BEFORE THE
FEDERAL COMMUNICATIONS Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed And Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
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 RM-9718
	)	

PETITION FOR RECONSIDERATION

Wireless Direct Broadcast System ("WDBS"), pursuant to Section 1.429(a) of the Commission's rules, hereby petitions the Commission to reconsider certain aspects of the *Report and Order and Further Notice of Proposed Rulemaking* ("Order")[1] in the above-referenced proceeding. Petitioner is licensee of Broadband Radio Service ("BRS") spectrum, lessee of various BRS and Educational Broadband Service ("EBS") licenses and is currently operating a digital video system in Bisbee, Arizona.

[1] Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report & Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (July 29, 2004). A synopsis of the Order was published in the Federal Register on December 10, 2004. 69 Fed. Reg. 72020.

I. The Commission Should Reduce the Size of Areas to Be Transitioned from Metropolitan Economic Areas to Basic Trading Areas

WDBS seeks reconsideration of paragraph 82 and Section 27.1231(a) of the rules in which the Commission states that transitions of markets must occur by Metropolitan Economic Areas ("MEAs"). Such large transition areas are unpractical, cumbersome and prohibitive to any entity who desires to transition its market.[2] The administrative burden alone of transitioning such a large area is overwhelming. A typical MEA covers an entire state. There are numerous licensees *in each market* in the MEA that must be notified and who are unlikely to uniformly agree to a Proponent's transition plan. The cost of engineering a plan, then notifying and negotiating with numerous licensees, as well as transitioning them, will be a tremendous burden to any small operator, not to mention the cost for providing downconverters for all ITFS receive sites in such a large area.[3] Such a task would be daunting for a single-market operator like WDBS if it has to transition all the EBS receive sites in its MEA.

Due to the history of the Broadband Communications Service ("BCS"), it is not uncommon for numerous individuals or entities to hold licenses in a single market that they then lease to an operator, who accumulates such licenses in order to garner enough spectrum to adequately provide service. Such individual licensees will not take the lead in initiating a transition and will rely on their operator or some other larger entity with interests in their market or a nearby area to undertake this broad task. However, even the larger operators seem concerned about the breadth of such a task due to the size of the areas to be transitioned. Because the areas to be transitioned are too large, the

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[2] See Separate Statement of Commissioner Jonathan S. Adelstein, issued on July 29, 2004 (FCC 04-135), in which he stated "I am disappointed, though, that the Order moves forward with a transition process that is based on major economic areas (MEAs). The BRS and ITFS services are local services, and I believe that broadband deployment for the foreseeable future will be rolled out on a relatively localized basis. I am concerned that the obligation to transition an entire MEA will make it exceedingly difficult for proponents to effectuate transitions in their particular market."

[3] See Paragraph 94 of the Order in which each proponent "must install at every eligible EBS receive site a downconverter designed to minimize the reception signals from outside the MBS." Such a task for an entire MEA would be a tremendous burden to a small operator like WDBS.

Commission has basically created a scenario in which no one Proponent will want to transition an MEA single-handedly and most will wait to see if someone else will take the lead before they are forced to take action at the last minute to save their license.[4] While the Commission has allowed for Co-Proponents to bear such costs and administrative procedures, it is already apparent among industry operators that such partnerships are unlikely to occur between competitors. Rather than being an incentive to complete transitions quickly, the rules are currently structured as a game of who will "break" first to take on such a cumbersome and costly task.

WDBS requests that the Commission reconsider transition by MEA and instead, reduce transition areas to Basic Trading Areas ("BTA"). If reduced, transitions are much more likely to occur quickly, as either the BTA authorization holder or an operator of incumbent spectrum in the BTA, if one exists, would be much more willing to take on such a manageable area, either individually or as Co-Proponents. Reducing the size of such transition areas would make transitioning more appealing and allow smaller operators to be Proponents as well. A Proponent should be afforded the opportunity to transition as large of an area as desired, with the smallest area being a single BTA.

If such change is implemented under Section 27.1231 of the new rules, and the Proponent is an incumbent licensee or lessee of a Geographical Service Area ("GSA") with a 35 mile protected service area that overlap more than one BTA, then the Proponent should be able to elect to transition one or more BTAs, as desired. Where the Proponent is an incumbent licensee or lessee, the FCC should also incorporate into this rule that notice must be given to the BTA holder, as such authorization holders do not always hold station licenses.[5] Where the BTA holder seeks to transition an incumbent within its BTA

[4] Since the majority of BCS licenses are held by Sprint, Nextel and Clearwire, almost all other licensees will wait for these larger corporations to take the lead in transitioning an MEA because they are just unable to bear the costs of such a task as the rules are currently written.

[5] Section 27.1231(d) of the FCC rules requires that a Pre-transition data request be send to "each EBS and BRS licensee". Since not all BTA authorization holders actually hold a station license within their BTA, the rule should clarify that the BTA authorization holder, if not the Proponent, should also be notified.

that overlaps into an adjacent BTA, the BTA authorization holder should only be obligated to transition the BTA plus that licensee's incumbent GSA, but not additional BTAs, unless the BTA authorization holder chooses to do so either individually or as a Co-Proponent.

In addition, it is requested that the Commission reconsider its statement in paragraph 79 of the Order and in Section 27.1231(d) of the new rules in which only a BRS or EBS licensee or EBS lessee is permitted to act as a Proponent and initiate a transition. WDBS requests that the Commission broaden this definition to allow BRS lessees to also initiate transitions, as there are operators of such spectrum who are not licensees but who would like the opportunity to transition their markets.

Finally, the rules need to address that serving a BRS or EBS licensee pursuant to its information listed on the Universal Licensing System is sufficient. Despite the Commission's attempts to update this database, there are still addresses and licensee name information that is inaccurate. A Proponent should not have to use alternative methods to find such licensees, but should be able to proceed as if the licensee had agreed to the transition plan. Such a rule would encourage licensees to keep their contact information current and to once again verify their license information. Furthermore, the Commission should issue public notices whenever a Proponent files a notice of initiation is filed as well as its Post-transition notice so that licensees that should have be notified but may not have been have an alternative method in which to become aware of a Proponent's actions.

II. Ownership of Wireless Spectrum by Cable Operators and ILECs

WDBS seeks reconsideration of the Commission's decision to allow cable operators and ILECs to acquire MDS spectrum for the provision of data services. Allowing such entities access to the BCS spectrum will provide them with an opportunity

to acquire such spectrum for the sole purpose of thwarting competition. The Commission states that eligibility restrictions are only imposed when there is a significant likelihood of substantial competitive harm and eligibility restrictions will be effective in addressing such harm, relying on "market forces" to guide license assignment.[6] However, since the ability to use BCS spectrum to provide data services is a recent development, and given that the cable-cross ownership prohibitions were believed to prevent any ownership of such spectrum by a cable operator, there are no relevant market facts and circumstances to cite in which to support this position. Indeed, the belief that their entry into this service has been restricted has been a relief, as both industries have long histories of competitive and sometimes deviant business practices.

However, if the Commission were to allow use of this spectrum by such entities, it would further prohibit the development of such systems and encourage the warehousing of spectrum by large entities hoping to delay or quash competition. Cable companies and ILECs have been adamant about protecting access to their networks, preventing competition whenever possible, while demanding access to spectrum used by their competitors. Rather than allowing such use because the Commission does not read the Telecommunications Act as preventing it, such entities should prove how and why they need such access, considering the amount of resources already available to them and the limited budget of most small operators in this band with whom they would compete.

At the very least, the Commission should restrict any ownership of the Mid-Band channels to such entities in Section 27.1202 of its new rules, as these channels are specifically designated for high power video operations, which the Commission has confirmed that such entities are prohibited from using. Under no circumstances should a

[6] See paragraph 175 of the Order.

cable operator or ILEC be permitted to hold such channels, whether through an affiliate or otherwise, since this would provide such entities an opportunity to prevent the development of any competitive video services which WDBS hopes to continue to develop on the Mid-Band channels.

III. WDBS Supports the Denial of Underlay Use of Frequencies

WDBS supports the Commission's decision to forbid underlay or unlicensed operations in this band. Considering the amount of use that these frequencies will receive as a result of this proceeding, particularly mobile use, allowing for other users, even on a secondary basis, would only cause complications to operators in this band in having to discern such interference, when it occurs, then spending time and effort to uncover and resolve such matters.

CONCLUSION

In conclusion, the Commission is to be congratulated for making such great strides in improving the regulatory environment for Broadband Communications Service systems. However, WDBS respectfully requests that the Commission reconsider the issues raised above to ensure that such new rules are fairly and adequately applied in order for new services to be provided on an expedient basis.

Respectfully submitted,

WIRELESS DIRECT BROADCAST SYSTEM

By ___/s/ John McLain_____
John McLain

January 10, 2005