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BRS/EBS Tidied Up

But how should the FCC deal off the spectrum?

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In a combined Order/NPRM released last month, the FCC resolved a number of petitions for reconsideration and other extraneous pleadings which had nibbled at the edges of the new Broadband Radio Service/Educational Broadband Service regulatory structure adopted in 2004 and 2006. In the “Order” portion of the document, the Commission addressed a smorgasbord of outstanding issues including the following:

- Decided to go ahead and auction available BRS spectrum without awaiting the end of the spectrum transition process.
- Clarified the dates applicable to self-transitioning licensees: proponent-driven transitions must be initiated no later than January 21, 2009; self-transitions must be initiated no later than April 21, 2009. Both proponent-driven and self-driven transitions must be completed by October 20, 2011.
- Clarified technical issues with respect to antenna height benchmarking, out of band emissions, the complaint process in the event of interference, and GSA definitions where applications were pending as of January, 2005.
- Grandfathered mid-band high powered operations by EBS licensees if needed to maintain existing service.
- Clarified transition and interference rights for BRS Channel 1 and 2/2A licensees.
- Denied a proposal to limit the rights of former Channel 2A licensees to split the football with incumbent Channel 2 licensees. The concept here was that 2A licensees had gotten a huge windfall by being allotted 6 MHz of spectrum in the new plan rather than the 4 MHz which they originally

held, and they therefore should not be entitled to divide the overlap area between their new spectrum and the GSAs of long-standing Channel 2 licensees.

- Adhered to its split-the-football approach to overlaps between grandfathered EBS E and F Channel licensees and co-channel BRS licensees.
- Decided to reverse course and establish a licensing plan for BRS/EBS spectrum in the Gulf of Mexico due to new oil drilling needs and Katrina-related communications needs. The Gulf will be divided into three license zones (excluding area up to 12 miles from shore which is licensed to BRS incumbents) and auctioned. It is unclear whether EBS spectrum will be reserved for EBS licensees since there are presumably no educational institutions in the Gulf.
- Clarified that EBS leases entered into prior to January 10, 2005 were limited to 15 years in length. EBS leases entered into between that date and July 18, 2006 can be of indefinite length. (The Commission noted that state contract law may imply a term limit to avoid an absurd, infinitely long lease.) Leases entered into after July 18, 2006 are limited to 30 years, with five year re-evaluations after the 15 year mark. The Commission also clarified that video-only EBS leases with unknown start dates executed more than 15 years ago will be deemed to have expired. At the expiration of lease terms, EBS lessees can make available “comparable” equipment to EBS licensees – not necessarily the exact equipment that has been used in the operation.
- Refused to create a safe harbor for licensees based on past service which has been discontinued. BRS licensees had wanted the comfort of being able to rely on service provided earlier in the license term when they had to have service or risk loss of their license. Many licensees have discontinued service as allowed by the Commission pending the transition process. However, the FCC will be demanding a “substantial service” showing from BRS and EBS licensees as of May 1, 2011. (Some markets may not even be transitioned by that date.) It would have been useful to licensees to be able to point to the service that they provided earlier in their license terms (*i.e.*, pre-January, 2005) as constituting substantial service. The FCC would only agree to consider such past service as a factor but not as a guarantee that you have met your service obligation. The FCC did provide some relief by permitting licensees with GSAs

which have been severely truncated by overlapping service areas of other licensees to rely on service provided by them over other facilities in the market.

- Clarified that EBS licensees may use EBS spectrum for purposes other than video programming to establish their educational eligibility.
- Ruled that in situations where a late-filed EBS or BRS renewal was filed and the Commission has already elected to reinstate the license, the late-filing licensee will be treated as the equal of other co-channel licensees for purposes of splitting the football of overlap between it and the timely-filed licensees. However, licensees who have pending reinstatement petitions that have not yet been acted on will, if reinstatement is granted, be entitled only to the areas of their GSA where they have no overlap with other timely-filed licensees. Licensees will, however, be allowed to make a special showing if application of this policy works a bizarre result.

The second part of the Commission action sought input on how to handle the award of EBS spectrum which is currently vacant. The usual method would be to auction it, but the FCC seems to have recognized that many educational institutions cannot from a practical standpoint engage in an auction process. The FCC therefore seemed unusually open to outside-the-box ideas about alternatives to auctions. Persons with an interest in acquiring or leasing EBS spectrum should submit suggestions or proposals in the sixty-day window which will be opening shortly for comments.