

**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
)	

**REPLY COMMENTS OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

By: Rudolph J. Geist
Evan D. Carb
RJGLaw LLC
1010 Wayne Avenue
Suite 950
Silver Spring, MD 20910
(301) 589-2999

Its Attorneys

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SUMMARY

HITN hereby submits its Reply Comments in response to a Further Notice of Proposed Rulemaking. With regard to EBS substantial service performance requirements, HITN agrees with the additional safe harbors proposed by the industry, advocates short term renewals during the transition, and seeks a service review on a date certain about five years after final band plan transitions. With respect to white space EBS auctions, HITN urges early auctions on either its originally advocated MEA basis, or by BTA as most others request. HITN continues to urge auctions based on complete traditional EBS channel group assignments, but in a post-transition configuration. On the subject of alternative transition methods, HITN opposes the restriction on accepting bidding credits urged by WCAI, Sprint and Nextel, while continuing to advocate an additional self-transition option for untransitioned EBS licensees. HITN also seeks removal of the four-channel restriction as well as some antiquated elements of Section 27.1201 that would prevent non-local parties from qualifying under the new rules. HITN also seeks the prospective elimination of the wireless cable exception that allows commercial EBS licensing in certain instances. Finally, HITN continues to oppose the imposition of regulatory fees on educational and non-profit entities holding authorizations on the EBS band.

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To: The Commission

**REPLY COMMENTS OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

Hispanic Information and Telecommunications Network ("HITN"), by its attorneys, hereby submits its Reply 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

HITN, like most commenters, requested a reasonable period of approximately five years following the transition in which EBS licensees could amass a sufficient service record for a reasonable substantial service review. HITN alone has advocated the use of short renewals for EBS licenses that come up for renewal during the transition period to postpone the substantial service showing requirement for all licensees until five years after all EBS spectrum is to have been transitioned. HITN believes this to be the fairest way to ensure that licensees are on an

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*"); Petition for Reconsideration of HITN in response the *Broadband Services Order* (filed January 10, 2005); and Comments of HITN in response to the *FNPRM* (filed January 10, 2005).

even footing as new services are rolled out. While some licensees might have a little more time if their markets are transitioned early, there is some benefit in the FCC providing a date certain by which all EBS licensees should expect to be in compliance and be able to satisfy the required showing.

As previously pointed out by HITN, most EBS licensees will be unable to afford the significant cost of acting as a proponent for the transition of an entire region, or simply may find themselves contractually prohibited from doing so by their airtime lessees. Therefore, most EBS licensees will be dependent on the business plans of a relatively few commercial operators for the timing of their transition to the new band plan. In certain cases operators for their own business reasons may elect to file Initiation Plans at the last possible opportunity, or may simply elect not to transition certain markets, leaving individual EBS licensees to seek self-transition - presuming that the Commission adopts such an option. Thus, many licensees may find themselves transitioning to the new band plan at the latest possible point in time. Accordingly, a date certain for conducting a nationwide assessment of substantial service compliance must be sufficiently far off from transition to have allowed a licensee to launch new services and amass a record of service for the Commission to evaluate.³

HITN generally concurs with the application of the Part 27 substantial service rules with the additional safe harbors proposed by the industry and with special recognition of the unique circumstances specifically associated with EBS operations. As HITN stated previously, because of the unique circumstances associated with each licensee's service history, as well as issues

³ HITN believes that if EBS licensees are not provided sufficient time following the transition to develop a new service record, the Commission will be confronted with numerous waiver requests on the showing date from recently transitioned EBS licensees. Additionally, HITN believes that providing such additional time to create a new service record is consistent with the Commission's stated desire not to penalize licensees during the transition for having to discontinue existing operations. See *Broadband Services Order* at ¶ 233

related to the varied services and system designs that may be developed the Commission will not be able to free itself from case-by-case service evaluations.

III. Unlicensed EBS Spectrum Auction

WCAI and Clearwire, like HITN, in their comments urged the Commission to conduct early auctions of available spectrum.⁴ In opposition to early auctions, Nextel argued that early EBS white space auctions might “further complicate the transition” or eliminate opportunities for EBS Licensees to consolidate holdings across channels,” while Sprint argued that they would saddle BRS licensees with the added transition costs, and the NIA simply felt that EBS licensees would be too preoccupied with transition matters, lease negotiations and service plans.⁵ Such arguments are simply incorrect. If, as HITN has requested, EBS auctions are held for spectrum configured in a post-transition band plan format, early auctions will neither complicate the transition nor add extra transition costs to BRS licensees or operators. Additionally, while it is true that EBS entities will be focused on the matters indicated above by NIA in the near-term, such concerns would not prevent them from actively participating in a white space auction. As HITN has noted, most EBS licensees will not act as proponents, and therefore will have only modest issues to deal with related to the transition in the immediate future. Furthermore, EBS licensees should be no more focused in the near-term on issues related to lease negotiations and service plans as they will be three years from now. Accordingly, HITN sees no valid reason to delay EBS white space auctions.

On the issue of the size of geographic areas to be included in each auction, HITN alone argued for auctions based on MEAs as the Commission had suggested. HITN still believes that

⁴ See *WCAI Comments* at pp. 20-21 & *Clearwire Comments* at pp. 4-7.

⁵ *Nextel Comments* at p. 8. See also *Sprint Comments* at pp.3-4 & *NIA Comments* at p. 11.

the use of MEAs could ensure that 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. However, most parties including the WCAI and the NIA reasonably advocated auctions based on BTAs as more related to local EBS service areas and previously auctioned BRS white space.⁶ HITN would be equally comfortable with auctions conducted on this scale.

With regard to the grouping of frequency blocks for inclusion in the white space auctions, HITN urged the Commission to auction EBS spectrum by channel groups conformed to the band plan as it will exist following the transition. HITN suggested that spectrum blocks be auctioned in conformity with the four channels associated with each group, including the Midband channel.⁷ HITN believes that licensees that already own channels would thereby fill in areas surrounding their existing facilities on all channels ordinarily held by a licensee of that group. However, HITN does believe that licensees should be allowed to disaggregate spectrum and swap or assign LBS or MBS channels without channel group or numerical restrictions within any market. Further, HITN does not see any problem with auctioning spectrum based on the new band plan where other area stations may not yet have been transitioned. White space will ordinarily lie outside existing GSAs, and therefore will be no different from an adjacent market transitioning early within an adjacent BTA. HITN believes that auctioning in a post-transition band plan format will act as an incentive for a more prompt transition of other area spectrum in

⁶ If EBS White Space auctions were not held early, a comment made by IMWED would also be relevant to this issue. IMWED points out bidding credits provided to EBS licensees for turned in stations, presumably based on local GSA populations, would likely be insufficient to bid on MEA sized spectrum licenses. *IMWED Comments* at § II (A) (II (B) if numbered correctly).

⁷ While most Commenters would allow bidding on single MBS channels apart from their complimentary LBS or UBS channels, and visa versa, HITN believes that conducting the white space and vacant channel EBS auctions in that manner will result in confusion to EBS bidders that simply wish to secure service rights in surrounding white area interstitial spaces on all channels they presently serve if they must bid in two or more auctions to do so.

order to fully unlock the potential of the auctioned spectrum while excusing proponents from the need to transition such spectrum.

HITN supports the NIA's position that in accordance with the requirements of Section 309(j) of the Communications Act, that the Commission only hold an EBS auction in the event that it receives bids from more than one party. In situations where only a single eligible entity bids, the Commission should simply review the party's application without regard to minimum reserve amount or other auction requirements.

IV. Alternative Band Transition Methodologies - EBS Self-Transition

Most commenting parties, like HITN, advocated the inclusion of a self-transition mechanism for EBS licensees in markets where no proponent has stepped forward during the provided three year period. HITN agrees with WCAI that such an entity should be given 60 days following the end of the three year period to elect such option and then, as inferred by WCAI, should receive an amount of time to effectuate the self transition, presumably until a date 18 months from the close of the three year period for filing Initiation Plans.⁸ If this approach is adopted, self transitions would be completed at approximately the same time as the last timely market transitions under a transition plan. HITN also supports the multi-stage self-transition plan outlined by NIA and IMWED.⁹

As discussed above, given the scope and cost area-wide transitions, 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. Therefore, HITN has concerns regarding the

⁸ See *WCAI Comments* at p.19 and *Broadband Services Order* at ¶ 81.

⁹ See *NIA Comments* at p. 17 & *IMWED Comments* at § II (B) (would be II (C) if properly numbered)

position being advanced by the WCAI, Sprint and Nextel that the Commission take the position that untransitioned EBS licensees with existing excess capacity leases be prohibited from accepting bidding credits in exchange for turning in licenses without the prior approval of their excess capacity lessee.¹⁰

Such a position is flawed for several reasons. First, in such cases, operators with excess capacity leases are on notice that they have three years to step forward as proponents to transition markets in which they hold leases. It is simply unfair to deny a licensee an option otherwise available and to force such a licensee to incur the cost of a self-transition in order to protect the rights of an operator who has elected for its own business reasons not to transition that market.

Second, the adoption of such a position by the Commission would provide a perverse incentive for operators to forego stepping forward as proponents in certain markets. Presumably, an operator might forego the substantial expense of transitioning an entire geographic area where it knew that its spectrum lessors, if left untransitioned, would either have to self-transition at their own expense or exchange their LBS or UBS spectrum for transition assistance of their video programming to the MBS.

Third, the purpose of many existing EBS excess capacity leases has been frustrated by the change in the Commission's Rules governing this service rendering such leases legally invalid. The existence of such invalid leases should not act as an effective bar to one of the transition options otherwise available to EBS licensees. In many cases, EBS licensees entered into excess capacity video oriented leases years ago, not just for equipment and lease fees to defray their programming service expenses, but largely for the extended penetration into the

¹⁰ See *WCAI Comments* at pp. 23-24; *Sprint Comments* at p.5 & *Nextel Comments* at pp. 6-7.

community offered by Wireless Cable Operators.¹¹ Under such an arrangement, an EBS licensee was to be afforded access to the operator's subscribers for dissemination of its educational video content beyond the licensees registered receive sites. With the advent of data services, many operators have fled the video business, rendering such video-based leases largely useless. While some new leases specifically provide for data use, and while some older leases were amended for flexible use, many leases remain tied exclusively to wireless cable video services. Accordingly, even if, notwithstanding the other points raised above, the Commission were to agree to condition the election of the bidding credit option on prior lessee approval, it should only do so where such leases will extend out for some reasonable period of time and contain either specific reference to data services or flexible use.

V. EBS Four-Channel Restriction

Most Parties commenting on the so-called Four Channel Rule agreed with HITN that the rule should be abolished entirely even prior to completion of market transitions.¹² However, in this regard, HITN has noticed that certain qualification provisions for non-local EBS licensees contained within Section 27.1201 may need to be revised or removed as an impediment to such entities qualifying initially under the new rules to acquire additional spectrum through white space auctions or assignments. Specifically, Section 27.1201 continues to require the creation of local program committees and the provision of educational programming schedules to entities

¹¹ The Commission should not let itself be taken in by claims that operators may have made significant upfront payments or equipment grants under such leases. *See e.g. WCAI Comments* at p. 23. In many of the smaller markets that will remain untransitioned, Operators afforded little upfront cash and in many cases never even completed construction of collocated video systems, while passing such leases from Operator to Operator.

¹² *See e.g. NIA Comments* at p. 18; *IMWED Comments* at § V; *Digital Broadcast Corporation Comments* at p.5; *Cheboygan-Ostego Presque Isle Educational Service District and Pace Telecommunications Consortium Comments* at p.5; *Wireless Direct Broadcast System Comments* at p.5; *Speednet LLC Comments* at p.5.

providing supporting service usage letters, each of which is inapplicable where the applicant is seeking to provide next generation educational broadband Internet and data services to local accredited schools. Because of the nature of broadband Internet service, accredited institutions would be free to download educational content from the Worldwide Web that is most appropriate to their for credit curricula, and therefore such entities could not be provided with a content list or schedule prior to their provision of a qualifying letter. Similarly, local program committees would have no impact on the myriad of program and educational materials available for download over the Internet. Accordingly, HITN respectfully urges the Commission to remove these antiquated rule vestiges from Section 27.1201, where they could prevent non-local entities like HITN from qualifying to acquiring additional stations or relevant white space spectrum.

VI. Wireless Cable Exception to EBS Eligibility Restrictions

Most commenters agreed to the elimination of the so called Commercial ITFS Rule on a going forward basis, and most favored or were not opposed to grandfathering existing commercial licensees on EBS spectrum. However, a few advocate retention of the exception. HITN believes that eligibility restrictions have always precluded commercial licensing for BTA or BRS licensees on EBS frequencies except through the provision at issue. The Commission's liberal rules on leasing excess capacity from EBS licensees have always proved a more than adequate means for commercial entities to make use of capacity otherwise reserved for educational uses, while providing a reasonable mechanism for recapture of dedicated educational capacity as needed. Accordingly, HITN believes that the Commission should eliminate the rule at a point in time prior to conducting EBS white space auctions.

VII. Regulatory Fees

HITN notes that of those comments that addressed applicability of regulatory fees to EBS all agreed with HITN that the FCC is not free under its Rules or The Communications Act to subject educational, government and non-profit entities to such regulatory fees.¹³

VIII. Conclusion

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

Respectfully submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK

By: /s/ Evan D. Carb
Rudolph J. Geist
Evan D. Carb
RJGLaw LLC
1010 Wayne Avenue
Suite 950
Silver Spring, MD 20910
(301) 589-2999

Its Attorneys

February 8, 2005

¹³ See *Comments of WCAI* at p. 31 & *Comments of NIA* at p. 19;

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing Reply Comments of Hispanic Information and Telecommunications Network, Inc. were served this 8th day of February, 2005 on the following parties via electronic mail.

Bryan Tramont
Office of Chairman Michael K. Powell
Federal Communications Commission
445 12th St., SW
Room 8-B201
Washington, D.C. 20554
E-Mail: bryan.tramont@fcc.gov

Jennifer Manner
Office of Commissioner Abernathy
Federal Communications Commission
445 12th St., SW
Room 8-B115
Washington, D.C. 20554
E-Mail: jennifer.manner@fcc.gov

Paul Margie
Office of Commissioner Copps
Federal Communications Commission
445 12th St., SW
Room 8A-302
Washington, D.C. 20554
E-Mail: paul.margie@fcc.gov

Samuel Feder
Office of Commissioner Martin
Federal Communications Commission
445 12th St., SW
Room 8-A204
Washington, D.C. 20554
E-Mail: sam.feder@fcc.gov

Barry Ohlson
Office of Commissioner Adelstein
Federal Communications Commission
445 12th St., SW
Room 8-C302
Washington, D.C. 20554
E-Mail: barry.ohlson@fcc.gov

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C252
Washington, D.C. 20554
E-Mail: john.muleta@fcc.gov

John Schauble
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-C336
Washington, D.C. 20554
E-Mail: john.schauble@fcc.gov

D'wana Terry, Division Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-C321
Washington, D.C. 20554
E-Mail: dwanna.terry@fcc.gov

Shellie Blakeney
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C300
Washington, D.C. 20554
E-Mail: shellie.blakeney@fcc.gov

Charles Oliver
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124

Washington, D.C. 20554
E-Mail: charles.oliver@fcc.gov
Nancy Zacezek
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554
E-Mail: nancy.zaczek@fcc.gov

Stephen Zak
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554
E-Mail: stephen.zak@fcc.gov

Andrea Kelly
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554
E-Mail: andrea.kelly@fcc.gov

Gary Michaels
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554
E-Mail: gary.michaels@fcc.gov

Joel Taubenblatt
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4A260
Washington, D.C. 20554
E-Mail: joel.taubenblatt@fcc.gov

Uzoma C. Onyeije
Wireless Telecommunications Bureau
Federal Communications Commission
Room 3-C217
445 12th St., SW
Washington, D.C. 20554
E-Mail: uzoma.onyeije@fcc.gov

Catherine Seidel
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554
E-Mail: cathy.seidel@fcc.gov

Genevieve Ross
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554
E-Mail: genevieve.ross@fcc.gov

William Huber
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554
E-Mail: william.huber@fcc.gov

Erik Salovarra
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554
E-Mail: erik.salovaara@fcc.gov

Best Copy and Printing, Inc.
Portals
225 12th St., SW
Courtyard Level
Washington, DC 20554
fcc@bcpiweb.com

/s/ Norman Liu