

October 30, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *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*

WRITTEN EX PARTE COMMUNICATION

Dear Ms. Dortch:

I am writing on behalf of the Wireless Communications Association International, Inc. (“WCA”) to reassert WCA’s strong opposition to the repeated attempts by Hispanic Information & Telecommunications Network, Inc. (“HITN”) to reinstate outdated site-based applications that the Commission correctly dismissed in its 2004 *Report and Order* in the above-referenced proceeding.¹ Undaunted by the Commission’s denial of its first petition for reconsideration of that decision,² HITN has pending before the Commission a second petition for reconsideration (the “Second Petition”) and has recently held *ex parte* meetings with the Commission’s staff to press for reinstatement of its dismissed applications.³ As WCA has previously demonstrated,

¹ 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, 14264-65 (2004) [“2004 *Report and Order*”].

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*, 21 FCC Rcd 5606, 5703-04 (2006) [“2006 *Order on Reconsideration*”].

³ See *Petition of Hispanic Information & Telecommunications Network, Inc. for Further Reconsideration*, WT Docket No. 03-66, at 3-6 (filed July 19, 2006) [“Second Petition”]; Letter from Rudolph J. Geist, Counsel to Hispanic Information & Telecommunications Network, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Oct. 24, 2006); Letter from Rudolph J. Geist, Counsel

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and establishes again below, there are no legal or policy reasons for the Commission to change course – neither HITN’s Second Petition nor its *ex parte* submissions provide any justification for the relief HITN requests.

At the outset, the record demonstrates that HITN’s Second Petition should be dismissed as repetitious and thus in violation of Section 1.429(i) of the Commission’s Rules. In the *Notice of Proposed Rulemaking* (“NPRM”) that commenced this proceeding, the Commission tentatively concluded that it would clear the way for conversion of the 2.5 GHz band to geographic licensing by dismissing all site-based applications that were pending as of the April 2, 2003 release date of the *NPRM*, except those that were subject to a filed settlement agreement that comported with the Commission’s rules.⁴ Over HITN’s objection, the Commission adopted its tentative conclusion in the *2004 Report and Order* and dismissed the dozens of pending mutually exclusive EBS applications that did not meet the Commission’s criteria for retention.⁵ HITN sought and was denied reconsideration of that decision in the Commission’s *2006 Order on Reconsideration*.⁶ Now, with its Second Petition, HITN is asking the Commission to examine the issue for a *third* time.

The Commission need not and should not do so. Indeed, the oppositions to the Second Petition confirm that the Commission’s decision was based on substantial precedent,⁷ and that the agency properly concluded that the “public interest is served by an efficient transition toward geographic licensing, and dismissing mutually exclusive applications in the current instance furthers that public interest goal.”⁸ HITN’s Second Petition does little more than parrot arguments the Commission has already rejected in both the *2004 Report and Order* and *2006 Order on Reconsideration*. It is well settled that the Commission does not grant reconsideration to allow a petitioner to reiterate arguments already presented, particularly where the petitioner

to Hispanic Information & Telecommunications Network, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 03-66 (filed Oct. 23, 2006) [“HITN October 23 *Ex Parte* Letter”].

⁴ 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*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722, 6813-14 (2003).

⁵ *2004 Report and Order*, 19 FCC Rcd at 14264-65, Appendix E. The Commission initially dismissed 51 site-based applications, but subsequently reinstated one of them upon determining that it had been subject to properly filed settlement agreements as of April 2, 2003 and thus should not have been dismissed. See *2006 Order on Reconsideration*, 21 FCC Rcd at 5704.

⁶ See Consolidated Petition of Hispanic Information & Telecommunications Network, Inc. for Reconsideration, File Nos. BPLIF-19951020WP *et al.* (filed Aug. 30, 2004); *2006 Order on Reconsideration*, 21 FCC Rcd at 5703-04.

⁷ See Consolidated Opposition and Comments of the Wireless Communications Ass’n Int’l, Inc., WT Docket No. 03-66, at 18 (filed Aug. 18, 2006); Comments and Consolidated Opposition of Sprint Nextel Corporation to Petitions for Reconsideration, WT Docket No. 03-66, at 24-26 (filed Aug. 18, 2006) [“Sprint Opposition”].

⁸ *2006 Order on Reconsideration*, 21 FCC Rcd at 5703-04.

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merely rehashes what the Commission has already considered and rejected in a prior order.⁹ HITN's Second Petition is surplusage and should be dismissed as such.¹⁰

HITN fares no better in its October 23 *ex parte* letter reporting on its recent meeting with members of the Wireless Telecommunications Bureau staff. Notably, nowhere in that filing does HITN challenge the Commission's finding that "[o]ur precedent of dismissing pending mutually exclusive applications when converting to geographic area licensing is well established."¹¹ Instead, HITN falsely asserts that the Commission's decision "was primarily based" on the *1997 Maritime Services Order*,¹² and that the Commission's supposedly "primary" reliance on that case was misplaced.¹³ HITN's argument is not only revisionist history – it is a rather astonishing attempt to mislead the Commission via a contorted reading of the law and the facts.

To begin with, the Commission's decision in 2004 dismissing the applications in question here, and its reaffirmation of that decision in 2006, did not rely "primarily" on the *1997 Maritime Services Order*. To the contrary, there is ample other precedent for the Commission's decision, a fact that HITN conveniently dodges in its October 23 *ex parte* letter.¹⁴ For example, in its

⁹ See *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 17 FCC Rcd 8520, 8525 (2002); *S&L Teen Hospital*, Order on Reconsideration, 17 FCC Rcd 7899, 7900 (2002), citing *Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles*, Order, 3 FCC Rcd 1667 (1988); *Applications of Warren Price Communications, Inc. Bay Shore, New York et al. for a Construction Permit for a New FM Station on Channel 276 at Bay Shore, New York*, Memorandum Opinion and Order, 7 FCC Rcd 6850 (1992), citing *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1964) ("it is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken"). See also *Applications of Vodafone AirTouch, Plc and Bell Atlantic Corporation, et al.*, Order on Further Reconsideration, 18 FCC Rcd 13448, 13450 (WTB 2003).

¹⁰ Section 1.429(i) of the Rules limits a second round of reconsideration to modifications made to the original order on reconsideration, and permits the staff to dismiss as repetitious a second petition that requests reconsideration of the Commission's denial of the petitioner's first petition for reconsideration. See also, e.g., *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Order, DA 06-1910 (rel. Sept. 22, 2006) (rejecting as repetitious a petition for reconsideration of a Commission action denying a prior reconsideration petition).

¹¹ *2006 Order on Reconsideration*, 21 FCC Rcd at 5703-04 (footnote omitted).

¹² See *Amendment of the Commission's Rules Regarding Maritime Communications*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 16949, 17015-16 (1997) ["*1997 Maritime Services Order*"].

¹³ See HITN October 23 *Ex Parte* Letter at 1-2.

¹⁴ See *2006 Order on Reconsideration*, 21 FCC Rcd at 5703-04 n.570, citing *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732, 2739 (1997) ["*Paging Second R&O*"]; *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6 GHz Bands*, Memorandum Opinion and Order, 14 FCC Rcd 12428, 12441-45 (1999) ["*39 GHz MO&O*"], *aff'd Bachow Comms., Inc., et al. v. FCC*, 237 F.3d 683, 686-691 (D.C. Cir. 2001) ["*Bachow*"]; *Ranger Cellular v. FCC*, 333 F.3d 255, 256 (D.C. Cir. 2003) (affirming FCC

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Second Report and Order in WT Docket No. 96-18, the Commission dismissed pending mutually exclusive site-based applications when transitioning the paging industry to geographic licensing.¹⁵ Likewise, in the *Memorandum Opinion and Order* in ET Docket No. 95-183, the Commission dismissed pending point-to-point 39 GHz applications when transitioning the 39 GHz service to geographic licensing.¹⁶ In affirming that decision, the United States Court of Appeals for the District of Columbia Circuit confirmed the agency's authority to, as it has done here, make midstream adjustments to its licensing rules even where those changes disrupt the expectations of pending applicants.¹⁷

Furthermore, HITN's attack on the precedential value of the *1997 Maritime Services Order* is disingenuous in the extreme. In that decision, the Commission discontinued its processing of site-based applications for public coast stations on VHF spectrum (156-162 MHz) to facilitate its transition of such facilities to geographic licensing.¹⁸ HITN appears to be suggesting, almost a decade later, that the Commission's decision there was incorrect (and thus should not serve as precedent here) because it was "not consistent with earlier precedent cited in the [*1997 Maritime Services Order*]"¹⁹ According to HITN, the "earlier precedent" from which the *1997 Maritime Services Order* purportedly deviates is the D.C. Circuit's 1963 decision in *Kessler v. FCC*,²⁰ which HITN contends stands for the proposition that once an application is accepted for filing, it cannot be dismissed under the circumstances here.²¹

HITN's analysis of *Kessler* is wrong. The holding in *Kessler* is actually much narrower than HITN suggests – the D.C. Circuit merely ruled there that when the Commission imposes a freeze on new applications, a post-freeze application must be processed and the applicant will

decision to dismiss pending lottery applications for initial cellular licenses and auction licenses with open eligibility), *cert. denied*, 541 U.S. 987 (2004); *Benkelman Telephone Company, et al. v. FCC*, 220 F.3d 601, 603-04 (D.C. Cir. 2000) (affirming decision to replace site-specific licensing regime for paging with geographic area licensing system that included transitional licensing freeze and dismissal of pending applications); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995) ("It is because the Commission has this authority – to establish rules of general applicability, . . . that the . . . argument that the Commission should have conducted individual adjudications under sections 308 and 309 before modifying existing cellular licenses fails.").

¹⁵ See *Paging Second R&O*, 12 FCC Rcd at 2739.

¹⁶ See *39 GHz MO&O*, 14 FCC Rcd at 12441-45.

¹⁷ See *Bachow*, 237 F.3d at 686, 687.

¹⁸ See *1997 Maritime Services Order*, 12 FCC Rcd at 17015-16. The Commission eventually dismissed those applications when it adopted its final geographic licensing rules. See *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853, 19889 (1998).

¹⁹ HITN October 23 *Ex Parte* Letter at 1.

²⁰ 326 F.2d 673 (D.C. Cir. 1963).

²¹ HITN October 23 *Ex Parte* Letter at 2.

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retain its *Ashbacker* right to a comparative hearing where its application is mutually exclusive with that of a pre-freeze applicant and filed prior to the applicable cut-off date.²² In other words, the D.C. Circuit ruled that the Commission could not, through a freeze, preclude the filing of mutually exclusive applications. Here, by contrast, the Commission has done nothing to preclude applications – the dismissals were without prejudice and HITN and the other filers of dismissed applications are free to seek licenses under the new geographic licensing system when the Commission opens a filing window. Thus, the holding in *Kessler* has no bearing on the Commission’s well-established authority to dismiss mutually exclusive applications already on file when the agency moves from a site-based to a geographic licensing model.²³

To the contrary, *Kessler* reaffirms that the Commission has broad discretion to manage its own application processes through determinations of general applicability, and that courts will defer to the Commission’s judgment in this area where the agency’s decision is supported by an adequate analysis of what will best serve the public interest.²⁴ That is precisely the situation here. After balancing a variety of competing considerations, the Commission made a reasonable determination that the most efficient mechanism for moving to geographic licensing is to wipe the slate as clean as possible by dismissing pending mutually exclusive applications that were not subject to a settlement agreement acceptable under the Commission’s rules.

It must be remembered that while HITN would self-servingly have the Commission reinstate only its six dismissed applications, far more applications are at issue here – a total of 50 applications have been dismissed under the policy that HITN challenges. It is understandable that HITN would want the Commission to reinstate only its applications, as such a ruling would provide HITN with additional licenses without being subjected to an auction. However, the Commission cannot selectively reinstate HITN’s applications to the detriment of the remaining similarly situated applicants who had their applications dismissed in the *2004 Report and Order*.²⁵ This, of course, merely applies the bedrock principle that the Commission may not

²² See *id.*, quoting *Kessler v. FCC*, 326 F.2d at 688 (D.C. Cir. 1963). Further damaging HITN’s credibility here is the fact that the *1997 Maritime Services Order* cited *Kessler* for an entirely different proposition, *i.e.*, that the *1997 Maritime Services Order* was procedural in nature and thus was not subject to the notice and comment requirements of the Administrative Procedure Act. See *1997 Maritime Services Order*, 12 FCC Rcd at 17016 n.293.

²³ See *supra* note 14 and the cases cited thereunder.

²⁴ See, *e.g.*, *Kessler*, 326 F.2d at 686 (“The issue is not what we might have done ourselves or what we might think would have been more reasonable. The issue is whether what the Commission did, in the light of the reasons it gave, was unreasonable and capricious.”).

²⁵ In an analogous situation, the Commission rejected a waiver request that sought to extricate certain applications from mutually exclusive groups. See *Robert E. Combs*, Memorandum Opinion and Order, 19 FCC Rcd 13421, 13426 (2004). There, the Commission noted that it would be “fundamentally unfair selectively to allow an applicant to obtain a construction permit outside the auction process, while requiring all other similarly situated applicants to comply with our competitive bidding rules.” *Id.* The Commission further held that “liberal granting of rule waivers potentially disserves future applicants whose proposals could be adversely affected because we effectively exempted other parties from the auction process in an earlier filing window.” *Id.* See also *Capital Cities Communications*,

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make arbitrary distinctions that have the effect of treating similarly situated applicants differently.²⁶ Indeed, it would be fundamentally unfair for the Commission to grant the one-sided relief HITN seeks – those applicants who were mutually exclusive with HITN, but accepted the Commission’s decision and are prepared to submit new applications when a filing window is opened, would forever be precluded from seeking the licenses at issue. As such, reinstatement of just HITN’s dismissed applications would establish a dangerous precedent. In future cases where the Commission dismisses groups of pending applications under circumstances comparable to those here, dismissed applicants, including those who agree with the Commission’s public interest finding supporting dismissal, would have no choice but to file speculative petitions for reconsideration solely to keep their applications alive on the off chance that the Commission might grant relief to another applicant. The Commission has recognized that policies that encourage the filing of non-legitimate petitions burdens applicants, wastes the Commission’s resources and otherwise do not serve the public interest.²⁷ It should not adopt such a policy here.

At a time when the Commission is attempting to expedite a transition of 2.5 GHz licensees to a new bandplan and thereby expedite the delivery of new wireless services to the public, reinstating the applications dismissed in the *2004 Report and Order* would be a decided step in the wrong direction. Reinstatement will only spawn delays that will obstruct the transition process, a highly relevant consideration now that the process has already commenced. At least one initiation plan has already been filed with the Commission for a Basic Trading Area (“BTA”) that includes applications that were dismissed in the *2004 Report and Order*,²⁸ and pre-transition data requests have been served for at least 23 BTAs which include one or more of the

Inc. et al. v. FCC, 554 F.2d 1135, 1139 (D.C. Cir 1976) (remanding a case back to the FCC to, *inter alia*, reconsider “the problem of unequal treatment of petitioners and others similarly situated....”).

²⁶ See, e.g., *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (the Commission must treat similarly situated parties alike unless it explains its reasons for differential treatment in light of the purposes of the Communications Act).

²⁷ See, e.g., *Revision of Part 22 of the Commission’s Rules Governing Public Mobile Services*, Notice of Proposed Rule Making, 7 FCC Rcd 3658, 3665 (1992) (proposing a rule that would curtail the filing of “non-bona fide applications.”); *Amendment of Parts 2 and 22 of the Commission’s Rules to Allocate Spectrum in the 928-941 MHz Band*, First Report and Order, 89 FCC 2d 1337, 1354-55 (1982) (noting the importance of adopting rules that do not encourage the filing of numerous petitions which “would greatly add to the Commission’s workload associated with these applications.”); *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, Memorandum Opinion and Order, 97 FCC 2d 279, 280-81 (1984) (noting that “a flood of FM petitions” would “strain...staff resources and creat[e]...unmanageable backlogs.”).

²⁸ See 2.5 GHz Transition Initiation Plan of Sprint Nextel Corp. for Chicago, IL (BTA078), WT Docket No. 06-136 (filed Sept. 27, 2006). The *2004 Report and Order* dismissed the mutually exclusive EBS applications of Chicago Instructional Technology Foundation Inc. and St. Bede Academy for the D-group channels in University Park and Ottawa, Illinois, respectively. See *2004 Report and Order*, 19 FCC Rcd at 14377-8.

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applications that had been dismissed, including three HITN applications.²⁹ Were the Commission to reinstate the dismissed EBS applications at this juncture, the transition processes for these markets would have to be restarted, the transition to the new bandplan delayed, and new 2.5 GHz services to the public held hostage. While HITN might benefit from such a result, the public most certainly will not.

Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand

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²⁹ The Commission does not maintain a database listing all BTAs for which pre-transition data requests have been filed, and thus WCA's data, obtained from a poll of those members believed to be likely proponents, may understate the number of BTAs for which pre-transition data requests have been served.