

**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</b>
	) <b>RM-10586</b>
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	)
<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>
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<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</b>
	) <b>RM-9718</b>
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	)
<b>Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets</b>	) <b>WT Docket No. 00-230</b>
	)
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**To: The Commission**

**REPLY COMMENTS**

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 Sections 1.415(c) and 1.421 of the Commission's Rules, hereby submits its reply to certain comments filed in this proceeding in response

to the Commission's Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135, released July 29, 2004 ("FNPRM").<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.

### **Performance Requirements**

2. In the FNPRM, the Commission tentatively concluded that performance requirements based upon the "substantial service" standard codified in Part 27 of the Rules will provide the strongest incentives to licensees to develop and deploy new services; and sought comment on specific safe harbors that will satisfy the substantial service requirements for Broadband Radio Service ("BRS") and Educational Broadcast Service ("EBS") licensees. FNPRM, Para. No. 321. In other contexts, the Commission has employed the substantial service performance requirement as a flexible approach that fulfills the goal of promoting innovation and development by maximizing flexibility in the service rules. FNPRM, Para. No. 320. This approach is generally viewed as superior to the use of "one-size-fits-all" static build-out requirements, which follow fixed time-schedules. FNPRM, Para. No. 320.

3. The term "substantial service" is defined in Section 27.14(a) of the Rules as service which is "sound, favorable, and substantially above a level of mediocre service

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<sup>1</sup> The FNPRM was published in the Federal Register on December 10, 2004. Accordingly, these Reply Comments are timely filed. See FNPRM, Para. No. 376.

which just might minimally warrant renewal.” Two general safe harbors have emerged under Commission jurisprudence – one for non-rural areas and one for rural areas.

4. The safe harbors for non-rural areas are exemplified by those employed for the Wireless Communications Service (“WCS”), as follows: a) for a fixed service, the construction of four permanent links per one million people within the licensed service area; and b) for mobile service, a demonstration of coverage to 20% of the population of the licensed service area. Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (Report and Order), 12 FCC Rcd. 10785, 10843 at Para. No. 113 (1997). The safe harbors for rural areas are those recently adopted by the Commission in Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services (Report and Order & Further Notice of Proposed Rulemaking), 19 FCC Rcd. 19078 (2004) (“Rural Service R&O”), as follows: a) for a fixed service, the construction of at least one end of a permanent link in at least 20% of the number of rural areas within its licensed area; and b) for mobile service, coverage to at least 75% of the geographic area of at least 20% of the rural areas within its licensed areas. For purposes of these requirements, a “rural area” is a county with a population density of 100 persons or less per square mile, based upon the most recent Census data. Rural Service R&O, Para. No. 79.

5. We agree with those commenters who urge the Commission to adopt these safe harbors in implementing the substantial service standard for BRS and EBS

licensees;<sup>2</sup> with those commenters who argue that licensees should be deemed to satisfy these construction requirements through lease agreements when the lease arrangements comply with the conditions set forth in the Commission's recent Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets (Second Report and Order, Order on Reconsideration, & Second Further Notice of Proposed Rulemaking), 19 FCC Rcd. 17503 (2004);<sup>3</sup> and with those commenters who argue that substantial service should be measured on a per-system-basis, not a per-call sign or a per-channel basis.<sup>4</sup> The adoption of these proposals will provide the greatest flexibility to licensees in the deployment of new services, ensure the prompt delivery of services to new areas, prevent the warehousing of spectrum, and promote investment in the rapid deployment of new technologies and services, goals which the Commission seeks to achieve through the adoption of the substantial service standard. FNPRM, Para. Nos. 321 – 322. Simply stated, the above-noted safe harbors for rural and non-rural areas work well in other services, and there is no reason to believe that they will not be equally as effective in achieving the Commission's stated objectives for the BRS and EBS radio services. With respect to leased channels, service provided by spectrum lessees is service nevertheless; and even though it is not being provided by the licensee, such service promotes the Commission's aforementioned objectives. No valid public interest purpose would be achieved by not counting this service in determining whether

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<sup>2</sup> Comments The Wireless Communications Association International, Inc. at pp. 8-9; Comments of Sprint Corporation, pp. 8-9.

<sup>3</sup> Comments of Sprint Corporation, pp. 8-9.

<sup>4</sup> Comments of The Wireless Communications Association International, Inc. at pp. 12-13; Comments of Sprint Corporation, pp. 8-9; Comments of Nextel Communications, pg. 4.

the substantial service requirement has been met. With respect to measuring substantial service on a per-system basis, this seems to be the best method of determining whether the requisite level of service is being provided given the diverse service offerings which an integrated system will deploy as a whole.

6. We disagree with the position advanced by Clearwire Corporation (“Clearwire”), which argues for a more stringent construction benchmark (Clearwire Comments, pp. 14 – 18). Clearwire correctly notes that the former Part 21 build-out standard for BRS Basic Trading Area (“BTA”) licensees (as codified in Section 21.930 of the Rules) specified that “within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals ... that are capable of reaching at least two-thirds of the population of the applicable service area;” and that many BTA licensees met this coverage requirement and filed corresponding build-out certifications. According to Clearwire, “[i]f coverage to two-thirds of the population was achievable under the former regulatory regime, then it should be achievable under the new regulatory regime” (Clearwire Comments, pg. 15). Clearwire thus urges the Commission to adopt the Rule Section 21.930 requirement that licensees serve two-thirds of the service area’s population within five years, but with certain modifications to the standard to specify that the signal must be of a quality that can provide reliable broadband service. (Clearwire Comments, pp. 16 – 18).

7. The principal difficulty with the more rigorous standard advanced by Clearwire is that it is contrary to the evolving safe harbor standards adopted by the Commission elsewhere (and discussed above), and it does not advance the Commission’s objectives any more than those safe harbors. Indeed, adoption of the Clearwire standard

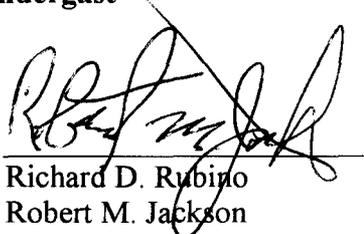
would serve only to reduce the flexibility accorded licensees under those safe harbors – and reducing a licensee’s flexibility is something the Commission should avoid. Indeed, the safe harbors for rural and non-rural areas discussed above have been found adequate by the Commission to achieve its goals in other radio services, and there is simply no reason to believe that they will prove inadequate to meet those objectives in the case of the BRS and EBS.

**WHEREFORE**, BloostonLaw requests the Commission to adopt the proposals set forth herein.

Respectfully submitted,

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By: 

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## **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

**CERTIFICATE OF SERVICE**

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast and that on February 8, 2005 I caused to be mailed by first class United States mail, postage prepaid, a copy of the foregoing "**Reply Comments**" to the following:

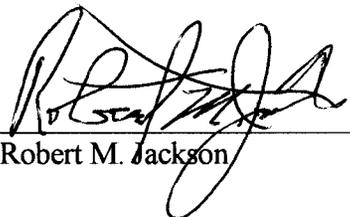
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