being made by auction. However, it may be difficult to obtain consensus on the appropriate eligibility factor(s) to apply. NEBSA previously pointed out, for example, that the comparative criteria that formerly applied to ITFS (such as accredited status and local presence) do not necessarily result in the best licensee in today's environment, and NEBSA similarly does not understand why an entity or group of entities with the largest number of students (as opposed to, for example, the biggest telecommunications budget, or largest technical staff, or the greatest amount of proposed system capacity devoted to educational applications, or most prior experience actually activating and using FCC licensed facilities) is necessarily the best new EBS licensee in all cases. NEBSA also has doubts that the approach may not comport with the legal requirements of Section 309(j) of the Act, which applies to licensing of EBS spectrum where more than one

applicant applies for a given license. Doing an initial screening of interested applicants to find the biggest one, and then limiting eligibility to that one, seems in essence to be applying a comparative evaluation among such interested parties.

Finally, while NEBSA and all other educators would like to think that well-intentioned educational and nonprofit entities could negotiate to form single voluntary consortia in any given area for any given license, and therefore avoid multiple applications followed by selection by auction, and indeed NEBSA puts strong hope in such a negotiation process in its own plan (the settlement period following FCC receipt of initial applications), the Commission cannot realistically count on private negotiations to resolve all EBS licensing cases.

NEBSA therefore once again proposes that the Commission first maximize existing licensees' Geographic Service Areas (GSAs) on any given channel throughout BTAs which currently have licensed stations on that channel. The FCC should then invite applications for the remaining 201 BTA-wide white space licenses identified by NEBSA, with some reasonable limit on the number of applications that can be filed by any entity in any given BTA. In the event there are multiple applications for any given license, following an opportunity for settlement, the Commission inevitably would go to auction.

While on the whole NEBSA thus continues to support the process it articulated in its comments, it also believes that two points raised by other comments deserve serious consideration, as they may improve or enhance NEBSA's original proposal, or help reconcile somewhat different approaches and move closer to consensus.

Specifically:

(1) NEBSA proposed that the expanded coverage areas of maximized stations' GSAs should be incorporated into the license and call sign of the original station, rather than under a newly issued license and call sign. Other parties proposed that licensees have the choice of including the expanded GSA under the existing call sign, or seek a new license and call sign by filing a Form 601 application. See Comments of Bellville ISD at 9, the Source for Learning at 9, and IHETS at 9. Upon further consideration, NEBSA agrees with giving EBS licensees a choice of licensing maximized areas under an old or new license.

(2) Following the GSA maximization process and filing of applications for the remaining BTA-wide licenses, NEBSA proposed that there would be a 60 day period following public notice of acceptance of applications for settlement of mutual exclusivities. The same three commenting parties noted above proposed a similar process, but proposed a 90 day period for settlements. See Comments of Bellville ISD at 10, the Source for Learning at 10, and IHETS at 10. While NEBSA seeks to move the licensing process along as quickly as reasonably possible, it understands that educators may need more time to consider, negotiate and obtain approval for settlements, and it would support a 90 day settlement period.

(3) NEBSA proposed a three year deadline for demonstrating substantial service in newly licensed areas. Again, only three commenting parties discussed the issue, but they each suggested that expanded areas of existing licensed stations should be given five years from grant to demonstrate substantial service in the expanded portion of the GSA, and, because the substantial service requirement for new stations customarily under the rules relates to a showing to support license renewal, the substantial service showing in

the cases of newly granted EBS licenses should be made at license renewal, or 10 years from the original grant of the license. See Comments of Bellville ISD at 20, the Source for Learning at 19, and IHETS at 20. Upon reflection, NEBSA believes that the five-year/10-year approach is a better one – it is consistent with the FCC's basic approach to substantial service in other wireless services, and also reflects more realistic time frames, particularly for most of the areas outside of metropolitan areas that would be newly licensed.

There is one more point, articulated by several of the commenting parties, to which NEBSA must express strong objection – the notion of opening again the issue of eligibility for applying for EBS spectrum, so as to permit commercial entities to be licensed in one circumstance or another. See, for example, the Comments of Adams Telecom, Inc. *et al.* at 6, Broadpoint at 7, and API at 3. The EBS eligibility issue is simply beyond the scope of this proceeding, and re-opening it here, or anywhere else, would do little more than divert attention and resources from solving the very complex problem that is the focus of this proceeding and re-igniting an acrimonious and far flung debate over the fate of EBS, the only spectrum block reserved to educators for education. This would be an entirely unnecessary diversion, given that the Secondary Markets rules make excess capacity on EBS stations readily available to commercial entities who can use it. It is not necessary for any commercial entities to hold EBS licenses themselves. It is necessary for the Commission to put EBS spectrum into educators' hands, and then let Secondary Markets allocate that spectrum to its greatest and best uses.

## CONCLUSION

NEBSA continues to urge the FCC to defer a decision on the licensing of EBS channels in the Gulf of Mexico. NEBSA also continues to support an EBS white space licensing regime that would combine a GSA maximization process with an open application process for defined, BTA-wide new licenses, followed by a settlement opportunity and, if necessary, a simple auction process. NEBSA believes that certain elements of other commenting parties deserve careful consideration in the development of those processes. Finally, NEBSA categorically rejects any notion that the Commission should re-open the issue of eligibility of commercial entities for EBS licenses.

Respectfully submitted,

NATIONAL EBS ASSOCIATION

By: /s/ Todd D. Gray  
Its Counsel

Dow Lohnes PLLC  
1200 New Hampshire Ave., N.W.  
Suite 800  
Washington, DC 20036-6802  
(202) 776-2571  
[tgray@dowlohn.com](mailto:tgray@dowlohn.com)

October 22, 2008