

**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 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-9178
)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets)	WT Docket No. 00-230
)	
To: The Commission		

**OPPOSITION OF THE BRS RURAL ADVOCACY GROUP TO
PETITION FOR FURTHER RECONSIDERATION AND
REQUEST FOR CLARIFICATION OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

The BRS Rural Advocacy Group (the "Group"), a coalition of Broadband Radio Service ("BRS") operators and licensees in rural markets,¹ by counsel, hereby opposes certain

¹ A list of the Group members and the markets in which they operate is attached hereto as Exhibit 1. Members of the Group filed a Petition for Partial Reconsideration on January 10, 2005, a Consolidated Opposition to and Comments in Support of Petitions for Reconsideration on February 22, 2005, and a Consolidated Reply to Oppositions to Petitions for Reconsideration on March 9, 2005 in the proceeding leading to adoption of the *Second Order*.

aspects of the Petition for Further Reconsideration and Request for Clarification (“Petition”) of Hispanic Information and Telecommunications Network (“HITN”) in this proceeding.² Specifically, the Group urges the Commission to reject HITN’s proposal that would impose unnecessary and burdensome obligations on licensees seeking to “opt out” of the transition process. If adopted, these obligations would unfairly prejudice the rights of existing operators, including the Group members, to continue providing critical services as a multi-channel video programming distributor (“MVPD”) and as a provider of wireless broadband services to rural Americans in underserved areas of the country.

Statement of Interest

The members of the Group operate BRS/EBS systems serving numerous small communities throughout rural America. They pioneered the delivery of MVPD services to these communities and, even as direct broadcast satellite (“DBS”) services have proliferated, they continue to provide competitive choice in the MVPD marketplace. In many cases, the Group members provide MVPD services where there is no cable, and today provide the only alternative to the DBS services offered by EchoStar and DirecTV. Likewise, they provide wireless broadband services in many areas where DSL and cable modem services are unavailable.

The Commission acknowledged in the *First Order*³ that “there remains a continued need for high-power operations in the band” and “high-power systems allow use of spectrum in rural areas where low-power systems are not as effective.”⁴ The Group’s

² See 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, FCC 06-46 (rel. Apr. 27, 2006) (“*Second Order*”).

³ See 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*, 19 FCC Rcd 14165 (2004) (“*First Order*”).

⁴ *First Order* at ¶46.

operations illustrate these circumstances. For example, **Central Dakota TV, Inc.** has been providing video service on MDS channels in rural communities near Carrington and Jamestown, North Dakota since 1990, and also uses that spectrum to provide high-speed wireless broadband services to customers that have no other broadband option. Central Dakota TV provides service to 657 video customers and 184 high-speed data customers. **Evertex, Inc.** utilizes all of the capacity on its BRS licenses to provide MVPD and broadband services in the agriculturally-based communities of Everly, Palmer, Quimby and Sioux City, Iowa. Evertex has provided video services for 17 years and broadband for the last seven, and currently provides MVPD service to 1,246 customers and broadband services to more than 2,500 customers, the overwhelming majority of whom have no other choice in service. **Northern Wireless Communications, Inc.** began providing MVPD services on BRS frequencies in the Aberdeen-Bath, South Dakota area in 1988, and now provides multichannel video services to 868 customers and wireless broadband services to 932 customers. **Pine Telephone Company, Inc.** provides video service in Broken Bow, Oklahoma. **Polar Communications** offers data services over BRS spectrum to more than 500 customers in Grand Forks, North Dakota and other communities in northeast North Dakota and northwest Minnesota. **RC Technologies Corporation** recently acquired BRS MVPD systems in Kranzburg, Sisseton and Willow Lake, South Dakota, and is investing significant funds to enhance its service offerings to include upgraded video and new broadband services. **Starcom Inc.**, which began operations in 1991, provides MVPD and broadband services to approximately 800 subscribers in small agricultural communities in southern Minnesota and northern Iowa from a transmit site at Fairmont, Minnesota. **United Telephone Mutual Aid Corporation** began its BRS video service in 1990, and now provides 18 channels of multichannel video service to approximately 900 subscribers in

Milton and Egeland, North Dakota. United also provides broadband services using BRS-1 for upstream communications to about 250 customers.

Background

Following adoption of the *First Order*, the Group asked the Commission to allow certain licensees to automatically “opt out” of a transition if they met specific criteria, including provision of MVPD and/or broadband services to a critical mass of customers in defined “rural areas.” The Commission did not adopt this proposal, but instead affirmed that licensees could request waiver of the transition rules, and that such requests would be resolved on a case-by-case basis. The Commission stated that:

Individually waiving the new technical rules and band plan permits us to make decisions based on the individual facts of the case rather than trying to craft an automatic “opt-out” rule that risks either “opting-out” too many or too few MVPD operators. Evaluating an individual waiver will also permit us to examine the effect of interference from the MVPD operator on other operators in the transitioning or adjacent market.⁵

The Commission also required a licensee intending to seek waiver to so indicate in its response to a proponent’s Pre-Transition Data Request⁶ and to file its waiver request by the earlier of April 27, 2007 or within 60 days after the proponent files its Initiation Plan for the market with the FCC.⁷

The Group is not seeking reconsideration of the *Second Order*, but certainly opposes HITN’s Petition insofar as it seeks to impose unnecessary burdens on licensees that pioneered the construction of BRS systems, operated those systems despite competition from satellite and terrestrial companies, invested significant funds to upgrade services and complied with the Commission’s rules and policies. The rules adopted in the *Second Order* and the Commission’s waiver standard provide sufficient guidelines for composing a waiver

⁵ *Second Order* at ¶72.

⁶ See 47 C.F.R. § 27.1231(d)(1)(v).

⁷ See 47 C.F.R. § 27.1231(g).

request and adequately describe the basis on which the Commission's decision will rest. The Commission need not adopt HITN's proposal, and it should be rejected.

Discussion

THE COMMISSION SHOULD REJECT HITN'S PROPOSAL TO IMPOSE UNNECESSARY AND BURDENSOME OBLIGATIONS ON LICENSEES SEEKING TO OPT OUT OF THE TRANSITION.

HITN's Petition stems from its opposition to a waiver request filed by WHTV, an MVPD in Puerto Rico.⁸ In that proceeding, HITN has alleged that WHTV's showing is insufficient to justify grant of a waiver, curiously arguing that WHTV did not discuss the impact of its continuing MVPD operations on a system that had not yet been designed and for which no transition plans had been announced. Apparently frustrated that the WHTV waiver proceeding is unresolved, HITN now attempts to argue its case in this rulemaking proceeding. In so doing, HITN is attempting to have the Commission take its objections to the sufficiency of a specific waiver request and apply them to rules that will dictate waiver requests generally. The Group submits that the waiver guidelines and standards the Commission has adopted are sufficient and appropriate to apply across the board to all waiver requests – including WHTV's – and it is thus not necessary or reasonable for a new set of standards to be adopted.

As a general proposition, HITN's proposal disrupts the balance created by the Commission's rules that recognizes the rights of certain MVPDs to continue providing service under the pre-transition band plan.⁹ If adopted, HITN's proposal would create

⁸ See Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Request by WHTV Broadcasting Corp. d/b/a Digital TV One for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan," 21 FCC Rcd 5015, DA 06-968, rel. May 2, 2006 ("WHTV PN"). See Petition to Deny WHTV Waiver Request filed by HITN on Dec. 1, 2005.

⁹ See Section 27.5(i)(1). In 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, Order, 19 FCC Rcd 22284, FCC 04-258 (2004) ("Interim Order"), the

unnecessary procedural hurdles and burdensome substantive obstacles that would distort the Commission's waiver standard and drive up the cost of seeking waiver. Indeed, much of what HITN seeks to have clarified is already contained in the *First Order* and the *Second Order*.

These conclusions are illustrated when considering the specific elements of HITN's Petition.

A. HITN's Proposed Service Requirement Is Unnecessary In Light Of Existing Rules And Practice.

HITN proposes that waiver requests be served on neighboring BRS/EBS licensees and others that would be affected by the waiver.¹⁰ A service requirement is totally unnecessary. Section 27.1231(d)(1)(v) already requires a licensee intending to seek a waiver to so indicate in its response to the Pre-Transition Data Request, providing the transition proponent and MVPD with a pre-transition opportunity to negotiate a solution that would accommodate their respective business objectives. Moreover, following release of the *Second Order*, in the only known pending case where an MVPD requested a waiver, the Commission released the *WHTV PN* establishing deadlines for the filing of public comments and replies.¹¹ This process allows any interested party to participate in the waiver proceeding – and HITN has done exactly that without suffering any prejudice. The Commission has not indicated that it intends to depart from this practice. In sum, a service requirement would needlessly duplicate the Pre-Transition Data Request Response and the Public Notice process, at the expense of the licensee seeking waiver.

Commission adopted Section 27.53(l)(5) to remedy an unintended consequence of rules adopted in the *First Order* and permit licensees to operate under pre-transition technical standards.

¹⁰ See HITN Petition at 13.

¹¹ See *WHTV PN*.

B. It Is Not Necessary to Clarify Language In The *First Order* And *Second Order* Concerning The Substance Of Waiver Requests.

HITN claims that the Commission should clarify what a licensee should include in its waiver request. First, HITN would require a waiver proponent to explain why it cannot continue to provide its service while meeting the interference protection requirements of the new rules.¹² Second, HITN asks the Commission to require that waiver requests detail specific techniques and efforts the licensee will take at its sole expense to mitigate interference.¹³ Third, HITN argues that a waiver request should provide sufficient information about current operations to allow for case-by-case resolution.¹⁴

If adopted, these proposals would distort the Commission's long-standing waiver standard, which states that:

waivers will be granted if it is shown that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁵

Rather than relying on this standard – which HITN fails to challenge – HITN would have licensees state why they cannot comply with the rules rather than why the purpose of the rules in a particular case would be frustrated or whether there are facts that warrant a finding that applying the rule would be inequitable, burdensome or contrary to the public interest.

Moreover, both the *First Order* and the *Second Order* make clear that the Commission will consider the licensee's compliance with rules and the interference environment when it acts on waiver requests. In the *First Order*, the Commission stated that “we will consider the

¹² See HITN Petition at 13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 1.925(b)(3), cited in *Second Order* at ¶69.

actions taken by MVPD or BRS licensees to minimize the affect *[sic]* 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."¹⁶ In the *Second Order*, as discussed above, the Commission stated that "[e]valuating an individual waiver will also permit us to examine the effect of interference from the MVPD operator on other operators in the transitioning or adjacent market."¹⁷ Thus, not only would HITN's proposals unnecessarily impose a stricter standard on opt-out waiver proponents than on waiver proponents generally, the Commission has already stated that it will consider the interference environment in reviewing waiver requests.

Implicit in HITN's proposal is the possibility that MVPDs will be required to cut off service to customers, change out equipment, exclude areas within the GSA from service or fund upgrade of facilities so as not to interfere with a new service in a nearby market. As discussed above, the Group members have been providing MVPD services for many years, and should not be required to bear the burden of justifying their existence. Yet HITN's proposal ignores Section 27.53(l)(5), which provides that licensees may, pre-transition, continue to operate facilities deployed as of January 10, 2005 under the technical standards in place prior thereto. To the extent that HITN's proposal is inconsistent with this rule, it must be rejected.

C. Signed Statements From All Licensees Requesting An Opt-Out Waiver Would Create Unnecessary Burdens.

HITN proposes that waiver requests should include signed statements of all licensees that are participating in the waiver.¹⁸ HITN does not attempt to justify why this obligation should be imposed. The Group notes that in the *Second Order*, the Commission

¹⁶ *First Order* at ¶77. See also *Second Order* at ¶69.

¹⁷ *Second Order* at ¶72.

¹⁸ See HITN Petition at 13.

amended Section 27.1235 that required all licensees transitioning in a market to sign the post-transition notification.¹⁹ In lieu of a joint notice, which adds expense and delay as signatures are obtained, only the proponent is required to file the notice, which will then appear on public notice and be subject to objections.²⁰ Applying the same reasoning, the public notice of the filing of the waiver request should suffice to inform all interested parties that they have an opportunity to object to the waiver request.

D. The Commission Should Reject HITN's Attempt To Limit Waivers Where Geographic Service Areas Would Overlap.

HITN speculates that in some cases, a waiver may lead to overlapping Geographic Service Areas (“GSAs”) that could compromise a transitioning neighbor’s ability to have uniform GSAs on its channels.²¹ Here again, HITN attempts to limit the Commission’s ability to consider the merits of each waiver request on a case-by-case basis. Certainly, the Commission should reject any suggestion from HITN that an opt-out is not “possible” under these circumstances.²² To the extent that a nearby operator feels that its ability to transition would be compromised, it may have two opportunities to achieve a resolution. First, if the operator is served a Pre-Transition Data Request on a licensee that intends to opt out, the operator will learn of the opt-out decision in the response, and the parties can discuss a resolution. For instance, the parties could agree that the MVPD could migrate its service to the Middle Band Segment for financial consideration and/or digital upgrade, a solution that clears the Lower Band Segment and the Upper Band Segment and eliminates HITN’s concerns. Second, an opponent can respond to the public notice, and the Commission can conduct its examination of interference and service issues. The

¹⁹ See 47 C.F.R. § 27.1235(2005).

²⁰ See *Second Order* at ¶152.

²¹ See HITN Petition at 14.

²² *Id.*

Commission's case-by-case determination of the rights of an opt-out licensee *vis a vis* its neighbor should not be eviscerated by HITN's mere suggestion that the grantability of waiver requests should be pre-judged.

Conclusion

Reduced to its essence, HITN's Petition is all about what it thinks a licensee should include in its waiver request for it to be grantable, not about the well-settled standards for the Commission's case-by-case analysis of waiver requests. Some of HITN's proposed clarifications merely duplicate the Commission's statements in this proceeding and are thus unnecessary, while others reflect an ill-conceived and transparent campaign to prejudice and burden incumbent operators. These aspects of HITN's Petition should be rejected.

Respectfully submitted,

THE BRS RURAL ADVOCACY GROUP

August 18, 2006

By: /s/ Stephen E. Coran

Stephen E. Coran
Jonathan E. Allen
Rini Coran, PC
1615 L Street, N.W., Suite 1325
Washington, D.C. 20036
(202) 463-4310

Its Attorneys

Exhibit 1

BRS Rural Advocacy Group

Central Dakota TV, Inc.

Carrington, ND
Jamestown, ND

Evertex, Inc.

Palmer, IA
Quimby, IA
Sioux City, IA
Everly, IA

Northern Wireless Communications, Inc.

Aberdeen, SD
Bath, SD

Pine Telephone Company, Inc.

Broken Bow, OK

Polar Communications

Grafton, ND
Grand Forks, ND
Lakota, ND
Northwood, ND
Robbin, MN

RC Technologies Corporation

Kranzburg, SD
Sisseton, SD
Willow Lake, SD

Starcom Inc.

Fairmont, MN

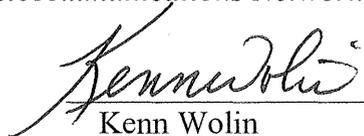
United Telephone Mutual Aid Corporation

Egeland, ND
Milton, ND

Certificate of Service

I, Kenn Wolin, a legal assistant at Rini Coran, PC, do hereby certify that on this 18th day of August, 2006, I caused a copy of the foregoing “Opposition of the BRS Rural Advocacy Group to Petition for Further Reconsideration and Request for Clarification of Hispanic Information and Telecommunications Network” to be sent by United States Postal Service, First Class Mail, to the following persons:

Rudolph J. Geist
Evan D. Carb
RJGLaw LLC
1010 Wayne Avenue
Suite 950
Silver Spring, MD 20910
Counsel to Hispanic Information and Telecommunications Network


Kenn Wolin