

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other	)	
Advanced Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service	)	
for the Gulf of Mexico	)	

**REPLY TO COMMENTS BY HISPANIC INFORMATION  
AND TELECOMMUNICATIONS NETWORK, INC.**

Submitted by:

Rudolph J. Geist  
Douglas A. Hosack  
Clare C. Liedquist  
RJGLaw LLC  
7910 Woodmont Avenue  
Suite 1400  
Bethesda, MD 20814  
(240) 821-9850

Its Attorneys

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## Summary

Hispanic Information and Telecommunications Network, Inc. (“HITN”), by its attorneys, submits this reply in response to comments filed in the *Second Further Notice of Proposed Rulemaking* which addressed methods for allocating EBS white space. The majority of these comments supported expansion of current Geographic Service Areas (GSAs). HITN also supports expansion of GSAs but only so long as incumbent GSA holders first demonstrate interest through written application.

Many commenters, including NEBSA, supported automatic extension of incumbent licensees’ GSAs. However, such an automatic extension is impermissible under the Communications Act of 1934, as amended (“Communications Act”) and is inconsistent with FCC precedent. Section 308 of the Communications Act mandates: “[t]he Commission may grant construction permits and *station licenses, or modifications* or renewals thereof, *only upon written application* thereof received by it....” Although NEBSA and others cited FCC precedent allegedly supporting automatic extension; the precedent cited is inapplicable to EBS licensee GSAs. In the FCC orders these commenters cite, the Commission conducted rule changes based on technical and operational issues of the licenses. The automatic extension NEBSA et. al. propose would be for every single EBS licensee without a demonstration of previous operations or major technical changes in the industry. In addition, granting the proposed GSA maximization would automatically fragment all white space parcels within each BTA between all adjacent GSA holders and therefore not harmonize EBS authorizations with extant BRS BTA authorizations.

The allocation method HITN proposed in its comment permits incumbent GSA holders an opportunity to extend their GSAs through a written application process. The HITN proposal,

therefore, achieves the goals of NEBSA et al.'s proposal, is in compliance with the Communications Act and is consistent with Commission precedent. The HITN proposal also accomplishes NEBSA et al.'s goals of avoiding or minimizing the risks of application mills by requiring each GSA holder applicant to identify the white space extension for which they are applying.

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Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
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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
	)	

**REPLY TO COMMENTS**

Hispanic Information and Telecommunications Network, Inc. (“HITN”), by its attorneys, hereby submits this reply in response to comments filed in the *Second Further Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> The majority of commenters that commented upon allocating Educational Broadband Service (“EBS”) white space supported expansion of current Geographic Service Areas (GSAs). HITN supports expansion of GSAs so long as incumbent GSA holders first demonstrate interest through written application, as required by the Communications Act of 1934, as amended (the “Communications Act”).

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<sup>1</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, WT Docket No. 03-66, 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, *Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd 5992 (2008) (“Second FNPRM”).

Automatic extension of incumbents' GSAs without their demonstrated interest is contrary to statute, inconsistent with Commission precedent, and is against public policy. Only upon application should current GSA holders be granted such an extension. In order to avoid risks of application mills and to facilitate that the GSA extension is granted to the GSA holder that will put it to the highest and best use, the FCC should require each GSA holder applicant to identify the white space extension for which it is applying, as outlined in the HITN Proposal. The HITN Proposal is in the public interest, achieves the goals of the EBS industry, is permissible under the Communications Act and is consistent with FCC precedent.

**I. Commenters Agree That Extension of Current GSA Holders' Coverage Best Serves the Public Interest**

Most commenters agree that extension of current GSA holders' coverage will best serve the public interest and the purpose of EBS.<sup>2</sup> Recognizing "the legitimate interest of existing EBS licensees to expand their coverage areas to better encompass their natural areas of interest,"<sup>3</sup> NEBSA, for example, believes "that the interests of educators, and the public interest, are best served by... expanding GSAs of existing stations on their authorized channels."<sup>4</sup> Bellville Independent School District, Indiana Higher Education Telecommunication System, and the

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<sup>2</sup> See e.g.s Joint Comments by Adams Telcom, Inc., Central Texas Communications, Inc., Leaco Rural Telephone Cooperative, Inc., Public Service Communications, Inc., Vermont Telephone Company, Inc. and Wisper Wireless Solutions, LLC, WT Docket No. 03-66 (filed Sept. 22, 2008)("Adams Telcom et. al. Comment"); Joint Comments by Rocky Mountain Broadband, Auburn Broadband, Bridge the Divide, WT Docket 03-66 (filed Sept. 22, 2008); Comments by North Carolina Association of Community College Presidents, WT Docket 03-66 (filed Aug. 8, 2008)("NCACCP Comment"); Reply to Comments by The George Mason University Instructional Foundation, Inc., WT Docket 03-66 (filed Oct. 7, 2008); and *supra notes* 3-6.

<sup>3</sup> Comments by National EBS Association, WT Docket 03-66, at 7 (filed Sept. 22, 2008)("NEBSA Comment").

<sup>4</sup> NEBSA Comment at 22.

Source for Learning outline the following important public interest benefits of maximizing GSAs in their comments:

- Expediting educational and wireless broadband services to new areas of the country;
- Rationalizing commercial markets by eliminating small and irregularly shaped areas that would be difficult to serve;
- Harmonizing the service areas of BRS and EBS channels so that more channels can serve the same area;
- Enabling operators to more efficiently serve more areas by minimizing the additional seams between GSAs that would be created if new licensed areas were added between GSAs;
- Mitigating the negative effects of competitive bidding; and
- Promoting economic development.<sup>5</sup>

The North Carolina Association of Community College Presidents (NCACCP) “recommends that the primary scheme for licensing unassigned spectrum to avoid mutual exclusivity should be to expand the GSA’s for existing licenses.”<sup>6</sup> HITN, too, believes the public interest requires the Commission to first permit the current GSA holders, which have demonstrated the greatest interest in EBS spectrum, to apply for the spectrum contiguous to (and a logical extension of) their current holding. If the Commission was to open an application window to all EBS eligible entities without allowing incumbents first bite at the white space contiguous to their GSA, the likeliness of mutually exclusive applications would increase dramatically as would the likeliness of non-EBS-savvy prospective new entrants being taken advantage of by application mills. Perhaps more importantly, allowing current GSA holders an exclusivity period for applications,

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<sup>5</sup> Comments by Bellville Independent School District, WT Docket 03-66 at ii (filed Sept. 22, 2008)(“Bellville ISD Comment”); Comments by Indiana Higher Education Telecommunication System, WT Docket03-66 at ii (filed Sept. 22, 2008)(“IHETS Comment”); and Comments by The Source for Learning, WT Docket 03-66 at ii (filed Sept. 22, 2008)(“The Source for Learning Comment”).

<sup>6</sup> NCACCP Comment ¶ 1.

as specified in HITN's proposal, will circumvent speculators which are interested in acquiring adjacent spectrum merely to hold it hostage for the purposes of potential resale to the incumbent GSA holder most interested in putting that spectrum to its best and highest use.

## **II. The Commission Must At Minimum Require Written Application for GSA Extensions.**

Although several commenters advocated for an automatic extension without requiring an application, HITN strongly believes automatic extensions without application violates the Communications Act and is contrary to FCC precedent and the public interest. In an industry plagued by non-operation of station authorizations, the Commission should at minimum require that GSA holders at least have a pulse before arbitrarily granting them an extension.

### **A. The Communications Act Requires Written Application for License Modification.**

The automatic extensions advocated by NEBSA and others would either be considered a new station license or a modification. The Commission is statutorily obligated under Section 308 of the Communications Act to require incumbent licensees to apply for an extension of their licenses (and not just automatically extend their GSAs). Section 308(a) of the Communications Act states: "The Commission may grant construction permits and *station licenses, or modifications* or renewals thereof, *only upon written application* thereof received by it...."<sup>7</sup> The only exceptions listed are in the case of extreme emergency (for example, a national emergency proclaimed by the President or declared by Congress).<sup>8</sup> Here, commenters ask the Commission to improperly establish modifications that for all intents and purposes establish new geographic fixed licenses, which is contrary to the Commission's mandate under the Communications Act.

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<sup>7</sup> 47 U.S.C. § 308(a) (2007).

<sup>8</sup> *Id.*

**B. Commission Precedent Is Contrary to NEBSA et al.’s Automatic Extension of GSA Holders that Have Failed to Demonstrate Any Interest.**

NEBSA, Bellville ISD, Indiana Higher Education Telecommunications System, and the Source for Learning (“NEBSA et. al.”) proffered FCC precedent to justify maximization of the coverage of existing stations prior to providing an opportunity for new applications;<sup>9</sup> however, the circumstances present in the precedent offered are distinguishable from automatically extending GSAs of non-operational EBS licensees. In the orders these commenters cite, the Commission conducted rule changes based on technical and operational issues of the licenses. The orders did not justify automatically extending GSAs without some indication of demonstrated interest by the current GSA holders.

Commenters cite the Commission’s 1992 decision to amend “its cellular rules to change the method for calculating the Cellular Geographic Service Areas (“CGSA”) of cellular systems and by rule modif[y] the authorizations of existing licensees to enlarge CGSA boundaries,”<sup>10</sup> as supporting automatic GSA maximization. However, the Commission’s decision in that order was to amend the *technical standards* for determining reliable cellular service from 39 dBus to 32 dBus so that the FCC could more accurately identify areas receiving reliable cellular service.<sup>11</sup> The Commission then defined an operator’s CGSA in terms of the area where the operator was *actually providing reliable cellular service* (defined by the new technical

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<sup>9</sup> NEBSA Comment at FN 10; Bellville ISD Comment at 12-4; IHETS Comment at 12-4; The Source for Learning Comment at 11-4.

<sup>10</sup> See IHETS Comment at 12 (citing *See In the Matter of Amendment of Part 22 of the Commission’s Rules to Provide for the Filing and Processing of Applications of Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 7 FCC Rcd 2449 (1992)(“Cellular Order”).

<sup>11</sup> *See Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995).

measurement of 32 dBus).<sup>12</sup> This new definition replaced the Commission’s earlier system, in which cellular licensees delineated their own service area.<sup>13</sup> While the change “generally increased the size of the incumbent licensees’ CGSAs,” it only increased the CGSAs of licensees that had demonstrated a clear interest in the extension through operation. The proposal put forth by NEBSA et. al. would automatically modify and extend every single EBS licensee without a requirement of previous or current operations or any other demonstrated interest (even as minimal as an application).

The other precedent offered by parties supporting automatic extension were FCC orders regarding Multipoint Distribution Service (“MDS”) (now referred to as Broadband Radio Service (“BRS”))<sup>14</sup> and Instructional Television Fixed Service (“ITFS”) (now referred to as EBS) spectrum,<sup>15</sup> in which the Commission adopted a uniform 35-mile boundary for the protected service area (“PSA”) of each licensee.<sup>16</sup> The Commission’s actions in these orders related to operational and technological issues. As it did in the case of the Cellular Order, the Commission expanded the scope of the PSAs pursuant to its rulemaking authority in its MDS Order. The FCC reasoned that recent technological developments in the MDS industry and

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<sup>12</sup> *Id.* (citing Second Report and Order, 7 F.C.C.R. at 2452-54.).

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

<sup>14</sup> *In the Matter of Amendment of Parts 21,43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 10 FCC Rcd 7074, 7078 (1995).

<sup>15</sup> *In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19173 (1998).

<sup>16</sup> *See In the Matter of Amendment of Parts 21,43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Band, Second Order on Reconsideration*, ¶19 (rel. June 21, 1995) (“MDS Order”).

current operations on the band justified expansion of the PSAs from 15 mile radii to 35 mile radii. The Commission noted that “the majority of [MDS stations’] subscribers are located more than 15 miles from the transmitter.”<sup>17</sup> Similar to its holding in the Cellular Order, the Commission held that “expanding protected service areas to more closely reflect actual service areas should strengthen the viability of authorized MDS stations by ensuring more of their customers are protected against harmful interference from other stations.”<sup>18</sup> To harmonize the Commission’s MDS rules with the Commission’s ITFS rules, the Commission later granted all EBS licensees the same 35-mile PSA in its ITFS Order. In effect, this decision to allow license holders to serve customers out to 35-miles from a PSA center was not a permanent right to that fixed area. It gave license holders the right to serve customers in those extended areas if they had consent to interfere with co-channel or adjacent channel overlapping or neighboring PSAs where serving a customer would create potential interference. Most strikingly different than the current request by NEBSA et. al., in numerous cases these 35 mile PSAs overlapped with several other co-channel PSAs – and sometimes very substantially. This was not an extension of a geographic service area whatsoever and is starkly in contrast with what NEBSA and other commenters now propose. As stated *supra*, the automatic extension NEBSA et. al. propose would be for every single EBS licensee without a demonstration of previous or current operations or major technical changes in the industry. In addition, granting the proposed GSA maximization would automatically fragment all white space parcels within each BTA between all adjacent GSA holders and therefore not harmonize EBS authorizations with extant BRS BTA

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<sup>17</sup> MDS Order ¶ 4.

<sup>18</sup> *Id.* ¶ 9.

authorizations.<sup>19</sup> The justification for expansion of ITFS to harmonize with MDS simply cannot be applied to automatic EBS GSA extensions that ensure fragmentation of the BTA structure which is the basis for non-site-licensed BRS authorizations. Therefore such automatic extensions without application exceed the Commission's rulemaking authority.

Last, commenters supporting automatic extensions cited the recent DTV decision, in which "the Commission opened a window for television broadcast stations to file DTV maximization applications as part of the DTV transition process."<sup>20</sup> This decision is consistent with the HITN Proposal, which provides that the Commission would open a filing window for incumbent licensees to apply for extensions of their GSAs, and is inconsistent with automatic GSA maximizations requiring no application.

**III. Forcing White Space Spectrum Upon Existing EBS GSA Holders that Have Not Requested White Space Will Not Put that Spectrum to Its Best and Highest Use.**

The Commission must take care to consider the impact upon potentially affected parties who are justifiably underrepresented in this series of commentary: namely, existing EBS GSA holders with no interest in acquiring additional EBS spectrum. The automatic GSA extensions proposed by other commenters are tantamount to forcing EBS spectrum upon all adjacent GSA holders. Although some commenters suggest an opt-out procedure whereby GSA holders can forego GSA expansion, such an extra step will force the expense upon every single EBS licensee adjacent to white space of learning about this proceeding and making a determination of whether

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<sup>19</sup> This is in contrast to the HITN Proposal, in which fragmentation could only occur (if at all) in the case of settlement between mutually exclusive applications. The HITN Proposal requires incumbent EBS licensees to apply for extensions of their GSAs that must include any contiguous area of cochannel EBS White Space to the border of any BTA (White Space Parcels).

<sup>20</sup> Bellville ISD Comment at 14 (citing *Commission Lifts the Freeze on the Filing of Maximization Applications and Petitions for Digital Channel Substitutions, Effective Immediately*, DA 08-1213 (rel. May 30, 2008)).

to opt out. Such EBS licensees without the resources to do so will fail to opt out, and will have additional substantial service requirements and other expensive obligations forced upon them. This will further hamper the full development of EBS and the 2.5 GHz band. This onerous situation can be avoided completely by simply adopting a procedure, such as HITN's, that implements what appears to be a rather obvious solution: require that interested parties file an application to actually demonstrate their interest and agreement to comply with Commission rules versus forcing requirements upon licensees whom may have absolutely no interest in this proceeding or getting any extension.

The public interest requires the Commission to ensure the spectrum resources in the United States are put to their highest and best use. Forcing spectrum upon parties that have expressed no interest in such spectrum is patently contrary to the public interest. It almost goes without saying that a party who is unmotivated or unable to file an application for white space spectrum will also be unmotivated or unable to undertake the obligations that accompany such spectrum. There may be hundreds (or more) of EBS licensees which do not have any desire to obtain an extension and the additional regulatory obligations that go along. The only way for the Commission to be certain it is issuing additional coverage to parties whom agree they will comply with the Commission requirements associated with that new coverage is to mandate signed applications before the additional coverage is authorized. Even if the Communications Act could somehow be construed to permit license grants without an application, this would nevertheless not be a prudent course of action. Given the choice between a party who is willing to prepare and submit an application and another who is not, common sense dictates that the party willing to submit an application is more motivated to put the resource to use. At a

minimum, the FCC should require an application by the interested party as a threshold showing of its interest in putting the white space spectrum in question to its best and highest use.

**IV. To Avoid Application Mills and Facilitate the Highest and Best Use of EBS White Space, The Commission Should Require That GSA Holder Applicants Identify the White Space Applied For.**

Almost unilaterally, commenters agree that the Commission should implement a process that reduces the likeliness of mutually exclusive applications, thereby obviating the need to go to competitive bidding. NEBSA stated it believes “that auctions, however implemented, are not an appropriate spectrum allocation tool for an educational service and are not likely to result in spectrum coming into the hands of those that can best use it.”<sup>21</sup> American Association of School Administrators et. al. argue “EBS licenses should be awarded through non-competitive, negotiation procedures.”<sup>22</sup> Adams Telecom et. al. recommend the Commission first expand GSAs so as to minimize the amount of EBS white space, which would “decrease opportunities for mutually exclusive applications, and would decrease opportunities for fraudulent auction activity.”<sup>23</sup>

Many commenters that promoted automatic extension advocated that such a process would reduce/eliminate the risk of application mills and fraudulent auction activity – a must for

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<sup>21</sup> NEBSA Comment at 7.

<sup>22</sup> Joint Comments by The American Association of School Administrators (AASA), Association of Educational Service Agencies (AESAs), Association of School Business Officials International (ASBO), Consortium for School Networking (CoSN), International Society for Technology in Education (ISTE), National Association of State Boards of Education (NASBE), National Education Association (NEA), National Association of Independent Schools (NAIS), National Rural Education Association (NREA), Organizations Concerned about Rural Education (OCRE), and Rural Schools and Community Trust, WT Docket 03-66 at 11 (filed Sept. 22, 2008).

<sup>23</sup> Adams Telcom et. al. Comment at 4.

any white space allocation process the Commission implements. NEBSA's forth goal, for example, stated that the Commission should implement a process that will:

Reduce the likelihood that the process will result in a vast flood of applications by entities, many or most of whom, in the final analysis, (i) will be at risk for being taken advantage of by application mills and speculators, (ii) will not actually be able to participate meaningfully in the inevitable auctions because of legal or resource constraints, and/or (iii) will not likely be able to engage in effective management of their spectrum.<sup>24</sup>

While automatic extension (without application) would certainly eliminate the risk of mutually exclusive applications and the possibility of application mills; as explained above, the Commission cannot 'automatically' modify or grant new licenses. An incumbent EBS licensee must apply for the modification through written application. To reduce the risk of mutually exclusive applications and the possibility of application mills, HITN recommends an application process in which the applicant must go through the minimal efforts to identify the white space within which it desires to operate. An incumbent licensee that is *truly interested* in extending its GSA should be familiar with the white space area it is interested in serving, and should not find identifying the same to be too onerous. Identification of the white space may, however, be too burdensome for an uninterested licensee or a fraudulent third party interested in taking advantage of the 'free white space give away.' Placing the burden on the applicant rather than Commission staff has the added benefit of easing the administrative burden on the Commission and expediting the allocation process. The Commission should therefore require each incumbent licensee to make

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<sup>24</sup> NEBSA Comment at 6.

minimal efforts to identify the extension area for which it applies as outlined in the HITN Proposal.<sup>25</sup>

**V. The HITN Proposal Achieves the Goals of Other Commenters And Is Permitted by Statute and FCC Precedent**

The HITN proposal is the best and most efficient way to allocate EBS white space. The proposal is agreeable to most other commenters in that it extends GSA holders' coverage (recognizing the legitimate interests of incumbent licensees and reducing the likeliness of competitive bidding), restricts any commercial influence (reducing the likeliness of speculators), and requires that applicants demonstrate a minimal interest in the white space by identifying it (reducing the likeliness of application mills and need for competitive bidding).<sup>26</sup>

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<sup>25</sup> See Comment by Hispanic Information and Telecommunications Network, WT Docket 03-66 at 9 (filed Sept. 22, 2008) (“Accepted applications should include specific geographic coverage information for the White Space Parcel requested, defining its borders in terms of all surrounding GSA and BTA borders, and include a clear White Space Parcel map showing all bordering GSAs and BTAs.”).

<sup>26</sup> *Id.* at 11.

## VI. Conclusion

For the foregoing reasons, HITN urges the Commission to adopt the allocation method outlined by HITN. The HITN Proposal achieves the purpose of EBS and benefits the public interest while also upholding the requirements of the Communications Act and maintaining consistency with FCC precedent.

Respectfully submitted,

HISPANIC INFORMATION AND  
TELECOMMUNICATIONS NETWORK, INC.

By:



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Rudolph J. Geist  
Douglas A. Hosack  
Clare C. Liedquist  
RJGLaw LLC  
7910 Woodmont Avenue, Suite 1400  
Bethesda, MD 20814  
(240) 821-9850

## CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Reply to Comments* of Hispanic Information and Telecommunications Network, Inc. were served this 22<sup>nd</sup> day of October, 2008 on the following parties via electronic mail:

Aaron Goldberger  
Office of Chairman Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Aaron.Goldberger@fcc.gov](mailto:Aaron.Goldberger@fcc.gov)

Blaise Scinto  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
[Blaise.Scinto@fcc.gov](mailto:Blaise.Scinto@fcc.gov)

Bruce Gottlieb  
Office of Commissioner Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Bruce.Gottlieb@fcc.gov](mailto:Bruce.Gottlieb@fcc.gov)

James Schlichting  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
[Jim.Schlichting@fcc.gov](mailto:Jim.Schlichting@fcc.gov)

Scott Bergmann  
Office of Commissioner Adelstein  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Scott.Bergmann@fcc.gov](mailto:Scott.Bergmann@fcc.gov)

Christopher Moore  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
[Chris.Moore@fcc.gov](mailto:Chris.Moore@fcc.gov)

Wayne Leighton  
Office of Commissioner Tate  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Wayne.Leighton@fcc.gov](mailto:Wayne.Leighton@fcc.gov)

Joel Taubenblatt  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
[Joel.Taubenblatt@fcc.gov](mailto:Joel.Taubenblatt@fcc.gov)

Angela Giancarlo  
Office of Commissioner McDowell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554  
[Angela.Giancarlo@fcc.gov](mailto:Angela.Giancarlo@fcc.gov)

Lynn Ratnavale  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
[Lynn.Ratnavale@fcc.gov](mailto:Lynn.Ratnavale@fcc.gov)

John Schauble  
Federal Communications Commission  
Wireless Telecommunications Bureau  
445 12th Street, S.W.  
Washington, DC 20554  
[John.Schauble@fcc.gov](mailto:John.Schauble@fcc.gov)

