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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEB 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)
)
 Rulemaking to Amend Part 1 and)
 Part 21 of the Commission's Rules)
 to Redesignate the 27.5-29.5 GHz)
 Frequency Band and to Establish)
 Rules and Policies for Local)
 Multipoint Distribution Services)
)
 Applications for Waiver of the)
 Commission's Common Carrier)
 Point-to-Point Microwave Radio)
 Service Rules)

CC Docket No. 92-297

TO: The Commission

PETITION FOR RECONSIDERATION

University of Texas-Pan American ("UTPA") and RioVision of Texas, Inc. ("RioVision") (collectively "Petitioners"), by counsel, hereby request that the Commission reconsider in part its Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration ("Notice"), FCC 92-538, released January 8, 1993, denying inter alia the applications¹ of Petitioners for

1 Petitioners' proposals were filed subsequent to the FCC's grant of a waiver request in *Hye Crest Management, Inc.* However, Petitioners' waiver requests and public interest statements were wholly distinguishable from the proposal of Hye Crest. RioVision filed applications for the "A" block of spectrum on November 15, 1991, to serve the McAllen and Brownsville areas (File Nos. 9215179 and 9215180). UTPA filed applications to serve the same area via the "B" block of channels on April 10, 1992 (File Nos. 9216654 and 9216655). RioVision's applications appeared on Public

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authority to provide a novel educational programming distribution service in the Rio Grande Valley of Texas. Notice at ¶¶ 53, 82. For the reasons set forth below, such portion of the Notice as affects Petitioners' applications should be reversed. Petitioners presented the Commission with compelling waiver requests which the Commission omitted to consider, notwithstanding its duty to do so under well-established law. Accordingly, the Notice should be reversed in part in order for Petitioners' applications to be reviewed and granted.

**I. PETITIONERS' PROPOSAL PRESENTED THE
FCC WITH A COMPELLING WAIVER SHOWING.**

A. Uniqueness of Petitioners' Service Area

As explained in detail in their applications, Petitioners presented the Commission with a remarkable opportunity to act for the public good in one of the neediest regions of the Nation. The Rio Grande Valley of Texas, comprising a four-county area bordering Mexico along the Rio Grande River, is an area radically unlike any market for which other 28 GHz aspirants filed applications.

Educationally and economically, the Rio Grande Valley is the most deprived region in the United States. The Pan American component of the University of Texas System, with a campus at Edinburg, is the only institution of higher learning within a

1(...continued)

Notice December 26, 1991. UTPA's applications appeared on Public Notice August 5, 1992. Another entity, CT Communications Corp., filed an application for the "B" channels for McAllen, Texas on October 2, 1992.

radius of 70 miles. Some eighty percent of the students at UTPA are the first in their families to attend a university, and many are the first to graduate from high school. Over 65 percent of UTPA students receive significant amounts of financial aid and could not pursue a degree without state and federal assistance.

The Rio Grande Valley has no established system of public transportation and most of the households within the Basic Trading Area have only one vehicle that is shared by all family members. The average per capita income across the four county area is only \$6,196 per year and region-wide unemployment averages 14.3 percent. In Starr County, the most impoverished in the nation, unemployment is a staggering 23.5 percent with annual per capita income of \$4,152. A large number of UTPA students reside in homes where Spanish is the primary language. As a result, many bright, gifted and otherwise fully qualified young people find themselves with little or no opportunity to obtain remedial assistance prior to being thrust into the challenging environment of a four-year university.

As the Commission is aware, UTPA and RioVision have entered into an agreement whereby UTPA will lease excess bandwidth to RioVision for the distribution of wireless cable programming. The contract is loosely modelled on existing ITFS agreements, with a crucial distinction. Unlike a typical ITFS arrangement, Petitioners' plan will provide the University with the two-way capability essential for genuine distance learning to occur. RioVision, in turn, will realize the benefits of increased channel capacity,

permitting it to offer Valley residents an attractive blend of educational, cultural and entertainment programming.

Petitioners' plan is a product of their mutual desire to enhance the quality of life "in their own backyard." RioVision's principals are long-time residents and businessmen in the Rio Grande Valley. They have been active in civic affairs for many years and are known and trusted by local residents. Likewise, UTPA has been a presence in the Valley for almost 70 years, with an enrollment of 14,000, 93 percent of whom are Hispanic. The educational oasis provided by UTPA can perhaps best be illustrated by the fact that UTPA cannot fill its fieldhouse for a basketball game, but family members and friends must arrive three to four hours early to be assured of getting a seat in the same facility for a graduation ceremony. Valley residents perceive education as so fundamental a social value that baccalaureate services outdraw athletic events.

Based on their intimate familiarity with the Valley's people and the needs and problems of the people, Petitioners are convinced that education is the key to a fundamental revitalization of daily life in this region. However, severe impediments to providing necessary educational resources are indigenous to the Valley. The Valley contains approximately 200,000 households in an area roughly 100 miles long and anywhere from 20 to 30 miles wide. With few educational outlets of any sort to be found, residents simply do not have adequate formal learning opportunities. More problematic is that even families which are within

range of UTPA or one of its extensions are disinclined to take advantage of such resources because of an apprehension about the university campus proper. To understand this, it must be remembered that an astonishingly high percentage of UTPA's students are the first in their families ever to set foot on a university campus. Thus, the instinctive familiarity which the majority of Americans have with university life and opportunities are, in large measure, alien to many families in the Valley.

B. Uniqueness of Petitioners' Utilization Plan

Given the educational and economic circumstances of Valley residents, UTPA has been studying for some time the prospect of delivering the University's resources directly to homes. Driven by this over-arching goal, UTPA and RioVision have developed a plan which employs the LMDS concept by building upon the University's experience and research in the field of distance learning.

This utilization plan is outlined in the public interest statements and the waiver requests which are a part of UTPA's and RioVision's applications. The plan is developed in additional detail in UTPA's Petition for Pioneer's Preference filed in this proceeding on May 1, 1992. The Pioneer's Petition was filed at the recommendation of one of the Commissioners' offices, on the theory that a detailed presentation of Petitioners' accomplishments and future plans in this area would be a valuable component of the record supporting Petitioners' applications. Moreover, on the basis of Petitioners' proposal they were awarded licenses to inaugurate new service in the 28 GHz spectrum on an experimental

basis.

II. CONTROLLING PRECEDENT

Clear instructions concerning the appropriate course for the FCC to follow when presented with a compelling waiver request were laid out over twenty years ago by the U.S. Court of Appeals. The Court directed that the FCC has a general duty to consider waivers of the rules as a matter of administrative due process.

[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.

* * *

[A] system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties. The Commission is charged with administration in the 'public interest' ... [w]hich includes an obligation to seek out the 'public interest' in particular, individualized cases.

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Applications presented "with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look'." WAIT Radio, 418 F.2d at 1156. Additionally, the Commission must articulate a reasoned basis for its disposition. Id.

In the case of Petitioners' applications, all factors ordinarily defined as necessary conditions for grant of a waiver are present: (1) existing frequency allocations, as RioVision pointed out in its application, are inadequate to provide the service; (2)

the 28 GHz spectrum is plainly underutilized, see Notice at ¶ 5; (3) Petitioners' use of the frequencies will not be detrimental to the spectrum's assigned users, id., and (4) the public interest will be served by a grant of the waiver, as is self-evident from the very nature of Petitioners' proposal. See Hye Crest Management, Inc., 6 FCC Rcd. 332 (1991).

III. THE FCC'S BLANKET DENIAL OF ALL PENDING 28 GHz APPLICATIONS ASSUMES FALSELY THAT NO COMPELLING WAIVER APPLICATIONS WERE PRESENTED.

In the Notice, the FCC denied all pending waiver requests on the theory that to grant them in toto "would amount to a de facto reallocation of the 28 GHz band," would be "inconsistent with the Commission's suggestion that it would not grant a flood of such requests," and "would be detrimental to the assigned users" of the spectrum. The Commission also stated that it "see[s] no basis for distinguishing among any of the individual requests in an equitable fashion." Id. at ¶ 53. These considerations simply do not apply to petitioners' applications.

Petitioners do not dispute that a massive grant of hundreds of waiver requests would have been improper. At the same time, however, as the Commission implicitly acknowledged in the Notice, were specific waiver proposals (a) distinguishable from the others, (b) compelling, and (c) not so numerous as to constitute a de facto reallocation of the 28 GHz spectrum, WAIT Radio would dictate a favorable disposition of the applications. Petitioners' applications plainly satisfied these parameters. Accordingly, the

Commission's failure to consider Petitioners' proposal separately was a lapse that must be corrected.²

IV. CONCLUSION

UTPA and RioVision set forth in their applications the substance of a proposal to integrate technology and education in an area of the country in desperate circumstances. UTPA and RioVision did not file any other 28 GHz applications; their exclusive concern and focus is the Rio Grande Valley of Texas where they have deep roots and to which through the years they have demonstrated their commitment.

The vision which UTPA and RioVision have for the Valley is not an exclusively modern concept. Thomas Jefferson, perhaps the staunchest advocate of the power of knowledge to raise the quality of life, articulated the same vision over a hundred and eighty years ago: "I look to the diffusion of light and education as the resource most to be relied on for ameliorating the condition, promoting the virtue, and advancing the happiness of man." Letter to C.C. Blatchy (1822). The plan which UTPA and RioVision have for bringing the redemptive power of education to Valley residents, Jeffersonian in its conception, will be thoroughly futuristic in its execution. Indeed, Petitioners' plan is in full harmony with Vice President Gore's "electronic highway" program

² It should be emphasized that the service areas proposed by Petitioners in their applications correspond to the Basic Trading Areas concept advanced in the Notice. See Notice at ¶¶ 30-31. Likewise, Petitioners have presented the Commission with a definite plan for allocation of bandwidth within the spectrum.

and, if endorsed by the Commission, may well serve as a model for the Clinton Administration's educational initiatives. A proposal of such originality, which holds the promise for so much public good, warrants a waiver of the FCC's rules.

For these reasons, Petitioners ask that the FCC reconsider such portion of the Notice as denies the applications of UTPA and RioVision, that this reconsideration petition be granted, and that Petitioners waiver applications be granted expeditiously.

Respectfully submitted,

**UNIVERSITY OF TEXAS-PAN AMERICAN
and RIOVISION OF TEXAS, INC.**

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February 8, 1993

CERTIFICATE OF SERVICE

I, V. Frappier, hereby certify that I have, this 8th day of February, 1993, caused to be sent by U.S. first-class mail, postage-prepaid, a true and correct copy of the foregoing "Petition for Reconsideration" to the following:

CT Communications
Suite 200
1146 - 19th Street, N.W.
Washington, D.C. 20036

A handwritten signature in black ink, appearing to read 'V. Frappier', with a long horizontal line extending to the right.