

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Part 1 of the Commission’s) **WT Docket No. 97-82**
Rules – Competitive Bidding Procedures)

To: The Commission

**PETITION FOR RECONSIDERATION
OF THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group (“RTG”), by its attorneys, and pursuant to § 1.429 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby respectfully seeks reconsideration of the August 14, 2000 *Fifth Report and Order* in the above-captioned proceeding.¹ The *Fifth Report and Order*, *inter alia*, established a “controlling interest” standard for determining which entities qualify for bidding credits and adopted a new rule pursuant to which the officers and directors of an entity, including a rural telephone cooperative, are considered to have a controlling interest in the entity. In the case of a rural telephone cooperative, this will force such cooperative to attribute the gross revenues of the unrelated business interests of its officers and directors. The expansion of the attribution rules in this manner is overbroad, unduly burdensome and contrary to the mandate of Section 309(j) of the Communications Act of 1934, as amended (the “Act”). Accordingly, RTG requests that the Commission reconsider its attribution rules for officers and directors of rural telephone cooperatives.

¹ *In the Matter of Amendment to Part 1 the Commission’s Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking, WT Docket No. 97-82, FCC 00-274 (rel. Aug. 14, 2000) (“*Fifth Report and Order*”).

I. Statement of Interest

RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services ("PCS"), and Multichannel Multipoint Distribution Service ("MMDS") to their subscribers. Many of RTG's members also hold Local Multipoint Distribution Service ("LMDS") licenses and intend to use LMDS to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas. RTG's members are all affiliated with rural telephone companies. RTG participated in the proceeding leading to the adoption of the *Fifth Report and Order*.²

II. The Attribution of the Outside Business Interests of an Officer or Director of a Rural Telephone Cooperative is Overbroad, Unduly Burdensome and Contrary to the Mandate of § 309(j) of the Act

In the *Fifth Report and Order*, the Commission adopted a "controlling interest" standard for determining whether to attribute to an applicant the gross revenues of its interest holders and their affiliates in assessing whether such applicant qualifies for a bidding credit. Conceptually, under this standard, all parties that control an applicant or have the power to control an applicant, and their affiliates, will have their gross revenues counted and attributed to the applicant.³ The Commission also adopted rule § 1.2110(c)(2)(ii)(F) pursuant to which, "Officers and directors of an entity shall be considered to have a controlling interest in the entity."⁴ The Commission specifically applied this new attribution rule to the officers and directors of "rural telephone

² See Comments of the Rural Telecommunications Group filed February 6, 1998 ("RTG Comments").

³ See *Fifth Report and Order* ¶ 60.

companies and entities that control rural telephone companies.”⁵ The new attribution rules will effectively attribute to rural telephone cooperatives the gross revenues of the outside business interests of such cooperatives’ officers and directors.

As demonstrated below, the new attribution rules as applied to rural cooperatives are overbroad and inconsistent with the Act. Because of the unique nature of rural telephone cooperatives the new attribution rules may grossly exaggerate the gross revenues of rural cooperatives thereby improperly excluding them from eligibility for bidding credits. The outside business interests of individual officers and directors of a rural telephone cooperative are not financial resources available to the cooperative, have no impact on such cooperative’s access to capital and should not be attributed when determining such entity’s eligibility for a bidding credit. In addition, the new attribution rules are unduly burdensome and will lead to ridiculous and unintended attribution of other unrelated entities. Finally, the officers and directors of a rural telephone cooperative should not be considered to have a controlling interest in the cooperative because ultimate control rests in the subscriber-members, and the individual officers and directors of a cooperative do not individually have the power to control the cooperative.

Accordingly, upon reconsideration, the Commission should: (1) clarify that the gross revenues of the outside business interests of a rural cooperative’s officers and directors are not attributable to the cooperative unless the cooperative and such outside businesses are closely involved with each other’s businesses; and, (2) modify its attribution rules to consider an officer or director of a rural cooperative to have a “controlling interest” in the cooperative only if such individual officer or director has the actual power to control the cooperative.

⁴ 47 C.F.R. § 1.2110(c)(2)(ii)(F) as adopted.

⁵ *Fifth Report and Order* n. 203 (citing RTG Comments).

A. The Attribution Rules are Overbroad as Applied to Rural Telephone Cooperatives Because of the Unique Organizational Structure of a Cooperative

Unlike common stock companies, rural telephone cooperatives are non-profit, tax-exempt entities owned by their subscriber-members. They provide vital telecommunications services to rural and difficult to serve areas – areas no other telecommunications companies were willing to serve. Each rural cooperative is managed by a professional manager and governed by a large board of citizen-directors elected by the subscriber-members of the cooperative. The officers and directors of a cooperative have no appreciable ownership interest in the cooperative and no direct financial interest that differs from the subscriber-members at large.

The officers and directors of a rural telephone cooperative receive at most only nominal compensation for their service, and accordingly, support themselves and their families through businesses outside of and unrelated to the cooperative’s telecommunications business. Many of these officers and directors are farmers and ranchers who run family-owned farms and ranches. Others are business people in their rural communities. Often these same individuals serve on other civic boards as well.

Under new rule § 1.2110(c)(2)(ii)(F), the FCC will consider the officers and directors of a rural telephone cooperative to have a “controlling interest” in the cooperative. Pursuant to new § 1.2110(b)(1), the gross revenues of any “affiliate” of such officer and director will also be attributed to the cooperative.⁶ The rules therefore effectively attribute to the cooperative the gross revenues of the outside business interests of its officers and directors even though these outside business interests may be unrelated to the telecommunications industry and, as explained

⁶ See also 47 C.F.R. § 1.2110 (b)(4)(c) (An affiliate is an entity that is “directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant.”).

below, have no impact on such cooperative's ability to raise capital or compete for FCC licenses. Specifically, under the new rules, a cooperative may now have to attribute the gross revenues of family-owned farms, ranches and local businesses of the cooperative's officers and directors.⁷

Sections 309 (j) (3) (B) & (4) (D) of the Act require the Commission to, among other things, disseminate licenses among a wide variety of applicants and ensure that small businesses and rural telephone companies are given the opportunity to participate in the provision of spectrum-based services.⁸ The newly adopted attribution rules as applied to rural telephone cooperatives are inconsistent with the directive of § 309(j) because the attribution rules will vastly exaggerate the gross revenues of such rural telephone companies, thereby denying them the only mechanism the Commission has yet adopted to promote their participation in spectrum-based services.⁹

Because of their unique status as non-profit entities providing telecommunications service to remote and rural areas, and their status as designated entities pursuant to § 309(j), the Commission should revise its attribution rules to make it easier, rather than more difficult for rural telephone cooperatives to obtain bidding credits.¹⁰

⁷ Although many "family farms" are held by individuals rather than business entities and are therefore not attributable, for a variety of reasons, many such family farms and ranches are organized as business entities which would therefore be attributable under the rules. For example, for estate tax reasons, a family farm may be owned by a trust which would be considered an "affiliate" under the new rules.

⁸ See 47 U.S.C. § 309 (j) (3) (B) & (4) (D).

⁹ As explained in RTG's Comments, the Commission has failed to adopt mechanisms for ensuring rural telephone company participation other than allowing rural telephone companies to qualify for bidding credits if they otherwise qualify as a small business.

¹⁰ The FCC has previously recognized that different treatment may be warranted for non-stock entities, particularly not-for-profit entities, than for traditional for profit stock companies. See *Virginia Tech Foundation, Inc. Petition for Reconsideration of Request for Waiver of Section 101.23 -- Auction No. 17. Local Multipoint Distribution Service, Order, 13 FCC Rcd 4535, DA 98-387 (WTB 1998) ("Virginia Tech")* (permitting a not-for-profit entity to exclude revenues of its affiliates). See also *In re Implementation of Section 309(j) of the Communications Act --*

B. The Outside Business Interests Of a Cooperative’s Officers or Directors Are Not Resources Available to the Cooperative and Do Not Affect a Cooperative’s Access to Capital

Recognizing that the designated entities enumerated in § 309(j) lack the same access to capital enjoyed by large companies, the Commission adopted bidding credits to allow designated entities an opportunity to compete against larger, well-capitalized entities.¹¹ The Commission also adopted affiliation and attribution rules to determine what interests must be considered when assessing whether an entity qualifies for a bidding credit. The affiliation and attribution rules are intended to track an entity’s financial resources and access to capital, and therefore its ability to participate in spectrum-based services. The affiliation and attribution rules are also intended to ensure that large companies do not spin-off a “front” to compete against legitimate small businesses.¹² The attribution rules generally aggregate the gross revenues of commonly-controlled entities because the controlling parties of such concerns can utilize all the resources of such concerns and can leverage and borrow against the revenues and assets of all of the commonly-controlled companies.

The outside business interests of a cooperative’s individual officers and directors, however, are not resources available to the cooperative and have no impact on a rural

Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, ¶ 45 (1994) (“*Competitive Bidding Fifth MO&O*”) (a centralized equal access provider (*i.e.*, a group of rural telephone companies that provide centralized equal access and other sophisticated information services) will not be deemed an affiliate of each of its constituent members because such entities do not control their constituent members and each individual member does not control the centralized equal access provider); *Transfer Of Control Of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403 (Comm'n 1989).

¹¹ See, e.g., *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, FCC 94-178, 75 RR 2d 859, 9 FCC Rcd 5532 ¶ 121 (1994) (“*Competitive Bidding Fifth Report and Order*”) (recognizing that small entities stood “little chance of acquiring licenses in... auctions if required to bid against existing large companies”).

¹² See, e.g., *Virginia Tech* ¶ 5 (*citing* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, PP 31-45 (1994)).

cooperative's access to capital. Officers and directors do not personally guarantee a cooperative's debts, nor do they leverage their other assets to secure capital for the cooperative. The outside business interests do not contribute their resources to the cooperative. Accordingly, attribution of the outside interests of a cooperative's officers and directors serves no regulatory purpose and merely penalizes such rural telephone cooperative for its cooperative structure. Because the outside interests of officers and directors are not financial resources available to cooperatives and do not allow cooperatives greater access to capital, the gross revenues of such outside interests should not be attributed to the cooperative.¹³

C. Application of Rule § 1.2110(c)(2)(ii)(F) to Rural Cooperatives Is Unduly Burdensome and Will Lead to Ridiculous and Unintended Over Attribution of Revenues

Attribution of a cooperative's officers and directors outside business interests is also unduly burdensome and will lead to ridiculous and unintended results. For example, the FCC's rules attribute to one family member all the business interests of all other family members.¹⁴ Accordingly, under the new rules, a rural cooperative will be forced to identify and attribute the gross revenues of any business in which a controlling interest is held by the "father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister" of every officer and director.¹⁵

In addition, as noted above, many officers and directors of rural cooperatives are also

¹³ See *Virginia Tech* ¶ 5.

¹⁴ See 47 C.F.R § 1.2110(b)(4)(iii)(B).

¹⁵ *Id.* The "Kinship affiliation" provision may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters, however, a rural cooperative will still be forced to research such family businesses and familial relationships to rebut the presumption.

prominent citizens in their communities and serve on other citizen boards. Presumably, under the new rules, the gross revenues of these other citizen-run organizations will also be attributed to such rural cooperatives. For example, under the new rules, if a director of a rural cooperative also serves as a member of the local school board or local college, the rural cooperative would have to attribute the gross revenues of these institutions.

Moreover, cooperatives hold regular elections to determine the composition of their boards. The public election of new officers and directors with significant outside interests could cause a rural telephone company to lose its eligibility for bidding credits for which it previously qualified. The Commission's attribution rules might force a cooperative to limit which citizens are eligible to run for a board position only allowing individuals to run who would not cause the cooperative to lose its eligibility. The ridiculous results illustrated above are unduly burdensome, unnecessary, and inconsistent with § 309(j) of the Act.

D. Individual Officers and Directors Do Not Have the Power to Control a Rural Telephone Cooperative

Finally, the Commission should reconsider rule § 1.2110(c)(2)(ii)(F) because no individual officer or director has the power to control a rural telephone cooperative. All significant cooperative action must be approved by a majority of the directors. Ultimate control rests with the subscriber-members who regularly elect their representatives to the board.¹⁶ In the unlikely event that an individual or collection of individuals gains control of a cooperative, the general "controlling interest" standard would be sufficient to attribute any other interests they may have. It is unnecessary, however, for the Commission to automatically consider each officer

¹⁶ See *Transfer Of Control Of Certain Licensed Non-Stock Entities* where the Commission proposed treating even a sudden change in a majority of the board of directors of a member-owned cooperative as a non-substantial, *pro forma*, transfer of control rather than a substantial change in control.

and director to have a controlling interest pursuant to § 1.2110(c)(2)(ii)(F).

III. Conclusion

Rural telephone cooperatives are not-for-profit enterprises that provide vital telecommunications services to rural populations in difficult to serve areas. Because of the unique nature of rural telephone cooperatives, the new attribution rules as applied to rural cooperatives are overbroad, unduly burdensome, and inconsistent with the Act. The new attribution rules will grossly exaggerate the gross revenues of rural cooperatives thereby improperly excluding them from eligibility for bidding credits.

For the reasons stated above, the FCC should reconsider the *Fifth Report and Order* and modify the attribution rules applicable to rural telephone cooperatives as proposed herein.

Respectfully submitted,

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