

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD). +Elevation in feet (NAVD).	Communities affected
At the confluence with Mill Creek	+199	Bienville Parish (Unincorporated Areas).
Approximately 1.3 miles upstream of Ceasar Road Bienville Parish, Louisiana and Incorporated Areas, (FEMA Docket No. P-7903).	+250	

ADDRESSES

Town of Arcadia:

Maps are available for inspection at 1819 South Railroad Avenue, Arcadia, Louisiana.

Bienville Parish (Unincorporated Areas):

Maps are available for inspection at 100 Courthouse Drive, Arcadia, Louisiana.

Town of Ringgold:

Maps are available for inspection at 2135 Hall Street, Ringgold, Louisiana.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Michael Buckley,

Deputy Director, Mitigation Division, Federal Emergency Management Agency, Department of Homeland Security.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 25 and 27

[WT Docket Nos. 03-66, 03-67, 02-68, 00-230, MM Docket No. 97-217, IB Docket No. 02-364, ET Docket No. 00-258; FCC 06-46]

Facilitating the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission amends the rules governing the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) in response to petitions for reconsideration filed in the *BRS/EBS Report and Order* and comments filed in the *BRS/EBS Further Notice of Proposed Rulemaking*. Also, the Commission responds to petitions for reconsideration filed the *BIG LEO Spectrum Sharing Order* by affirming its decision to establish a plan for sharing between the fixed and mobile (except aeronautical mobile) services and Code Division Multiple Access (CDMA) Mobile-Satellite Service

(MSS) operators in the 2495-2500 MHz band. This decision will permit BRS Channel No. 1 licensees to relocate to the 2496-2502 MHz portion of the 2495-2690 MHz band. The Commission's actions in this proceeding are designed to encourage the transition of the 2495-2690 MHz band and to provide both incumbent licensees and potential new entrants in the 2495-2690 MHz band with greatly enhanced flexibility to encourage the efficient and effective use of spectrum domestically and internationally, and the growth and rapid deployment of innovative and efficient communications technologies and services.

DATES: Effective on July 19, 2006, except for 47 CFR 27.1231(d), 27.1231(f), 27.1231(g), and 27.1235-27.1239, which contain information collection modifications that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. A copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SE., Washington, DC 20554 or via the Internet at Judith B. Herman@fcc.gov.

FOR FURTHER INFORMATION CONTACT:

Nancy Zaczek at 202-418-7590.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, released on April 27, 2006. The complete text of the *Order on Reconsideration and Fifth*

Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, including attachments and related Commission documents is available for public inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of the *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order* and related Commission documents may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., (BCPI), Portals II, 445 12th Street, SW., CY-B402, Washington, DC 20554, telephone 202-488-5300, facsimile 202-488-5563, or you may contact BCPI at its Web site: <http://www.BCPIWEB.com>. When ordering documents from BCPI please provide the appropriate FCC document number, for example, FCC 06-46. The *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order* is available on the Commission's Web site: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-46A1.doc. Alternate formats are available to persons with disabilities by e-mail at FCC504@FCC.Gov or by calling (202) 418-0530 or TTY (202) 418-0432.

Summary

I. Big Leo Order on Reconsideration and AWS Fifth Memorandum Opinion and Order

1. In the *Big LEO Spectrum Sharing Order*, the Commission established a primary fixed and mobile (except aeronautical mobile) allocation in the

upper five megahertz of Big LEO MSS S-band spectrum at 2495–2500 MHz. The Commission stated that the resulting services would operate in those frequencies with CDMA MSS downlink operations. The Commission further stated that the CDMA MSS providers would provide their services in that spectrum on an unprotected basis. The Commission determined that this allocation was appropriate because the Commission was reviewing proposals to restructure the adjacent 2500–2690 MHz band, also allocated as a primary fixed and mobile (except aeronautical mobile) band. The result would establish the new BRS/EBS band plan at 2496–2690 MHz. The Commission also stated that those bands combined could serve as suitable relocation spectrum for BRS licensees currently operating in the 2150–2160/62 MHz band.

2. The Commission concluded that CDMA MSS operators could use the same spectrum as fixed and mobile operators, specifically BRS, without harmful interference because BRS operations would be more likely to occur in urban, suburban and less developed areas, whereas MSS operators would more likely serve customers in rural and underdeveloped areas. To address interference concerns for CDMA MSS, the Commission stated that the BRS would be a low power service at 2496–2500 MHz. The Commission also noted that MSS operators would have access to a newly-established one megahertz guard band at 2495–2496 MHz, but MSS would not receive protection in the 2495–2500 MHz band. To address interference concerns for BRS, the Commission stated that the ITU-established power flux-density (PFD) values for MSS downlinks operations in this band should sufficiently protect the BRS from harmful interference. The Commission also shifted MSS ancillary terrestrial component (ATC) operations down five megahertz, from 2492.5–2498 MHz to 2487.5–2493 MHz, to ensure adequate separation between MSS ATC and BRS operations at and above 2496 MHz.

3. With respect to incumbent terrestrial radio operators in the 2483.5–2500 MHz band, the Commission declined to relocate industrial, science, and medical (ISM) devices, reasoning that BRS could operate with ISM operations present. The Commission stated, however, that it would consider a relocation plan for broadcast auxiliary service (BAS) and private radio services grandfathered in that band, if necessary, after addressing the then-remaining issues concerning the relocation associated with the introduction of

Advanced Wireless Services (AWS) in ET Docket No. 00–258.

A. Relocation Policy and BRS Operators

4. In the *Big LEO Order on Reconsideration and AWS Fifth Memorandum Opinion and Order*, we take the following actions with respect to petitions for reconsideration filed in response to the *Big LEO Spectrum Sharing Order*:

- Affirm the Commission's decision to allocate the 2495–2500 MHz band for fixed and mobile (except aeronautical mobile) services on a primary basis.
- Conclude that BRS/EBS and MSS operators have compatible characteristics that enable them to share the 2496–2500 MHz band through engineering solutions, without causing harmful interference.
- Adopt specific PFD limits for CDMA MSS downlink operations in the band to further ensure that harmful interference does not occur to BRS operations.
- Decline to modify part 18 of the Commission's rules to restrict the emissions of ISM devices in that band.
- Decline to relocate grandfathered BAS and parts 90 and 101 fixed service licensees.

II. BRS/EBS Third Memorandum Opinion and Order

5. On July 29, 2004, the Commission released the *BRS/EBS Report and Order and Further Notice of Proposed Rulemaking (BRS/EBS R&O & FNPRM)*. In the *BRS/EBS R&O*, the Commission adopted a band plan that restructured the 2500–2690 MHz band into upper and lower-band segments for low-power operations (UBS and LBS, respectively), and a mid-band segment (MBS) for high-power operations, in order to reduce the likelihood of interference caused by incompatible uses. The Commission also designated the 2496–2500 MHz band for use in connection with the 2500–2690 MHz band. Through the adoption of the new band plan, the Commission provided incentives for the development of low-power cellularized broadband use and, accordingly, renamed Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) as the “Broadband Radio Service” and “Educational Broadband Service,” respectively, to more accurately describe the kinds of the services anticipated in this band.

6. The *BRS/EBS R&O* also adopted service rules that give licensees increased flexibility, reduce administrative burdens on both licensees and the Commission, and promote regulatory parity. Specifically,

the Commission implemented geographic area licensing for all licensees in the band, consolidated licensing and service rules for EBS and BRS in part 27, allowed spectrum leasing for BRS and EBS under our secondary markets spectrum leasing policies and procedures, and provided licensees with the flexibility to employ the technologies of their choice in the band. In addition, the Commission applied the part 1 Wireless Telecommunications Bureau rules to the BRS/EBS spectrum, dismissed pending mutually exclusive applications for new ITFS stations, and took other actions to streamline the rules and eliminate unnecessary regulatory burdens.

7. With respect to eligibility to hold licenses in 2496–2690 MHz band, the Commission retained restrictions on the use of EBS licenses in continued furtherance of the educational objectives that led to the establishment of ITFS. Also, the Commission removed all non-statutory eligibility restrictions applicable to cable and digital subscriber line (DSL) operators for the BRS and thus permitted these operators to provide non-video services like broadband internet access.

8. In addition, the *BRS/EBS R&O* resolved certain technical issues as follows: Set the signal strength limits for the low-power bands at the boundaries of the geographic service areas (GSAs) to 47 dBμ(V/m; restricted the transmitter output power of response stations to 2.0 watts; modified emission limits for stations that would operate on the LBS and UBS channels; and refrained from allowing high-power unlicensed operations in the 2500–2690 MHz band, but allowed unlicensed operation under our existing part 15 rules in the 2655–2690 MHz band.

9. We received 33 petitions for reconsideration of the *BRS/EBS R&O*.

A. Transition

10. The rules governing the transition of the 2500–2690 MHz band adopted in the *BRS/EBS R&O* are designed to reconfigure the 2500–2690 MHz band to enable the provision of new and innovative wireless services. To accomplish this goal, the transition rules create a market-oriented process for relocating EBS licensees and BRS licensees from their current interleaved channel locations to their new contiguous spectrum blocks in the LBS, MBS, or UBS. The transition rules also provide for the relocation of EBS and BRS licensees from 2500–2502 MHz and 2618–2624 MHz to allow for the relocation of BRS Channels No. 1 and No. 2/2A licensees from the 2150–2160/

62 MHz band to the 2496–2690 MHz band.

11. In the *BRS/EBS Third*

Memorandum Opinion and Order, we take the following actions with respect to the transition of the 2.5 GHz band to the new band plan adopted in the *BRS/EBS R&O*:

- *Transition Size*. Require the transition to occur by Basic Trading Areas (BTAs), rather than by Major Economic Areas (MEAs).

- *Overlapping Transition Areas*.

Decline to require a proponent to transition two or more BTAs when a stations' geographic service area overlaps two or more BTAs. However, if the center point of a geographic service area is located in a BTA, the proponent must transition all facilities associated within the geographic service area but in another BTA if the other BTA is not bring transitioned.

- *Multichannel Video Programming Distributors*. Require certain Multichannel Video Programming Distributors (MVPD) to obtain a waiver before opting out of the transition process. To assist a proponent in transitioning a BTA, a MVPD operator that is intending to seek a waiver must so indicate to the proponent when it responds to the Pre-Transition Data Request. In any event, the MVPD operator must then seek a waiver from the Commission by April 30, 2007. If a proponent files an Initiation Plan with the Commission prior to April 30, 2007, an MVPD operator must file its waiver request within sixty days after the Initiation Plan is filed with the Commission. Furthermore, to enable the transition of the 2.5 GHz band to proceed quickly and efficiently and to protect the operations of MVPD licensees that have developed successful systems under the old band plan, we expect the Wireless Telecommunications Bureau to act on unopposed requests for waiver within 180 days.

- *WATCH TV's Waiver Request*.

Grants WATCH TV's Waiver Request to permanently opt-out of transitioning to the new band plan. Based upon our evaluation of WATCH TV's request, we conclude that requiring WATCH TV to transition pursuant to the new band plan would be inequitable, unduly burdensome, and contrary to the public interest.

- *Proponents*. Requires that a proponent *must* be a BRS licensee or lessee or an EBS licensee or lessee. Adopt a "first-in-time" rule for determining which entity will be a proponent. Thus, the first entity to file an Initiation Plan with the Commission shall automatically be designated as the

proponent for a given BTA without any action required by the Commission.

- *Pre-Transition Data Requests*.

Makes minor changes to our rules relating to Pre-Transition Data Requests in order to clarify the responsibilities of the parties and the data the proponents can request from licensees. Makes changes to improve the administration of the transition process and to require BRS and EBS licensees to respond within 45 days of receiving the Pre-Transition Data Request. Declines to establish automatic sanctions for licensees that fail to respond to pre-transition data requests.

- *Initiation Plans and Initiation Planning Period*. Extends the length of the Initiation Planning Period until 30 months after the effective date of the amended rules. Removes the requirement to complete an engineering analysis at the Initiation Planning stage. Requires that the proponent give its best available estimate of when the transition will be completed.

- *Transition Planning Phase*. Adopts two additional "safe harbors" that will be presumed to be reasonable offers for the transition from proponents. One safe harbor addresses situations in which more than one licensee shares a channel group in a particular location. The other safe harbor applies when an EBS licensee uses one or more of its channels for studio-to-transmitter links. Declines to adopt a proposed safe harbor involving a situation where a licensee is entitled to two or more programming tracks in the Middle Band Segment.

- *Eligibility restrictions/channel swapping*. Clarifies that although the Commission retained the eligibility restrictions in the *BRS/EBS R&O*, those restrictions do not prohibit licensees from swapping channels to effectuate the transition. Further clarifies that EBS licensees are not restricted to four channels nor are they restricted to one MBS channel.

- *Financial penalties in dispute resolution process*. Declines to reconsider the Commission's determination not to adopt financial penalties within the dispute resolution context.

- *Relocation of BRS Channels No. 1 and 2*. Amends our rules to designate 2496–2500 MHz as available pre-transition spectrum for BRS Channel No. 1 and 2686–2690 MHz as available pre-transition spectrum for BRS Channel No. 2.

- *Self-transitions*. Allows licensees to self-transition after 30 months after the effective date of the amended rules in markets where a proponent does not come forward. Requires that licensees in areas that will not be transitioned by a

proponent must notify the Commission within 90 days of the date Initiation Plans must be filed with the Commission whether they will self-transition or be subject to whatever alternative transition process the Commission may adopt. Also, requires BRS and EBS licensees that seek to self-transition to notify other licensees in the BTA where their licensee's GSA geographic center point is located, as well as other licensees whose GSAs overlap with the self-transitioning licensee that they will self-transition. An adjacent licensee that is not self-transitioning may not object to the transition. If, however, the adjacent licensee is also self-transitioning, the licensees must work out interference issues. Licensees that self-transition are not required to file engineering analyses with the Commission. Licensees may only self-transition to the LBS, UBS, or MBS channels assigned to them under the new band plan, however. Licensees must file modification applications to complete the self-transition and must complete the self-transition on or before 21 months after the Initiation Plans must be filed.

- *Replacement Downconverters*.

Declines to require proponents to replace downconverters in an EBS licensee's protected service area (PSA) but outside its GSA as inconsistent with our decision to adopt GSAs, burdensome to proponents, and likely to slow the transition process. Further declines to adopt a recommendation to refine the criteria for eligible receive sites under § 27.1233(a) of the Commission's rules.

- *Transition deadline*. Retains the transition deadline as adopted in the *BRS/EBS R&O*, i.e., the transition must be completed 18 months after the transition planning period ends.

- *Post-transition Notification*. Allows a proponent to certify on behalf of all affected licensees that a transition has been completed. Requires the proponent to provide all parties to the transition with a copy of the post-transition notification. Directs the Wireless Telecommunications Bureau to issue a public notice when a post-transition notification is filed. Requires objections to post-transition notifications to be filed within 30 days after public notice is issued.

- *Transition Costs-Proponent-driven transitions*. Requires non-proponent BRS licensees and other commercial users of the 2.5 GHz band to reimburse the proponent for their pro rata share of the costs of transitioning a BTA and that eligible costs be allocated among the proponent and commercial licensees and lessees based on a MHz/pops

formula. Adopts a list of costs eligible for reimbursement. Permits co-proponents to agree among themselves on how to share cost allocation reimbursements. Requires that the costs of transitioning a GSA that overlaps two or more BTAs be attributable to each BTA in proportion to the amount of the GSA located in the BTA. When the proponent must transition licensees in an adjoining BTA to resolve interference issues, requires "Proponent B" (of the adjoining BTA) to fully reimburse "Proponent A" (of the transitioning BTA) and then seek reimbursement from spectrum holders in its own BTA. Permits the proponent to request reimbursements after the Post-Transition Notification has been filed and the proponent has accumulated the documentation necessary to substantiate the full and accurate cost of the transition. When a license is transferred or assigned, the reimbursement obligation must be paid immediately, or the assignor/transferor and assignee/transferee remain jointly and severally liable to pay the reimbursement obligation. With regard to licenses that are partitioned or disaggregated, the parties to the partition or disaggregation must remain jointly and severally liable for repaying the proponent.

- *Cost of EBS self-transitions.* Permits EBS licensees that self-transition to recover their costs. Requires self-transitioning EBS licensees to send a Self-Transition Data Request to all BRS and EBS licensees in the BTA where the EBS licensee's GSA geographic center point is located, as well as other licensees whose GSAs overlap with the self-transitioning licensee. The Self-Transition Data Request contains the same information that is contained in the Pre-Transition Data Request, which is used in the proponent-driven transition. EBS licensees may request reimbursement from all BRS licensees and lessees, entities that lease EBS spectrum for a commercial purpose, and commercial EBS licensees that are located in the BTA where the EBS licensee's GSA geographic center point is located, as well as other licensees whose GSAs overlap with the self-transitioning licensee. BRS licensees and lessees, entities that lease EBS spectrum for a commercial purpose, and commercial EBS licensees must pay a pro-rata share based on MHz/pops. The EBS licensee may seek reimbursement of the same costs that must be reimbursed in the proponent-based transition. The EBS licensee may request reimbursement after the EBS licensee has filed a modification application with the Commission. The

cost-sharing obligation remains with the license. Thus, if a license with a reimbursement obligation is transferred or assigned, the reimbursement obligation must be paid immediately by the assignor or transferor, or the obligation remains with the license.

- *Dispute Resolution.* With regard to disputes over the Transition Plan, we have urged the parties to the dispute to seek dispute resolution through a third party. With regard to other disputes that may arise, we decline to mandate the use of a clearinghouse, although we encourage the BRS/EBS community to use a clearinghouse if they believe that this would be the most expedient means of resolving disputes. Furthermore, we note that parties have several options to resolve disputes that may arise including mediation, the voluntary use of a clearinghouse, or pursuing civil remedies in the court system. We will consider mandating a clearinghouse or other appropriate mechanism for resolving cost-sharing disputes in the future if we find that there are an inordinate number of such disputes.

- *Bureau Reports.* The Wireless Telecommunications Bureau must report to the Commission on the status of the transition of the 2.5 GHz band at 18 months, three years, and five years after the effective date of the amended rules.

B. Technical Issues

12. In the *BRS/EBS Third Memorandum Opinion and Order*, we take the following actions with respect to the technical rules adopted in the *BRS/EBS R&O*:

- *Receive sites.* Requires that all downconverters within the EBS GSA must be replaced, regardless of the desired or undesired signal strength. Allows a proponent to upgrade EBS reception equipment at a site.

- *Adjacent channel.* Allows a -10 dB adjacent channel D/U signal ratio for EBS receive sites that are transitioned. However, in instances where EBS stations utilize older television receivers that are not transitioned, the adjacent channel D/U ratio will remain 0 dB.

- *Signal Strength Limits.* Declines to repeal the rule that permits licensees to exceed the signal level at the border of their geographic service area where there is no affected licensee providing service.

- *Documented Interference Complaint Requirement.* Declines to eliminate the requirement in § 27.53(l) of the Commission's rules that a licensee receive a documented interference complaint before being subject to a stricter emission mask for base stations. Affirms our prior

conclusion that only adjacent channel licensees can file a documented interference complaint. Gives the interfering licensee 60 days after receiving a documented interference complaint to coordinate with affected licensee and resolve the situation. If no resolution is reached in that time period, both licensees must employ a more rigorous emission mask.

- *User stations.* Declines to amend the requirement in § 27.53(l)(4) of the Commission's rules that provides that "[f]or mobile digital stations, the attenuation factor shall not be less than $43 + 10 \log (P)$ dB at the channel edge and $55 + 10 \log (P)$ at 5.5 MHz from the channel edges."

- *2495–2496 MHz Guard Band.* Retains the requirement in § 27.53(a)(6) that requires licensees to measure emission limits from "as close to the edges, both upper and lower, of the licensee's bands of operation as the design permits." Therefore, BRS Channel No. 1 licensees would be required to measure out-of-band emissions from the lower edge of their channel and meet the $67 + 10 \log (P)$ standard 3 MHz from that edge.

- *Geographic Service Areas.* Retains the "splitting the football" methodology adopted in the *BRS/EBS R&O*. Adopts recommendations concerning the GSAs of pending applications on file January 10, 2005 as follows. Where there is pending as of January 10, 2005 an application for a new incumbent station with a PSA that overlaps that of a licensed incumbent station, the GSA of the incumbent station is created by "splitting the football" and, if the pending application is ultimately dismissed or denied, the territory covered by the GSA of the applied-for station reverts to the BRS BTA holder (if a BRS application) or to EBS white space (if an EBS application). Where there is pending as of January 10, 2005 an application for a modification that would impact the location/size of an incumbent station's GSA and the resulting splitting of a football with another station, the GSAs should be calculated by "splitting the football" based on the current authorizations, and if the modification is granted, the GSAs will be immediately redrawn upon the grant of the modification. Where there is pending as of January 10, 2005 an application for review or petition for reconsideration of the dismissal or denial of an application for a new or modified station that has a PSA overlapping another station's PSA, the facilities proposed in the dismissed or denied application should not be considered in establishing GSAs. However, the GSA of the incumbent

licensee will be subject to carving back consistent with the “splitting the football” rules if the dismissed/denied application is reinstated. Where there is pending as of January 10, 2005 an application for review or petition for reconsideration of the forfeiture or cancellation of a license that has a PSA overlapping another station’s PSA, that license should not be considered in establishing GSAs. However, the GSAs of licensees with overlapping GSAs will be subject to carving back consistent with the “splitting the football” rules if the forfeited or cancelled license is reinstated. Where an incumbent station license was in existence as of January 10, 2005 and caused a splitting of the football, and that incumbent station license is later forfeited, the reclaimed territory reverts to the BRS BTA holder (if BRS spectrum) or to EBS white space (if EBS spectrum) regardless of whether the action/inaction that caused the forfeiture occurred prior to January 10, 2005.

- *Modifications to Geographic Licensing.* Declines to revise the provision in § 27.1206(a) of the Commission’s rules that permits BRS and EBS licensees to place transmitters anywhere within their GSA without prior authorization as long as their operations comply with applicable service rules. Notes that we will take prompt and decisive action when interference is caused to EBS operations and a two-way operator is unable or unwilling to resolve the problem promptly.

- *Unlicensed Operations.* Continues to permit low-power unlicensed operations in the 2655–2690 MHz portion of the band in accordance with part 15 of our rules, as described in and to the extent indicated in the *BRS/EBS R&O*.

- *Minimum Performance Requirements for EBS receive sites.* Declines to adopt a rule that EBS receive sites must meet minimum standards in order to receive interference protection.

- *Miscellaneous Corrections to Sections 27.5 and 27.1221.* Amends the footnote to § 27.5 (i)(2) to read: “No 125 kHz channels are provided for operation in this service. The 125 kHz channels previously associated with these channels have been reallocated to channel G3 in the UBS.” Corrects § 27.1221(a) to refer to interference protection for both BRS and EBS on a station-by-station basis.

C. Minimum Usage Requirements

13. Declines to make any changes to the minimum educational usage requirements for EBS licensees. The Commission stated that it will continue

to rely on the good faith efforts of EBS licensees to meet these requirements. Revises § 27.1214(b)(1), which states a licensee must reserve 5% of the capacity of its channels for “instructional purposes” to state that the reservation must be for “educational uses consistent with § 27.1203(b) and (c) of the rules.”

D. Cable/ILEC Cross Ownership

14. Finds that there is no basis to reconsider our decision to allow cable operators and ILECs to acquire or lease BRS or EBS spectrum, subject to the statutory prohibition on cable operators holding licenses or leasing spectrum to supply MVPD service.

E. Mutually Exclusive Applications

15. With one exception, we affirm the dismissal of the applications that were dismissed in the *BRS/EBS R&O*. We affirm the dismissal of South Florida applications that were the subject of a May 24, 1995 settlement agreement because that agreement did not resolve all of the pending mutual exclusivity.

16. Petitioner Shekinah Network presented evidence that it had filed, and the Commission approved, a settlement agreement before the April 2, 2003 deadline. We will therefore grant Shekinah’s petition and reinstate its application.

F. Leasing Issues

- *License Purchase Rights.* Declines to prohibit purchase option provisions in EBS leases.

- *Filing of Excess Capacity Leases.* Rejects proposal to require licensees to file unredacted copies of EBS leases.

- *Limitation on Length of EBS Leases.* The comments we have received on this issue demonstrate the need to clarify the Commission’s intentions as they relate to the length of EBS leases and the validity of automatic renewal provisions in such leases.

17. First, as the Catholic Television Network (CTN) and the National ITFS Association (NIA) correctly point out, in paragraph 180 of the *BRS/EBS R&O*, the Commission concluded that leases entered into prior to the effective date of the new EBS rules would be grandfathered under the then-existing EBS leasing framework, thus, such leases would be subject to the existing 15-year lease limitation.

18. With the exceptions noted below, spectrum leasing arrangements entered into after the effective date of the new EBS rules, however, are subject to the Commission’s Secondary Markets rules. With respect to the Secondary Markets rules, we must distinguish between restrictions on the terms in any lease agreement between the parties, and the

length of any spectrum leasing arrangement that the licensee and spectrum lessee have filed with Commission under our part 1 rules. Under our Secondary Markets rules and policies, “no spectrum manager lease notification or *de facto* transfer lease application can propose a lease term that extends beyond the term of the license authorization itself.”

19. We conclude that EBS licensees may enter into a lease with a maximum term of thirty years, subject to conditions designed to ensure that EBS licensees have a fair opportunity to re-evaluate their educational needs. We are persuaded by the analyses presented by commenters indicating the difficulty that commercial lessees may have in obtaining financing if leases are limited to a shorter duration. We agree with the Wireless Communications Association International, Inc. (WCA) and CTN, however, that EBS licensees must have a mechanism to ensure that their educational, technological, and spectrum needs are being met.

Therefore, we adopt a requirement for all EBS leases with a term of fifteen years or longer to include a right to review the educational use requirements of their leases every five years starting at year fifteen of the lease agreement. We agree with WCA and CTN that a spectrum leasing arrangement may include any mutually agreeable terms designed to accommodate changes in the EBS licensee’s educational use requirements and the commercial lessee’s wireless broadband operations.

20. With regard to EBS leases entered into between the effective date of the existing *BRS/EBS* rules (January 10, 2005) and the effective date of the amended rules adopted today, however, we clarify those leases were governed by the Secondary Markets rules and policies that did not restrict the parties’ ability to have lease agreements with terms longer than the license term. Thus, the length of EBS leases entered into between January 10, 2005 and the effective date of the amended rules adopted today was not limited under the Commission’s rules.

21. Although we will not permit automatic renewal of an EBS lease beyond 30 years, we will maintain the Commission’s existing policy of allowing EBS licensees to afford lessees a right of first refusal, as well as allowing agreements to grant the EBS licensee (but not a lessee) the unilateral right to extend a lease. That is, at the end of any particular EBS lease term, the EBS licensee must retain the ability to re-evaluate the use of their licensed spectrum to identify new educational uses, and to renegotiate such leases as

they relate to the licensee's current needs. We continue to permit renewal options or rights of first refusal for lessees, while prohibiting automatic renewal provisions that do not afford licensees the opportunity to renegotiate their leases at the end of the lease term.

- *Other Leasing Issues.* Amends § 27.1214(c) to reflect that EBS licensees retain the right to purchase or lease dedicated or common equipment regardless of whether the relationship terminates as a result of action by the lessee. Agrees that two of the EBS substantive use requirements, (iv) and (v), which the Commission indicated in the *BRS/EBS R&O* apply to EBS leases, are not appropriate under the *de facto* transfer model. Thus, in *de facto* leasing, EBS licensees are not required to retain responsibility for compliance with rules regarding station construction and operation or to have all station modification applications submitted through the EBS licensee. To reflect that EBS stations in the two-way data environment may not always be used for in-classroom instruction, amends the first sentence of § 27.1214(b)(1) to indicate that EBS licensees must reserve a minimum of 5 percent of the capacity of its channels for educational uses consistent with § 27.1203(b) and (c) of our rules.

III. BRS/EBS Second Report and Order

A. Performance Requirements

i. Use of Substantial Service

22. We conclude that BRS and EBS licensees will be required to demonstrate substantial service in order to retain their licenses. "Substantial service" is defined in part 27 of our rules as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."

ii. Safe Harbors

23. We agree with WCA, Bell South, and the other commenters that it is appropriate to use the type of safe harbors applied to other fixed and mobile services to BRS and EBS. Our new rules give licensees the flexibility to use these services to provide a wide variety of services. Consequently, we believe it is vital to establish safe harbors that encompass licensees' potentially disparate business and service deployment plans. We also believe, however, that it is appropriate to establish safe harbors that are predicated upon an appropriate showing by the licensee that it has made notable progress in deploying service. We agree with Clearwire that the traditional safe harbors associated with

other part 27 services are too lenient given the particular circumstances of BRS and EBS. The safe harbors we adopt today give licensees offering a variety of services ample opportunity to meet at least one safe harbor while ensuring that these frequencies are used to provide an appropriate level of service.

24. We believe that distinctive characteristics of this band support setting safe harbors for these services that are more stringent than those proposed by WCA, BellSouth, and others. First, as noted below, licensees have approximately five years from the release of this item to demonstrate substantial service. Most of the existing licenses in the band were issued at least ten years ago, and proposals to reshape the band have been under discussion within the industry since at least 2002, when WCA, CTN, and NIA (the Coalition) developed their proposal (the White Paper) to change the band plan and technical rules of the 2500–2690 MHz band. Accordingly, we believe that licensees and/or their predecessors have had a more than adequate opportunity to develop plans for rapidly instituting service pursuant to our new rules. We, therefore believe, that licensees should only be permitted to rely on a safe harbor to meet the substantial service requirement if they can show significant service deployment. We, therefore, adopt safe harbors that require licensees to make a stronger showing of service deployment than that proposed by WCA, BellSouth, and others.

25. In determining the precise level of service to be required in order to meet a safe harbor, we must also ensure that we do not place an undue burden on licensees. These standards will apply to EBS licenses and small rural operators as well as large carriers. Furthermore, the past difficulties licensees have faced in this band do place some limit on the amount of service we can expect licensees to provide. We, therefore, agree with commenters that urge us to establish safe harbors that encompass both fixed and mobile service deployments and recognize efforts to serve specialized or niche markets. After full consideration of all the relevant factors, we adopt the following safe harbors:

- Constructing six permanent links per one million people for licensees providing fixed point-to-point services;
- Providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;
- Providing specialized or technologically sophisticated service

that does not require a high level of coverage to benefit consumers; or

- Providing service to niche markets or areas outside the areas served by other licensees.

26. Additionally, in an effort to provide maximum flexibility for licensees in satisfying the safe harbors, we agree with Sprint and BloostonLaw that a licensee will be deemed to satisfy a safe harbor through lease agreements when such arrangements satisfy the conditions set forth in the *Secondary Markets 2nd R&O*, and the lessee is actually providing the level of service required by a licensee that would be deemed to satisfy one of the safe harbors that we adopt today for BRS/EBS licensees.

27. Finally, in response to WCA's and Clearwire's concern that the Commission does not plan to make substantial service determinations on a case by case basis, we explain how we expect the substantial service review process will work. If a licensee meets a safe harbor established by the Commission, we will deem the licensee to have offered substantial service with that license. If the licensee does not meet a safe harbor, we will review the showing on a case-by-case basis. We emphasize that a licensee will not be required to meet a safe harbor if it can otherwise demonstrate substantial service to the public. As recognized in the Commission's own precedent, the primary advantage of the substantial service standard is that it is tied to the individual circumstances of each licensee. In general, there is broad support for the adoption of a substantial service performance standard that provides for case-by-case showings of substantial service coupled with safe harbors.

iii. Additional Safe Harbors for EBS Licensees

28. We agree with the commenters and believe that EBS licensees should be given additional flexibility to satisfy the substantial service standard. With respect to the first safe harbor proposed by CTN and NIA, we believe that this safe harbor properly takes into account the special circumstances EBS licensees and provides EBS licensees with flexibility while ensuring that they are providing educational services. With respect to the second safe harbor proposed by CTN and NIA, we have established above that both EBS and BRS licensees have the flexibility to meet the substantial service standard through leasing. In light of this, we agree that EBS licensees can meet the substantial service standard through leasing but we decline to adopt CTN's

and NIA's second safe harbor proposal that a lease agreement can be used to meet a safe harbor standard on a system-wide basis regardless of the number of channels leased or in use. As discussed in greater detail below, we apply the safe harbors to both BRS and EBS licensees on a license-by-license basis.

iv. Service to Rural Areas

29. We adopt the definition of "rural area" used in the *Rural Order* for BRS/EBS, *i.e.*, those counties (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data. We also adopt modified versions of the safe harbors adopted by the Commission in the *Rural Order*. Specifically, we adopt the following safe harbors:

- Providing service to "rural areas" (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services:

- For mobile service, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or
- For fixed service, where the BRS or EBS licensee has constructed at least one end of a permanent link in at least 30% of the rural areas within its licensed area.

v. Other Decisions Regarding Substantial Service

- Require that substantial service be demonstrated on a per-license basis.
- Establish May 1, 2011 as the deadline for demonstrating substantial service.

- Agree with the majority of the commenters that prior service, even if discontinued, should be a factor that we take into account when making a determination as to whether substantial service has been met. We, however, decline to adopt a rule stating that a licensee will have deemed to have provided substantial service if it met a safe harbor at any point during the license term. The most significant consideration in a substantial service evaluation is the licensee's current service. If the current operations are sufficient to support a finding of substantial service, no further evaluation is needed. If the current service does not support a finding of substantial service, we will look at the licensee's overall record during the prior license term.

- Hold that in order for a BRS/EBS licensee or lessee to provide substantial service, it must be providing service to

customers or students. We therefore conclude that the transmission of test signals and/or color bars by a BRS/EBS licensee or lessee that has no customers or students does not constitute substantial service.

B. Licensing Unassigned and Untransitioned Spectrum in the Band

30. We make the following conclusions regarding unassigned and untransitioned spectrum:

- Conclude that we should not make any decisions regarding how to assign unassigned spectrum at this time.
- Conclude that any future auction of unassigned spectrum will be open to all eligible bidders.
- Conclude that it is premature to make available unassigned spectrum until the transition period is completed.
- Conclude that the resolution of issues related to additional new licenses is premature prior to the completion of voluntary incumbent transitions.

C. Grandfathered E and F Channel EBS Stations

31. We first conclude that where there is no overlap between the EBS and BRS licensees, we will free up the grandfathered E and F channel EBS licensees, grant these licensees a GSA, and allow them to modify or assign their license. Next we conclude, in the case where the GSAs of a grandfathered EBS and BRS licensees overlap, but that overlap is 50% or less, we will divide the GSAs by "splitting the football," as we do with other overlapping GSAs. Both the BRS and EBS licensees will be free to add, modify, and remove facilities within their GSAs, consistent with our new technical rules. In addition, the grandfathered EBS facility will be free to assign its license. In the case of an overlap that is greater than 50% in service areas, we conclude that different treatment is warranted. Where there is a major overlap of service areas, splitting the football may no longer be the best solution for accommodating the needs of both licensees. To encourage a voluntary settlement of this issue between the affected parties, we will establish a ninety-day mandatory negotiation period where both the BRS and EBS licenses have an explicit duty to work to accommodate each other's communications requirements. If, at the end of ninety days the parties cannot reach a mutual agreement, the Commission then will split the football on its own accord.

D. Four Channel Rule

32. In light of the record on this issue, we agree that retaining the rule pre-transition is not in the public interest.

E. Wireless Cable Exception

33. Concludes to eliminate the wireless cable exception, pre-transition. Grandfathers existing licenses granted pursuant to the rules, and permits such licenses to continue to be renewed and assigned. Permits transfers of control of such licenses and modifications to these licenses.

F. Regulatory Fees

34. With regard to EBS licensees, we agree with commenters that we should not impose regulatory fees on EBS licensees. We note that governmental entities are statutorily exempt from fees under Section 8 of the Communications Act, and both governmental entities and nonprofit entities are statutorily exempt from Section 9 fees. EBS licensees by definition fit within these statutory exemptions, with the exception of entities licensed pursuant to the wireless cable exception.

35. With regard to BRS licensees, we conclude that the regulatory fee structure for BRS should be changed as proposed in the *FNPRM* to reflect the scope of a licensee's authorized spectrum use and the benefits it receives under its spectrum authorization. We shall adopt, therefore, a MHz-based formula with tiered fees by markets, similar to our annual scale for broadcast television stations, but on a somewhat more simplified scale. Annual fees will be charged on a per-megahertz basis based upon the size of the BRS licensee's BTA. For a BRS licensee licensed by GSA, its BTA is the BTA where the geographic center point of its GSA is located. We shall assess a per-megahertz fee in three categories, BTA ranked by population size those ranked 1–60 paying the highest fee, those ranked 61–200 paying a lesser fee, and those ranked 201–493 paying the lowest fee.

G. Gulf of Mexico Proceeding

36. The record does not demonstrate a demand for BRS or EBS operations in the Gulf of Mexico at this time.

IV. Procedural Matters

A. Paperwork Reduction Analysis

37. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note

that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

38. In this present document, we have assessed the effects of changes in the pre-transition data request, self-transition notification, Initiation Plans, Post-Transition Notifications, and transition costs, and find that in most instances the effect on entities with fewer than 25 employees will be minor. We anticipate that entities with fewer than 25 employees will be most affected by the changes to the pre-transition data request and the post-transition notification. The changes to the pre-transition data request are relatively minor, were requested by petitioners, and are designed to ease the transition. The changes to the post-transition notification eases the paperwork burden on all affected BRS and EBS licensees.

V. Final Regulatory Flexibility Act Certification of Big LEO Order on Reconsideration

39. For the reasons described below, we now certify that the policies and rules adopted in the *Big LEO Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the U.S. Small Business Administration (SBA).

40. In this *Big LEO Order on Reconsideration*, the Commission adopts specific PFD limits for MSS downlink operations in the 2496–2500 MHz band. If the MSS providers intend to operate at power levels that exceed those PFD limits, or if actual operations routinely exceed those PFD limits, the MSS operators must obtain approval from BRS systems operating in the same region that are affected by these PFD limits. These rules will help to ensure that MSS–BRS sharing in that band will not result in harmful interference to the BRS.

41. We find that our actions will not affect a substantial number of small

entities because only MSS operators in the 2496–2500 MHz band will be affected. In particular, only one Big LEO MSS licensee currently is authorized to provide MSS in the 2496–2500 MHz band in United States. We find that this licensee is not a small business. Small businesses often do not have the financial ability to become MSS system operators due to high implementation costs associated with launching and operating satellite systems and services. Therefore, we certify that the requirements of the *Big LEO Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this *Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. 801(a)(1)(A).

VI. Final Regulatory Flexibility Analysis of BRS/EBS Third Memorandum Opinion and Order and Second Report and Order

A. Need for, and Objectives of, the Final Rules

42. On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM*. In the *BRS/EBS R&O*, the Commission adopted a band plan that restructured the 2500–2690 MHz band into upper and lower-band segments for low-power operations (UBS and LBS, respectively), and a mid-band segment (MBS) for high-power operations, in order to reduce the likelihood of interference caused by incompatible uses. The Commission also designated the 2495–2500 MHz band for use in connection with the 2500–2690 MHz band. Through the adoption of the new band plan, the Commission provided incentives for the development of low-power cellularized broadband use and, accordingly, renamed MDS and ITFS as the “Broadband Radio Service” and “Educational Broadband Service,” respectively, to more accurately describe the kinds of the services anticipated in this band. In order to facilitate the transition to the new band plan, the *BRS/EBS R&O* adopted a market-oriented, transition mechanism that enables incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. The *BRS/EBS R&O* also adopted service rules that give licensees increased flexibility, reduce administrative burdens on both licensees and the Commission, and promotes regulatory parity.

43. In this *Third Memorandum Opinion and Order and Second Report and Order (3rd MO&O and 2nd R&O)* we adopt a number of changes concerning the rules governing the 2500–2690 MHz band, for the Broadband Radio Service (BRS) and the Educational Broadband Service (EBS). The rules we adopt today include: requiring licensees to transition based on Basic Trading Areas (BTAs), rather than Major Economic Areas (MEAs) as specified in the *BRS/EBS R&O* permitting licensees to self-transition if a proponent does not file an Initiation Plan by a date certain or withdraws an Initiation Plan and another proponent does not come forward by a date certain; requiring all commercial licensees, in a proponent-driven transition, to reimburse the proponent a pro rata share of the cost of transitioning a BTA to the new band plan; requiring commercial licensees to pay their own costs if they self-transition, but permitting non-commercial EBS licensees to seek reimbursement from commercial licensees; establishing a geographic service area for grandfathered E and F channel EBS licensees, and allowing such licensees to modify or assign their licenses; eliminating the overlap between a grandfathered EBS licensee and a BRS site-based incumbent by “splitting the football; eliminating the rule that limits EBS licensees to four channels in a given geographic area; eliminating the wireless cable exception to the EBS eligibility rules; altering, where possible, the regulatory fee structure for the BRS services to establish a tiered regulatory fee structure based on market size MHz; adopting a substantial service standard for BRS and EBS licensees, and establishing safe harbors similar to those used in other services; and requiring all licensees to establish substantial service by May 1, 2011.”

44. We believe the rules we adopt today will both encourage the enhancement of existing services using this band and promote the development of new innovative services to the public, such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our new rules will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than to government regulation, in determining how this band can best be used.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

45. No comments were submitted specifically in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

46. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules. The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 2002, there were approximately 1.6 million small organizations. The term "small governmental jurisdiction" is defined as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small. Below, we discuss the total estimated numbers of small businesses that might be affected by our actions.

47. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years. The BRS auctions

resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. Some of those 440 small business licensees may be affected by the decisions in this *3rd MO&O* and *2nd R&O*.

48. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses.

49. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity. EBS is a non-profit non-broadcast service. We do not collect, nor are we aware of other collections of, annual revenue data for EBS licensees. We find that up to 1,932 of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to EBS.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

50. While these requirements are new with respect to potential licensees in the EBS and BRS bands, the Commission

has applied these requirements to licensees in other bands. Moreover, the Commission is also eliminating many burdensome filing requirements that have previously been applied to BRS and EBS.

51. To enable transition proponents to arrange for the installation of required equipment, BRS and EBS licensees will be required to provide the following information to potential proponents: the transitioning licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax number. Licensees will also be required to provide the location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection and other pertinent technical information on the antenna for that main station or booster. These requirements are being adopted in response to a request from commenters that such information be provided. This information is critical to ensuring a smooth transition, because the Commission's ULS database does not contain information concerning the desired signal level at each EBS receive site entitled to protection during the transition. Furthermore, this information should be readily available to the licensee and is not particularly burdensome to collect and provide.

52. Licensees that self-transition must provide the following information to all BRS and EBS licensees in the BTA where the self-transitioning licensee is located: the self-transitioning licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax number. Self-transitioning licensees will also be required to provide the location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection and other pertinent technical information on the antenna for that main station or booster.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

53. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption

from coverage of the rule, or any part thereof, for small entities.”

54. Regarding our decision to require licensees to transition by BTA instead of by MEA, we do not anticipate any significant economic impact on small entities. The overwhelming majority of commenters preferred BTAs over the alternative of MEAs because they believe BTAs are both significantly easier to transition and less expensive to transition than MEAs. The record reflects that licensees almost unanimously agreed that the Commission should alter the transition area from MEAs to BTAs because these areas are more likely to conform to the size and location of geographic markets where systems have developed, and licensees, in many cases, have already developed interference and other interoperating relationships along BTA lines. Commenters also requested that the transition area be changed to BTAs because transitioning such areas will be less expensive, making it easier for licensees to transition, especially small and rural operators. Thus, we believe this decision will actually result in cost-savings to entities that are responsible for transition costs.

55. Regarding our decision to grant individual waivers of the rules rather than adopt a blanket “opt-out” for Multichannel Video Programming Distributors (MVPD), we believe that a large number of small entities will not be unduly burdened. While individual waivers require more work on the part of licensees, we anticipate that only a very few licensees, fewer than twenty, will be affected by the waiver process. Given that so few entities will be affected, we believe that an individual waiver is the more appropriate regulatory response than crafting a rule that covers so few entities.

56. Regarding our decision to allow licensees the option to self-transition in markets where a proponent does not come forward by a date certain or has withdrawn and no other proponent has come forward by a date certain, we do not believe this rule will impose any significant burdens on licensees because self-transitioning EBS licensees will be able to seek reimbursement for the costs of self-transitioning from commercial licensees and lessees in the BTA. BRS licensees that self-transition will be required to pay for their own costs. Licensees that do not transition will be faced with the prospect of losing their licenses. Thus, this rule provides an additional transition option for licensees who wish to comply with transition rules but cannot afford to be a proponent to retain their spectrum. Pursuant to this rule, EBS licensees can

avoid losing their licenses for reasons that may be beyond their control (such as the financial inability to transition all licensees within its transition area, or the absence of a commercial proponent that can do so, or the failure of a commercial proponent to complete the process). We considered the alternative of requiring self-transitioning EBS licensees to pay their costs and rejected it as too costly for educational entities. There was overwhelming support in the record to permit licensees to self-transition and no opposition.

57. Regarding our decision to require that all commercial licensees, in a proponent-driven transition, reimburse the proponent a pro rata share of the cost of transitioning a BTA to the new band plan, this decision is beneficial to licensees in that it avoids the “free rider” problem by requiring those who provide commercial service, whether through their own BRS or EBS channels or through leased EBS channels, to share the costs of transitioning the 2.5 GHz band. This relieves any particular commercial provider from having to pay for expenses of other commercial providers and institutes a cost-sharing regime that provides greater incentive for a proponent to come forward. We recognize that developing a list of reimbursable costs in the BRS/EBS context may be difficult given the varied types of operations in the band, but interested parties, such as Sprint, have already developed proposed lists. We also recognize that it may be difficult for the FCC to determine the population of a GSA, which is based on a 35-mile protected service area and not on a particular jurisdiction. Nonetheless, we believe that this scheme provides a fair and equitable solution, which outweighs the calculation difficulties that may arise.

58. Regarding our decision to adopt substantial service standards for BRS and EBS licensees and establish safe harbors similar to those used in other services, this decision does not impose any burdens on licensees above what is traditionally required for one to be a licensee holder. It is reasonable to expect that a licensee will deploy service on spectrum on which they have been licensed to operate, and the Commission routinely obligates licensees to do so lest the spectrum lie fallow and valuable spectrum resources go unutilized. Commenters expressed much support for the part 27 standard we have adopted which accomplishes the goal of regulatory parity between like services as this standard is used for other part 27 wireless services. Furthermore, substantial service standards are preferable to the alternative of

construction benchmarks that focus solely on population served or geography covered and do not take into account qualitative factors important to end-users and the market, such as reliability of service, and the availability of technologically sophisticated premium services. Moreover, these standards reduce the likelihood of scenarios where licensees construct solely to meet regulatory requirements as opposed to satisfying market conditions.

59. Regarding our decision to establish a geographic service area for grandfathered E & F channel EBS licensees, allow such licensees to modify or assign their licenses, and employ a “splitting the football” mechanism where there is overlap, we do not believe this rule will impose any burdens upon licensees. To the contrary, this procedure will eliminate deadlocks in areas where licensees have overlapping service areas and have been unable to deploy service as a result thereof. Furthermore, this rule will permit grandfathered E & F EBS licenses, which have been providing service for 20 years, to modernize their systems to better serve the public. Granting this type of flexibility is consistent with the *BRS/EBS R&O's* geographic area licensing and greater flexibility approaches. Moreover, there is substantial support from the commenters regarding this decision.

60. Regarding our decision to eliminate the rule that limits EBS licensees to four channels in a given geographic area, we do not believe that this action will impose additional obligations upon a licensee. To the contrary, given the wider range of services that EBS channels can now be used for and the changes to the Commission's leasing rules, retention of the four-channel rule may actually unduly limit the ability of educational institutions and organizations to take full advantage of the potential of EBS. We recognize that this rule was designed to promote diversity of programming and ownership, and that, in many cases, four channels should provide sufficient capacity for EBS operations. However, this concern is mitigated by the fact that the four-channel rule could result in spectrum laying fallow when an educator wishes to use the spectrum. Furthermore, choosing the alternative option of retaining the restriction could undermine transition planning, which may in some instances require licensees to swap MBS for UBS/LBS channels or vice versa. Moreover, commenters overwhelmingly support elimination of the rule, which will obviate the need for

the Commission to review numerous waiver requests by EBS licensees.

61. Regarding our decision to eliminate the wireless cable exception to the EBS eligibility rules, we recognize that BTA licensees who acquired their rights at auction may contend that they had an expectation that the exception would apply. However, this concern is mitigated by the fact that changes made by the *BRS/EBS R&O* to the BRS-EBS band and the continued availability of EBS spectrum on a leased basis will provide commercial operators with sufficient access to spectrum even if the exception is eliminated. Furthermore, due to changes in technology and the video marketplace, there is unlikely to be a growing need for spectrum for wireless cable systems.

62. Regarding our decision to, where possible, change the regulatory fee structure for the BRS services to establish a tiered regulatory fee structure based on market size/MHz, we do not believe this new structure would be burdensome to licensees. On the contrary, the current methodology for assessing regulatory fees can be onerous for rural operators because, on a per population basis, the fees can amount to multiple times that of fees paid by urban licensees who serve more customers. In contrast, a sliding fee—based upon population density—would more equitably distribute fees. We recognize that assessing fees based on the benefits of spectrum requires quantification and measurement of those benefits to the greatest extent possible, and that to the extent that variables used for fee calculation can change or become unknown, the fee could be difficult to ascertain. However, we believe that the public interest is better served by assessing BRS regulatory fees based on the scope of a licensee's authorized spectrum use and the benefits they receive under their spectrum authorization. Furthermore, this concern is mitigated by the fact that calculations will actually be simpler for licensees than employing a MHz/pops formula. Moreover, establishing a tiered formula by market size eliminates the difficulties involved in ascertaining population within a GSA.

63. The regulatory burdens contained in the *3rd MO&O and 2nd R&O* are necessary in order to ensure that the public receives the benefits of innovative new services, or enhanced existing services, in a prompt and efficient manner. As described above, we have reduced burdens wherever possible by eliminating a number of unnecessary regulations.

VII. Report to Congress

64. The Commission will send a copy of this *3rd MO&O and 2nd R&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of this *3rd MO&O and 2nd R&O*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Ordering Clauses

65. Pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Order on Reconsideration and Fifth Memorandum Opinion and Order, Third Memorandum Opinion and Order and Second Report and Order* is hereby adopted.

66. The Petitions for Reconsideration filed in these proceedings are granted to the extent indicated and are otherwise denied.

67. Pursuant to section 4(i) of the Communications Act of 1934, 47 U.S.C. 154(i), and § 1.925 of the Commission's rules, 47 CFR 1.925, that the "Request for Waiver" filed by W.A.T.C.H. TV Company on April 29, 2005 is granted.

68. The proceeding entitled 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 is terminated.

69. The Final Regulatory Flexibility Analysis and the Final Regulatory Flexibility Certification are adopted.

70. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order on Reconsideration and Fifth Memorandum Opinion and Order, Third Memorandum Opinion and Order and Second Report and Order*, including the Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 25 and 27

Communications common carriers, Communications equipment, Equal employment opportunity, Radio, Reporting and recordkeeping requirements, Satellites, Securities, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 25 and 27 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended. 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, and 332, unless otherwise noted.

■ 2. Amend § 25.208 by adding a new paragraph (v) to read as follows:

§ 25.208 Power flux-density limits

* * * * *

(v) In the band 2496–2500 MHz, the power flux-density at the Earth's surface produced by emissions from non-geostationary space stations for all conditions and all methods of modulation shall not exceed the following values (these values are obtained under assumed free-space propagation conditions):

(1) -144 dB (W/m²) in 4 kHz for all angles of arrival between 0 and 5 degrees above the horizontal plane; -144 dB (W/m²) + 0.65(δ - 5) in 4 kHz for all angles of arrival between 5 and 25 degrees above the horizontal plane; and -131 dB (W/m²) in 4 kHz and for all angles of arrival between 25 and 90 degrees above the horizontal plane.

(2) -126 dB (W/m²) in 1 MHz for all angles of arrival between 0 and 5 degrees above the horizontal plane; -126 dB (W/m²) + 0.65(δ - 5) in 1 MHz for all angles of arrival between 5 and 25 degrees above the horizontal plane; and -113 dB (W/m²) in 1 MHz and for all angles of arrival between 25 and 90 degrees above the horizontal plane.

■ 3. Amend § 25.213 by adding the text to paragraph (b) to read as follows:

§ 25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz mobile-satellite service.

* * * * *

(b) If a Mobile-Satellite Service space station operator in the 2496–2500 MHz band intends to operate at powers levels that exceed the PFD limits in § 25.208(v), or if actual operations routinely exceed these PFD limits, we require the Mobile-Satellite Service operator to receive approval from each operational BRS system in the affected geographical region.

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 4. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154 and 303, unless otherwise noted.

■ 5. Section 27.4 is amended by adding the following definition to read as follows:

§ 27.4 Terms and definitions.

* * * * *

Commercial EBS licensee. A licensee authorized to operate on EBS channels pursuant to the provisions of § 27.1201(c) contained in the edition of 47 CFR parts 20 to 39, revised as of October 1, 2005, or §§ 74.990 through 74.992 contained in the edition of 47 CFR parts 70 to 79, revised as of October 1, 2004, of this chapter, and that does not meet the eligibility requirements of § 27.1201(a).

* * * * *

■ 6. Amend § 27.5 by revising paragraphs (i)(1), (i)(2)(ii), (i)(2)(iii), the note to paragraph (i)(2), and paragraph (i)(3) to read as follows:

§ 27.5 Frequencies.

* * * * *

(i) * * *

(1) Pre-transition frequency assignments.

RS Channel 1: 2150–2156 MHz or 2496–2500 MHz

BRS Channel 2: 2156–2162 MHz or 2686–2690 MHz

BRS Channel 2A: 2156–2160 MHz

EBS Channel A1: 2500–2506 MHz

EBS Channel B1: 2506–2512 MHz

EBS Channel A2: 2512–2518 MHz

EBS Channel B2: 2518–2524 MHz

EBS Channel A3: 2524–2530 MHz

EBS Channel B3: 2530–2536 MHz

EBS Channel A4: 2536–2542 MHz

EBS Channel B4: 2542–2548 MHz

EBS Channel C1: 2548–2554 MHz

EBS Channel D1: 2554–2560 MHz

EBS Channel C2: 2560–2566 MHz

EBS Channel D2: 2566–2572 MHz

EBS Channel C3: 2572–2578 MHz

EBS Channel D3: 2578–2584 MHz

EBS Channel C4: 2584–2590 MHz

EBS Channel D4: 2590–2596 MHz

BRS Channel E1: 2596–2602 MHz

BRS Channel F1: 2602–2608 MHz

BRS Channel E2: 2608–2614 MHz

BRS Channel F2: 2614–2620 MHz

BRS Channel E3: 2620–2626 MHz

BRS Channel F3: 2626–2632 MHz

BRS Channel E4: 2632–2638 MHz

BRS Channel F4: 2638–2644 MHz

EBS Channel G1: 2644–2650 MHz

BRS Channel H1: 2650–2656 MHz

EBS Channel G2: 2656–2662 MHz

BRS Channel H2: 2662–2668 MHz

EBS Channel G3: 2668–2674 MHz

BRS Channel H3: 2674–2680 MHz

EBS Channel G4: 2680–2686 MHz

I Channels: 2686–2690 MHz

(2) * * *

(ii) Middle Band Segment (MBS): The following channels shall constitute the Middle Band Segment:

EBS Channel A4: 2572–2578 MHz

EBS Channel B4: 2578–2584 MHz

EBS Channel C4: 2584–2590 MHz

EBS Channel D4: 2590–2596 MHz

EBS Channel G4: 2596–2602 MHz

BRS/EBS Channel F4: 2602–2608 MHz

BRS/EBS Channel E4: 2608–2614 MHz

(iii) Upper Band Segment (UBS): The following channels shall constitute the Upper Band Segment:

BRS Channel KH1: 2614.00000–

2614.33333 MHz

BRS Channel KH2: 2614.33333–

2614.66666 MHz

BRS Channel KH3: 2614.66666–

2615.00000 MHz

EBS Channel KG1: 2615.00000–

2615.33333 MHz

EBS Channel KG2: 2615.33333–

2616.66666 MHz

EBS Channel KG3: 2615.66666–

2616.00000 MHz

BRS Channel KF1: 2616.00000–

2616.33333 MHz

BRS Channel KF2: 2616.33333–

2616.66666 MHz

BRS Channel KF3: 2616.66666–

2617.00000 MHz

BRS Channel KE1: 2617.00000–

2617.33333 MHz

BRS Channel KE2: 2617.33333–

2617.66666 MHz

BRS Channel KE3: 2617.66666–

2618.00000 MHz

BRS Channel 2: 2618–2624 MHz

BRS/EBS Channel E1: 2624–2629.5 MHz

BRS/EBS Channel E2: 2629.5–2635 MHz

BRS/EBS Channel E3: 2635–2640.5 MHz

BRS/EBS Channel F1: 2640.5–2646 MHz

BRS/EBS Channel F2: 2646–2651.5 MHz

BRS/EBS Channel F3: 2651.5–2657 MHz

BRS Channel H1: 2657–2662.5 MHz

BRS Channel H2: 2662.5–2668 MHz

BRS Channel H3: 2668–2673.5 MHz

BRS Channel G1: 2673.5–2679 MHz

BRS Channel G2: 2679–2684.5 MHz

BRS Channel G3: 2684.5–2690 MHz

Note to paragraph (i)(2): No 125 kHz channels are provided for channels in operation in this service. The 125 kHz channels previously associated with these channels have been reallocated to Channel G3 in the upper band segment.

(3) During the transition (see § 27.1230–27.1239) EBS and BRS licensees may exchange channels to effectuate the transition of the 2.5 GHz band in a given BTA.

* * * * *

■ 7. Amend § 27.14 by adding a new paragraph (e) to read as follows:

§ 27.14 Construction requirements; Criteria for comparative renewal proceedings.

* * * * *

(e) BRS and EBS licensees must make a showing of “substantial service” no later than May 1, 2011. Incumbent BRS licensees must file their “substantial service” showing with their renewal application. “Substantial service” is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. Substantial service for BRS and EBS licensees is satisfied if a licensee meets the requirements of paragraph (e)(1) or (e)(2) of this section. If a licensee has not met the requirements of paragraph (e)(1) or (e)(2) of this section, then demonstration of “substantial service” shall proceed on a case-by-case basis. All substantial service determinations will be made on a license-by-license basis. Except for BTA licenses, BRS licensees must file their “substantial service” showing with their renewal applications. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(1) A BRS or EBS licensee has provided “substantial service” by:

(i) Constructing six permanent links per one million people for licensees providing fixed point-to-point services;

(ii) Providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;

(iii) Providing service to “rural areas” (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services:

(A) For mobile service, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or

(B) For fixed service, where the BRS or EBS licensee has constructed at least one end of a permanent link in at least 30% of the rural areas within its licensed area.

(iv) Providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or

(v) Providing service to niche markets or areas outside the areas served by other licensees.

(2) An EBS licensee has provided “substantial service” when:

(i) The EBS licensee is using its spectrum (or spectrum to which the EBS licensee's educational services are shifted) to provide educational services within the EBS licensee's GSA;

(ii) The EBS licensee's license is actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; or

(iii) The level of service provided by the EBS licensee meets or exceeds the minimum usage requirements specified in § 27.1214.

(3) An EBS or BRS licensee may be deemed to provide substantial service through a leasing arrangement if the lessee is providing substantial service under paragraph (e)(1) of this section. The EBS licensee must also be otherwise in compliance with this chapter (including the programming requirements in § 27.1203).

■ 8. Amend § 27.53 by revising the introductory text of paragraph (l) to read as follows:

§ 27.53 Emission limits.

* * * * *

(l) For BRS and EBS stations, the power of any emissions outside the licensee's frequency bands of operation shall be attenuated below the transmitter power (P) measured in watts. BRS and EBS stations that are not in compliance with the standards below, after receiving a documented interference complaint from an adjacent channel licensee, have 60 days to coordinate with the affected licensee and meet a mutual resolution before both parties employ a more rigorous emission mask.

* * * * *

■ 9. Amend § 27.1201 by revising paragraph (a) introductory text, removing and reserving paragraph (c), and adding a new paragraph (d) to read as follows:

§ 27.1201 EBS Eligibility.

(a) A license for an Educational Broadband Service station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

* * * * *

(d) This paragraph applies to EBS licensees and applications licensed or filed pursuant to the provisions of § 27.1201(c) contained in the edition of 47 CFR parts 20 to 39, revised as of October 1, 2005, or §§ 74.990 through 74.992 contained in the edition of 47 CFR parts 70 to 79, revised as of October 1, 2004, of this chapter, and that do not meet the eligibility requirements of paragraph (a) of this section. Such licensees may continue to operate pursuant to the terms of their existing licenses, and their licenses may be renewed, assigned, or transferred, so long as the licensee is otherwise in compliance with this chapter. Applications filed pursuant to the provisions of former § 27.1201(c) or §§ 74.990 through 74.992 of this chapter may be processed and granted, so long as such applications were filed prior to July 19, 2006.

■ 10. Amend § 27.1202 by revising paragraph (c) to read as follows:

§ 27.1202 Cable/BRS cross-ownership.

* * * * *

(c) Applications for new stations, station modifications, assignments or transfers of control by cable operators of BRS stations shall include a showing that no portion of the GSA of the BRS station is within the portion of the franchise area actually served by the cable operator's cable system, or of any entity indirectly affiliated, owned, operated, controlled by, or under common control with the cable operator. Alternatively, the cable operator may certify that it will not use the BRS station to distribute multichannel video programming.

* * * * *

■ 11. Amend § 27.1203 by revising paragraph (b) to read as follows:

§ 27.1203 EBS programming requirements.

* * * * *

(b) Educational Broadband Service stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized educational broadband channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students.

* * * * *

■ 12. Amend § 27.1213 by revising paragraph (c)(2) to read as follows:

§ 27.1213 Designated entity provisions for BRS in Commission auction commencing prior to January 1, 2004.

* * * * *

(c) * * *

(2) *Conditions and obligations.* See § 1.2110(g)(4) of this chapter.

* * * * *

■ 13. Amend § 27.1214 by revising paragraphs (b)(1) and (c) and adding new paragraph (e) to read as follows:

§ 27.1214 EBS spectrum leasing arrangements and grandfathered leases.

* * * * *

(b) * * *

(1) The licensee must reserve a minimum of 5% of the capacity of its channels for educational uses consistent with § 27.1203 paragraphs (b) and (c), and may not enter into a spectrum leasing arrangement involving this reserved capacity. In addition, before leasing excess capacity, the licensee must provide at least 20 hours per licensed channel per week of EBS educational usage. This 5% reservation and this 20 hours per licensed channel per week EBS educational usage requirement shall apply spectrally over the licensee's whole actual service area. However, regardless of whether the licensee has an educational receive site within its GSA served by a booster, the licensee may lease excess capacity without making at least 20 hours per licensed channel per week of EBS educational usage, provided that the licensee maintains the unbridgeable right to recapture on one month's advance notice such capacity as it requires over and above the 5% reservation to make at least 20 hours per channel per week of EBS educational usage.

* * * * *

(c) All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease dedicated or common EBS equipment used for educational purposes in the event that the spectrum leasing arrangement is terminated.

* * * * *

(e) The maximum permissible term of an EBS spectrum leasing arrangement entered into on or after July 19, 2006 (including the initial term and all renewal terms that commence automatically or at the sole option of the lessee) shall be 30 years. In furtherance of the educational purposes for which EBS spectrum is primarily allocated, any spectrum leasing arrangement in excess of 15 years that is entered into on or after July 19, 2006 must include terms which provide the EBS licensee on the 15th year and every 5 years

thereafter, with an opportunity to review its educational use requirements in light of changes in educational needs, technology, and other relevant factors and to obtain access to such additional services, capacity, support, and/or equipment as the parties shall agree upon in the spectrum leasing arrangement to advance the EBS licensee's educational mission.

■ 14. Add § 27.1216 to read as follows:

§ 27.1216 Grandfathered E and F group EBS licenses.

(a) Except as noted in paragraph (b) of this section, grandfathered EBS licensees authorized to operate E and F group co-channel licenses are granted a geographic service area (GSA) on July 19, 2006. The GSA is the area bounded by a circle having a 35 mile radius and centered at the station's reference coordinates, and is bounded by the chord(s) drawn between intersection points of that circle and those of respective adjacent market, co-channel licensees.

(b) If there is more than 50 percent overlap between the calculated GSA of a grandfathered EBS license and the protected service area of a co-channel BRS license, the licensees shall not be immediately granted a geographic service area. Instead, the grandfathered EBS license and the co-channel BRS licensee must negotiate in good faith to reach a solution that accommodates the communication needs of both licensees. If the co-channel licensees reach a mutually agreeable solution on or before October 17, 2006, then the GSA of each co-channel license shall be as determined pursuant to the agreement of the parties. If a mutually agreeable solution between co-channel licensees is not reached on or before October 17, 2006, then each co-channel licensee shall receive a GSA determined pursuant to paragraph (a) of this section and § 27.1206(a).

■ 15. Amend § 27.1221 by revising paragraph (a) to read as follows:

§ 27.1221 Interference protection.

(a) Interference protection will be afforded to BRS and EBS on a station-by-station basis based on the heights of the stations in the LBS and UBS and also on height benchmarking, although the heights of antennas utilized are not restricted.

* * * * *

■ 16. Revise § 27.1230 to read as follows:

§ 27.1230 Conversion of the 2500–2690 MHz band.

BRS and EBS licensees in the 2500–2690 MHz band on the pre-transition A-

I Channels will be transitioned from the frequencies assigned to them under § 27.5(i)(1) to the frequencies assigned to them under § 27.5(i)(2). The transition, which will be undertaken by one or more proponent(s), will occur in the following five phases: initiating the transition process (see § 27.1231), planning the transition (see § 27.1232), reimbursing transition costs (see §§ 27.1233 and 27.1237–1239), terminating existing operations in transitioned markets that do not comport with § 27.5(i)(2) (see § 27.1234), and filing the post-transition notification (see § 27.1235). Licensees may also self-transition (see § 27.1236).

■ 17. Revise § 27.1231 to read as follows:

§ 27.1231 Initiating the transition.

(a) *Transition areas.* Unless paragraph (b) of this section applies, the transition will occur by Basic Trading Area (BTA). BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39, that identifies 487 BTAs based on the 50 States; it also includes the following additional BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands, for a total of 493 BTAs. The Mayaguez/Aguadilla-Ponce BTA-like area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincon, Sabana Grande, Salinas, San German, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like area consists of all other municipios in Puerto Rico. The BTA associated with the Gulf of Mexico will not be transitioned.

(b) *Overlapping GSAs.* When a Geographic Service Area (GSA) overlaps two or more BTAs:

(1) The proponents of the adjacent BTAs may agree on how to transition a GSA that overlaps their respective BTAs.

(2) If an agreement has not been reached between or among the proponents of the adjacent BTAs:

(i) Each proponent must transition all of the facilities associated with the GSA that are inside the GSA and inside the proponent's BTA if all of the adjacent BTAs are transitioning; or

(ii) The proponent of the BTA that is transitioning must transition all of the facilities associated with the GSA that

are within the GSA but outside the BTA, if the adjacent BTA is not transitioning.

(c)(1) *Proponent(s).* The proponent or co-proponent must:

(i) Be a BRS or EBS licensee or BRS or EBS lessee;

(ii) Send a Pre-Transition Data Request (see paragraph (d) of this section) and a Transition Notice (see paragraph (e) of this section) to every BRS and EBS licensee in the BTA, using the contact information in the Commission's Universal Licensing System; and

(iii) Be first to file an Initiation Plan (see paragraph (f) of this section) with the Secretary of the Commission.

(2) Before filing an Initiation Plan, BRS or EBS licensees or BRS or EBS lessees may agree to be co-proponents.

After the Initiation Plan is filed the proponent may accept a co-proponent at its sole discretion.

(d) *Pre-Transition Data Request.* The Pre-Transition Data Request must include the potential proponent's full name, postal mailing address, contact person, e-mail address, and phone and fax numbers.

(1) BRS and EBS licensees that receive a Pre-Transition Data Request must provide the following information to the potential proponent within 45 days of receiving the Pre-Transition Data Request:

(i) The BRS or EBS licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax number.

(ii) The location (by street address and by geographic coordinates) of every constructed EBS receive site that, as of the date of receipt of the Pre-Transition Data Request, is entitled to a replacement downconverter (see § 27.1233(a)). The response must:

(A) Specify whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure;

(B) Specify the approximate height above ground level of the downconverting antenna; and

(C) Specify, if known, the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the receive site.

(iii) The location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection, including:

(A) The make and model of the antenna for that main station or booster, along with the radiation pattern if it is not included within the Commission's database;

(B) The ground elevation, above mean sea level (AMSL), of the building or antenna supporting structure on which

the main station or booster transmission antenna is installed;

(C) The height above ground level (AGL) of the center of radiation of the transmission antenna;

(D) The orientation of the main lobe of the transmission antenna;

(E) Any mechanical beamtilt or electrical beamtilt not reflected in the radiation pattern provided or included within the Commission's database;

(F) The bandwidth of each channel or subchannel, the emission type for each channel or subchannel, and the EIRP measured in the main lobe for each channel or subchannel; and

(G) The make and model of the receive antenna installed at that site, along with the radiation pattern if it is not included within the Commission's database.

(iv) The number and identification of EBS video programming or data transmission tracks the EBS licensee is entitled to receive in the MBS and whether the EBS licensee will accept fewer tracks in the MBS (see § 27.1233(b)).

(v) Whether it will seek or has sought a waiver from the Commission as a Multichannel Video Programming Distributor (MVPD).

(2) BRS and EBS licensees that do not respond to the Pre-Transition Data Request within 45 days of its receipt may not object to the Transition Plan.

(e) *The Transition Notice.* The potential proponent(s) must send a Transition Notice to all BRS and EBS licensees in the BTA(s) being transitioned. The potential proponent(s) must include the following information in the Transition Notice:

(1) The potential proponent(s)'s full name; postal mailing address, contact person, e-mail address, and phone and fax numbers;

(2) The identification of the BRS and EBS licensees that will be transitioned;

(3) Copies of the most recent response to the Pre-Transition Data Request for each participant in the process; and

(4) A certification that the potential proponent(s) has the funds available to pay the reasonably expected costs of the transition based on the information in the Pre-Transition Data Request.

(f) *Initiation Plan.* To initiate a transition, a potential proponent(s) must submit an Initiation Plan to the Commission at the Office of the Secretary in Washington, DC within 30 months of July 19, 2006.

(1) An Initiation Plan must contain the following information:

(i) A list of the BTA(s) that the proponent(s) is transitioning;

(ii) A list by call sign of all of the BRS and EBS licensees in the BTA(s) that are being transitioned;

(iii) A "best estimate" of when the transition will be completed;

(iv) A statement indicating that an agreement has been concluded with the proponent(s) of the adjoining or adjacent BTA(s) when a licensee or licensees in an adjacent or adjoining BTA must be transitioned to avoid interference to licensees in the BTA being transitioned, or in lieu of an agreement, the proponent(s) may provide an alternative means of transitioning the licensees in an adjacent or adjoining BTA;

(v) A statement indicating that an agreement has been concluded with another proponent(s) on how a BTA will be transitioned when there are two or more proponents seeking to transition the same BTA and they agree to be co-proponents before the Initiation Plan is filed, and a statement that identifies the specific portion of the BTA each proponent will be responsible for transitioning; and

(vi) A certification that the proponent or joint proponents have the funds available to pay the reasonable expected costs of the transition based on the information contained in the Pre-Transition Data Request (see paragraph (d) of this section).

(2) A proponent, at its own discretion, may withdraw from transitioning a BTA by notifying the Commission and all affected BRS and EBS licensees in the BTA that it is withdrawing the Initiation Plan.

(3) A proponent may amend an Initiation Plan after it has been filed with the Commission to correct minor or inadvertent errors.

(g) *MVPD waiver requests.* MVPD licensees that seek to opt-out of the transition must seek a waiver within 60 days after the proponent files the Initiation Plan or on or before April 30, 2007, whichever occurs first.

■ 18. Amend § 27.1232 by revising paragraph (a), the introductory text of paragraph (b), and (c)(1), the first sentence of paragraph (d)(1), and the first two sentences of paragraph (d)(2), and adding new paragraphs (d)(3) and (d)(4) to read as follows:

§ 27.1232 Planning the Transition.

(a) *The Transition Planning Period.* The Transition Planning Period is a 90-day period that commences on the day after the proponent(s) files the Initiation Plan with the Commission.

(b) *The Transition plan.* The proponent(s) must provide to each BRS and EBS licensee within a BTA, a Transition Plan no later than 30 days prior to the conclusion of the Transition Planning Period.

* * * * *

(c) * * *

(1) Accept the counterproposal, modify the Transition Plan accordingly, and send the modified Transition Plan to all EBS and BRS licensees in the BTA;

* * * * *

(d) * * *

(1) *Safe harbor No. 1.* This safe harbor applies when the default high-power channel assigned to each channel group is authorized to operate after the transition with the same transmission parameters (coordinates, antenna pattern, height of center radiation, EIRP) as the downstream facilities before the transition. * * *

* * * * *

(2) *Safe harbor No. 2.* This safe harbor applies when an EBS licensee has channel-shifted its single video programming or data transmission track to spectrum licensed to another licensee. Under § 27.5(i)(2), that track must be on the high-power channel licensed to the EBS licensee upon completion of the transition. * * *

* * * * *

(3) *Safe harbor No. 3.* This safe harbor applies when a four-channel group is shared among multiple licensees in a given geographic area. Absent an agreement otherwise, a proponent may:

(i) Secure a 6 MHz MBS channel for each licensee in exchange for the non-MBS channels assigned to the group. Following the channel swap(s) necessary to secure those additional MBS channels, the Transition Plan can provide for the licensing of the remaining channels in the LBS, UBS, and Guard Bands on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment);

(ii) Provide for pro rata segmentation of the default MBS channel for the group, provided that the proponent commits to provide each of the licensees with the technology necessary for its EBS video programming or data transmissions to be digitized, transmitted and received utilizing the provided bandwidth. The non-MBS channels would be divided among the sharing licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment); or

(iii) Assign the default MBS channel assigned to the channel group to one of the licensees, if that licensee is the only one that elects to migrate video programming or data transmission tracks to the MBS. The remaining spectrum assigned to the group may be

allocated among the licensees on a pro rata basis, with the 6 MHz in the MBS counting against that licensee's portion. To the extent necessary, the non-MBS spectrum can be disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment. If the proponent chooses to effectuate a channel swap to provide more than one channel in the MBS, the remaining channels assigned to the group (after considering that one or more LBS/UBS channels and associated Transition Band channels will have been swapped away to provide the additional MBS channel) can be allocated among the licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).

(4) *Safe harbor No. 4.* This safe harbor applies when an EBS licensee uses one or more of its channels for studio-to-transmitter links. The proponent may provide for one of the following options:

(i) The use of the LBS and/or UBS band for the point-to-point transmission of the EBS video or data (through superchannelization of the licensee's contiguous LBS or UBS channels), provided the proponent commits to retune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with new equipment tuned to operate on those channels and the proposal complies with the LBS/UBS technical and interference protection rules;

(ii) The migration of the EBS programming to the MBS by retuning the existing point-to-point equipment to operate in the MBS or replacing it with equipment tuned to operate in the MBS; or

(iii) The replacement of the point-to-point link with point-to-point equipment licensed to the EBS licensee in alternative spectrum, so long as the replacement facilities meet the definition of "comparable facilities" set out in § 101.75(b) of this chapter.

■ 19. Amend § 27.1233 by revising paragraphs (a)(1)(i) and (b)(3)(ii) and removing paragraph (c) and to read as follows:

§ 27.1233 Reimbursement costs of transitioning.

(a) * * *

(1) * * *

(i) A reception system was installed at that site on or before the date the EBS licensee receives its Pre-Transition Data Request (see § 27.1231(d));

* * * * *

(b) * * *

(3) * * *

(ii) *Adjacent Channel D/U Ratio.* The actual adjacent channel D/U must equal or exceed the lesser of 0 dB or the actual pre-transmission D/U ratio. However, in the event that the receive site uses receivers or is upgraded by the proponent(s) as part of the Transition Plan to use receivers that can tolerate negative adjacent channel D/U ratios, the actual adjacent channel D/U ratio at such receive site must equal or exceed -10 dB. Provided that the receive site receiver is not upgraded and cannot tolerate -10 dB, the adjacent channel D/U ratio would be 0dB.

■ 20. Amend § 27.1235 by revising the introductory text and paragraph (a) and adding a new paragraph (d) to read as follows:

§ 27.1235 Post-transition notification.

The proponent(s) must certify to the Commission at the Office of the Secretary, Washington, DC, that the Transition Plan has been fully implemented.

(a) The notification must provide the identification of the licensees that have transitioned to the band plan in § 27.5(i)(2) and the specific frequencies on which each licensee is operating.

* * * * *

(d) A BRS or EBS licensee must file any objection to the post-transition notification within 30 days from the date the post-transition notification is placed on Public Notice.

■ 21. Add §§ 27.1236 through 27.1239 to subpart M to read as follows:

§ 27.1236 Self-transitions.

(a) If an Initiation Plan is not filed within 30 months of July 19, 2006 for a BTA, BRS and EBS licensees in that BTA may self-transition by relocating to their default channel locations specified in § 27.5(i)(2) and complying with §§ 27.50(h), 27.53, 27.55 and 27.1221.

(b) To self-transition, a BRS or EBS licensee must:

(1) Notify the Secretary of the Commission on or before 90 days after the Initiation Plan must be filed with the Commission that it will self-transition (see paragraph (a) of this section);

(2) Send a Self-Transition Notification (see paragraph (c) of this section) to other BRS and EBS licensees in the BTA where the self-transitioning licensee's GSA geographic center point is located that it is self-transitioning;

(3) Notify other licensees whose GSAs overlap with the self-transitioning licensee that it is self-transitioning.

(4) Address interference concerns with other BRS and EBS licensees in the BTA that are also self-transitioning;

(5) File a modification application with the Commission, and

(6) Complete the self-transition within 57 months of July 19, 2006.

(c) *Self-Transition Notification.* The Self-Transition Notification must include the EBS licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax numbers. A self-transitioning EBS licensee must provide the following information to all BRS and EBS licensees located in the BTA where the self-transitioning licensees GSA geographic center point is located:

(1) The location (by street address and by geographic coordinates) of every constructed EBS receive site that, as of the date the Self-Transition Notification is sent, is entitled to a replacement downconverter (see § 27.1233(a)). The response must:

(i) Specify whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure;

(ii) Specify the approximate height above ground level of the downconverting antenna; and

(iii) Specify, if known, the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the receive site.

(2) The location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection, including:

(i) The make and model of the antenna for that main station or booster, along with the radiation pattern if it is not included within the Commission's database;

(ii) The ground elevation, above mean sea level (AMSL), of the building or antenna supporting structure on which the main station or booster transmission antenna is installed;

(iii) The height above ground level (AGL) of the center of radiation of the transmission antenna;

(iv) The orientation of the main lobe of the transmission antenna;

(v) Any mechanical beamtilt or electrical beamtilt not reflected in the radiation pattern provided or included within the Commission's database;

(vi) The bandwidth of each channel or subchannel, the emission type for each channel or subchannel, and the EIRP measured in the main lobe for each channel or subchannel; and

(vii) The make and model of the receive antenna installed at that site, along with the radiation pattern if it is not included within the Commission's database.

(3) The number and identification of EBS video programming or data transmission tracks the EBS licensee is

entitled to receive in the MBS (see § 27.1233(b)).

§ 27.1237 Pro rata allocation of transition costs.

(a) *Self-transitions.* EBS licensees that self-transition may seek reimbursement for their costs to replace eligible downconverters (see § 27.1233(a)) and to migrate video programming and data transmission tracks (see § 27.1233(b)) from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the BTA where the center point of the EBS licensee's GSA is located. In addition, BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the LBS or UBS must reimburse the self-transitioning EBS licensee a pro rata share of the eligible costs of transitioning EBS licensees, based on the formula in paragraph (c) of this section. Eligible costs are listed in § 27.1238.

(b) *Proponent-driven transitions.* BRS licensees and lessees, entities that lease EBS spectrum for a commercial purpose, and commercial EBS licensees must pay their own transition costs. In addition, except for MVPD operators that opt-out of the transition, BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the LBS or UBS must reimburse the proponent a pro rata share of the eligible costs of transitioning EBS licensees, based on the formula in paragraph (c) of this section. Eligible costs are listed in § 27.1238.

(c) *Formula.* The pro rata share shall be based on the following formula:

$$R = \frac{L \times LP}{T \times TP}$$

(1) R equals the pro rata share;

(2) L equals the amount of spectrum used by a BRS licensee or lessee or commercial EBS licensee or lessee to provide a commercial service, either directly or through a lease agreement with an EBS or BRS licensee;

(3) T equals the total amount of spectrum licensed or leased for commercial purposes in the BTA;

(4) LP equals the population of the geographic service area or BTA served by the BRS licensee or lessee or commercial EBS licensee or lessee based on the data in the 2000 United States Census; and

(5) TP equals the population of the BTA based on the data in the 2000 United States Census.

§ 27.1238 Eligible costs.

(a) The costs listed in paragraphs (b) through (f) of this section are eligible costs.

(b) *Pre-transition costs:*

(1) Engineering/Consulting
(i) Evaluation of equipment;
(ii) RX site identification;
(iii) EBS Programming plan covering the BTA;

(iv) Market Analysis (MHz per POP Study);

(v) RF study (interference analysis); and

(vi) Transition Plan creation and support;

(2) Project management (may be sourced external);

(3) Filing fees;

(4) Legal fees;

(5) Site acquisition fees-contractor; and

(6) Arbitrator fee;

(c) *Transmission facility—analog conversion costs:*

(1) Transmitter upgrading or retuning;

(2) Combiner re-tuning or new;

(3) Power divider/circulator adjacent channel combiner hardware;

(4) STL/fiber relocation;

(5) Miscellaneous material costs (including cabling and connectors);

(6) Contract labor:

(i) Tower;

(ii) Building modifications;

(iii) Electrical/HVAC; and

(iv) Mechanical

(7) Engineering:

(i) Structural; and

(ii) Pathway Interference Analysis.

(8) Equipment disposal/shipping

(9) Program Management (third party or internal costs to manage the BTA conversion); and

(10) Travel and Per Diem Cost.

(d) *Transmission facility-digital conversion costs:*

(1) New transmitter or retuning;

(2) Digital compression equipment-TX site (including encoders, controller, and software);

(3) Combiners-new or retune;

(4) Power divider/circulator adjacent channel combiner hardware;

(5) Cabinets, cabling, feedline and connectors;

(6) STL—fiber digital upgrade;

(7) Installation cost due to adding additional broadcast antenna (4 or more digital channels required);

(8) Contract labor:

(i) Tower;

(ii) Building modifications;

(iii) Electrical/HVAC; and

(iv) Mechanical.

(9) Proof of performance testing (may be contracted);

(10) Engineering:

(i) Structural; and

(ii) Path engineering analysis.

(11) Equipment disposal/shipping;

(12) Training;

(13) Program management (third party or internal costs to manage BTA conversion);

(14) Travel and per diem costs.

(e) *Qualified receive-sites only-modifications (analog and digital):*

(1) Digital set top boxes;

(2) Downconverters (with filtering)/antennas (replacement downconverters);

(3) Contract labor:

(i) Antenna change/DC install (antenna change may be necessary); and

(ii) Electrical; and mechanical

(4) Project management (third party or internal costs to manage the BTA conversion);

(5) Proof of performance testing (may be contracted);

(6) Mini headend (cost effective distribution method):

(i) Modulators, combiners;

(ii) Equipment racks; and

(iii) Amplifiers

(7) Cable, connectors; and

(8) Training.

(f) *Miscellaneous transition fees.* (1) Filing fees;

(2) Arbitrator fee; and

(3) Legal fees.

§ 27.1239 Reimbursement obligation.

(a) A proponent may request reimbursement from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in a BTA after the Transition Notification has been filed with the Secretary of the Commission and the proponent has accumulated the documentation to substantiate the full and accurate cost of the transition. A self-transitioning licensee may request reimbursement from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in a BTA where its GSA geographic center point is located after it has completed the self-transition and has filed a modification application with the Commission and has accumulated the documentation to substantiate the full and accurate cost of the transition.

(b) If a license is assigned, transferred, partitioned, or disaggregated, all parties to the assignment, transfer, disaggregation, or partition are jointly and severally liable for paying the reimbursement obligation until that obligation is paid.

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