

**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	)	WT Docket No. 03-66
and Mobile Broadband Access, Educational and Other	)	RM-10586
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	

**OPPOSITION TO PETITIONS FOR RECONSIDERATION  
OF HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

Pursuant to Section 1.429 of the Commission’s rules, Hispanic Information and Telecommunications Network, Inc. (“HITN”), by its attorneys, hereby submits this Opposition to the Petitions for Reconsideration<sup>1</sup> filed with respect to the *Fourth Memorandum Opinion and Order* in the above-captioned proceeding.<sup>2</sup> The Federal Communications Commission (“FCC” or “Commission”) has sufficient authority under Federal law to decide issues concerning the maximum duration of spectrum leasing agreements between Educational Broadband Service (“EBS”) licensees and commercial lessees. While the Commission should deny the petitions for reconsideration and affirm the Fourth MO&O, generally, HITN is not opposed to a clarification in line with HITN’s proposal below, which takes into consideration a proposal made in an *ex parte* letter recently filed on behalf of various commercial operators in this proceeding and supported by at least one EBS licensee.<sup>3</sup>

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<sup>1</sup> *Petition for Partial Reconsideration* of Gateway Access Solutions, Inc. in WT Dkt. No. 03-66 (June 9, 2008)(“Gateway Petition”); and *Petition for Reconsideration* of the Wireless Telecommunications Association International, Inc. in WT Dkt. No. 03-66 (June 9, 2008) (“WCA Petition”)(collectively “Petitioners”).

<sup>2</sup> 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, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, WT Dkt. No. 03-66, FCC 08-83 (“Fourth MO&O”).

<sup>3</sup> Letter of the Wireless Communications Association International, Inc. in WT Dkt. No. 03-66 (May 6, 2008) (joined by Sprint Nextel Corporation, Clearwire Corporation, Xanadoo Inc., NextWave Broadband Inc. (“industry

**I. Introduction.**

HITN, founded in 1981, is a 501(c) non-profit corporation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN holds more than 80 station authorizations in the Educational Broadband Service (“EBS”) for facilities throughout the United States and Puerto Rico and is perhaps the largest holder of EBS authorizations in the United States. In 1987 HITN formed HITN-TV, the first and only independent 24-hour-a-day Spanish language public interest television channel in the United States. Today, HITN-TV is carried by DirecTV, Dish Network, Comcast Cable, Time Warner Cable, and Charter Communications and is presently available in over 15 million U.S. households. It remains the first and only non-profit Latino managed and controlled public interest television network offering educational content to the nation’s largest minority group and to all who share an interest in Hispanic news, information, and culture.

**II. The Commission Rightly Decided the Fourth MO&O.**

The Commission, through its Fourth MO&O, resolved a myriad of outstanding issues that arose out of the 2006 BRS/EBS Reconsideration Order<sup>4</sup> in an effort to facilitate rapid deployment of service to the public. The Petitioners seek reconsideration of the FCC’s decision that all EBS spectrum leases executed prior to January 10, 2005 are limited to a term of 15 years from the date of execution.<sup>5</sup> Contrary to the assertions by Petitioners, the Commission rightfully decided issues concerning the maximum duration of the pre-January 10, 2005 spectrum leases with respect to

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representatives”)) (the “*ex parte*”); *see also* Letter from Kemp Harshman, Clarendon Foundation, in WT Dkt. No. 03-66 (May 9, 2008) (supporting the May 6, 2008 *ex parte*).

<sup>4</sup> 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*, WT Dkt. No. 03-66, FCC 06-46 (rel. April 27, 2008) (“2006 BRS/EBS Reconsideration Order”).

<sup>5</sup> WCA Petition at 3; Gateway Petition at 2. Fourth MO&O, paras. 136-137.

one-way video only leases that have not yet commenced for any reason and has full authority to make such a declaration which is consistent with Commission precedent.

**A. The Commission Satisfied Concerns Regarding Abuse of Legacy Leases.**

The Commission's decision to limit the duration of pre-January 10, 2005 spectrum leases to 15 years from the date of execution was partially in response to HITN's request in its Petition for Reconsideration that the FCC stop EBS spectrum warehousing by certain operators with respect to EBS legacy leases. Specifically, HITN asked the FCC to declare as void provisions in legacy video-only EBS leases allowing for extension of the terms indefinitely and entered into under rules in effect prior to 1998, if the leases have never commenced.<sup>6</sup> HITN was and remains extremely concerned that these legacy lease provisions are being utilized by certain commercial operators to extend their hold on the spectrum for decades without having to renew the leases for two-way uses, effectively preventing development of the spectrum.<sup>7</sup>

In its Petition, the Wireless Communications Association, Inc. ("WCA"), with its all too common use of hyperbole, takes issue with HITN's request to void these leases, calling it "draconian" and claiming that the request was met with a "firestorm of protests."<sup>8</sup> These assertions are neither relevant nor an accurate recounting of the docket. As the Commission notes in the Fourth MO&O, Clearwire Corporation ("Clearwire"), the Catholic Television Network, National ITFS Association, and ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. supported Clarendon and HITN, while WiMAX Forum, WCA, Sprint Nextel Corporation ("Sprint), and BellSouth did not.<sup>9</sup>

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<sup>6</sup> Petition for Reconsideration of HITN at 6-7, fn 12 in WT Dkt. No. 03-66 (July 19, 2006).

<sup>7</sup> *Id.* at 7.

<sup>8</sup> WCA Petition at 5.

<sup>9</sup> Fourth MO&O, para. 133.

More importantly, the FCC declined to void the leases, stating that the resolution of this issue did not require it to interpret private contractual agreements since the issue is resolved simply by “clarifying the rules and policies of the Commission.”<sup>10</sup> Accordingly, the Commission stated that video-only leases executed more than 15 years ago have expired under the terms of the Two-Way Order.<sup>11</sup> HITN believes that the Commission can properly decide to close the loophole that allowed legacy operators to utilize vague terms in their contracts to extend their leases indefinitely. Far from denying the relief sought as WCA suggests, the Commission satisfied HITN’s concerns and removed the potential for warehousing of spectrum.

**B. The Fourth MO&O Is Consistent with Commission Policy.**

Petitioners appear to challenge the Commission’s decision to limit any pre-January 10, 2005 EBS lease to 15 years and take the extreme position of asking the Commission to acknowledge that it incorrectly stated its own policy and therefore must reverse the decision in its entirety. WCA, in particular, claims that the FCC’s understanding of its own policy was merely an “observation in *dicta*,”<sup>12</sup> that the Fourth MO&O inaccurately reflects the Commission’s policy, and that any attempt to alter the early policy on a *post hoc* basis would be unwise and unlawful.<sup>13</sup> To substantiate its request, WCA states that the FCC never suggested that the maximum lease term be measured from the execution of the lease, and that the FCC routinely approved leases submitted to the Commission for review.<sup>14</sup>

The Commission’s decision was not contrary to early policy but rather a clarification of its policy in an attempt to resolve an abuse of its rules. As the FCC states, “[t]he issue is resolved

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<sup>10</sup> *Id.*, para 136.

<sup>11</sup> *Id.*, para. 137.

<sup>12</sup> WCA Petition at 4.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 7-9.

by clarifying the rules and policies adopted by the *Two-Way Order*, the *BRS/EBS R&O* and the *BRS/EBS 3<sup>rd</sup> MO&O*.<sup>15</sup> This is not *dicta*; this is a specific decision by the Commission to clarify its rules. It is apparent from earlier rulemakings that the intent of the Commission was for EBS leases to extend a maximum of 15 years.<sup>16</sup> However, the Commission did not specifically state that the leases would be measured from the date of execution. This need for clarity is why HITN filed its Petition for Reconsideration in the first place, asking the Commission to close the loophole and stop the abuse by certain operators pursuant to certain legacy leases because it was not clear when, or even if, their term had ever started.

The FCC understood the concerns raised by HITN and apparently made a conscious decision to address that concern:

We find. . .that the alleged unknown start date is contrary to the rules and policies adopted by the Commission in the Two-Way Order, which limited the term of EBS leases to 15 years from the date they are executed between the parties. Any other interpretation of the Two-Way Order would permit warehousing of valuable spectrum for decades and is contrary to the underlying purpose of the rule.<sup>17</sup>

Even WCA admitted in its petition that "some of the one-way video only EBS leases that concerned HITN could prove problematic."<sup>18</sup> The Fourth MO&O is consistent with prior policy to limit EBS lease terms to a defined period of time and that is why it was appropriate to issue a clarification at HITN's request.

Petitioners also claim that the Fourth MO&O will have an adverse effect on deployment of service as the termination of the legacy leases will cause operators to re-assess their deployment

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<sup>15</sup> Fourth MO&O, para. 136.

<sup>16</sup> 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*, WT Dkt. No. 03-66, FCC 04-135, para. 180 (rel. July 29, 2004); ("2004 BRS/EBS Order"); 2006 BRS/EBS Reconsideration Order, para. 266.

<sup>17</sup> Fourth MO&O, para. 137.

<sup>18</sup> WCA Petition at 13.

plans, discourage investment, and disrupt business plans.<sup>19</sup> HITN believes that the opposite is more likely. As HITN previously presented to the Commission, these legacy leases with uncertain start dates tie up licenses for decades, prevent deployment, and limit the ability of the EBS licensees under these leases to develop a partnership with a commercial operator which is actually prepared to construct a system using the license. Expiration of this type of lease is a boon to the EBS licensee and may actually encourage deployment on the spectrum if a new lease can be obtained with an operator that intends to deploy service over that spectrum.

Moreover, WCA suggests that the May 1, 2011 deadline for demonstration of substantial service by EBS licensees will ensure that EBS spectrum will soon be put to productive use.<sup>20</sup> However, this self-serving and rosy prediction is actually an inherent contradiction to WCA's main contention. If the Commission allowed these leases to continue, the legacy lessees would not have the incentive (or be required under the leases) to build-out and would simultaneously prevent the EBS licensees subject to the leases from finding new commercial partners who will deploy. Consequently, EBS licensees subject to these leases may be unable to meet their substantial service requirements and may be forced to pursue waivers of the build-out requirements that may not be granted, adding expense and further uncertainty to educational entities, and jeopardizing the license, not to mention slowing deployment and service to the public. The Fourth MO&O rightly decided to limit the terms of these one-way video lonely leases to 15 years from date of execution.

In opposing the Commission's EBS lease term commencement clarification generally, WCA proposes that EBS licensees can pursue contractual remedies through state courts.<sup>21</sup> This

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<sup>19</sup> *Id.* at 17; Gateway Petition at 3.

<sup>20</sup> WCA Petition at 14, fn 36.

<sup>21</sup> *Id.* at 17.

arduous measure turns the purpose of the Commission’s policy regarding EBS on its head. Most EBS licensees are educational institutions with limited budgets, while lessees have far more extensive resources and legal expertise. While the courts may be “ready, willing and able”<sup>22</sup> to hear contract disputes, EBS licensees might not have the resources or the personnel to successfully challenge the leases. Instead of allowing the Commission to resolve this issue by clarifying its rules, WCA would have the Commission push the costs of such resolution onto schools, colleges, and non-profit educational institutions. This is contrary to the FCC’s policy of protecting and preserving EBS for use by educational entities and the Commission should reject this argument.

WCA also claims, in a seemingly further self-contradiction, that interpreting these leases consistent with the Fourth MO&O will purportedly result in extensive litigation as a myriad of issues arise from premature lease terminations that will have to be addressed in state court on a case-by-case basis based on state contract law with respect to the particular terms of each lease.<sup>23</sup> This objection is curious as WCA suggests earlier in its petition that the “ready, willing and able” courts are the only way of addressing EBS lease issues, whereby the courts are the appropriate place for disputes under these leases to be handled on a case-by-case basis pursuant to state contract law and the particular terms of each lease. On the one hand, WCA is arguing that a Commission policy that it claims will create litigation for the commercial operators is bad for the commercial interests; but on the other hand, a Commission policy that guarantees litigation for non-profit educational entities is good. The Commission should not be persuaded by this disingenuous and self-contradicting absurdity. As the FCC states, if a license is subject to a one-way only video lease agreement that has not yet expired, the parties must renegotiate.<sup>24</sup> Licensees

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<sup>22</sup> *Id.* at 14.

<sup>23</sup> *Id.* at 16.

<sup>24</sup> Fourth MO&O, para. 137.

have every interest in negotiating new leases with commercial operators and most likely the vast majority will move quickly to do so.

**C. The Fourth MO&O Is Consistent with Law.**

In addition to its specious policy arguments, WCA claims that the Fourth MO&O violates the Administrative Procedure Act (“APA”), claiming that the Commission provided no notice that it intended to adopt a new rule governing the calculation of EBS lease terms.<sup>25</sup> The APA imposes notice-and-comment requirements that must be followed before a rule may be issued.<sup>26</sup> Adequate notice is given if the final rule is a “logical outgrowth” of the proposed rule.<sup>27</sup> If the final rule is logically connected to the proposed rule, the public is considered to have had an adequate opportunity to make its views known. A final rule will fail the “logical outgrowth” test if the agency did not provide adequate notice of the proposed rule to interested parties.<sup>28</sup> If the final rule determined after notice and comment varies too substantially from the proposal, affected parties will have been deprived of proper notice and an opportunity to comment on the proposal.<sup>29</sup>

The Fourth MO&O is a logical outgrowth of the proposed rules in this docket. The Commission has long been concerned with the term of the EBS leases, discussing them in three previous proceedings.<sup>30</sup> The Fourth MO&O clarified its rules in response to HITN’s request, and WCA notes that HITN’s “draconian” proposal to cancel the leases created a “firestorm of protest,”

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<sup>25</sup> *Id.* at 18.

<sup>26</sup> See 5 U.S.C. § 553; See also *U.S. Telecom Association and CenturyTel, Inc. v. FCC & USA* [No. 03-1414] (D.C. Cir. 2005).

<sup>27</sup> *Fertilizer Inst. v. EPA*, 290 U.S. App. D.C. 184, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

<sup>28</sup> *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2<sup>d</sup> Cir. 1986).

<sup>29</sup> *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir.1985); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C.Cir.1980), *cert. denied sub nom. Lead Industries Ass'n v. Donovan*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981).

<sup>30</sup> See 2006 BRS/EBS Reconsideration Order, paras. 254-270; 2004 BRS/EBS Order, paras. 177-181; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, MM Dkt. No. 97-217, FCC 98-231, paras. 133-134 (rel. Sept. 25, 2008).

as all parties were fully on notice and did in fact comment. The Commission notes WCA's objection in the Fourth MO&O.<sup>31</sup> WCA may disagree with the Commission's policy and its reasoning, but it certainly had notice that the issue was before the Commission and its voice was heard. The Commission's resolution of the one-way video only lease term in the Fourth MO&O is a logical outgrowth of the proposed rule and consistent with the APA.

### **III. HITN Supports a Further Clarification of Pre-January 10, 2005 EBS Lease Terms.**

WCA presents several incidences where active EBS leases are deemed to have expired as a result of the Commission's clarification and where the issues HITN was seeking to address are not present.<sup>32</sup> While HITN believes the Commission rightfully clarified its policy and had legal authority to do so, HITN also believes that adoption of the following clarifications would be appropriate to narrow the scope of the pre-January 10, 2005 EBS leases covered by the statements the Commission made in paragraphs 136 and 137 of the Fourth MO&O to only one-way video only leases, taking into consideration the earlier-filed proposal made by industry representatives in the *ex parte* presentation to the Commission.<sup>33</sup> To that end, HITN supports clarifications consistent with those proposed in that *ex parte* as modified below:

One-way video only EBS leases executed prior to the effective date of the *Two-Way Order* commence on the later of (1) the date that the parties executed the lease or an amendment to the lease, (2) the date that the FCC granted any application that was contemplated by the lease prior to lessee's use of the spectrum so long as the lessee has complied with all obligations under such leases, including construction of the channels prior to the March 20, 2008 adoption date of the *Third Order*, or (3) if the lease specifies that the lease term begins upon an event solely within the control of the lessee, then the date that the event within the lessee's sole control occurred, provided that that event within the lessee's sole control occurred prior to the March 20, 2008 adoption date of the *Third Order*.

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<sup>31</sup> Fourth MO&O, para. 33.

<sup>32</sup> *Id.* at 15-16.

<sup>33</sup> *See supra*, note 3.

HITN believes that this compromise approach addresses its concerns regarding legacy leases, preserves relief for one-way video only leases, and is a far better policy than the result requested by WCA.

**IV. Conclusion.**

The Fourth MO&O rightfully decides a number of outstanding issues for EBS. One of the crucial decisions made by the Commission is to limit pre-January 10, 2005 EBS leases to 15 years from the date of execution. This decision resolves HITN's concerns regarding legacy leases that contain uncertain start date clauses that allow commercial operators to hold EBS spectrum hostage. Clarifying that these leases may run a maximum 15 years from the date of their execution is consistent with Commission policy and the APA. HITN does not oppose the clarifications proposed by industry representatives as modified by HITN. Accordingly, HITN urges the Commission to deny the petitions for reconsideration filed by Gateway and WCA and affirm the Fourth MO&O to the extent discussed above.

Respectfully submitted,

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July 29, 2008

## CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Opposition to Petitions for Reconsideration of Hispanic Information and Telecommunications Network, Inc.* were served this 29<sup>th</sup> day of July, 2008 on the following parties via the United States Postal Service, unless otherwise noted, at the following addresses:

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