

**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
)	

To: The Commission

**EX PARTE
REQUEST FOR CLARIFICATION**

Hispanic Information and Telecommunications Network, Inc., by its attorneys and pursuant to Sections 1.41, 1.49 (f), and 1.1206 (b)(1) of the Commission's rules, hereby submits this Ex Parte Request for Clarification 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").*

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 facets of this Rulemaking. In digesting the Orders and adopted rules, HITN has observed several inconsistencies between the positions taken by the Commission within the text of the *Broadband Reconsideration Order* and the position contained within the text of the rules attached as Appendix A thereto, and incorporated into Part 27 of the Commission's Rules. HITN respectfully requests that the Commission reconcile these discrepancies at the same time it addresses the pending reconsideration requests.

Discussion

I. The text of the rules should be reconciled with the Commission's conclusion that it will assess penalties on a case-by-case basis should a licensee fail to respond to a Pre-Transition Data Request within forty-five days.

In paragraph 102 of the *Broadband Services Reconsideration Order*, the Commission stated that “in the event that a licensee fails to respond to the Pre-Transition Data Request, we will assess penalties, on a case-by-case basis, *such as* requiring the tardy licensee to forfeit its right to object to the Transition Plan **if** the BRS or EBS licensee's failure to timely respond to the Pre-Transition Data Request has caused harm to the proponent or has delayed the transition in the BTA.”² However, in the Final Rules contained within Appendix A of the *Broadband Services Reconsideration Order* and adopted into Title 47 of the Code of Federal Regulations, Section 27.1231 reads simply, “BRS and EBS licensees that do not respond to the Pre-Transition Data Request within 45 days of its receipt *may not object* to the Transition Plan.”³

² *Broadband Services Reconsideration Order*, FCC 06-4 6, ¶ 102 (emphasis added).

³ 47 C.F.R. § 27.1231 (d)(2) (2006) (emphasis added).

The inconsistency between the Code and the Order should be reconciled so that the codified rule properly reflects the Commission's clearly stated intentions. It is evident that the forfeiture of the right to object was merely an illustration of one penalty that the Commission *might* assess should a licensee fail to respond within the requisite time frame. In addition, the Commission's discussion made clear that such penalty would only be assessed if the licensee's failure to respond has caused actual harm to the proponent or the transition process. Regardless of the reasoning behind a licensee's failure to respond or the harm to the proponent because of such failure, the Commission reserved the right to assess penalties on a case-by-case basis. Therefore, the automatic penalty contained within section 27.1231 (d)(2) of the Commission's Rules is clearly inconsistent with the Commission's intentions as outlined in paragraph 102.

II. The text of the rules concerning the proponent's options in the event of a counterproposal should be amended in accordance with the discussion within the Order to state that where a proponent seeks dispute resolution, but continues the transition, it must be continued as modified by the counterproposal.

In paragraph 123 of the *Broadband Services Reconsideration Order*, the Commission listed three options for proponents when confronted with a counterproposal to the Transition Plan. "[T]he proponent may: (1) accept the counterproposal and modify the Transition Plan accordingly; (2) reject the counterproposal, stay the transition, and seek dispute resolution; or (3) reject the counteroffer, but continue with the transition **as modified by the counteroffer**, and seek dispute resolution."⁴ However, in the Final Rules contained within Appendix A of the *Broadband Services Reconsideration Order* and adopted into Title 47 of the Code of Federal Regulations, Section 27.1232 states that the proponent may: "(1) Accept the counterproposal, modify the Transition Plan accordingly, and send the modified Transition Plan to all EBS and BRS licensees in the BTA; (2) Invoke dispute resolution procedures for a determination of

⁴ *Broadband Services Reconsideration Order*, FCC 06-4 6, ¶ 123 (emphasis added).

whether the Transition Plan is reasonable and take no action until a determination of reasonableness is made; or (3) Invoke dispute resolution procedures for a determination of whether the Transition Plan is reasonable, **but may implement the transition immediately.**”⁵

Pursuant to paragraph 123 of the Order, if a proponent chooses to proceed with the transition pending dispute resolution procedures, it must do so in accordance with the proffered counterproposal. Nevertheless, the language of section 27.1232 (c)(3) permits a proponent to proceed with the *original* transition plans during dispute resolution procedures, without incorporating the measures contained within the counterproposal. Therefore, the rules are inconsistent with the Commission’s stated intention of requiring the proponent to modify the transition plan pursuant to the counterproposal should it seek to continue with the transition during dispute resolution.

III. The text of the rules should be clarified with a reference to the so-called “one-strike” rule where a proponent chooses to withdraw an Initiation Plan filed with the Commission.

The Commission has stated that a proponent may withdraw from the Initiation Plan at his own discretion by formally informing all of the BRS and EBS licensees that were included in the Initiation Plan and the Commission, but it may not seek to transition that BTA at a future time.⁶ Additionally, in its *Broadband Services Reconsideration Order* the Commission confirmed the importance of this “one-strike” rule and stated that it “provides a date certain for determining who the proponent is and for establishing the time-line for the transition of that particular BTA.”⁷ Specifically, in response to Nextel’s recommendation to allow a proponent to withdraw an

⁵ 47 C.F.R. § 27.1232 (c)(1)(2)(3) (emphasis added).

⁶ See Amendment of Parts 1, 21, 73, 74, and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, ¶ 87 (2004).

⁷ *Broadband Services Reconsideration Order*, FCC 06-4 6, ¶ 95

Initiation plan and resubmit a corrected version, the Commission clearly retained the “one-strike” rule, but instead permitted proponents to amend the Initiation Plan to correct minor or inadvertent errors.⁸

Under section 27.1231, the rules permit a proponent to withdraw from transitioning a BTA at its own discretion and to amend a plan to correct minor errors. Yet, the rules fail to mention the penalty imposed on a proponent should it withdraw an Initiation Plan. This omission should be resolved in order to advise potential proponents that they will be banned from transitioning that particular BTA in the future if an Initiation Plan is withdrawn. Thus, the language of Section 27.1231 should be modified to expressly mention the “one-strike” rule.

IV. The text of the rules should be clarified regarding the date upon which all self-transitions must be complete.

In markets where a proponent has not filed or has withdrawn an Initiation Plan, a licensee is permitted to initiate a self-transition thirty months after the effective date of the amended rules.⁹ If a licensee intends to self-transition at that time, it must so notify the Commission within ninety days from the last possible date on which the Initiation Plans for a proponent-driven transition could have been filed.¹⁰ Thereafter, in an effort to harmonize self-transitions with proponent-driven transitions, the Commission stated that self-transitions should conclude twenty-one months after the Initiation Plans in a proponent-driven transition should have been filed.¹¹ Consequently, if licensees followed the prescribed timeline, without any delays, all self-

⁸ *Id.*

⁹ *Id.* at ¶ 135.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 143.

transitions should be complete within fifty-one months from the effective date of the amended rules.¹²

However, the language of the *Broadband Services Reconsideration Order* is ambiguous regarding the amount of time a self-transitioning licensee is allocated to complete its transition. For instance, the Commission stated that a proponent must notify the Commission within ninety days of the last date on which a proponent driven Initiation Plans could have been filed as to whether it plans to self-transition.¹³ Subsequently, the Commission stated “licensees must complete the self-transition on or before 21 months after the Initiation Plans must be filed.”¹⁴ This language may create a misconception among self-transitioning licensees. For example, those that promptly notify the Commission of plans to self-transition are likely to assume that they have a total of twenty-one months to complete the entire process. Further, although the goal of the Commission was to “harmonize self-transitions with proponent-driven transitions,” the language potentially allocates a total of twenty-one months to self-transitioning licensees, whereas proponent-driven transitions are given eighteen months to complete the transition. It is probable that the Commission intended to give each self-transitioning licensee ninety days following the close of initiation plan acceptance for proponent driven transitions to assess their situation and then notify the Commission of their intention to self transition, but then provide each such licensee with eighteen months to complete its transition following the filing of its notification with the Commission.

¹² It was noted that Section 27.1236 (b)(6) of the final Rules contained within Appendix A, contained a typographical error listing the final date for completion of the transition process, including self-transitions, as fifty-seven months following July 19, 2006. Several commenters spotted and requested the correction of this error.

¹³ *Broadband Services Reconsideration Order* ¶ 141.

¹⁴ *Id.* at ¶ 143.

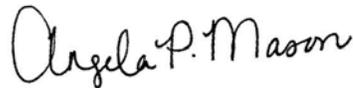
For the above reasons, the text of the rules should be corrected to read that self-transitions should be complete within fifty-one months of July 19, 2006. Also, the rules should specifically reference the amount of time that each self-transitioning licensee will be given to complete its transition following notification to the Commission of its intent to self-transition.

Conclusion

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

Respectfully submitted,

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November 2, 2006

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Ex Parte Request for Clarification* of Hispanic Information and Telecommunications Network, Inc. were served this 2nd day of November, 2006 on the following parties via electronic mail at the following addresses:

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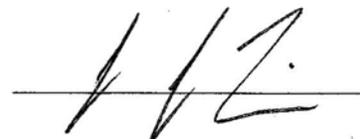
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A handwritten signature in black ink, appearing to read "G. Michaels", written over a horizontal line.