

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 Fixed) RM-10586
and Mobile Broadband Access, Educational and Other)
Advanced Services in the 2150-2162 and 2500-2690)
MHz Bands)
)

**PETITION FOR RECONSIDERATION
OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.**

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EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. (“WCA”) urges the Commission to reconsider the *Fourth Memorandum Opinion and Order* (the “*Fourth MO&O*”) in the above-captioned proceeding. The *Fourth MO&O* raises two serious concerns that must be addressed on reconsideration if the Commission’s objectives for the 2.5 GHz band are to be fully realized.

First, the Commission should reconsider factually incorrect statements in Paragraphs 136 and 137 of the *Fourth MO&O* to the effect that the Commission’s policies applicable to Educational Broadband Service (“EBS”) leases executed prior to January 10, 2005 barred EBS licensees from entering into spectrum leasing arrangements that extend more than 15 years from the date of execution of the underlying agreement. In fact, the Commission *never* required that the maximum permissible term of EBS spectrum leasing arrangements be measured from the date of execution of the agreement. To the contrary, it routinely approved spectrum lease agreements under which the maximum lease term was measured from the occurrence of an event following execution. Further, if the Commission intended to alter its long-standing policy, the Commission has violated the Administrative Procedure Act by adopting a new rule without notice and comment and by engaging in retroactive rulemaking. For the foregoing reasons, the Commission should withdraw the incorrect statements in Paragraphs 136 and 137 and confirm that the *Fourth MO&O* did not purport to alter the EBS maximum lease term policy that had been in place prior to January 10, 2005. Indeed, to avoid irreparable harm to parties who entered into agreements that call for the spectrum leasing to extend more than 15 years from the date of execution, WCA is today submitting to the Commission a request for stay.

Second, the Commission should confirm that Broadband Radio Service (“BRS”) channel 1 and 2 licensees may operate simultaneously on their current assignments in the 2.1 GHz band and their post-transition locations at the 2596-2502 MHz (BRS channel 1) and 2618-2624 MHz (BRS channel 2) until their migration of customers to the post-transition locations is fully completed. The requested clarification regarding BRS channel 1 and 2 operations would be consistent with the determination in the *Fourth MO&O* to permit simultaneous operation on the 2.1 GHz band and the pre-transition spectrum available to BRS channel 1 and 2 licenses, and will avoid forcing consumers of BRS channel 1 and 2 services to face severe service disruptions.

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PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. (“WCA”), by its attorneys and pursuant to Section 1.429 of the Commission’s Rules, hereby petitions the Commission for reconsideration of the *Fourth Memorandum Opinion and Order* (the “*Fourth MO&O*”) in the above-captioned proceeding.¹ While WCA generally applauds the Commission for the rule changes adopted in the *Fourth MO&O*, that decision raises two serious concerns that must be addressed on reconsideration if the Commission’s objectives for the 2.5 GHz band are to be fully realized.

First, the Commission should reconsider factually incorrect statements in Paragraphs 136 and 137 of the *Fourth MO&O* to the effect that the Commission’s policies applicable to Educational Broadband Service (“EBS”)² leases executed prior to January 10, 2005 barred

¹ *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*”].

² Prior to January 10, 2005, EBS was referred to as the Instructional Television Fixed Service (“ITFS”). 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*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) [“*BRS/EBS R&O*”](this

EBS licensees from entering into spectrum leasing arrangements that extend more than 15 years from the date of execution of the underlying agreement. In fact, the Commission *never* required that the maximum permissible term of EBS spectrum leasing arrangements be measured from the date of execution of the agreement. To the contrary, it routinely approved spectrum lease agreements under which the maximum lease term was measured from the occurrence of an event following execution. Thus, the Commission should withdraw the incorrect statements in Paragraphs 136 and 137 and confirm that the *Fourth MO&O* did not purport to alter the EBS maximum lease term policy that had been in place prior to January 10, 2005. Indeed, to avoid irreparable harm to parties who entered into agreements that call for the spectrum leasing to extend more than 15 years from the date of execution, WCA is today submitting to the Commission a request for stay.

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Order became effective January 10, 2005). WCA will refer to the service as “EBS” throughout this pleading, even when referring to the pre-January 10, 2005 time frame.

I. THE COMMISSION MUST WITHDRAW ITS INACCURATE CHARACTERIZATION OF THE PRE-JANUARY 10, 2005 POLICY REGARDING THE MAXIMUM TERM OF EBS LEASING ARRANGEMENTS.

In Paragraphs 136 and 137 of the *Fourth MO&O*, the Commission states that EBS spectrum leases executed prior to January 10, 2005 are limited to a term of 15 years *from the date of execution*.³ While it is certainly true that the Commission prior to January 10, 2005 limited the term of any EBS spectrum leasing arrangement to 15 years, the Commission has consistently provided contracting parties with the flexibility to commence the spectrum leasing arrangement, and thus the running of the maximum permissible term, on a date other than the execution of the contract. Thus, the statements in Paragraphs 136 and 137 are not correct, and on reconsideration should be withdrawn.

These Commission comments regarding the maximum permissible EBS spectrum lease term came in the context of addressing petitions for reconsideration of *the Third Memorandum Opinion and Order* filed by Clarendon Foundation (“Clarendon”) and by Hispanic Information and Telecommunications Network (“HITN”).⁴ Clarendon had sought confirmation that, although EBS leases entered into between January 10, 2005 and July 18, 2006 were not subject to any maximum lease term under the *Secondary Markets* policies that governed during that period, a lease entered into prior to January 10, 2005 remained subject to the 15 year maximum lease term in effect as of that date and thus could not be renewed by the lessee in perpetuity even if the agreement included a provision affording the lessee a right to renew for additional periods beyond 15 years if the Commission ever altered its rules to

³ See *Fourth MO&O* at ¶¶ 136-37.

⁴ Petition of Hispanic Information and Telecommunications Network for Reconsideration, WT Docket No. 03-66 (filed July 19, 2006); Petition of Clarendon Foundation, WT Docket No. 03-66 (filed July 20, 2006).

permit longer spectrum leases.⁵ Clarendon did not suggest that the 15 year maximum spectrum lease term commenced upon execution of the underlying agreement, nor did it suggest that the Commission modify its policies regarding the commencement of the running of maximum lease terms – it merely sought confirmation that the policies in effect prior to January 10, 2005 continued to govern pre-January 10, 2005 EBS spectrum leases.

The *Fourth MO&O* granted in part the relief requested by Clarendon, confirming that when the Commission in the initial *Report and Order* in this proceeding grandfathered pre-January 10, 2005 EBS leases upon the adoption of new *Secondary Markets*-based EBS lease requirements, it intended to continue subjecting those grandfathered leases to the 15 year maximum lease term that had applied to such leases under the former regulatory regime.⁶ To be clear — WCA is not objecting to application of the Commission’s pre-January 10, 2005 EBS leasing policies to these grandfathered leases. What WCA does object to is that in the course of its discussion of the Clarendon filing, the Commission makes the inaccurate observation in *dicta* that “EBS leases executed before January 10, 2005 are limited to a term of 15 years *from the date of execution*.”⁷ Because Clarendon had merely sought clarification that the pre-January 10, 2005 policy would continue to apply to the leases in issue, and did not seek any change in that policy, grant of the relief requested by WCA fully resolves the concerns raised by Clarendon. In fact, Clarendon itself expressed concern regarding this aspect of the Commission’s decision:

all of the leases that the Clarendon Foundation entered into with wireless operators prior to the grant of an [EBS] license provided that the start date for the lease began when the FCC granted the application. . . . The length of the lease is a critical

⁵ See *Fourth MO&O* at ¶ 130; Clarendon Petition at 1-8.

⁶ See *Fourth MO&O* at ¶ 136.

⁷ *Id.* (emphasis added).

factor in the viability of the wireless business operation, without which there may not be adequate incentive to fund the educational component of the service.⁸

HITN's petition sought very different, and far more draconian, relief than that sought by Clarendon -- HITN urged the Commission to void any agreement that allowed the lessee of EBS spectrum to provide one-way video services only and that provided for the spectrum lease to commence upon the occurrence of an event solely within the control of the lessee.⁹ That request drew a firestorm of protest, and in the *Fourth MO&O* the Commission agreed with WCA and others that "the Commission should not become involved in the interpretation of private contractual agreements,"¹⁰ concluding that the "[t]he interpretation of private contractual agreements is *best left to the individual state courts.*"¹¹ Indeed, the Commission recognized that:

*[W]e do not have the authority to void contracts executed by two private parties under the laws of individual states. . . . [E]ven 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.*¹²

Once again, WCA has no quarrel with this disposition of the HITN petition, which is clearly correct and consistent with Commission precedent. What concerns WCA, however, is that in the context of discussing the HITN petition, the Commission repeats its earlier error, asserts

⁸ Letter from Kemp R. Harshman, President, Clarendon Foundation to Marlene H. Dortch, Secretary, FCC at 2 (May 2, 2008).

⁹ HITN Petition at 6-7 & n.12.

¹⁰ *Fourth MO&O* at ¶¶ 133, 136.

¹¹ *Id.* at ¶ 136 (emphasis added).

¹² *Id.* at ¶ 137 (emphasis added).

that its policy prior to January 10, 2005 had been to limit EBS leases “to 15 years from the date they are executed between the parties,” and thus wrongly opines that “video-only leases executed more than 15 years ago have expired.”¹³

The statements in Paragraphs 136 and 137 to the effect that the 15 year maximum lease term must run from the execution of the agreement, regardless of whether that is the date on which spectrum leasing commences, are at odds with more than two decades of Commission precedent. They do not accurately reflect the Commission’s policy at any time prior to January 10, 2005, and any attempt to alter the pre-January 10, 2005 policy on a *post hoc* basis would be both unwise policy and unlawful.

The leasing of EBS spectrum has been permitted since 1983, when the Commission determined that leasing would produce “substantial benefits to the public” because “new revenue sources are necessary in order to give [EBS] every chance to grow and succeed.”¹⁴ Historically, the Commission has afforded EBS licensees substantial flexibility to craft leasing arrangements that met their particular needs.¹⁵ However, soon after EBS spectrum leasing was first authorized, the Commission recognized that certain core requirements were necessary to assure that the Commission’s objectives for EBS were met. In addition to

¹³ *Id.* at ¶ 137.

¹⁴ *Amendment of Parts 2, 21, 74 and 91 of the Commission’s Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Report and Order*, 94 FCC 2d 1203 (1983).

¹⁵ *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, 89 (1985) [“1985 Leasing Order”]; *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, Report and Order*, 13 FCC Rcd 19112, 19180 (1998) [“Two-Way Order”] (holding that the Commission has “a limited role which allows for maximum possible flexibility of the parties in establishing excess capacity lease provisions . . .”).

requirements that leases provide EBS licensees with ample opportunities to program their facilities, one of the key safeguards adopted was the imposition of a maximum spectrum lease term.¹⁶

Initially, the Commission limited the maximum length of EBS leases to the remaining EBS license term (*i.e.*, if a license only had three years remaining on its term, the lease could not extend beyond three years).¹⁷ In the years between the first authorization of EBS leasing and January 10, 2005, the Commission has been called upon to revisit the maximum lease term requirement on several occasions. In 1995, the Commission recognized that commercial operators and their investors required assured access to spectrum for longer periods of time than were possible under the 1985 policy, and revised its rules to permit an EBS lease (including any renewals at the option of the lessee) to extend a full 10years, subject to renewal of the EBS license.¹⁸ Three years later, acknowledging that longer lease terms provided EBS licensees with greater certainty and that even the new 10year maximum lease term was insufficient to attract the flow of capital necessary to fully develop the 2.5 GHz band, the Commission extended the maximum EBS lease term to 15 years, again subject to renewal of the EBS license.¹⁹ *In none of the orders adopting these requirements, nor in any Commission order discussing these requirements, did the Commission ever*

¹⁶ See *1985 Leasing Order*, 101 FCC 2d at 90-91.

¹⁷ See, *e.g.*, *id.* at 91 (“since a license to operate authorized facilities runs for a period of ten years, any lease arrangements involving those facilities cannot exceed that period”).

¹⁸ *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 2907, 2913-14 (1995) [“*EBS Filing Window Order*”].

¹⁹ *Two-Way Order*, 13 FCC Rcd at 19183-84.

*suggest that the maximum lease term must be measured from the execution of the lease where usage of the spectrum did not commence until some later date.*²⁰

Indeed, just the opposite is true. When confronted by the issue, the Commission consistently allowed the parties to an EBS spectrum lease agreement to provide for the commencement of the actual leasing of the spectrum well after the agreement was executed, and approved a variety of lease provisions under which the lease term extended more than 10/15 years beyond the date of execution of the agreement.²¹

Until January 10, 2005, EBS licensees were required to submit their spectrum leases to the Commission for review.²² This review requirement was imposed “in order to police established safeguards, and require the amendment of noncompliant leases.”²³ During the period this requirement was in effect, the Commission often required EBS licensees to amend noncompliant leases to eliminate provisions that were inconsistent with the Commission’s EBS leasing rules and policies, including provisions relating to the maximum lease term.²⁴ Those active in EBS leasing at the time carefully monitored the Commission’s review of

²⁰ Thus, the *Fourth MO&O* is plainly wrong when it asserts that “[t]he 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.” *Fourth MO&O* at ¶ 136. In fact, a review of those documents shows that the Commission never discussed when the running of the 15 year maximum lease term commences.

²¹ See *infra* note 25.

²² See *BRS/EBS R&O*, 19 FCC Rcd at 14232-34 (eliminating the EBS lease filing and review process, effective January 10, 2005, in favor of the general Secondary Markets leasing rules and policies).

²³ *Two-Way Order*, 13 FCC Rcd at 19180.

²⁴ See *EBS Filing Window Order*, 10 FCC Rcd at 2914 (“In previous cases, the Commission granted ITFS licenses subject to the revision of lease provisions that extended beyond the 10-year license term because such provisions were viewed as inconsistent with the terms of the license.”)(citing *Rock Port R-II Schools*, 9 FCC Rcd 7342, 7343 (1994)).

lease provisions, and provisions approved by the Commission were routinely included in subsequent agreements.

*Prior to January 10, 2005, the Commission routinely approved EBS leases that extended more than the 10 or 15 year maximum, as applicable at the time, from the date of execution.*²⁵ In each case, the approved agreement provided for the commencement of

²⁵ See, e.g., *Adams Central Junior-Senior High School*, 8 FCC Rcd 3604, ¶ 7 (1993) (Commission finds that a lease “conforms in all respects with the Commission’s requirements” when the lease was executed on February 18, 1992 but the term was calculated based on the lessee’s initiation of service over the channels covered by the lease); *Botetourt County School Board*, 8 FCC Rcd 6265, at ¶ 13 (1993) (Commission finds that a lease “conforms in all respects with Commission requirements” when the lease was executed on April 21, 1992 but the term was calculated based on the issuance to the lessor of a new license); *Comanche Public School*, 10 FCC Rcd. 3316 (1995) (Commission finds that a lease “conform[s] in all respects with our requirements” when that lease provides that “the initial term of this agreement shall commence upon the date commercial broadcasting on the channels commences. . . .”); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Board of Trustees, Community College District 535, Oakton Community College (April 2, 1993) (finding “in compliance with the Commission’s rules and policies” a lease agreement that provided for a 10-year term commencing upon “the date Lessor is issued a license by the FCC”); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Boardman Local School District, Northeastern Educational Television of Ohio, Inc. and Youngstown State University (May 27, 1994) (requiring a lease to be amended to address control over transmission site selection, but approving a 10-year term commencing upon “the date the FCC grants Lessor’s application”); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Columbia School District (Mar. 26, 2002) (finding that a lease agreement “has been reviewed and found to be in compliance with the Commission’s requirements” when that lease provided that the initial 15-year maximum permissible term “shall commence on the date on which the facilities contemplated by . . . FCC authorization for the channels . . . are constructed and the FCC has authorized [the licensee] to commence broadcasting on the channels”); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Napoleon Community Schools (Mar. 26, 2002) (finding that a lease agreement “has been reviewed and found to be in compliance with the Commission’s requirements” when that lease provided that the initial 15-year maximum permissible term “shall commence on the date on which the facilities contemplated by . . . FCC authorization for the channels . . . are constructed and the FCC has authorized [the licensee] to commence broadcasting on the channels”); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau to Vandercook Lake Public Schools (Mar. 26, 2002) (finding that a lease agreement “has been reviewed and found to be in compliance with the Commission’s requirements” when that

leasing to begin upon some future event (*e.g.*, the grant of an initial or modified license, construction of facilities, commencement of commercial operations), and the lease was deemed satisfactory because the term did not extend beyond the 10/15 year maximum permissible term measured from that event. Indeed, as noted above, WCA is unaware of any case in which the Commission required an EBS licensee to amend a spectrum lease to limit the duration to the then-applicable maximum term measured from the date of execution of the underlying agreement.

The Commission's track record in this regard is hardly surprising, given its historic willingness to afford EBS licensees and commercial operators flexibility to craft terms and conditions that met their particular needs. Parties had very good reasons for deferring the date on which spectrum leasing commenced until well after execution of the agreement — depending upon the particular leasing arrangement they had negotiated, both the EBS lessor and the commercial operator could benefit from delaying the commencement of the leasing (and thus the running of the maximum permissible lease term) until the lessee was actually in a position to make productive use of the spectrum. Given the Commission's pre-January 10, 2005 rules and policies (which featured site-based licensing and the use of a comparative process to resolve mutual exclusivity) and the realities of the commercial marketplace, there was almost invariably a substantial time lag between execution of an agreement and the commencement of EBS spectrum leasing. The Commission's flexible policies allowed the parties to pre-January 10, 2005 leases to address the substantial delays between the execution of the lease and the commencement of commercial service that were the norm, and to

lease provided that the initial 15-year maximum permissible term “shall commence on the date on which the facilities contemplated by . . . FCC authorization for the channels . . . are constructed and the FCC has authorized [the licensee] to commence broadcasting on the channels”).

implement a variety of mechanisms to accommodate those delays in crafting their relationships.

For example, in many cases during the 1980s and 1990s, leases were being entered into by educational entities that were eligible for EBS, but which were not yet licensees. In other words, before spectrum leasing could begin, the lessor would have to apply for and secure a new license. That was never a rapid process. Initially, applications for new EBS licenses were subjected to an “A/B cut-off” processing system that proved so time-consuming and cumbersome that the Commission was compelled on February 25, 1993 to institute a freeze on new EBS applications and to propose the adoption of a more streamlined window filing system.²⁶ While two years later the Commission adopted such a system to “expedite the inauguration of new and improved ITFS service and prompt the continued development of the wireless cable service,”²⁷ there was only one filing window for applications for new EBS licenses.²⁸ Illustrative of the types of delays that EBS licensees and lessees experience, some of the applications filed in that 1995 window and prior were not granted until 2005 and after!²⁹ Further compounding processing delays, where an application

²⁶ *Amendment of Part 74 of the Commission’s Rules With Regard to the Instructional Television Fixed Service*, Notice of Proposed Rulemaking, 8 FCC Rcd 1275 (1993). At the time of the freeze, there were more than 800 pending applications awaiting staff review. See *EBS Filing Window Order*, 10 FCC Rcd at 2908.

²⁷ *EBS Filing Window Order*, 10 FCC Rcd at 2908.

²⁸ 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*, Second Memorandum Opinion and Order, 18 FCC Rcd 16848, n.31 (2003)(citing 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)).

²⁹ See *Applications of Shekinah Networks*, File No. 19951017AM (filed Oct. 17, 1995, granted Jul. 12, 2006); *NorthEast TV Cooperative*, File No. 9651569 (filed Oct. 19, 1995, granted Dec. 12, 2005); *Castleton State College*, File No. 9201130C (filed Jan. 13, 1992,

for a new EBS facility was subject to a mutually-exclusive application, it often took many years before they could determine the prevailing licensee under its comparative process.³⁰ Thus, it was not unreasonable for parties to agree that the spectrum lease would not commence until grant of the underlying license and that the maximum lease term would run from that date.

Educators that had already secured EBS licensees and their commercial partners were not immune to similar problems. Although they already held initial licenses, those licenses were issued under the site-based licensing system in place until January 10, 2005 and only authorized operations at a specific location, with specific equipment, and with specific technical parameters. It was rare indeed that an EBS licensee held an authorization for facilities that were useful to the commercial operator. Rather, as the Commission frequently recognized at the time, it was usually necessary for the EBS licensee to submit an application for modification of its license to “collocate” its facilities at the location and with the same technical parameters as the other stations that would be part of the commercial system. Although the rules and policies governing such modification applications differed slightly from those governing new applications and occasionally allowed more rapid processing, parties entering into such leases knew that the required modification applications could take years to be processed and often negotiated the commencement of the spectrum lease to

granted April 13, 2005); Lucas County Board of Education, File No. 19910502DC (filed May 2, 1991, granted Dec. 15, 2006).

³⁰ To cite an extreme example, in 1991, Lucas County Board of Education and North American Catholic Educational Programming Foundation, Inc. each filed new station applications for channels C1-4 in Toledo, Ohio (File Nos. 19910502DC and 19910722DI). After staff review these applications were deemed to be mutually exclusive. On June 30, 2000, the two applicants filed a Settlement Agreement thereby resolving the mutual exclusivity of the applications. It was not until December 15, 2006 that the underlying applications for the new stations were granted, a period over 15 years!

reflect this reality. Thus, it was not unreasonable for even an existing EBS licensee to agree that the leasing of its spectrum would not commence until the Commission granted its application for authority to construct and operate modified facilities.

But even the securing of an EBS license authorizing operations at the right site, with the right technical parameters, did not necessarily provide the commercial operator with the ability to launch a viable system utilizing that license. As the Commission frequently acknowledged, providing the wireless cable services that were the focus of industry efforts at the time was “dependent upon the accumulation of a significant number of channels in a market (critical mass).”³¹ Thus, commercial operations were not viable until the operator had secured the ability to utilize the critical mass of channels, with all of those channels authorized to operate from the right site with the right technical parameters. Often, there were substantial delays between the time the Commission authorized the first channel group to operate from the right site with the right technical parameters and the time a critical mass of similarly authorized channels was achieved. As such, it was not unreasonable for parties to look to the construction of facilities or the commencement of commercial services as the commencement of the spectrum lease and the running of the maximum permissible lease term.

It is in this environment that the Commission’s maximum lease term policies were developed and evolved. WCA recognizes that, with the benefit of 20/20 hindsight, some of the one-way video only EBS lease provisions that concerned HITN could prove problematic, notwithstanding that those provisions appeared entirely reasonable when agreed to by the parties and approved by the Commission. However, as the Commission recognized in the *Fourth M&O*, EBS licensees that are subject to one-way only video lease agreements that

³¹ *EBS Filing Window Order*, 10 FCC Rcd at 2908.

have not yet expired by their terms are free to “pursue contractual remedies through the State courts or through an alternative dispute resolution process.”³² Indeed, as established by the state court decision in *Nextwave Broadband, Inc. v. Saint Rose Church Schools*³³ cited in the *Fourth MO&O*, the courts are ready, willing and able to provide relief to EBS licensees in egregious situations.³⁴ The *Fourth MO&O* has it right – the resolution of these matters “is best left to the individual state courts.”³⁵

And that, quite simply is why the Commission should not even consider retroactively modifying its policy regarding pre-January 10, 2005 EBS leases to address HITN’s concerns. Leaving aside for the moment that any attempt by the Commission to revisit its approval of leases that extend more than 15 years beyond their execution date would be unlawful, attempting to address HITN’s concern regarding the potential for spectrum warehousing through retroactive re-interpretation of the Commission’s pre-January 10, 2005 maximum lease term requirement would prove to be unsound communications policy.³⁶

The simple fact is that there are numerous EBS lease agreements in existence today that were executed prior to January 10, 2005, that run for the maximum permissible term as calculated from a date other than the date of execution consistent with Commission precedent, and that do not raise any of the concerns that were presented by HITN. Yet, were the Commission to enforce the policy set out in Paragraphs 136 and 137, EBS licensees and

³² *Fourth MO&O* at ¶ 137.

³³ *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).

³⁴ See *Fourth MO&O* at ¶ 130 n.391.

³⁵ *Id.* at ¶ 136.

³⁶ While the *Fourth MO&O* expresses a concern regarding “the warehousing of valuable spectrum for decades,” (*id.* at ¶ 137) the Commission’s upcoming May 1, 2011 deadline for demonstration of substantial service by EBS licensees will assure that all EBS spectrum is soon put to productive use.

their lessees would find existing leases to be terminated or to have a far shorter remaining term than they had agreed to. For example:

- Lease executed on June 29, 1992 for the use of EBS spectrum, with an EBS-eligible entity that had not yet applied for an initial license. Under the lease, which was filed with the Commission, the parties agreed to a term of 10 years (the maximum permissible at the time). The agreements specified that the spectrum leasing term was to start running upon grant of the license, which did not occur until April 15, 2005. *Again, there is no “warehousing” issue because the future event occurred and the spectrum leasing has commenced.* The parties have viewed these leases as being in full force and effect in accordance with their terms, yet under the Commission’s interpretation in Paragraphs 136 and 137 of the *Fourth MO&O*, the leases would have expired in 2000 — years before the initial license was ever granted!
- Lease executed on August 28, 1990 for the use of EBS spectrum, with an EBS-eligible entity that had not yet applied for an initial license. Under this lease, which was filed with the Commission as part of the application for the initial license, the parties agreed to a term of 10 years (the maximum permissible at the time), with a renewal option should the Commission extend the maximum permissible lease term (as it did in 1995). The agreement specified that the spectrum leasing term was to start running upon the commencement of commercial operations, which occurred in 1998 and have continued to this day. *Thus, the “warehousing” concern raised by HITN is not present here, as the future event occurred and the spectrum leasing has commenced.* Absent the statements in Paragraphs 136 and 137 of the *Fourth MO&O*, this lease would be in full force and effect in accordance with its terms, with an expiration date in 2013. However, under the *Fourth MO&O*, the agreement filed with the Commission and reviewed prior to the grant of initial license would have expired on August 28, 2005 (15 years from execution). This uncertainty has put the lessee’s current operations in jeopardy.
- Lease entered into on March 9, 1992 for the use of EBS spectrum, with an EBS-eligible entity that had not yet applied for an initial license. Under the lease, which was filed with the Commission, the parties agreed to the maximum term permissible under the FCC’s rules. The agreements specified that the spectrum leasing term was to start running upon grant of the license, which did not occur until June 30, 1995. Under the terms of the lease, it will not expire until June 30, 2010. The *Fourth MO&O*, however, would interpret the lease as having expired for Commission purposes on March 9, 2007.
- Lease entered into with an EBS-eligible entity on April 12, 1993 for the use of EBS spectrum. In the agreement, which was filed with the Commission, the parties agreed that lease commencement would be the date the construction authorization was granted, which ultimately occurred on November 8, 1996. The terms of the lease establish that it will remain effective until November 8, 2011. The *Fourth MO&O*, however, would interpret the lease as having expired for FCC purposes on April 12, 2008.

- Lease entered into with an EBS-eligible entity on August 31, 1991 for the use of EBS spectrum. Under the lease, which was filed with the FCC, the term was 10 years. The parties agreed that lease commencement would be the date the license was granted, which ultimately occurred on January 13, 1993. In 2003, the parties amended the lease to add two additional 5 year terms. Under the *Fourth MO&O*, however, there would have been nothing to amend — the lease would have expired in 2001.

The Commission's erroneous statements have caused substantial consternation within the 2.5 GHz community, as leases that by their terms are valid and in full force and effect suddenly appear to be in violation of Commission policy (notwithstanding that they are consistent with Commission precedent) or, even worse, to have expired without any prior notice to the operator that it no longer had rights to the spectrum upon which it was basing its business — either to deploy or to continue providing service. WCA suspects that the statements in Paragraphs 136 and 137 were inadvertent, and that the Commission did not intend to alter the policy that governed pre-January 10, 2005 leases. If WCA is wrong, and those statements are not withdrawn on reconsideration, they are bound to result in extensive litigation between lessors and lessees, as state courts will be called upon to determine the relative rights and obligations of the parties to spectrum leases that by their terms extend longer than 15 years from execution. A myriad of issues arise from premature termination of a leasing arrangement, all of which will have to be addressed in state court on a case-by-case basis based on state contract law and the particular terms of each lease. To identify a few:

- Does premature termination of a leasing arrangement entitle the commercial operator to a refund of consideration given in contemplation of a longer lease term (such as the large initial payments or equipment that is often provided at the commencement of an agreement in exchange for lower periodic payments)?
- Do “reformation” or other similar clauses in a lease, or overriding concepts of equity under state law, obligate the parties to enter into a new lease to provide for spectrum leasing during the remaining period when the parties anticipated a lease to be in effect?
- Is the lessor liable for consequential damages for failing to honor its contractual commitment to provide the spectrum for the entire term agreed to by the parties?

- How will the lessee be provided options, exclusive negotiating rights, rights of first refusal, rights of first offer, or similar rights that were exercisable under the lease within a period related to the date of lease expiration (*e.g.*, six months before lease expiration or one year following lease termination) when they parties expected the lease to run for additional time, but now are advised that the lease was of excessive duration pursuant to the Commission's new interpretation of its pre-January 10, 2005 policy?

More is at stake here than just the opening of thorny state law questions that in many cases may be determined in a manner adverse to the EBS licensee that entered into a lease that extends more than 15 years from execution. At a time when the Commission is seeking to promote the development of the 2.5 GHz band as an effective competitive alternative to other broadband alternatives, premature termination of spectrum leasing arrangements will have a material adverse impact on the deployment of 2.5 GHz band broadband services. Many operators have deployed systems or are planning deployments based on leases that, by the plain terms of the agreements, were valid and have years remaining. These actual and planned deployments were the result of lease terms that provided the operators with assurances that there would be access to sufficient spectrum for a sufficiently long period of time in order to realize a return on investment. The result of Paragraphs 136 and 137, if permitted to stand, is to substantially reduce the remaining term on innumerable existing leases. As operators find that they do not have the spectrum they thought, for as long as they thought, they will invariably re-assess deployment plans accordingly.

And, EBS licensees will be harmed, as they find that they will not be receiving the guaranteed flow of revenues they had expected. In the *Two-Way Order*, the Commission acknowledged that one of the benefits of increasing the maximum permissible EBS lease term is to provide EBS licensees with additional certainty regarding long term revenue

flows.³⁷ Application of the Commission's new policy, however, will work just the opposite result – EBS licensees will find years taken off the length of their spectrum leases.

As a legal matter, any attempt by the Commission to now limit the maximum term of pre-January 10, 2005 leases to 15 years from execution violates the Administrative Procedure Act (“APA”). Specifically, if the Commission intended to alter its long-standing policy, the Commission has violated the APA by adopting a new rule without notice and comment³⁸ and by engaging in retroactive rulemaking.³⁹

Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rule making that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved” and to give interested parties an opportunity to submit comments on the proposal. The Commission has provided no notice whatsoever that it intended to adopt a new rule in this proceeding governing the calculation of pre-January 10, 2005 EBS lease terms. If intentional, the Commission's assertion that lease terms must be measured from their execution date constitutes a substantive change that directly conflicts with prior Commission interpretations of its rules.⁴⁰ As noted by the Third Circuit, “if an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA.”⁴¹

³⁷ *Two-Way Order*, 13 FCC Rcd at 19183-84.

³⁸ *See* 47 U.S.C. § 553(b).

³⁹ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988).

⁴⁰ *See Air Transport Ass'n of America, Inc. v. FAA*, 291 F.3d 49, 56 (D.C. Cir. 2002) (rulemaking is required if agency's interpretation of rule adopts a new position inconsistent with existing regulations).

⁴¹ *SBC Inc. v. FCC*, No. 03-4311, 36 CR 325 (2005) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

The Commission's actions also are legally suspect because the new ruling constitutes impermissible retroactive rulemaking that would result in "manifest injustice."⁴² Rules are retroactive if they "alter the past legal consequences of past actions" or "change what the law was in the past."⁴³ As discussed above, numerous agreements previously approved by the Commission and found to be in full compliance with all applicable regulations now would be deemed, under the new *Fourth MO&O*, to exceed the maximum license term.⁴⁴ Numerous spectrum leases that had years remaining under the terms negotiated by the parties would be deemed terminated, while others would be materially altered. Effectively terminating or shortening the leases necessary for the operation of hundreds of businesses clearly would constitute retroactive rulemaking and would result in a manifest injustice to those parties relying on the now suspect leases.

Moreover, an intentional effort to change the Commission's pre-January 10, 2005 policy regarding maximum EBS lease terms runs afoul of Section 706(2)(A) of the APA, which states that agency actions, findings, and conclusions shall be held unlawful and set aside if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in

⁴² See *Bowen*, 488 U.S. at 216-20; *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

⁴³ See *Bowen*, 488 U.S. at 219-20.

⁴⁴ It is a fundamental tenet of administrative law that an agency changing course must provide a reasoned analysis for departing from prior precedent. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed. . . ."). This analysis must be sufficient to demonstrate that the agency is aware that "prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston*, 444 F.2d at 852. Here, the Commission has failed to acknowledge that it has departed from prior practice. Thus, the decision is legally suspect and should be reconsidered.

accordance with law”⁴⁵ This requires that Commission decisions demonstrate a correlation between the facts found and the choices made.⁴⁶ Here, no such correlation exists.

Indeed, it is impossible to square the Commission’s acknowledgement that “we do not have the authority to void contracts executed by two private parties under the laws of individual states”⁴⁷ with an intentional change to the policy governing the maximum term of pre-January 10, 2005 leases. Despite recognizing the Commission’s inability to abrogate EBS contracts, the *Fourth MO&O* does just that. As discussed in the prior section, if the Commission intended that EBS leases executed before January 10, 2005 may now extend no more than 15 years from execution, the Commission has abrogated or altered hundreds of leases that had been crafted in reliance on Commission precedent. Such action is contrary to Section 706(2)(A) of the APA, and cannot be sustained.

Based on the foregoing, WCA respectfully requests that the Commission reconsider and withdraw its statements at Paragraphs 136 and 137 of the *Fourth M&O* that the maximum term of EBS leases must be measured from the date of execution. The Commission should declare on reconsideration that the maximum permissible length of a pre-January 10, 2005 EBS lease will continue to be determined consistent with past precedent, and to the extent that strict application of the terms of a lease works a grave injustice to the EBS licensee, state courts and alternative dispute resolution procedures remain available to provide relief.⁴⁸

⁴⁵ 5 U.S.C. § 706(2)(A).

⁴⁶ See *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁷ *Fourth MO&O* at ¶ 137.

⁴⁸ As recognized in the *Fourth MO&O*, state courts have been interpreting EBS leases. *Fourth MO&O* at ¶130 (citing *Nextwave Broadband, Inc. v. Saint Rose Church Schools*,

II. THE COMMISSION SHOULD CONFIRM THAT UNTIL THEIR OPERATIONS ARE FULLY MIGRATED TO THE 2.5 GHZ BAND, BRS CHANNEL 1 AND 2 LICENSEES MAY SIMULTANEOUSLY USE THEIR CURRENT 2.1 GHZ BAND SPECTRUM AND THEIR DESIGNATED 2.5 GHZ BAND SPECTRUM IN BTAs THAT HAVE TRANSITIONED TO THE NEW 2.5 GHZ BAND PLAN.

Finally, the Commission should confirm that a BRS channel 1 or 2 licensee is authorized to simultaneously use its current 2.1 GHz band spectrum and, if the Basic Trading Area (“BTA”) in which it operates has transitioned to the new 2.5 GHz band plan, its designated spectrum assignment under that new band plan until all of its subscribers have been successfully migrated to the 2.5 GHz band. Issuance of such a clarification will avoid any ambiguity that might unnecessarily delay the migration of current operations in the 2.1 GHz band to the 2.5 GHz band and postpone the inauguration of Advanced Wireless Service (“AWS”).

In the initial *Report and Order*, the Commission adopted a new band plan for the 2.5 GHz band that incorporated the designation of replacement spectrum for BRS channels 1 and 2, which the Commission had decided in ET Docket No. 00-258 would be relocated from 2150-2162 MHz band to clear that spectrum for AWS.⁴⁹ Under that new band plan, once the transition of a market area to the new 2.5 GHz band plan pursuant to Sections 27.1230 *et seq.* has been completed, BRS channel 1 is assigned 2496-2502 MHz and BRS channel 2 is assigned 2618-2624 MHz.

On reconsideration, WCA expressed concern that the *Report and Order* had not provided relocation spectrum for BRS channel 1 and 2 licensees in markets where the

Order, Superior Court of New Jersey, Mercer County, Chancery Division, Docket No. C-53-06 (June 16, 2006)).

⁴⁹ See *BRS/EBS R&O*, 19 FCC Rcd at 14177-79.

transition to the new 2.5 GHz band plan would not be completed.⁵⁰ WCA suggested that the Commission permit AWS auction winners to migrate BRS channel 1 and 2 operations to 2496-2500 MHz and 2686-2690 MHz (both of which bands were generally unused at present) in markets that had not transitioned to the new 2.5 GHz band plan, while noting that the adequacy of this amount of spectrum to accommodate relocation of existing BRS channel 1 and 2 operations would depend on a case-by-case analysis.⁵¹

The Commission agreed, stating that:

[b]ecause the relocation of BRS Channels No. 1 and 2 licensees and the transition of the 2.5 GHz band will occur on parallel but distinct timetables, we conclude here that the concerns raised by the parties about the availability of replacement spectrum for BRS Channels No. 1 and No. 2 licensees can be addressed by providing flexibility for their relocation to the 2.5 GHz band if the transition of the spectrum designated for their relocation has not yet occurred. . . . We will amend our rules to designate 2496-2500 MHz as available pre-transition spectrum for BRS Channel No. 1. . . . Accordingly, four megahertz of spectrum at 2496-2500 MHz will be available for the relocation of BRS Channel No. 1 operations while the remaining two megahertz at 2500-2502 MHz will become available after the transition is complete. . . . With respect to BRS Channel No. 2 licensees, [w]e will amend our rules to designate 2686-2690 MHz as pre-transition spectrum for BRS Channel No. 2, subject to protection of existing facilities operating on the I channels. After the transition, BRS Channel No. 2 licensees would be relocated to their designated channel at 2618-2624 MHz.⁵²

⁵⁰ See Petition of Wireless Communications Ass'n Int'l, Inc. for Partial Reconsideration, WT Docket No. 03-66, at 31-33 (filed Jan. 10, 2005).

⁵¹ See *id.*

⁵² *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, 21 FCC Rcd 5606, 5669-70 (2006) [*"BRS/EBS 3rd MO&O"*].

However, the Commission stated in footnote 358 of the *Fourth MO&O* that BRS channel 1 and 2 licensees would not be permitted to operate their 2.1 GHz channel locations and their temporary locations simultaneously.⁵³

Footnote 358 came as a surprise to the industry, since the uncontested record before the Commission had made clear that simultaneous use of both the 2.1 GHz and the 2.5 GHz channels is the only practical manner in which BRS operations can be relocated from the former to the latter without materially disrupting service to subscribers.⁵⁴ As WCA explained in seeking reconsideration, “[d]ual operation on both bands during migration is absolutely essential, as the system operator will have to replace the 2.1 GHz band equipment at each subscriber location with 2.5 GHz band, and that process will have to occur location-by-location over time.”⁵⁵ Thus, WCA urged the Commission to declare that:

BRS operators may conduct simultaneous operations in the 2.1 GHz and 2.5 GHz bands until each and every one of their subscribers have been properly relocated to the 2.5 GHz replacement spectrum per the policies and procedures adopted for BRS relocation in ET Docket No. 00-258.⁵⁶

⁵³ *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5670. n.358.

⁵⁴ *See, e.g.*, Comments of the Wireless Communications Ass’n Int’l, Inc., ET Docket No. 00-258, at 27 n.55 (filed Nov. 25, 2005); Letter from Wireless Communications Ass’n Int’l, Inc. *et al.* to Chairman Michael K. Powell, Chairman, FCC, ET Docket No. 00-258, Appendix A at 2-3 (Apr. 7, 2004); Reply Comments of Wireless Communications Ass’n Int’l, Inc. ET Docket No. 00-258, at 33 n.88 (filed March 9, 2001).

⁵⁵ Petition of the Wireless Communications Ass’n Int’l, Inc. for Partial Reconsideration, WT Docket No. 03-66 at ii (filed July 19, 2006) [“WCA Petition for Partial Reconsideration”]. The alternative would require a “flash cut” approach that could not be squared with the prior Commission determination that the process of relocating BRS channels 1 and 2 out of the 2150-2162 MHz band should “minimize disruption to incumbent [BRS] operations used to provide service to customers...” *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*, Ninth Report and Order and Order, 21 FCC Rcd 4473, 4479-80 (2006).

⁵⁶ WCA Petition for Partial Reconsideration at 22.

In the *Fourth MO&O*, the Commission agreed with WCA that “it will be impossible to make a ‘flash cut’ of all subscribers from the old frequency band to their pre-transition locations in the 2.5 GHz band and that it is therefore necessary to have simultaneous operation in order to ensure a seamless transition.”⁵⁷ The Commission thus concluded that “BRS Channels 1 and 2/2A licensees may operate simultaneously in their old channel locations in the 2150-2160/62 MHz band and their temporary, pre-transition locations at 2496-2500 MHz (BRS Channel 1) and 2686-2690 MHz (BRS Channel 2) until every subscriber is relocated to the 2.5 GHz band, at which point the licensees must cease all operations in the 2150-2160/62 MHz band.”⁵⁸ While that discussion satisfactorily addressed the problem in markets that *have not* transitioned to the new 2.5 GHz band plan, the *Fourth MO&O* did not specifically address simultaneous dual operation in those markets that *have* transitioned to the new 2.5 GHz band plan at the time migration from the 2.1 GHz band commences.

Of course the same rationale for allowing dual operations in a pre-transition market applies in a post-transition market – absent simultaneous operations at both 2.1 GHz and 2.5 GHz, a system operator would be forced to undertake a flash cut approach that the Commission has recognized is “impossible.”⁵⁹ On this issue, there is no rational basis for distinguishing between pre-transition and post-transition markets. To avoid any ambiguity, the Commission should confirm that simultaneous operation by BRS channel 1 and 2 licensees in the 2.1 GHz and 2.5 GHz band is permitted until the migration process is complete, whether or not the market at issue has transitioned to the new 2.5 GHz band plan.

⁵⁷ *Fourth MO&O* at ¶ 87.

⁵⁸ *Id.*

⁵⁹ *Id.*

* * *

WHEREFORE, for the foregoing reasons, the Commission should withdraw the statements in Paragraphs 136 and 137 of the *Fourth MO&O* that incorrectly state the Commission's policy prior to January 10, 2005 regarding the maximum EBS lease term and should clarify the rights of a BRS channel 1 and 2 licensee to engage in dual operations at 2.1 and 2.5 GHz until the migration of all of subscribers from the former to the latter has been completed.

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