

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets)	WT Docket No. 00-230
)	

**COMMENTS OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

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SUMMARY

HITN hereby submits its comments in response to a Further Notice of Proposed Rulemaking. With regard to substantial service performance requirements, HITN seeks a safe harbor for EBS renewals that occur prior to January 2015 so that EBS licensees will not be penalized for service interruptions during the transition. With respect to white space EBS auctions, HITN urges the Commission to proceed expeditiously without delay to auction such spectrum on and MEA basis by traditional EBS channel group assignments, but in a post-transition configuration. On the subject of alternative transition methods, as a matter of fundamental fairness, HITN urges the Commission to provide a self-transition option for EBS licensees where no proponent has stepped forward to initiate the transition within the prescribed three-year period. HITN also seeks removal of the four-channel restriction on EBS licensees within individual markets, and on a going forward basis, elimination of the wireless cable exception that allows commercial licensing of EBS spectrum on a limited basis. HITN also supports licensing on the BRS and EBS band in the Gulf of Mexico in such a way that does not unfairly strip the normal service area from coastal EBS Licensees. Finally HITN opposes the imposition of regulatory fees on educational and non-profit entities holding authorizations on the EBS band.

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To: The Commission

**COMMENTS OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

Hispanic Information and Telecommunications Network ("HITN"), by its attorneys, hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-referenced matter.¹

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 and Order ("*Broadband Services Order*") and Further Notice of Proposed Rulemaking ("*FNPRM*"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004). A summary of the *Broadband Services Order* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,020.

I. Introduction

HITN, founded in 1981, is a 501(c)(3) non-profit private foundation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV, the first and only 24-hour a day Spanish language public interest television channel in the United States, is presently carried on the Dish Network and the Time Warner Cable Network. HITNet, a satellite-based broadband service delivered via HITN's state of the art satellite platform at the Brooklyn Navy Yard, NY, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico. HITN also holds over 45 station authorizations in the Educational Broadband Service ("EBS") for facilities throughout the United States and Puerto Rico. HITN's EBS facilities are presently used to provide educational programming, and through a partnership with Clearwire, Inc. advanced wireless broadband services in several markets. HITN, as perhaps the largest holder of EBS authorizations in the United States, has a significant stake in the outcome of this proceeding, and therefore has participated in all earlier facets of this Rulemaking.²

II. Substantial Service Performance Requirements for EBS

In its *FNPRM*, the Commission sought comment on its intention to adopt substantial service performance requirements for EBS Licensees and on specific "safe harbors" that might be adopted with regard to the performance evaluation of individual licenses.³ Because the services that will be provided by EBS licensees over these facilities following the transition may vary widely, with some continuing to provide high powered traditional video service over their MBS channels, while others seek to provide all manner of next-generation services including internet and WiMax over their LBS or

² See Comments and Reply Comments of HITN filed in response to Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003), 18 FCC Rcd 6722, 6734 (2003) ("*NPRM*").

UBS spectrum, it may be hard to craft safe harbors that can define adequate levels of service in each instance. Therefore the adoption of safe harbors may not spare the Commission from retaining a more general case-by-case evaluation standard. HITN understands that the NIA is submitting a detailed proposal of recommended substantial service safe harbors, and will therefore reserve detailed comment on the safe harbor issue for response or refinement, if needed, regarding the industry proposals.

However, HITN does believe that a special safe harbor should be created for any licensee whose renewal comes due following the effective date of the new rules, but prior to January of 2015. Pursuant to that safe harbor, such licensees would automatically be granted a short renewal for those facilities until January of 2015. Under the rules presently adopted, the transition will take almost four and one half years to be completed, if all transition notices are timely filed with the Commission. If areas remain untransitioned at that time, depending on additional transition mechanisms adopted by the Commission as a result of this FNPRM, the process could take even longer. Further, during portions of the transition period, certain authorized but unconstructed EBS “permitted” stations may seek to remain dark pending construction in accordance with the new band plan following the transition. Additionally, during that same period, individual EBS facilities may need to terminate existing high-powered operations to facilitate surrounding transitions.

The creation of the suggested safe harbor would ensure that EBS licenses will not be penalized at renewal time for having failed to satisfy substantial service standards based largely on periods of time falling within the transition process. It is also important that licensees be given sufficient time following the band plan transition to bring new

³ FNPRM at ¶¶ 322 & 328.

services online and amass a sufficient service record for renewal evaluation. HITN believes that if the transition would be scheduled to be completed by around January 2010, a five-year service period would be sufficient to amass the needed service history for renewal evaluation in 2015.

III. Unlicensed EBS Spectrum Auction

The *FNPRM* also seeks comment on issues concerning the auctioning of unassigned EBS spectrum or “white space.”⁴ Specifically, the Commission sought comment on the timing of such auctions, as well as the size of geographic areas and the specific frequency groupings to be auctioned. With regard to the issue of eligibility, HITN supports the Commission’s proposal to include “all parties, both incumbents and new entrants, who are potentially eligible to hold the licenses offered.”⁵ Thus, EBS white space auctions would include any non-profit, governmental or educational entity that could otherwise qualify to hold an EBS authorization under the Commission’s Rules.

The Commission also sought comment on whether it should wait until the end of the three-year period for filing Transition Initiation Plans before initiating EBS white space auctions in order to better identify all available spectrum.⁶ Given the position taken by HITN below with regard to a self-transition option, HITN does not believe that the Commission should wait to schedule EBS white space auctions, but rather should schedule them promptly following the conclusion of this proceeding.

On the issue of the size of geographic areas to be included in each auction, HITN believes the Commission’s suggestion may be the best course in this instance. The

⁴ *FNPRM* at ¶¶ 266-288.

⁵ *FNPRM* at ¶ 266.

⁶ *FNPRM* at ¶ 272.

Commission has proposed auctioning EBS white space authorizations by Major Economic Areas (“MEAs”), on a scale in line with the band plan transition model adopted by the Broadband Services Order. While in its Petition for Reconsideration of the Broadband Services Order, filed concurrently herewith, HITN takes issue with the use of such large geographic areas for the band plan transition, HITN believes that the use of MEAs in the context of EBS white space auctions makes a certain amount of sense. In the previous BRS white space spectrum auctions, bidders were well-heeled commercial operators intent on using the additional interstitial areas between previously authorized commercial facilities to fill in service gaps. In the case of the proposed EBS white space auction, bidders in rural areas would for the most part be public institutions less well equipped to finance the acquisition of additional spectrum, much less to efficiently develop that spectrum in conjunction with commercial operators to unleash its educational potential as well as the connective potential sought on leased frequencies by commercial operators. Because of the fill-in nature of this white space spectrum, if auctioned in smaller pieces it is quite possible that more rural areas will receive little interest or no bids at all.

By auctioning such EBS white space in large geographic blocks, the Commission will ensure that less populous rural areas as well as more populous urban areas will be jointly and promptly licensed and will be equally subject to any buildout requirements adopted by the Commission. Additionally, by holding relatively fewer auctions and allowing bidding pools and subsequent splitting of authorizations by winning bidders, the Commission will ensure not only prompt and efficient licensing, but a profitable and robust auction process as well.

With regard to the grouping of frequency blocks for inclusion in the white space auctions, HITN urges the Commission to auction EBS spectrum by channel groups, as they are ordinarily licensed within the band, rather than by individual channel or by LBS/UBS and MBS band segments. Because bidding will be restricted to parties eligible to hold EBS licenses and because existing EBS licensees may wish to pool together within a specific MEA area to gain access to areas surrounding specific existing station operations, it seems most appropriate that the Commission should group EBS white space frequencies for auction in the same four-channel groups as it has traditionally authorized EBS licenses (A, B, C, D and G Groups). Such Spectrum Groups should be configured in accordance with the new band plan, with an MBS channel and complimentary LBS or UBS channels, and as appropriate contributory portions of spectrum in the J and K guardbands. Thus, white area auctioned will already have been transitioned into the new band plan. This will excuse commercial operators from being intentionally presented by the Commission with additional EBS spectrum to transition within a short period of time after the auction, and will further act as an incentive for a more prompt transition in order to fully unlock the potential of the auctioned spectrum.

While HITN believes that there may need to be specific rules adopted to accommodate auctions tailored to the unique characteristics and needs of the various types of eligible entities within the EBS Service, it will await the NIA industry proposal on this matter before commenting in reply.

IV. Alternative Band Transition Methodologies - EBS Self-Transition

In its *FNPRM*, the Commission has proposed to use alternative processes for transitioning to the new band plan in areas where no transition plans have been filed within

the time allotted.⁷ Under the plan adopted by the Commission in its *Broadband Services Order*, EBS stations not transitioned within the prescribed three year period would be required to discontinue operations and EBS Licensees could ultimately face the prospect of losing their licenses for such stations. If transitions are to be effectuated by MEAs, or even if on reconsideration the Commission adopts the more reasonable alternative BTA transition proposal, it will be rare for an EBS licensee to act as a proponent in the regional transition process. Thus, the transition of most EBS stations to the new band plan will depend on the business plans, economic resources and schedules of a relatively few commercial operators. HITN seeks reconsideration of the plan to the extent that the authorizations of EBS licensees are placed at risk due to unexpected difficulties and economic issues encountered by the commercial operators attempting these regional transitions. HITN believes that a self-transition option should be put in place for EBS licensees in markets that have not been transitioned within the timeframe provided.

In the *Broadband Services Order*, the Commission stated that in markets where no transition plan is filed, it would not require licensees to “cease existing operations until at least eighteen months after the deadline for proponents to file initiation plans,” but further stated that if a transition is not initiated within three years of the effective date of the rules, the Commission would “use another method of transitioning” for the band.⁸ In the *FNPRM* the Commission suggested that such further transitions following service terminations by untransitioned EBS licensees would be achieved through the adoption of “rules to clear current spectrum assignments from the band.”⁹ The proposal anticipates

⁷ *FNPRM* at ¶ 289.

⁸ *Broadband Services Order*, at ¶¶ 81 & 83.

⁹ *FNPRM* at ¶ 290.

that untransitioned EBS licensees that lose their authorizations would be provided with “bidding offset credits.”¹⁰ Such procedures for terminating untransitioned stations would be contrary to the Commission’s position clearly stated within the NPRM that it did “not intend to evict incumbent licensees from the affected band,” and that it did “not intend to undermine the educational mission of ITFS licensees.”¹¹

HITN believes that the Commission’s rules as adopted, and as it proposes to modify them, might yield an unanticipated incentive for an operator to delay transitions in certain regions within the three-year timeframe if it believed that it would be cheaper to transition the band after the FCC cleared the Band of untransitioned licensees. Further, HITN believes that having created a transition method on a scale beyond the reasonable economic means of individual EBS licensees, it would be manifestly unfair for the Commission to then punish well-meaning and otherwise compliant licensees for any inability or failures of commercial entities to transition the band within the allotted timeframe. Accordingly, HITN believes that fundamental fairness requires the Commission to offer such EBS licensees a self-transition option in the event that no proponent has stepped forward to transition their market by the conclusion of the provided three-year period.

Under such an option, in any market where a proponent has not filed an initiation plan by the required date, an untransitioned EBS licensee should be permitted to state within some period of time that it intends to self-transition. Naturally, EBS licensees failing to file such a statement would be subject to other alternative transition mechanism

¹⁰ Id. However, the Commission did not assure EBS licensees that “bidding offset credits” awarded for such stations would, in most cases, be sufficient to allow such licensees to reacquire their EBS licenses in the future auction.

¹¹ *NPRM* at ¶ 2.

adopted by the Commission pursuant to this rulemaking, and could ultimately be forced to accept bidding offset credits in exchange for their licenses. However, self-transitioning EBS licensees that provided the requisite notice would be allowed to retain their authorization, and by a deadline to be established by the Commission, presumably coinciding with the termination of existing EBS high-power operations by untransitioned EBS licensees, would be required to terminate high-power operations on applicable LBS or UBS channels. Such self-transitioning EBS Licensees would be allowed to continue high power operations on their authorized MBS Channel under the new band plan.¹²

V. EBS Four-Channel Restriction

The Commission, as part of its FNPRM, has sought comment on whether to retain the four-channel rule in markets that have not yet been transitioned.¹³ HITN believes that the purpose of the four-channel rule has been largely overtaken by the evolution of services in these bands and exceptions routinely meted out by the Commission and therefore should be stricken in its entirety.

Historically, the FCC has given out waivers quite frequently to licensees showing even a modest desire, if not documented need, for additional channels within a market. Further, many licensees hold multiple authorizations within a market where certain authorizations are used point to point for various transmission needs. Additionally, many licensees hold individual channels and channels pairs associated with multiple channel groups within a single market. Under the new rules, EBS licensees will also need

¹² An EBS licensee would also be free at that time to retune a transmitter to initiate high power operations on their designated MBS channel, in cases where such designated channel had not been part of their authorization under the old band plan.

¹³ *FNPRM* at ¶ 346. Additionally, as part of the *Broadband Services Order*, the Commission seems to have included language in Section 27.5(i)(3) of the rules that further restricts EBS licensees, by requiring one of the four channels to be in the MBS.

flexibility to swap and assign channels where appropriate to address their needs for additional MBS channels or contiguous LBS channels as may best suit their educational needs. Further, where an entity is attempting to develop and provide educational broadband as well as traditional video services simultaneously to area schools, it would best serve the public interest to allow such entity to hold multiple EBS licenses within a market. Accordingly, HITN urges the Commission to delete Section 27.5(i)(3) as well as the four-channel rule in its entirety, and impose no restrictions on the number of EBS channels a qualified licensee may hold in a market.

VI. Wireless Cable Exception to EBS Eligibility Restrictions

The Commission has also sought comment on whether it should retain the existing exception to the EBS eligibility rules that allows commercial wireless operators to license stations on the EBS band for commercial purposes in certain limited cases.¹⁴ While it may be fair to grandfather any existing commercial authorizations on EBS channels, HITN believes that the purpose and requirements that led to the creation of the exception no longer exist and so the exception may be eliminated on a going forward basis. When the exception was created, significant blocks of EBS spectrum remained unlicensed. Accordingly, Section 74.990 contained a requirement that eight unused EBS channels would remain available in a market following the licensing of a commercial station on EBS frequencies. HITN does not believe that such large blocks of unlicensed EBS spectrum remain available that would allow a commercial entity to satisfy that requirement today. Accordingly, HITN believes that the exception may be eliminated, except with regard to grandfathered facilities post-transition.

¹⁴ *FNPRM* at ¶¶ 347-250.

VII. Gulf of Mexico Service Area

The Commission has sought comment on issues pertaining to a new service area on EBS frequencies serving the waters of the Gulf of Mexico. HITN supports the issuance of such authorizations provided that coastal EBS licensees are not prejudiced by the introduction of such new authorizations. Ordinarily, EBS licensees currently have a thirty five mile protected service area. The creation of Gulf stations would essentially deny them the area of their PSA/GSA that would fall over the Gulf while giving such benefit to another licensee. HITN believes that fundamental fairness requires that some area out into the Gulf should be considered the protected geographic service area of coastal stations. To afford sufficient protection to coastal stations, HITN proposes that Gulf stations on EBS spectrum be licensed starting thirty-five (35) miles off of the US Gulf Coast. Areas inside that distance that should be associated with a thirty-five mile GSA of an existing coastal EBS station should be considered part of that station's GSA. Any EBS spectrum not logically associated with an existing EBS coastal station, but within 35 miles of the US Gulf Coast, should be considered part of the EBS white space to be auctioned. MEAs along the coast should be drawn to extend 35 miles out into the Gulf so as to identify with which MEA such coastal water EBS white space areas should be associated.

VIII. Regulatory Fees

In the *FNPRM* the Commission suggests that it would extend regulatory fees to cover BRS and EBS licensees equally.¹⁵ HITN does not believe that the FCC is free to subject educational, government and non-profit entities to such regulatory fees. EBS eligibility is restricted to government and certain not-for-profit educational entities.

¹⁵ *FNPRM* at ¶¶ 351-359.

These entities are tax exempt and therefore exempt from such fees under the Commission's existing rules and the Communications Act. The Commission offers no rationale for changing its rules, and has no ability to modify the Communications Act, which is quite clear on this point. Under the Communications Act, the Commission may not assess regulatory fees on government entities and not-for-profit entities.¹⁶ Accordingly the FCC may not adopt rules that subject EBS Licensees to regulatory fees.

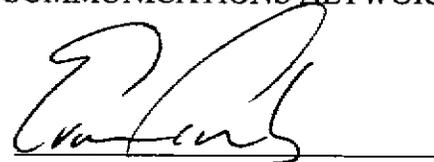
IX. Conclusion

HITN respectfully requests that the Commission clarify and modify its Rules and policies in accordance with the discussion set forth herein.

Respectfully submitted,

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January 10, 2005

¹⁶ 47 U.S.C. § 159(h).

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing Comments of Hispanic Information and Telecommunications Network, Inc. were served this 10th day of January, 2005 on the following parties via first class mail of the United States Postal Service, postage prepaid, to the following addresses:

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A handwritten signature in black ink, appearing to be 'JZ', is written over a horizontal line.