

**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)	MM Docket No. 97-217
)	
Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions)	
)	
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
)	

COMMENTS IN RESPONSE TO PETITIONS FOR RECONSIDERATION

NY3G Partnership ("NY3G"), by its attorneys, hereby files these comments in response to the various petitions for reconsideration of the *Report and Order* issued in the above-captioned proceeding.¹

¹ See *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*, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135 (2004) ("*Report and Order*"). The *Report and Order* was published in the Federal Register on December 10, 2004. See 69 F.R. 72048 (Dec. 10, 2004). Public Notice of the filing of Petitions for Reconsideration and Clarification of the *Report and Order* was published in the Federal Register on February 7, 2005. See 70 F.R. 6440 (Feb. 7, 2005).

Background

NY3G Partnership. NY3G is the incumbent co-channel licensee operating on the F group channels in New York City. At present, NY3G operates an MMDS station from the Empire State Building in New York City and is authorized to provide only west-facing service.² In response to the preceding *NPRM*,³ NY3G proposed various solutions to resolve the co-channel problem between grandfathered ITFS licensees and co-channel MMDS licensees.⁴ With the legal ability to provide service within its protected service area, NY3G expects to use its F group channels to deploy low-power facilities capable of providing two-way, high-speed broadband services to a variety of mobile terminals, including PDAs, laptops and mobile videophones. NY3G intends to focus on the provision of affordable service to consumers that have historically been underserved by legacy communications providers. NY3G anticipates that once the Commission firmly clarifies NY3G's spectrum rights, it will be able to deploy a system expeditiously.

Discussion

NY3G's primary interest has been, and continues to be, the rapid deployment of affordable wireless broadband services to the public. While NY3G generally applauds the Commission's *Report and Order*, NY3G believes that certain areas of the Commission's new rules should be modified in order to make the transition procedures more effective. At the same

² See Letter to Grand MMDS Alliance New York F/P Partnership from Charles E. Dziedzic, Assistant Chief, Video Services Division, Reference No. 1800E6, File No. 5455-CM-P-83, at 4 (May 6, 1997).

³ See *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*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003) ("*NPRM*").

⁴ See, e.g., Grand Alliance, Reply Comments (October 23, 2003); Letter to Marlene H. Dortch from Bruce D. Jacobs (June 1, 2004).

time, NY3G opposes several requests made by the petitioners that would stymie the transition process.

I. SELF-TRANSITIONING

NY3G supports the many petitioners that have asked the Commission to permit licensees to self-transition to the new band plan if no proponent initiates the transition of the relevant market by the Commission's three-year deadline.⁵ As WCA has noted, this approach ensures that no licensee will lose an authorization because no proponent is capable of transitioning all of the licensees in the market.⁶

II. UNLICENSED OPERATIONS

NY3G agrees with the several petitioners that have asked the Commission to prohibit low-power unlicensed operations in the 2655-2690 MHz band.⁷ Low-power operations would add an additional layer of complexity that would delay deployment in this band by licensed operators. Moreover, unlicensed use of this spectrum would undermine the evolution of the new band plan, and discourage investment.

⁵ *See, e.g.*, Petition for Partial Reconsideration of the Wireless Communications Association, International, Inc. at 33-34 (Jan. 10, 2005) ("WCA Petition"); Petition for Reconsideration of the Catholic Television Network and the National ITFS Association at 3-9 (Jan. 10, 2005) ("CTN Petition"). *See also Report and Order* at ¶ 84.

⁶ WCA Petition at 34-35.

⁷ *See, e.g.*, Petition for Partial Reconsideration of Nextel Communications at 22 (Jan. 10, 2005) ("Nextel Petition"); Petition for Reconsideration by Grand Wireless Company at 2 (Jan. 6, 2005); Petition for Reconsideration of Digital Broadcast Corporation at 6 (Jan. 10, 2005).

III. STATUS OF FORFEITED SPECTRUM

In the *Report and Order*, the Commission provided that if a license is forfeited, the forfeited spectrum rights would revert to the BTA licensee in the relevant market.⁸ Catholic Television Network and the National ITFS Association, and the Hispanic Information and Telecommunications Network, ask the Commission to clarify that the only spectrum rights that would revert in this manner are forfeited BRS⁹ spectrum rights, and not forfeited EBS spectrum rights.¹⁰ NY3G opposes this request to the extent it would impact the spectrum rights of incumbent MMDS licensees operating on a co-channel basis with grandfathered ITFS licensees on the E and F group channels. In permitting these licensees to operate on a co-channel basis, the Commission clearly anticipated that the rights of the incumbent MMDS licensee would expand if the grandfathered ITFS licensee ceased operations.¹¹ Accordingly, the Commission should reject the proposal by CTN and HITN with respect to grandfathered ITFS licensees operating on the E and F group channels.

⁸ *Report and Order* at ¶ 154.

⁹ NY3G employs the new service designations for the 2.5 GHz band in lieu of the former ITFS and MMDS designations, except where the terms are historically significant.

¹⁰ CTN Petition at 18-19; Petition for Reconsideration of Hispanic Information and Telecommunications Network at 7-8 (2005) (“HITN Petition”).

¹¹ *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC.2d 1203, at ¶ 110 (1983); see also *Application of Alliance for Higher Education*, DA 04-3883, at ¶ 9 (Dec. 13, 2004) (concluding that when a grandfathered ITFS licensee returns its licenses to the Commission, that portion of the ITFS licensee’s service area that is also within the service area of a co-channel incumbent MMDS licensee should revert to that MMDS licensee, and not to any BTA licensee).

IV. TRANSITION PROCEDURES

NY3G also urges the Commission to adopt several procedural modifications to its transition framework, as suggested by WCA. First, the Commission should streamline its pre-transition informational filing requirements, as the current rules require proponents to submit too much information at too early a stage in the transition process, at a time when minimal information has been collected, and minimum planning has occurred.¹² Second, the Commission should strengthen the obligations imposed on non-proponent licensees to comply with Pre-Transition Data Requests, so that proponents can craft effective Initiation Plans in a timely fashion.¹³ Third, the Commission should permit proponents to withdraw their Initiation Plans once without penalty. Since Initiation Plans must necessarily be based on incomplete information, licensees may submit Plans that later prove untenable.¹⁴ These licensees should not be precluded from subsequent efforts to develop a viable transition strategy, particularly when they may be the best hope for a successful transition.

V. COST RECOVERY

NY3G supports the requests of WCA, Clearwire, Nextel, and Sprint that the Commission establish a more explicit mechanism for the sharing of transition costs between proponents and other commercial users of the 2.5 GHz band.¹⁵ Proponents should be permitted to seek reimbursement of all transition-related expenses from other market licensees on a *pro rata* basis, using a pre-defined formula. That is the policy the Commission has adopted in transitioning

¹² See WCA Petition at 14-16.

¹³ See WCA Petition at 18-20.

¹⁴ WCA Petition at 16-17.

¹⁵ WCA Petition at 20-22; Petition for Partial Reconsideration of Clearwire Corporation (Jan. 10, 2005); Nextel Petition at 21-22; Sprint Petition for Reconsideration at 6-8 (Jan. 10, 2005).

other spectrum.¹⁶ Moreover, the ambiguous nature of the Commission's current rules is likely to delay the transition by deterring potential proponents from coming forward.

VI. INTERFERENCE PROTECTION

NY3G generally supports the proposals advanced by WCA regarding the modification of the interference protection rules established in the *Report and Order*.¹⁷ In particular, NY3G agrees that Section 27.53(l) should be modified to (a) impose the stricter mask for base station out-of-band emissions even in the absence of a "documented interference complaint," and (b) apply the specified attenuation requirement to both mobile and fixed user stations. These modifications would enhance existing interference protections, furthering the Commission's policy objectives without imposing any significant burdens on licensees.

On the other hand, NY3G opposes CTN's proposal, which would impose a broad D/U ratio-based interference protection requirement and enlarge the scope of a licensee's obligation to install downconvertors at EBS receive sites.¹⁸ The *Report and Order* strikes a careful balance between the interests of BRS and EBS licensees, and CTN offers no new arguments demonstrating that either a broad D/U ratio-based interference protection requirement or an enhanced downconvertor requirement would be in the public interest. If the Commission should determine, nevertheless, to reinstate the D/U ratio-based interference protection standard, NY3G supports two critical modifications to CTN's proposal. First, BRS licensees should be permitted to upgrade EBS receive sites if necessary to achieve the required D/U benchmarks.¹⁹ Second, the adjacent channel interference standard should be changed from 0 dB D/U to -10 dB D/U. As

¹⁶ See, e.g., 47 C.F.R. §§24.239 et seq. (detailing cost-sharing mechanisms for the relocation of incumbent microwave users from the 2 GHz band by PCS licensees).

¹⁷ WCA Petition at 35-46.

¹⁸ CTN Petition at 14-15.

¹⁹ See WCA Petition at 35.

WCA has ably shown, this standard more appropriately balances the competing needs of market licensees while ensuring adequate protection from interference.²⁰

VII. MARKET DEFINITION

NY3G supports the Commission's determination in the *Report and Order* that the band should be transitioned on the basis of Major Economic Areas (MEAs).²¹ The use of MEAs will result in a quicker and more even transition of the band throughout the nation. While MEAs are large, the *Report and Order* provides potential proponents with a variety of flexible options in transitioning these areas.²² In addition, the relatively large size of MEAs will provide the geographic footprint and consumer base necessary to facilitate the rapid development of new and innovative wireless services. On the other hand, the use of smaller BTAs, as suggested by many of the petitioners,²³ could result in a haphazard transition on a nationwide basis, and delay investment in and the roll-out of EBS and BRS operations; some areas of the country might not be transitioned for many years. As the Commission found in the *Report and Order*, MEAs "strike[] a balance between the goals of the proponent ... and [the Commission's] goals to ensure the efficient utilization of spectrum and the development of new and innovative wireless services throughout the United States."²⁴ The Commission should not upset this careful balance, and should maintain the *status quo*.

²⁰ WCA Petition at 36-37.

²¹ See also *Report and Order* at ¶¶ 82-83.

²² *Report and Order* at ¶¶ 79-80.

²³ See, e.g., Petition for Reconsideration of the School Board of Miami-Dade County, Florida (Jan. 10, 2005); WCA Petition at 3-12.

²⁴ *Report and Order* at ¶ 80.

VIII. FOUR-CHANNEL LIMITATION RULE

CTN and HITN ask the Commission to eliminate its four-channel limitation rule – which limits EBS licensees to the use of no more than four channels within one channel group in each market – arguing that the rule is inconsistent with the flexible nature of the new 2.5 GHz band plan.²⁵ NY3G opposes these requests. First, NY3G notes that they are improperly raised in the instant proceeding, as the Commission’s four-channel limitation rule was not discussed in the *NPRM*, was not discussed in the *Report and Order*, and was only raised in the Commission’s *Further Notice of Proposed Rulemaking*.²⁶ However, even if these requests were proper, NY3G has explained that the four-channel limitation rule continues to promote diversity of programming and ownership,²⁷ and has noted that there is no evidence on the record that that ITFS licensees require more than four channels in a market to provide educational or instructional services.²⁸ NY3G has also explained, and HITN has acknowledged, that licensees

²⁵ CTN Petition at 21-22; HITN Petition at 21-22.

²⁶ *Further Notice of Proposed Rulemaking* at ¶¶ 345-346.

²⁷ See Comments of NY3G Partnership at 21, WT Docket No. 03-66 (Jan. 10, 2005) (responding to *Further Notice of Proposed Rulemaking*).

²⁸ See Reply Comments of NY3G Partnership at 17, WT Docket No. 03-66 (Feb. 8, 2005).

that feel unduly constrained by the rule can seek waivers from the Commission.²⁹ Accordingly, the rule should be retained.³⁰

IX. TWO-WAY OPERATIONS

In the *Report and Order*, the Commission did not choose to limit the existing ability of BRS and EBS licensees to commence two-way operations in the 2.5 GHz band.

Notwithstanding, CTN and the ITFS/2.5 GHz Mobile Wireless and Development Alliance ask the Commission to prohibit two-way operations in markets that have not yet transitioned.³¹

These requests are improper, unsubstantiated, and unjustified, particularly as the Commission has already implemented extensive interference protection rules. Accordingly, the Commission should not impose any outright prohibition on two-way operations.

X. EFFECTIVE DATE OF THE REPORT AND ORDER

The *Report and Order* established a three-year window for the filing of transition Initiation Plans in order to provide licensees with enough time to arrange an orderly transition

²⁹ *Id.*; HITN Petition at 21. As NY3G has explained in other pleadings, EBS licensees must overcome a high hurdle in demonstrating that a waiver of the four-channel limitation rule is appropriate. HITN's claim that the Commission has "quite frequently" granted waiver requests or otherwise lowered its waiver standard is unsubstantiated and untrue. HITN cites no authority for its contention, and a review of reported cases reveals that virtually no waivers of the four-channel rule have been granted over the past ten years. This is compelling and objective evidence that there is no real world need to eliminate the four-channel limitation, and that the waiver standard has not been lowered. Indeed, as the Commission has stated explicitly in previous rulings, "[t]he waiver burden will be exceedingly high particularly in areas where a large demand for channels exists." *Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service*, 98 FCC 2d 925, at ¶ 19 (1984). *See also In the Matter of Board of Regents, Eastern New Mexico University*, 10 FCC Rcd 3162, at ¶ 4 (1995).

³⁰ NY3G does not object to modifying the language of the four-channel rule to permit ITFS licensees to use channels from different channels groups, so long as the spectrum capacity limitation is maintained.

³¹ CTN Petition at 11-14; Petition for Reconsideration of the ITFS/2.5 GHz Mobile Wireless and Development Alliance, Inc. at 6 (Jan. 10, 2005).

without unduly delaying BRS and EBS operations that would serve the public interest.³² NY3G opposes any modifications to the *Report and Order* that would delay this transition.

Conclusion

For the reasons stated above, NY3G respectfully requests that the Commission take actions consistent with these Comments.

Respectfully submitted,

By: _____ /s/

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³² *Report and Order* at ¶ 83.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments in Response to Petitions for Reconsideration" was sent via U.S. mail, first-class or by hand-delivery, on this 22nd day of February 2005, to the following:

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