Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
Amendment of Parts 21 and 74 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

To: The Commission

Comments of the Catholic Television Network

The Catholic Television Network ("CTN") submits these comments in response to the Second Further Notice of Proposed Rulemaking in the above-referenced proceeding, which asks how to license unassigned Educational Broadband Service ("EBS") spectrum through competitive bidding or through other means that would avoid the need for competitive bidding. CTN proposes to license unassigned EBS spectrum without competitive bidding by first identifying eligible local educators that wish to use the spectrum, and then licensing the spectrum to those entities that serve the most enrolled students in each Basic Trading Area ("BTA").

I. Background

For over a decade, the Commission has struggled with how to license unassigned EBS spectrum, often called "white space." White space includes all unlicensed spectrum between existing EBS geographic service areas and spectrum that has been forfeited or voluntarily returned to the Commission.

For many years, EBS spectrum was licensed through a comparative point system that favored local accredited applicants. However, the last opportunity to apply for EBS spectrum under the comparative point system was in 1995.[1] Shortly thereafter, the law was changed to require the use of auctions to license broadcast and other spectrum.[2] While public safety and non-commercial educational broadcast spectrum were exempted from the new auction law, EBS was not.

The Commission was concerned with this disparity given the instructional nature of EBS and the long-standing reservation of EBS for non-commercial educational use.[3] In 2000, the Commission even went so far as to ask Congress to exempt EBS from auctions given the limited funding available for educators to purchase EBS spectrum at auction.[4] But, Congress failed to act – leaving the Commission with the difficult task of deciding how to fairly license EBS spectrum within the confines of a commercial auction law. This, in turn, resulted in an application freeze which has prevented both incumbents

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[1] In re Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service, *Report and Order*, 10 FCC Rcd 2907 (1995).

[2] Pub. L. No. 105-33, 111 Stat. 251 (1997) codified at 47 U.S.C. § 309(j).

[3] *See* In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15999-16001 (1998).

[4] In the Matter of Section 257 Report to Congress, *Report*, 15 FCC Rcd 15376, 15445 (2000).

and new entrants from acquiring new EBS licenses for many years, and has precluded the expansion of EBS to many areas of the country.

Commercial auctions are not well-suited for EBS. EBS is the only spectrum specifically reserved for the formal education of enrolled students. Assigning EBS spectrum based on a single criterion – the highest bidder – would have questionable public interest benefits.

II. CTN's Proposal

Auctions are legally mandated when two or more applications are accepted for the same channels in the same geographic area.[5] Thus, the challenge is to devise an application process that will avoid mutual exclusivity (thereby avoiding auctions) and put the spectrum in the hands of entities most likely to use it in furtherance of the public interest.[6]

CTN believes this can best be achieved though a process that first invites interested parties to advise the Commission of their intent to apply for one of the five EBS channel groups available in a particular BTA, followed by the issuance of BTA overlay licenses to the five applicants that serve the most enrolled students in the BTA. As described more fully in Section III, to be eligible for a license, an applicant would certify that (1) it has a local physical presence in the BTA; (2) it is an accredited institution, governmental organization, or nonprofit educational organization; and (3) it provides educational services to enrolled students located in the white space of the BTA.

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[5] *See* 47 U.S.C. § 309(j)(1) ("If … mutually exclusive applications are accepted for any initial license …, then, except … [for exempted services], the Commission shall grant the license … to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.").

[6] *See* 47 U.S.C. § 309(j)(6)(E) ("Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings....").

The applicant would also specify the total number of currently enrolled students to whom it provides educational services in the BTA (or in the case of a nonprofit organization, the number of currently enrolled students in the BTA served by accredited institutions or governmental organizations that the nonprofit organization serves).

CTN's proposal is designed to ensure that the greatest number of students will benefit from the last remaining spectrum reserved for the formal education of enrolled students. The proposal is based on three principles that are the foundation of EBS – localism, accreditation, and service to enrolled students. Localism has long been important to the EBS licensing process. The Commission has found that locally-based entities "best understand the educational needs and academic standards of their communities" and can act most responsibly in designing and developing EBS systems.[7] In fact, the Commission previously established a one year local priority period during which *only* local eligible entities could apply for EBS licenses.[8]

Similarly, the primary purpose of EBS is, and always has been, to transmit instructional material to accredited schools, colleges and universities for the formal education of students.[9] Accordingly, the Commission requires EBS licensees to serve

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[7] In re Amendment of Part 74 of the Commission's Rules and Regulations – Instructional Television Fixed Service, *Second Report and Order*, 101 F.C.C.2d 49, 56 (1985) ("*Second Report and Order*"), *recon. denied*, *Memorandum Opinion and Order*, 59 RR.2d 1355 (1986).

[8] *Second Report and Order*, 101 F.C.C.2d at 57. The local priority period was upheld on appeal. *See Hispanic Information & Telecom. Network v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989). The Commission also has restricted the types of entities that can participate in spectrum auctions. *See, e.g.,* Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299, 5326 (2000) (precluding one party from winning both licenses in a given area); Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Rcd 9712, 9736-37 (1995) (prohibiting incumbents from acquiring specified new channels).

[9] *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, 14171 (2004).

enrolled students.[10]

III. Proposed Licensing Process

CTN proposes that in each BTA, no more than five entities would be eligible to apply for the five available four-channel white space licenses in the BTA (channels A1-4, B1-4, C1-4, D1-4 and G1-4). This would eliminate the possibility of mutually exclusive applications and therefore eliminate the need for auctions. If a sufficient number of applications are filed, all 493 BTAs and all five white space EBS channel groups in each BTA could be licensed simultaneously.[11] To maximize opportunities for new entrants and inhibit speculation, it is essential that applicants be limited to applying for just one BTA and one channel group in the BTA.[12]

Local eligible educators would be encouraged to work together to maximize the use of spectrum within their BTAs. For example, a large institution with students in the BTA, but not in the white space of the BTA, could join forces with a small school that has students in the white space to create a new legal entity to apply for a license. This arrangement would provide both entities with the opportunity to obtain a white space license even though, independently, the large entity would not have been eligible on its own and the small entity would not otherwise have been ranked among the top five. The large entity could then expand its service to students in the white space, and the small

[10] *See* 47 C.F.R. §§ 27.1201, 27.1203 and 27.1214. *See also* 47 C.F.R. § 73.7002(b) (population served is the threshold factor for awarding licenses in the non-commercial educational FM service). Although such licenses are awarded through a different mechanism than EBS, the purposes should be the same – provide non-commercial educational service to as many people as possible.

[11] In situations where one or more channels of a channel group are encumbered in an entire BTA by the geographic service areas of existing licensees, the remaining channels of the group would be available for licensing.

[12] An attribution rule similar to 47 C.F.R. § 1.2110 would be adopted to ensure this limitation is enforced.

entity could benefit from the expertise and resources of the large institution in deploying technology-based academic programs. Similarly, multiple local educators could cooperate to form a new entity to apply for available white space and then, after a license is issued, take advantage of partitioning, disaggregation, channel swaps, leasing and other mechanisms available under the Commission's secondary market rules to rationalize the use of the spectrum among themselves and with other licensees.[13] Set forth below are the specific procedures envisioned by CTN to implement this licensing plan:

1. **Request for Statements of Intent**. The Commission would issue a Public Notice inviting eligible entities to complete a Statement of Intent indicating their interest in applying for a white space license in a particular BTA. Each entity would be required to certify under penalty of perjury (a) that it is local, meaning that it has a physical presence within the BTA;[14] (b) that it is an accredited institution, governmental organization, or nonprofit educational organization within the meaning of 47 C.F.R. §§ 27.1201(a); and (c) that it provides educational services to enrolled students located in the white space of the BTA.[15] In the case of an accredited institution or governmental organization, it would be required to specify under penalty of perjury the number of currently enrolled students that it serves in the BTA. In the case of a nonprofit organization, it would be required to specify under penalty of perjury the number of currently enrolled students served by accredited institutions or governmental organizations that the nonprofit organization serves in the BTA. If a consortium or other legal entity submits a Statement of Intent, its individual members would not be able to separately submit additional Statements of Intent.

[13] While local educators could cooperatively agree to form a new entity to apply for a license, each member of the newly-formed entity would need to be independently eligible to apply (*i.e.*, each member would need to be a local accredited institution, local governmental organization, or a local nonprofit entity serving such institutions or organizations), and at least one member would need to have enrolled students in the white space of the BTA.

[14] For colleges, universities, private schools, and nonprofit educational organizations this would mean that they have a campus, school or headquarters located within the BTA. Governmental organizations would be considered physically present if the organization's jurisdiction extends into the BTA.

[15] All parties filing a Statement of Intent would need to be familiar with the white space available in the BTA. This should not be unduly burdensome, however, because parties will be limited to filing just one Statement of Intent. Typically, an interested party will need maps showing the BTA boundary, available white space in the BTA, and student locations in the BTA. Applicants for other facilities, including non-commercial FM and TV facilities, frequently need far more extensive engineering studies, maps, and related documentation to support their applications.

2. **Request for Applications**. The Commission would issue a second Public Notice identifying all entities that submitted Statements of Intent. The Public Notice would list each BTA, and entities would be ranked under each BTA from those that specified the most enrolled students in the BTA to those with the least enrolled students in the BTA. The Public Notice would invite the top five entities in each BTA to submit applications for the BTA white space along with their choice of channel groups ranked in order of preference from one through five.

3. **White Space Applications.** Only the top five entities in each BTA could file white space applications; any other applications filed would be dismissed. All applications would include certifications similar to those provided in the Statements of Intent. In addition, accredited institutions would be required to identify their accrediting bodies and nonprofit organizations would be required to submit documentation demonstrating service provided to accredited institutions or governmental organizations. All applicants would be required to select channel groups ranked one through five in order of preference, and acknowledge their obligation to satisfy the Commission's EBS educational use and substantial service requirements.[16]

4. **Acceptance of Applications**. The Commission would issue a third Public Notice announcing the acceptance for filing of all complete applications in all BTAs. Each applicant would get its first choice of channel group unless a higher ranked applicant (*i.e.*, an applicant with more enrolled students in the BTA) selected that channel group, in which case the applicant would get its next choice. All applications would be eligible for grant unless a petition to deny is filed within thirty days of the Public Notice.

5. **Grant of Applications.** The Commission would issue a fourth Public Notice announcing the grant of all applications in all BTAs where petitions to deny were not filed. Upon grant of an application, the licensee could use its spectrum throughout the BTA subject to the rights of incumbent EBS licensees with geographic service areas in whole or in part in the BTA.[17]

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[16] *See* 47 C.F.R. §§ 27.1201, 27.1203 and 27.1214. A Statement of Intent would not bind an entity to file an application. If a top five-ranked entity does not file an application, the Commission would provide the next highest-ranked applicant(s) with an opportunity to apply.

[17] In any BTA where a petition to deny is filed, the petition would be resolved before white space licenses are issued for that BTA.

IV. Benefits of the Proposal

The proposal has many advantages. It puts unassigned spectrum into the hands of local entities that serve the greatest number of students. It requires all licensees to use the spectrum in satisfaction of the Commission's educational use and substantial service requirements. It ensures the provision of new educational service within EBS white space. It avoids the need for auctions. It encourages collaboration among educators. It inhibits the potential for speculation and application mills. And it opens the door to applications from new entrants while not precluding existing licensees from obtaining more spectrum to meet their educational needs.

The proposal can be implemented quickly and with minimal burdens on applicants and the Commission. If the Commission uses a streamlined process similar to that used in the administration of auction applications, EBS white space could be licensed within six months.

Respectfully submitted,

THE CATHOLIC TELEVISION NETWORK

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