

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

<b>In the Matter of</b>	)
	)
<b>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</b>	) <b>WT Docket No. 03-66 RM-10586</b>
	)
<b>Part 1 of the Commission's Rules – Further Competitive Bidding Procedures</b>	) <b>WT Docket No. 03-67</b>
	)
<b>Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service To Engage in Fixed Two-Way Transmissions</b>	) <b>MM Docket No. 97-217</b>
	)
<b>Amendment to 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</b>	) <b>WT Docket No. 02-68 RM-9718</b>
	)
<b>Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets</b>	) <b>WT Docket No. 00-230</b>
	)

**To: The Commission**

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

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**Dated: January 10, 2005**

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### Summary

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (“BloostonLaw”) submits this “Petition for Reconsideration or Clarification” on behalf of certain clients who are licensees in the Broadband Radio Service serving predominately rural areas.

The transition plan provisions adopted in Paragraph No. 43 of the Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135, released July 29, 2004 (“R&O”) should be revised to include a third channel plan option for licensees serving rural areas. Under this third option, a licensee serving a rural area that presently has four interleaved 6 MHz channels could elect to receive three 6-MHz-wide channels, for high-power operations, one 5.5-MHz-wide channel for low-power operations, and 1 MHz of contiguous spectrum in the J or K guardbands.

The transition process should be modified to allow licensees serving rural areas to continue operations under the old band plan until January 10, 2013 (*i.e.*, the date occurring five years after the end of the transition process) to allow for the orderly replacement of otherwise perfectly good equipment in the ordinary course of business.

The three-year transition period should be tolled pending resolution of disputes of the transition plan presented to incumbent licensees under the Phase 2 transition procedures, regardless of whether the dispute is to be resolved by an arbitrator or the Commission.

The Commission should allow opt-out as matter of right. Nevertheless, if the Commission decides to retain waiver procedures, the waiver standard discussed in Paragraph No. 77 of the R&O should be modified or clarified with respect to the phrase

“as well as the licensee’s explanation as to why it cannot work within the transition rules we have adopted.”

The Commission should suspend the effectiveness of the rules adopted in the R&O until comprehensive final rules for MDS Channels on MDS Channels 1 and 2/2A have not yet been promulgated

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**To: The Commission**

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("BloostonLaw"), on behalf of its clients in the Broadband Radio Service listed on Attachment A hereto and pursuant to Section 1.429 of the Commission's Rules, hereby requests reconsideration and clarification of certain actions taken in the Report and Order

and Further Notice of Proposed Rulemaking, FCC 04-135, released July 29, 2004

(“R&O”).<sup>1</sup> In support hereof, the following is shown:

### **Statement of Interest**

1. BloostonLaw’s clients are licensees in the Broadband Radio Service serving predominantly rural areas in the United States. Accordingly, BloostonLaw’s clients have an interest in any changes to the licensing and service rules adopted by the Commission.

### **Introduction**

2. The R&O adopted a new band plan and an initial set of new regulations for the newly-named Educational Broadband Service (“EBS”) (formerly the Instructional Television Fixed Service (“ITFS”)) and the newly-named Broadband Radio Service (“BRS”) (formerly the Multipoint Distribution Service and the Multi-Channel Multipoint Distribution Service (collectively “MDS”)) in the 2500 – 2690 MHz band. The new band plan and associated rule changes adopted by the Commission to date in this proceeding are virtually unprecedented in their scope and complexity. This fundamental restructuring of the 2500-2690 MHz band is intended to foster access to ubiquitous broadband connections, as well as cellularized “3G” and “4G” type services in the band, while simultaneously allowing for the continued provision of video services. While the new regulatory structure may properly serve the needs of large metropolitan areas, BloostonLaw is concerned that the new band plan and regulatory structure do not properly address the needs of rural areas. Accordingly, BloostonLaw requests the Commission to reconsider or clarify certain of its actions, as set forth below.

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<sup>1</sup> The R&O was published in the Federal Register on December 10, 2004. Accordingly, this petition is timely filed. See Section 1.4(b)(1) of the Rules.

### **The New Band Plan**

3. Prior to the effective date of the R&O, the 2500 – 2690 MHz band was comprised of twenty 6 MHz ITFS channels and eleven 6 MHz MDS channels. The channels in this band were licensed in groups of four (with the exception of MDS H Block, which consisted of three channels) interleaved channels. According to the Commission, the interleaved channelization framework is not optimal for digital two-way services; and the technical rationale for the interleaved band plan no longer exists. The Commission finally concluded that the interleaved channelization scheme is particularly problematic where one licensee seeks to operate at low-power while the adjacent licensee operates at high-power because low-power services are especially susceptible to interference from high-power transmissions on adjacent channels. R&O, Para. No. 21.

4. To alleviate these concerns, the Commission has adopted a three-segment band plan with the following characteristics:

A) the Lower Band Segment (“LBS”) for low-power cellularized operations, extending from 2496 – 2572 MHz, and comprised of twelve 5.5-MHz-wide channels (all for EBS licensees), one 6-MHz-wide channel (for BRS licensees), and one 4-MHz-wide guardband (the J band);

B) the Middle Band Segment (“MBS”) for high-power operations, extending from 2572 – 2614 MHz, and comprised of seven 6-MHz-wide channels (five for EBS licensees and two for BRS licensees); and

C) the Upper Band Segment (“UBS”) for low-power cellularized operations, extending from 2614 – 2690 MHz, and comprised of twelve 5.5-MHz-wide channels (nine for BRS licensees and three for EBS licensees), one 6-MHz-wide channel (for BRS

licensees) and one 4-MHz-wide guardband (the K band). R&O, Para Nos. 37 and 38 and Appendix C, pages C-16 – C-18.

5. Under the new band plan adopted in the R&O, a licensee presently having four interleaved 6 MHz channels and four associated 0.125 MHz response channels (a combined 24.5 MHz of spectrum) will receive 16.5 MHz of contiguous spectrum in either the LBS or UBS for low-power operations, a 6 MHz channel in the MBS for high-power operations, and 1 MHz of contiguous spectrum in either the J or K guard bands (*i.e.*, a combined 23.5 MHz of spectrum) after the transition has been completed. A licensee presently assigned one channel in the band will receive **either** one 5.5 MHz channel in either the LBS or UBS for low-power operations **or** one 6 MHz channel in the MBS for high-power operations. R&O, Para. No. 43.

6. The new band plan, while perhaps well attuned to the needs of large metropolitan areas, does little to serve the particular needs of rural areas where low-power cellularized operations are not an economically feasible means of providing wireless video and data services. Indeed, the Commission has implicitly acknowledged as much. R&O, Para. No. 46 (“We agree with Teton that the expenses involved in deploying multiple cell sites to serve sparse populations may make it impractical to continue most services offered over high-power systems.”) All systems currently serving rural areas are high-power, and those high-power systems well serve the needs of rural populations in a cost effective manner. If required to migrate programming to low-power channels, many licensees may have to discontinue some or most of their services because it would simply be economically impossible to deploy the necessary transmission facilities and equipment.

7. Accordingly, BloostonLaw requests the Commission to add a third option to those enumerated in Paragraph No. 43 of the R&O for licensees serving rural areas. Under this option, a licensee serving a rural area that presently has four interleaved 6 MHz channels and four associated 0.125 MHz response channels could elect to receive three 6-MHz-wide channels for high-power operations and one 5.5-MHz-wide channel for low-power operations, and 1 MHz of contiguous spectrum in the J or K guardbands. BloostonLaw respectfully submits that this option would better serve the needs of rural areas. Adoption of this option would not adversely affect operations in metropolitan areas because, for example, it is more moderate than the provisions adopted for MVPD and BRS licensees in Paragraph No. 77 of the R&O.

8. It is recognized that the new rules contemplate high-power operations on channels in the LBS and UBS otherwise designated for low-power operations if the licensee can secure the consent of neighboring licensees. R&O, Para. No. 72. However, the Commission can give no assurance that such consents can be obtained, and BloostonLaw respectfully submits that a licensee's ability to provide good service to rural areas should not rest upon the whims of other licensees. In addition, allowing the third option as a matter of right will enable transition plan proponents to devise a transition plan for a given Major Economic Area ("MEA") which takes into account these high-power operations, and will enable more comprehensive transition plans to be devised and implemented than would be the case if exclusive reliance was placed upon the licensee's somewhat speculative ability to secure consent from neighboring licensees.

**The Transition Plan Implementation Period Should Be  
Extended For Rural Licensees**

9. To facilitate the transition of existing licensees to the new band plan, the Commission has adopted a five-phase transition process to be implemented on the basis of Major Economic Areas (“MEAs”). The transition period will commence on January 10, 2005 and end on January 10, 2008. The procedures adopted by the Commission contemplate that one or more private parties will serve as transition plan proponents for a given MEA, and that, at the end of the transition process, the existing licensees participating in the plan will have installed all replacement equipment necessary to operate under the new band plan. R&O, Para Nos. 72 – 92. Transition proponents are required to pay the transition costs of EBS licensees; but BRS licensees are responsible for paying their own transition costs. R&O, Para. No. 93.

10. BloostonLaw submits that the procedures adopted may be unsuited to the unique needs of many existing licensees serving rural areas. The cost of the necessary replacement equipment needed to implement a given transition plan will be great. The equipment currently utilized by these licensees remains in good working order (and, indeed, may only be a few years old in certain cases where licensees have recently built out market area licenses), and this equipment has many years remaining in its useful life span before it would otherwise have to be replaced in the ordinary course of business, were it not for the need to do so as part of the transition to the new band plan. The need to replace otherwise perfectly good equipment will impose an extreme economic burden

on existing licensees, a burden which can be eliminated (or at least significantly minimized) by the adoption of a reasonable modification to the transition process.

11. Therefore, BloostonLaw requests the Commission to modify the transition process to allow licensees serving rural areas to continue operations under the old band plan until January 10, 2013, *i.e.*, the date occurring five years after the end of the transition process. The additional five years should be adequate to allow most licensees to recoup the cost of their investment in their existing equipment (equipment that would not have to be replaced but for transition to the new band plan) and allow for its orderly replacement in the ordinary course of business. Adoption of this proposal would substantially alleviate the extreme hardship that transitioning to the new band plan would otherwise impose on licensees serving rural areas.

**The Three-Year Transition Period Should Be Tolled Pending Dispute Resolution**

12. The Commission, in establishing the three-year transition period and dispute resolution procedures, did not expressly provide for a mechanism to toll the three-year transition period in the event of a dispute. Such a mechanism is important to facilitate the proper development of transition plans.

13. Under the Phase 2 transition procedures adopted in the R&O (styled the “Transition Planning Period”), the transition proponent must provide its written transition plan to all licensees in the MEA; and individual licensees have a period of twenty days within which to submit written counterproposals to the proponent. R&O, Para. Nos. 88 – 89. If a timely counterproposal is received, the proponent may either accept the counterproposal and modify the transition plan accordingly or invoke dispute resolution procedures for a determination of whether the transition plan is reasonable. R&O, Para.

No. 89. According to the Commission, the proponent has two options if it decides to seek dispute resolution. First, it can refrain from taking action to transition the MEA until the dispute is resolved. Second, it can continue to transition the MEA while it awaits the results of the dispute resolution process. R&O, Para. No. 89. The Commission encouraged the use of Alternative Dispute Resolution (“ADR”) procedures, but nevertheless stated that “we reserve the right to determine whether transition plans comply with our rules,” thus suggesting that the use of ADR procedures is not mandatory and that it may not be appropriate in all cases. R&O, Para. No. 89.

14. Regardless of the dispute resolution method selected (ADR or Commission intervention), it will require a substantial amount of time to secure a decision from the arbitrator or the Commission because the technical issues presented may be very complex and, therefore, not inherently suitable for a rapid decision. Likewise, a decision adverse to the transition plan proponent could require sweeping changes to the plan – changes which could be time consuming to devise. For these reasons, dispute resolution procedures should toll the running of the three-year transition period.

15. Use of the Commission’s dispute resolution process (whether before an arbitrator or the Commission) should toll the running of the three-year transition period in the affected MEA since dispute resolution and revising the transition plan will both be time consuming activities which, in the absence of tolling, will reduce the amount of time needed for the orderly transition of the MEA to the new band plan. Accordingly, it is respectfully requested that the Commission clarify the R&O to address this issue.

**The Waiver Standard Should Be Modified Or Clarified**

16. In the R&O, the Commission sympathized with the plight of multichannel video programming distributors (“MVPDs”) (as defined in Section 522 of the Communications Act of 1934, as amended) who developed successful business plans under the old rules, and to their customers who receive both video and broadband services from those MVPD licensees. Similar sympathy was expressed for those BRS licensees who have a viable business for high-powered operations, but who need more than the seven digitized MDS channels to deliver service to their customers (which would constitute all of the high-power spectrum in the band). R&O, Para. No. 77. Therefore, the Commission stated that it would consider waivers on a case-by-case basis for certain MVPD, BRS and EBS licensees. Specifically, the Commission stated that it would consider waivers for BRS licensees that have a viable business for high-powered operations, but who need more than seven digitized high-power MBS channels to deliver their service to their customers. R&O, Para. No. 77. The Commission stated that waiver requests will be processed under the standards codified in Section 1.925(b)(3) of the Rules; and in reviewing waiver requests, the Commission will consider actions taken by MVPD or BRS licensees to minimize the affect of interference on neighboring markets, “as well as the licensee’s explanation as to why it cannot work within the transition rules we have adopted.” R&O, Para. No. 77.

17. As an initial matter, BloostonLaw fully supports the position being advanced in the “Petition for Reconsideration of Central Texas Communications, Inc.” (“CTC Petition”) being filed simultaneously herewith, which argues that opt-out should be a matter of right, instead of being implemented under a waiver standard. The arguments

advanced in the CTC Petition are well reasoned as a matter of law and compelling as a matter of policy.

18. Nevertheless, in the event the Commission decides to continue with the waiver procedures, BloostonLaw submits that the phrase “as well as the licensee’s explanation as to why it cannot work within the transition rules we have adopted” provides no useful insight into how the criteria will be applied and, therefore, provides no useful guidance to licensees in planning their actions. Indeed, the criteria appears facially inconsistent with the very concept of a waiver because, for example, requiring more than seven digitized high-power MBS channels is, in and of itself, inconsistent with the transition rules – yet it is nevertheless the cornerstone established by the Commission for securing a waiver. Accordingly, the Commission should either eliminate this criteria as a basis for waiver request evaluation, or state with specificity precisely what it means so that licensees can plan their actions in an intelligent manner.

**The Commission Should Suspend Effectiveness Of The New  
Rules Pending A Decision On MDS Channels 1 and 2/2A**

19. The actions taken in the R&O are incomplete inasmuch as they do not comprehensively encompass MDS Channels 1 and 2/2A. The R&O is replete with references to MDS Channels 1 and 2/2A, but principally to state that issues regarding these channels will be resolved in another (unidentified) proceeding. See R&O, Para. Nos. 23, 25, 27, 72, 88, 290 n. 600, 296, 299. When and where these issues will be resolved is at best unclear. It is similarly unclear how these channels will fit within the transition plan framework set forth in the R&O.

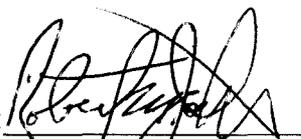
20. It does not appear that orderly transition plans can be developed and implemented absent the promulgation of complete rules regarding MDS Channels 1 and 2/2A. Transition plan proponents are supposed to develop comprehensive transition plans for **all** licensees within a given MEA (excluding those who opt-out), which seemingly includes MDS Channel 1 and 2/2A licensees, and have been accorded a three-year period commencing on January 10, 2005 within which to complete the transition process. This is because many licensees operate systems on a variety of channels which include MDS Channels 1 and 2/2A. Yet it seems readily apparent that the comprehensive transition plans which the Commission seeks cannot be devised and implemented without knowing what the full set of rules for these channels will be. Accordingly, the only prudent course of action is to suspend the effectiveness of the new transition plan rules until the promised, comprehensive regulations for MDS Channels 1 and 2/2A have been promulgated.

**WHEREFORE**, BloostonLaw requests that the instant petition be granted.

Respectfully submitted,

**Blooston, Mordkofsky,  
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By:   
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Its Attorneys

Dated: January 10, 2005

## **ATTACHMENT A**

- 1) Consolidated Telecom
- 2) The Hinton CATV Company, Inc.
- 3) North Dakota Network Co.
- 4) James D. and Lawrence D. Garvey d/b/a Radiofone
- 5) West River Cooperative Telephone Co. and G.W.  
Wireless, Incorporated Partnership