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

CONSOLIDATED REPLY OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK

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SUMMARY

HITN hereby submits its Consolidated Reply on further reconsideration of the Commission's recent Broadband Services Reconsideration Order in WT Docket 03-66. First, objections raised by WCA and Sprint/Nextel fail to alter the fact that in dismissing HITN's six MXed new station applications, the Commission completely failed to provide a reasoned decision responding to HITN's numerous and specific arguments.

Second, HITN responds to comments designed to distract the Commission and renews its request for clarification of the Commission's decision regarding the term limits of so-called grandfathered EBS leases and requests that the Commission affirmatively close certain loopholes by which operators have warehoused EBS spectrum without benefit to the licensee or the public in what are now substantially unusable video based leases.

Third, HITN clarifies its request for reconsideration of the Commission's decision regarding how it will handle the creation of geographic service areas for new or modified station applications that were pending as of January 10, 2005. Specifically, HITN points out that language adopted at the urging of WCA and commercial operators was in fact a fundamental shift from past Commission practice. Accordingly, HITN asks that the Commission remove an inconsistency in how it proposes to treat new station applications as compared with modification applications.

Fourth, with new support from various parties, HITN maintains its request that the Commission modify its EBS eligibility rule 27.1201 with regard to non profit entities that propose to serve local educational institutions to bring its language regarding currently permitted uses into line with other changes made in this proceeding.

Fifth, with new support from CTN/NIA and IMWED, HITN addresses certain misplaced criticisms from MVPDs and renews its request that the Commission amend and clarify the minimal requirements for sufficient MVPD opt-out waiver requests, and clarify what service areas and interference protection rights will apply where neighboring GSAs overlap due to an opt-out waiver.

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To: The Commission

CONSOLIDATED REPLY OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK

Pursuant to Section 1.429 of the Commission's rules, Hispanic Information and Telecommunications Network ("HITN"), by its attorneys, hereby submits its Consolidated Reply to Oppositions regarding its Petition for Further Reconsideration and Request for Clarification ("Petition") of the Commission's Order on Reconsideration 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*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, FCC 06-46, released April 27, 2006 ("*Broadband Services Reconsideration Order*").

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 by DirecTv, Dish Network, Comcast Cable, Time Warner Cable and the Charter Communications. HITNet, a satellite-based broadband Internet service delivered via HITN's state of the art satellite platform at the Brooklyn Navy Yard, New York, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico.. HITN also holds over 70 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 services, and through a partnership with Clearwire Corporation and other operators, advanced wireless broadband services in several markets. HITN, one of the largest holders 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]

A summary of the *Broadband Services Reconsideration Order* was published in the Federal Register on June 19, 2006, 71 Fed. Reg. 35,178 (2006). Petitions for Further Reconsideration were filed by nine parties on July 19, 2006. Notice of these reconsiderations was issued by FCC Public Notice (Report No. 2783), released on July 27, 2006 and in the Federal Register on August 3, 2006, see 71 Fed Reg 44029 (2006). See also underlying 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. Additionally See *Order* in WT Docket 03-66, DA 06-1567, released August 1, 2006, that granted an extension of the page limit for consolidated replies in this proceeding to twenty pages.

[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*").

On Further Reconsideration, HITN requested the reinstatement and processing of its six previously dismissed mutually exclusive applications for new EBS stations.[3] HITN also requested that the FCC close a loophole in grandfathered legacy one-way video only leases that has allowed operators to argue that vague language within their leases allows them to simply extend their lease term each time the FCC extends the limit on allowable lease terms. HITN also suggestst that given the Commission's recent changes in the rules, all legacy wireless cable video only leases entered into under pre-1998 rules, the terms of which have never commenced should be declared void.[4] HITN further requested reconsideration of the Commission's inconsistent decision to modify the service area of an existing incumbent station based on a division of an overlap of its protected service area contour ("PSA") with that of a pending ungranted new station application and then auction off the removed portion of that service area if the application for a new station is never granted.[5] Additionally, HITN requested that the Commission address certain inconsistencies in its EBS eligibility requirements contained in Section 27.1201(a)(3) that were overlooked when the service rules were modified to facilitate broadband uses.[6] Finally, HITN requested that the FCC clarify the minimum requirements for a case-by-case MVPD transition opt-out request, as well as the interference protection rights of licensees in situations

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[3] Petition at pp. 2-6. See also Commission actions in *Broadband Services Reconsideration Order* at ¶¶ 233-239, and *Broadband Services Order* at ¶ 263 and Appendix E thereto. HITN applications dismissed included: Alamosa, Colorado (G-Group) (File No. BPLIF-19951020WP); Billings, Montana (G-Group) (File No. BPLIF-19951020GG); Bloomingdale, Georgia (B-Group) (File No. BPLIF-19951016AV); Boise, Idaho (B-Group) (File No. BPLIF-19951020ET); Salinas, California (B-Group) (File No. BPLIF-19951020GI); and Santa Rosa California (C-Group) (File No. BPLIF-19951016BJ).

[4] See Petition at pp. 6-7 and Written Ex Parte Submissions of HITN dated April 4, 2006 and April 5, 2006 (attached thereto as Exhibit 2). HITN first raised this issue with the Commission in Comments filed on October 23, 2003.

[5] See Petition at pp. 7-9.

[6] See Petition at pp. 9-11. See also HITN Comments, submitted on September 1, 2005, in Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610, Public Notice DA-05-1524. The Wireless Telecommunications Bureau, by letter dated August 21, 2006, has now stated that it will take this issue up in Docket 03-66 in response to HITN's Petition.

where GSA overlaps occur due to frequency misalignments resulting from such opt-outs.[7] Four parties filed Oppositions taking issue with various positions taken by HITN, while three parties filed Comments in support of specific positions advocated by HITN.[8]

II. Mutually Exclusive Applications

In its Petition, HITN requested that the Commission reconsider its unreasoned and erroneous two sentence handling of its twenty two page reconsideration request, addressing the dismissal of six MXed HITN applications which sought new EBS stations.[9] HITN noted that the Commission's decision completely ignored all of HITN's arguments, cited to the same cases with which HITN had taken issue, and then simply reiterated its earlier conclusion.[10] Clearwire

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[7] See Petition at pp. 12-14.

[8] See Consolidated Opposition and Comments of The Wireless Communications Association International, Inc. filed August 18, 2006, at pp. 17-19, 21-23 & 24-28 ("WCA Opposition"); Comments and Consolidated Opposition of Sprint Nextel Corporation to Petitions for Reconsideration, filed August 18, 2006, at pp. 11-13, 18-24 & 24-26 ("Sprint Nextel Opposition"); WiMAX Forum Comments on Petitions for Reconsideration, filed August 18, 2006, at pp, 6-7 & 10-11 ("WiMAX Opposition"); and Opposition of the BRS Rural Advocacy Group, filed August 18, 2006, at pp. 5-10 ("BRAG Opposition"). See also Consolidated Opposition to and Comments on Petitions for Reconsideration, filed August 18, 2006, at pp. 5-7 & 9 ("Clearwire Comments"); Opposition to Petitions for Reconsideration Catholic Television Network and National ITFS Association, Filed August 18, 2006, at pp. 5-6 ("CTN/NIA Comments"); and The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. Consolidated Opposition to Petitions for Reconsideration and Clarification, filed August 18, 2006, at p. 6 ("IMWED Comments").

[9] See *Broadband Services Reconsideration Order* at ¶¶ 233-239. The Commission originally dismissed the applications in the *Broadband Services Order* at ¶ 263 and Appendix E thereto. HITN applications dismissed included: Alamosa, Colorado (G-Group) (File No. BPLIF-19951020WP); Billings, Montana (G-Group) (File No. BPLIF-19951020GG); Bloomingdale, Georgia (B-Group) (File No. BPLIF-19951016AV); Boise, Idaho (B-Group) (File No. BPLIF-19951020ET); Salinas, California (B-Group) (File No. BPLIF-19951020GI); and Santa Rosa California (C-Group) (File No. BPLIF-19951016BJ).

[10] See Petition at pp. 3-6. Therein, HITN argued that the decision must be reversed as arbitrary and capricious because the Commission failed to supply a reasoned explanation of: (1) how such dismissals would further its stated goals, especially in the case of educational service applications targeted toward specific local areas and funded with approved scarce federal funds, a context that differs dramatically from a previous referenced situation in which the Commission dismissed MXed applications; (2) why it was deviating from a stated policy, determined to be in the public interest; and (3) how the goals achieved by such dismissals would justify the trampling of the legitimate processing rights of the applicants, especially following an unreasonable ten year delay in processing these properly filed applications.

has filed Comments in support of HITN's Petition, while WCA and Sprint/Nextel have submitted Oppositions.[11]

Both WCA and Sprint/Nextel support the Commission's decision as being reasonable in light of the need for certainty in the transition and the long time failure of the parties to have resolved these ancient matters.[12] However, as HITN noted in its Petition, no rule or Commission policy had ever required the parties to resolve these applications through settlement, whereas the Communications Act and the Commission's Rules specifically made it the responsibility of the Commission itself to resolve these MXed applications in accordance with its Rules.[13] The Commission has to date offered no explanation for why its staff, for a period approaching ten years, failed to exercise the Commission's primary responsibility under Section 309 of the Communications Act to process the MXed applications.[14]

Additionally, the Commission to date has failed to state how processing the applications now would hamper the timely transition of this spectrum to geographic licensing. In this regard the opposing parties attempt to bolster the Commission's position that processing these applications now would result in undue burden and delay.[15] Specifically, the opposing parties argue that reinstating HITN's applications would require the reinstatement and processing of all

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[11] See Clearwire Comments at pp. 5-7. See also WCA Opposition at pp. 17-19 and Sprint Nextel Opposition at pp. 24-26. Clearwire advocates that the Commission reinstate HITN and the other similarly situated parties and provide such applicants a specific period of time in which to negotiate settlements, thereby ovoiding the need for auctions and facilitating service to these areas in the shortest possible time thereby furthering its policy objectives for the deployment of new broadband services. Clearwire Comments at pp. 5-7.

[12] See WCA Opposition at p. 19 and Sprint Nextel Opposition at pp. 25.

[13] Petition at p. 4-5& n.9.

[14] Id. Sprint/Nextel also incorrectly asserts that HITN has no right to have its application processed. Sprint Nextel Opposition at pp. 24. Such a processing right is implicit in the requirements of Section 309 the Communications Act. See 47 USC § 309(a); see also *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S.Ct. 148 (1945).

[15] See WCA Opposition at p. 19 and Sprint Nextel Opposition at pp. 25.

of the pending MXed applications.[16] However, such a conclusion is unclear given the fact that HITN alone has preserved its rights regarding the dismissed MXed applications. Even if the Commission were forced to reinstate and process the additional forty five new station applications dismissed by the Broadband Services Order, such additional processing would not result in an undue burden or significantly delay the transition to geographic licensing or the auctioning of white space areas.[17] As HITN noted in its Petition, the EBS/BRS transition is based on the conversion of thousands of existing stations entitled to 35 mile circular PSAs over to a geographic licensing scheme substantially based on those same existing service areas.[18] The addition of a few well defined and predictable service areas covered by the dismissed applications would have little impact on such a transition.[19] This is especially true where the FCC has proposed to delay the auctioning of EBS white space for up to four more years, giving it ample time to address these few MXed applications through an auction between the MXed parties.[20] To be certain, while Sprint/Nextel has served several notices of "Transition Kick Off Meetings," it has announced that it will not even start deploying any services until at least late 2007. The grant of up to six more stations to HITN cannot possibly prejudice their efforts.

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[16] Id.

[17] See *Broadband services Order* at Exhibit E.

[18] Petition at p. 5 & n. 7.

[19] The short term impact of the potential PSAs for such applications could be even smaller given the fact that many MXed applicants may have proposed nearly identical facilities.

[20] Even if the FCC elected to hold white space auctions early, as advocated by HITN and others, the resolution of these remaining applications could easily be handled as a first phase of that auction. Sprint Nextel wrongly argues that reinstatement would impose an impossible burden on the Commission forcing it to process each application under different processing rules depending on its filing date. Sprint Nextel Opposition at p. 24. As HITN has pointed out, while the FCC was duty bound to process these MXed applications under its rules at all times since their filing, in 1998 it concluded that Congress had mandated that it process them through an auction, the very device the FCC will use to address remaining white space.

WCA further contends that the 1997 Budget Act did not require the FCC to use auctions to resolve such conflicting applications.[21] However, as HITN correctly pointed out in its Petition, the Commission itself concluded in 1998 that the 1997 Budget Act required that it resolve such applications through the auction process and further concluded that the public interest would best be served by an auction restricted to the MXed parties alone.[22]

Accordingly, HITN respectfully requests that the Commission reconsider its unreasoned and erroneous decision regarding HITN's applications and reinstate and process such applications in furtherance of the public interest convenience and necessity in accordance with its obligations under its Rules and the Communications Act.

III. Limitation on Length of EBS Leases

In its *Broadband Services Reconsideration Order*, the Commission had stated that Leases entered into before January 10, 2005 would be grandfathered, but could not exceed a 15 year lease limitation.[23] In its Petition, HITN requested that the Commission clarify and close certain existing loopholes that allow for longer leases. Specifically, HITN noted that many such leases were actually for ten year terms and that the Commission should clarify that its action was not intended to lengthen them to 15 years.[24] Further HITN requested that the Commission clarify that clauses in such leases being construed by operators to simply extend the lease term each

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[21] See WCA Opposition at p. 18.

[22] See *First Report and Order in MM Docket 97-234* 13 FCC Rcd 15920 (1998), construing *Balanced Budget Act of 1997, Pub. Law No. 105-33*, 111 Stat. 251 (1997) ("1997 Budget Act"). Therein, the Commission stated that such MXed applications must be resolved by competitive bidding pursuant to Section 309(j)(1) and that because such MXed applicants had complied with existing procedures to file long-form applications they had a reasonable expectation that they would be competing only against those who had similarly filed timely applications. *First Report and Order* at ¶¶ 108, 204-205.

[23] *Broadband Services Reconsideration Order* at ¶¶ 268 and 266 citing *Broadband Services Order* at ¶ 180.

[24] Reconsideration at p. 6 & n. 10.

time the FCC extends the permissible term limit may not be employed to extend such leases beyond the former maximum 15 year limit set by the Commission.[25] Finally, because many of those leases were for video operations only and had start dates tied to such things as construction or commencement of new one-way wireless cable video systems, and in light of the fact that the recent rule changes have rendered operators unable to launch and operate new one-way wireless cable video systems on the majority of this leased EBS spectrum, the Commission should declare void, all legacy video only leases entered into under pre-1998 rules, the terms of which have never commenced.[26] CTN/NIA and IMWED each filed comments in support of some of these clarification requests, while WCA, Sprint/Nextel, and WiMAX submitted oppositions.[27]

Each of the opposing parties attempts to discredit HITN and its arguments by portraying HITN as having a secret agenda cloaked within the context of the broader public interest debate. In essence, each states that HITN is merely attempting to have the FCC extricate it from spectrum leases that it now regrets, so that it may shop its spectrum rights to its lessees' competitors in order to obtain more favorable contract terms.[28] Nothing could be farther from the truth. As far as HITN is aware, it has no leases for any of its seventy stations that contain such provisions. Over the years, HITN has been scrupulous to avoid such one-sided leases that

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[25] Id. at p. 6. See also Written Ex Parte Submissions of HITN dated April 4, 2006 and April 5, 2006 (attached hereto as Exhibit 2). HITN first raised this issue with the Commission in Comments filed on October 23, 2003.

[26] Reconsideration at p. 7 & n. 12.

[27] See CTN/NIA Comments at p. 6 (supporting HITN's request to prevent clauses in pre January 10, 2005 leases from being construed in any manner allowing for a perpetual lease); and IMWED Comments at p. 6 (supporting HITN's request to close loopholes that extend the length of legacy leases and forestall the implementation of broadband services). See Also WCA Opposition at pp. 24-28; Sprint Nextel Opposition at pp. 18-24; and WiMAX Opposition at pp. 6-7. WCA and Sprint/Nextel argue that the FCC had passed on these suggestions when raised earlier in the proceeding by HITN. In fact, the FCC has never affirmatively discussed or addressed any of these arguments and HITN respectfully requests that it do so now. See WCA Opposition at pp. 24-25 and Sprint Nextel Opposition at p. 18.

[28] See Sprint Nextel Opposition at pp. 18-19; WCA Opposition at pp. 24-25.; and WiMAX Opposition at pp.6-7.

allow operators to tie up spectrum for years without payment and without starting the lease term. HITN also avoided leases that allow operators to constantly extend the lease term any time the Commission changes its Rules. HITN, as perhaps the largest licensee of EBS spectrum feels duty bound to point out cases of industry overreaching to the Commission. This is especially true after HITN has seen legacy operators game the system and use strong-arm tactics against fellow educators. This is one such case. Here the only benefit to the retention and endless extension of grandfathered leases that do not allow for broadband services is to warehouse such spectrum and force licensees into a choice between disadvantageous lease renegotiations or costly litigation. Essentially, they offer Hobson's choice to educators in this situation. As commercial operators are aware, failure of EBS licensees to renegotiate these useless leases within the next few years could result in the loss of their licenses in 2011 when the FCC evaluates substantial service and finds that such capacity is still not being put to productive use. Thus, the only secret agenda here would appear to be that of the opposing commercial parties.

Opposing parties argue that the Commission should not inject itself into private contractual matters and that such intrusion would undercut established Secondary Markets policies.[29] However, the Commission has always restricted the terms of EBS leases, and until recently required that such leases be submitted to the Commission for review to ensure that they were in compliance with Commission restrictions on leased and retained capacity and lease duration. In fact, in this very proceeding the Commission has reaffirmed its right to intrude into

[29] See WCA Opposition at pp. 25-28; Sprint Nextel Opposition at pp. 20-24; and WiMAX Opposition at p. 7. Additionally, WCA, through sloppy excerpting of prior HITN statements, attempts to argue that HITN has changed its position on this issue. WCA Opposition at pp. 25-26. In fact, if one examines the omitted material, both proceeding and following the quote supplied by WCA, it is clear that in its January 8, 1998 Comments in MM Docket No. 97-217 at p. 8, HITN was in fact urging the FCC to intrude into contractual matters by clarifying that operators may not take advantage of rule changes to alter the terms of their existing agreements. Further, HITN was asking the FCC to clarify that existing leases were restricted to the delivery of one-way wireless cable video programming services. Both of these positions are consistent with what HITN is requesting today.

private contractual matters. On Reconsideration, the Commission stated that it would restrict grandfathered lease to fifteen years, would limit new leases to thirty years, and would require leases to contain a provision allowing EBS licensees to lease or purchase dedicated and common equipment upon the termination of the lease.[30]

The Commission, in balancing its interests under the Secondary Markets Policy and in restricting such leases, allowed for new leases of more than fifteen years duration, only where such leases provide EBS licensees an opportunity to review the educational use requirement of their lease at fifteen years and every five years thereafter. Because grandfathered leases negotiated before January 10, 2005 do not contain such provisions, they would not pass muster for leases entered into under the new rules. Allowing provisions in grandfathered leases to be read in such manner as to provide them the longer lease term benefit provided to lessees under the new rules, would in fact undercut restrictions placed on such longer term leases by the Commission in order to ensure that the educational technological and spectrum needs of EBS licenses are being met. The Commission has specifically stated in this proceeding, "we believe that any action that can perpetually bind an EBS licensee to an agreement that might cease to serve its interests, without the opportunity to renegotiate the terms thereof, would be seriously detrimental to the educational mission."[31] Thus, the Commission must close any loopholes that would allow for such lease extensions, because such provisions do not provide for the required renegotiation at the end of the original lease term, or conceivably at any time the Commission might elect to extend permissible lease terms, and would not provide EBS licensees with the required reevaluation mechanism at the 15, 20 and 25 year anniversaries.

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[30] *Broadband Services Reconsideration Order* at ¶¶ 266, 268 & 272

[31] Id. at ¶ 270.

On Reconsideration, the Commission stated unequivocally that its interest that "spectrum lessees cannot have any greater right to use the spectrum than the licensee" is fully applicable in EBS.[32] Because in this proceeding, the Commission substantially revamped its service rules for this band to preclude new high-powered one-way wireless cable video services on the bulk of traditionally leased EBS spectrum, allowing a grandfathered lease to continue, where such lease authorizes a lessee to provide only one-way high-powered wireless cable video services over an EBS licensee's channels, clearly would allow such lease to confer a greater right to use the spectrum than is now possessed by the licensee. Further, allowing a lessee to continue to tie up such capacity in an unusable lease would neither serve the public interest nor the policy objectives advanced by the Commission in conjunction with this Docket.

Accordingly, the Commission, having clearly stated that Leases entered into prior to January 10, 2005 should be limited to no more than fifteen years, should act to address remaining loopholes that would allow operators to extend such leases indefinitely. Additionally, for the reasons set forth above, the Commission should declare void, all legacy video only leases entered into under pre-1998 rules, the terms of which have never commenced.

IV. Geographic Service Areas

In its Petition, HITN requested that the Commission reconsider its decision on how to handle PSA overlaps and GSAs of new station applications pending before the Commission as of January 10, 2005, which later are dismissed prior to grant.[33] Such proposal, adopted by the Commission, unfairly strips a portion of a service area away from an incumbent licensee, awarding it pre-grant to a new station, and then when such applicant is dismissed prior to the

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[32] Id. at ¶ 267, citing *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17572, ¶ 151.
[33] Reconsideration at pp.7-9. See also *Broadband Services Reconsideration Order*, at ¶¶ 205-208.

issuance of any authorization, auctions it off as white space. IMWED has filed comments in support of HITN's request, while WCA, Sprint/Nextel, and WiMAX have filed in opposition.[34]

All opposing parties attempt to pretend that the treatment adopted for modifications is not inconsistent with the treatment adopted for new station applications.[35] However, in the case of a modification, no overlap partition is made unless the application is granted, while in the case of a new station application, the partition is made regardless of whether the new station application is ever authorized or licensed. Additionally, WCA incorrectly infers that the adopted language derives from some longstanding policy, and then wrongly concludes that if an incumbent licensee were not to lose a part of its service area to some dismissed applicant it would gain an undeserved windfall.[36] Until very recently new EBS applicants were required to protect the existing PSAs of licensees that had either requested a PSA (if prior to 1998), or who were conferred one by the FCC in 1998. Only applicants that filed prior to a PSA request, or concurrently therewith, were entitled to operations that did not protect such PSA. Naturally, where such application was not granted, such special rights disappeared. A new station applicant also was prevented from assigning its application (with any special rights) to another party. Any assignment constituted a major change necessitating the conferral of a new application file number, and a consequent loss of any rights to which such applicant was entitled by virtue of the filing date of its original application.

Thus, what WCA and the other objectors are advocating is in fact a fundamental shift from prior Commission policy. Here, WCA and the other opposing parties would have the rights

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[34] See IMWED Comments at p. 6. See Also WCA Opposition at pp. 21-23; Sprint Nextel Opposition at pp. 11-13; and WiMAX Opposition at pp. 10-11.

[35] See WCA Opposition at p. 23; Sprint Nextel Opposition at p. 12; and WiMAX Opposition at p. 11.

[36] See WCA Opposition at p. 23.

associated with such a new station application attach prior to the grant of the application, and then upon denial of such application work to strip an incumbent licensee of a portion of its service area so it can be auctioned off to the highest bidder. The Commission must reconsider the treatment of PSA overlaps in the case of forfeited new station applications to make it consistent with past policy and the treatment being afforded when modifications are dismissed.

V. EBS Eligibility

HITN has requested a change in the EBS eligibility requirements of Section 27.1201(a)(3) with regard to nonprofit organizations proposing the provision of educational material to local accredited educational institutions or governmental organizations. Specifically, HITN requested updates to the content of documentation required to be provided by such applicants from proposed receive sites, in light of the recent rule changes permitting licensees to provide both traditional video and new broadband services. Both Clearwire and CTN/NIA in comments expressed support for such revisions to the Rule.[37]

VI. MVPD Opt-Out

HITN has requested clarification by the Commission as to the minimum requirements for a sufficient MVPD opt-out waiver, in order to ensure that potentially affected licenses and the FCC have adequate information with which to evaluate each proposal on a case-by-case basis. CTN and NIA on behalf of their EBS licensee members have expressed their support for HITN's specific requests, while the BRS Rural Advocacy Group ("BRAG") expressed its opposition.[38] HITN proposed that, at a minimum, parties seeking an opt-out waiver: 1) serve potentially

[37] See Clearwire Comments at p. 9 and CTN/NIA Comments at p. 6.

[38] See CTN/NIA Comments at p. 6.

affected licensees with the waiver request, including an engineering analysis of any predicted impact on such stations; 2) if interference is predicted, explain why it cannot provide its services while meeting the interference protection requirements contained within the new rules; 3) detail specific techniques and efforts the MVPD will undertake at its sole expense to mitigate any interference its special operations will cause; 4) provide sufficient information about its current operations in order to allow for an objective case-specific determination of its eligibility and need for a waiver; and 5) provide evidence that licensees of all stations involved in the opt-out wish to participate and have their stations excluded from the bandplan transition. HITN also identified an issue regarding channel misalignment and GSA overlaps that will occur as a result of opt-outs and requested that the Commission consider how to handle competing service rights of licensees in such situations.

BRAG opposed HITN's request, "insofar as it seeks to impose unnecessary burdens on licensees that pioneered the construction of BRS systems."[39] It is this very statement that demonstrates the flaws in BRAG's position. It is the very act of an MVPD seeking special authority to opt-out of the mandatory transition that will precipitate any special burdens on BRS and EBS licensees. To the extent that HITN's reasonable suggestions appear to pose additional burdens on the moving party, HITN maintains that they are necessary to allow potentially affected parties and the FCC to evaluate the benefits and impact of the requested waiver. Further, it appears from BRAG's arguments that it too believes such information to be necessary to any full analysis, but simply wishes to shift the burden of providing it to potentially affected third party licenses, who incidentally may also be long time pioneers in this service.

[39] BRAG Opposition at p. 4.

While BRAG maintains that the underlying Orders have established adequate criteria for such waivers without need for further clarification, HITN's experience has indicated that this is not the case.[40] BRAG admits that Section 27.1231(d)(1)(v) already requires licensees to declare their intention to opt-out to a proponent in response to a pre-transition data request, but bristles at a requirement that would have such licensees express that intent directly to the FCC as part of the actual waiver request.[41] Where a licensee's authorization and obligations under the Rules will be affected by such a waiver request, and where their special operating parameters could negatively impact other licensees, it only seems reasonable to require that such licensee affirm its desire for such a waiver.[42]

BRAG argues that HITN's suggestions are unnecessary because the FCC has already stated that in reviewing any opt-out waiver request, it will consider: a licensee's compliance with the rules; the interference environment; the moving party's actions to minimize interference; and the reasons why it cannot work within the transition rules adopted.[43] BRAG fails to explain exactly how the FCC will come into possession of the information that it has already stated it will analyze in reviewing a waiver request. What BRAG has made clear is that it does not believe that the FCC should now clarify that this information should be supplied by the moving party as part of its waiver. Apparently, BRAG believes that the FCC will simply be able to generate this information itself, or believes that such information will be supplied by potentially

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[40] BRAG Opposition at pp. 5 & 7-8.

[41] Id. at p. 6.

[42] BRAG inappropriately attempts to compare the waiver request to the situation in which the FCC will permit a proponent to file the post-transition notice on behalf of all licensees in a market. Id. at pp. 8-9. In the case of a post transition notice, the proponent performed the mandatory conversion and is in a good position to notify the FCC when it has been completed. In the case of a waiver, the opt-out is not mandatory, will affect the future operating options of the affected licensee and will potentially impact other surrounding licensees. In such cases the FCC must establish with certainty that each licensee involved intends to participate.

[43] Id. at pp. 7-8.

affected third parties in response to a Public Notice that the FCC will release.[44] As HITN stated in its Petition, it is unfair to potentially affected parties, many of which will be non-profit educational licensees, to expect them to expend the funds necessary to meaningfully respond to such a Public Notice. This is especially true where they were never served with the relevant technical proposal, where such proposal failed to specifically address interference to an affected licensee's geographic service area, where the MVPD is unable to comply with the Commission's new rules, and where specific mitigation techniques that will be employed to reduce the impact on affected licensees have not been proffered.

The FCC must not allow MVPDs to shift their responsibility for crafting workable and technically clear opt-out requests onto the shoulders of innocent third parties in neighboring GSAs.[45] As HITN, with the support of NIA and CTN, has requested, the FCC must make clear where a party seeks a waiver to operate at variance with the Commission's Rules, it must:

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[44] Id. at pp. 7-9. BRAG also attacks HITN for having pointed out a unique anomaly of opt-outs, namely the misalignment of channel groups between transitioned and non-transitioned markets, and the consequent misalignment and overlap of the previously established and equally valid geographic service rights of neighboring licensees. While BRAG offers up a situation in which MVPDs and Proponents could have an opportunity to work to resolve such a situation identified during a transition planning phase, such process fails to include either affected licensee, but only commercial entities that might or might not have a contractual leasing arrangement with such licensees. While BRAG also suggests that such issues could be raised by licensees in oppositions to a Public Notice of the waiver request, such technical objections seem unlikely. To date, HITN is the only entity, commercial or non-commercial, that has identified this potential problem. It is unreasonable to expect smaller EBS licensees, when first made aware of a technically vague opt-out proposal that does not analyze its affect on their station, to recognize and raise this kind of sophisticated technical problem in an opposition.

[45] BRAG also complains that HITN's request infers that MVPD's might be required to modify operations in order to obtain a waiver, and points to Section 27.53(l)(5) that allowed licensees to continue to operate from existing facilities pre-transition. However, such interim operations were never intended to be permanent and the Commission remains free to condition any granted waivers as it sees fit. BRAG also faults HITN for objecting to interference from opt-out requests to future unspecified broadband operations. However, it is clear that the FCC expected MVPDs to protect such future uses in neighboring markets facilitated by its new rules. In denying blanket opt-outs the Commission stated: "we are particularly concerned, moreover that the adoption of a blanket opt -out for high- powered MVPD licensees may result in interference to licensees in neighboring population centers which would prevent these neighboring locales from receiving wireless broadband services under the rules adopted today." *Broadband Services Order* at ¶ 76. Further, on Reconsideration, the FCC required Opt-out requests to be made by April 30, 2007, well before the conclusion of the proponent driven and the self-transition processes. See *Broadband Services Reconsideration Order* at ¶ 74. Thus, the concern expressed by the Commission, was precisely as HITN stated it, that the grandfathering of existing high power services not preclude the future deployment of broadband services in neighboring markets under the new rules.

establish its eligibility for a waiver; demonstrate the participation of all licensees involved; explain why it cannot achieve its desired operation in compliance with such Rules; fully analyze the predicted affects of its requested operation on other licensees; outline mitigation techniques it will use to minimize interference to others; and serve its proposal on potentially affected licensees. Further, the FCC must address the potential impact of misaligned channel groups and overlapping GSAs in establishing how MVPDs can achieve their requested opt-outs.

VII Conclusion

HITN respectfully requests that the Commission reconsider and clarify its Broadband Services Reconsideration Order and the Rules adopted thereby in accordance with the discussion set forth herein and in its Petition.

Respectfully submitted,

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I, Norman Liu, hereby certify that copies of the foregoing *Consolidated Reply of Hispanic Information and Telecommunications Network, Inc.* were served this 28th day of August, 2006 on the following parties via electronic mail, unless otherwise noted, at the following addresses:

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