

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

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of	)	WT Docket No. 03-66
the Commission's Rules to Facilitate the	)	RM-10586
Provision of Fixed and Mobile Broadband	)	
Access, Educational and Other Advanced	)	
Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	WT Docket No. 03-67
Part 1 of the Commission's Rules – Further	)	
Competitive Bidding Procedures	)	
	)	MM Docket No. 97-217
Amendment of Parts 21 and 74 to Enable	)	
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
Amendment of Parts 21 and 74 to Engage in	)	
Fixed Two-Way Transmissions	)	
	)	WT Docket No. 02-68
Amendment of Parts 21 and 74	)	RM-9718
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	)	

**Reply Comments of American Association of School Administrators (AASA), Association  
of Educational Service Agencies (AESA), Association of School Business Officials  
International (ASBO), Consortium for School Networking (CoSN), International Society  
for Technology in Education (ISTE), National School Boards Association (NSBA),  
(National Education Association (NEA), National Association of Independent Schools  
(NAIS), National Rural Education Association (NREA), Organizations Concerned about  
Rural Education (OCRE), and Rural School and Community Trust**

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## Summary

As The Schools said in their initial comments, the needs of education should be at the center of this proceeding. There are 74 million students in the United States. The Educational Broadband Service (EBS) was established for their benefit and should be implemented for their benefit. To this end, The Schools advocate fair and flexible procedures for future EBS license awards that maintain the focus on education. All interested and eligible parties should be given a chance to share these licenses.

Some parties filing comments argue for preferences and auctions. While such approaches may benefit individual institutions, they don't serve education as a whole.

Indeed, these parties would give most of the remaining EBS white space to existing licensees without fair consideration for any other eligible parties interested in obtaining licenses. While the existing licensees represent only a small percentage of the students in the United States, if the available spectrum is given only to these existing licensees, they would end up with between 85 and 92% of the EBS licenses.

Moreover, such a bald award of preferences would eviscerate the Congressional mandate to award licenses through competitive bidding except for specific reasons delineated in the statute. Neither the language of the statute nor the policy behind it contemplates that the Commission can do away with auctions without advancing some other public interest policy.

The Schools believe the Commission's procedures have to be fair to all educators, both existing licensees and all other interested institutions. The Schools also feel that they have advanced a flexible approach that lets educators work together to use Basic Trading Areas (BTAs) and channel groups as building blocks for licenses that will treat everyone fairly, benefit education as a whole, and expedite the deployment of wireless broadband.

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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
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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	)	MM Docket No. 97-217
Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	
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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 Comments of American Association of School Administrators (AASA), Association  
of Educational Service Agencies (AESA), Association of School Business Officials  
International (ASBO), Consortium for School Networking (CoSN), International Society  
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National Rural Education Association (NREA), Organizations Concerned about Rural  
Education (OCRE), and Rural School and Community Trust**

The American Association of School Administrators (AASA), Association of  
Educational Service Agencies (AESA), Association of School Business Officials International  
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(NEA), National Association of Independent Schools (NAIS), National Rural Education

Association (NREA), Organizations Concerned about Rural Education (OCRE), and Rural School and Community Trust (hereinafter referred to collectively as “The Schools”) by counsel submit these Reply Comments in response to the Further Notice of Proposed Rulemaking. 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 Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, RM-10586 (March 20, 2008) (“Third Report and Order”). As detailed in their initial comments, these parties represent a broad segment of the educational community, particularly grades K through 12.

**1. This is educational spectrum, not commercial spectrum.**

In their initial comments, The Schools reviewed the origins of the Instructional Television Fixed Service (ITFS). They showed that the FCC started ITFS at the urging of Congress for the purpose of improving education in the United States. In the 1980s, when ITFS appeared to be underutilized, the Commission permitted educational licensees to enter into leases allowing the facilities to be used for commercial services. Importantly however, the spectrum remained educational. Even when changed from an instructional video service to the Educational Broadband Service (EBS), the original educational nature and purpose of the service was maintained. Therefore, The Schools believe that borrowing policies and procedures used for the licensing of commercial services and applying them to EBS without allowance for the differences would be a fundamental mistake.

**2. The Schools put forward a fair and flexible proposal that lets all educational institutions share the remaining spectrum.**

In their initial comments, The Schools proposed the Commission stipulate that future licenses be awarded to single entities that are composed of all interested and eligible institutions

within the license area. The key elements of The Schools proposal are these. First, it avoids auctions altogether. Second, it opens the way for new entrants and thus provides the benefits of EBS to as many students as possible. Third, it permits innovation and collaboration among eligible institutions in developing the spectrum, configuring services areas, and timing the filing of applications. Fourth, it requires licensees to have a physical presence in the service area.

This simple proposal is consistent with the original purpose of ITFS, aid to education, and eminently fair. It lets all interested educators share the spectrum.

This is not a commercial service. There should not be competition for licenses. There is no discernible benefit from intra-education competition either to education or taxpayers. For the most part, new licensees will likely lease the spectrum to commercial operators and then work with the commercial operators to develop and deploy broadband to educational users. Even if an educational licensee itself decides to construct and operate a wireless broadband service, it will in all likelihood be a community service. No educational institution here has suggested that it needs BTA-wide wireless broadband for the purpose of serving exclusively its own, internal, communications needs. Thus, if the benefit from EBS lies in lease revenues or in service to the community, then the only fair solution is to let all interested educators in the service area share the financial and telecommunications benefits from the licenses.

The proposal advanced by The Schools is also flexible. As they pointed out in their initial comments, if licenses are shared by all educators, then rigid geographic services areas and channel groups may no longer be necessary. The Commission may be able to license very large geographic service areas and all remaining available channels to a single entity.

**3. The alternatives advanced by other parties borrow from commercial licensing and rely on unfair preferences and undesirable auctions.**

The principal alternative to The Schools' proposal is typified by the one advanced by the National EBS Association (NEBSA). It recommends first that the geographic areas of existing licensees be expanded into all Basic Trading Areas (BTA) that fall within the licensee's current service area. It recommends second that once this is done, licenses for the remaining BTAs should be auctioned. NEBSA would give a preference to existing licensees by automatically expanding their service areas and then auction what little white space is left.

Hispanic Information and Telecommunications Network, Inc. (HITN) makes a proposal that is only slightly different. It wants all future licenses to be auctioned. However, like NEBSA, HITN would give a preference to existing licensees. They would be the only ones permitted to apply for licenses in BTAs overlapping their services areas and would only compete in an auction against other existing licensees with mutually exclusive applications. For the remaining areas, HITN's proposal appears the same as NEBSA's: any eligible educational institution could apply for a license, which would be awarded by auction. Other parties propose minor variations to NEBSA's scheme, and all, except the Catholic Television Network (CTN), take the basic approach of a preference to existing licensees first and an auction second. CTN would award licenses in the white spaces by BTA to whichever applicants had the most enrolled students. CTN contemplates that educators might band together in consortia in order to represent more students than competing applicants.

In its comments, NEBSA reviews various alternatives it considered and argues that the one it advances is the only feasible one. NEBSA ostensibly agrees in principle with The Schools' approach, saying "an open process for all educators and all white space *sounds* like a good idea." Comments of NEBSA (Sept. 22, 2008) 18 (emphasis in original). However,

NEBSA continues, this would not lead to “an efficient or speedy licensing process.” *Ibid.* In a similar vein, NEBSA rejects the concept of a single, national licensee because it would be difficult to organize, might not be under local control, and might not allocate the benefits (presumably lease revenues) fairly.

In short, NEBSA’s rationale for its proposal seems to be that it was the least objectionable alternative it considered. Absent from its comments is any explanation of how its proposal would benefit education as a whole or otherwise advance the purpose of the Educational Broadband Service of making broadband services widely available to all educational institutions. Absent from its comments is any positive reason for why preferences should be given to current licensees. Also absent from its comments is any policy reason for why the Commission should adopt this “Pac-Man” approach of letting current licensees gobble up the white space before letting anyone else apply. HITN’s proposal suffers from a similar failing.

NEBSA points out that even if its proposal were adopted, there would still be 201 licenses available for auction, but this belies the devils that are in the details. NEBSA notes that theoretically there could be as many as 2,465 licenses available if there were white space in each of the 493 BTAs for the 5 channels of EBS. Viewed from this perspective, NEBSA’s proposal will open only 8% (201 divided by 2,465) of the theoretically available spectrum to new entrants. Such a comparison may overstate the magnitude of NEBSA’s proposal because some BTAs may be completely covered by existing licenses already. But no one knows.

What is known is this. Exhibit A to NEBSA’s Comments lists all the BTAs that would be open to new licensees under its proposal and the number of channels available in each. According NEBSA, of the 493 BTAs in the United States, only 74 (15%) would be subject to any new license applications. And of the 201 new licenses that would be available, 36 (18%) of

them are in single state, mountainous West Virginia. By and large, NEBSA's proposal appears to open up white space only in geographic areas that are less commercially desirable while reserving the more commercially desirable, and more populated, areas for existing licensees. This approach ignores the interests of the great bulk of educational institutions.

In other words, whether one looks at the 8% measure of how many licenses are theoretically possible, the 15% measure of how many BTAs will be available, or the measure that 18% are in one state, NEBSA's proposal falls woefully short of being fair or widely beneficial to education as a whole. Using these measures, NEBSA's plan results in existing licensees having between 85% and 92% of the EBS spectrum.

**4. NEBSA's and HITN's proposals violate the letter and spirit of the competitive bidding law.**

The Congressional intent that licenses should be awarded through competitive bidding is articulated in the Communications Act thusly:

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection. 47 U.S.C. 309(j).

In part, Congress wanted to dispense with the procedures the Commission formerly employed in implementing Section 309, such as comparative hearings. But Congress also wanted the federal treasury to benefit financially from the award of licenses. It was for this reason that the competitive bidding requirement was contained in a law called the "Balanced Budget" Act. And as if this weren't enough of a hint as to Congress' intent, Section 309(j)(3) points out that if the Commission determines that competitive bidding is required, it should allow for "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use."

Thus it seems manifest that the Commission cannot without good reason dispense with auctions. It cannot blithely forego the revenue they would bring the Treasury. The comments of the North Carolina Association of Community College Presidents provide a different way of illustrating the potential magnitude of the giveaway. They parallel NEBSA's in giving a preference to existing licensees, except that the North Carolina Community College Presidents advance the more modest proposal of only expanding existing Geographic Service Areas from 35-miles to 50-miles. Comments of North Carolina Community College Presidents (August 8, 2008) 3. Using basic geometry to determine the area of a circle with a radius of 35 miles produces a result of 3,848 square miles whereas the area of a circle with a 50-mile radius is 7,853 square miles. This simple change gives a licensee twice as much coverage as it previously had. Congress clearly did not intend to give the Commission authority to give up the potential revenue from such a change if it didn't achieve some other, desirable goal.

Bald preferences also run into the *reductio ad absurdum* argument that if carried to the extreme, the Commission would never again need to issue a new license because it could just expand the service areas of existing licensees. One will search in vain for any hint in the Balanced Budget Act that Congress intended that the Commission should avoid the Congressional purpose, and give up money destined to balance the budget, by the artifice of expanding service areas for existing licensees – at least not without a reason.

What Congress did say about the conditions under which the Commission could avoid auctions was in subparagraph 6(E) and (F) that nothing in the competitive bidding law should:

(E) 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;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits. 47 U.S.C. 309(j)(6).

The Schools' proposal fits into both of these exceptions. And, unless the competing proposals find similar exceptions, it is difficult to understand why they do not violate the letter of the competitive bidding law.<sup>1</sup> Furthermore, the competing proposals certainly violate the spirit of the Balanced Budget Act since, so far, the only justification is that existing licensees find the alternatives more objectionable.

**5. The Schools' proposal is fair to all parties.**

The Schools' proposal does not give a legal preference to any educator. Any and all may join an application for a white space license. This includes incumbents, who benefit under NEBSA's proposal, as well as new entrants. Indeed, current licensees, who have familiarity with EBS, might well take the lead in applying for new licensees and in forging appropriate arrangements for all interested and eligible educators to join with them. The Schools ask only that the Commission treat all educators equally rather than giving a preference to those who obtained licenses thirteen or more years ago when the Internet was in its infancy and before anyone thought that ITFS could become the Educational Broadband Service.

**6. The Schools' proposal is the most flexible.**

The other parties to this proceeding are building on past policies that largely lost sight of the educational purpose of ITFS and that treated an educational service as a commercial one. For this reason, they focus on exclusive service areas, channel groups, and competitive applications when in fact none of these concepts was originally part of ITFS nor should they be a part of EBS today. If all interested and eligible educators were permitted to share in a license,

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<sup>1</sup> The Belleville Independent School District argues that the Commission's use of similar preferences was upheld by the Court of Appeals in *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995). Although that case was decided before the Balanced Budget Act of 1997, the issue before the court was a change in the technical rules that resulted in changing existing service areas. Section 309(j)(6)(E) expressly provides that engineering solutions do not necessarily trigger auctions.

then service areas, channels, and competition would diminish in importance. The Catholic Television Network moves in the same direction, suggesting educators should form consortia to hold EBS licenses. Comments of the Catholic Television Network (September 22, 2008).

The Schools' proposal gives applicants flexibility. BTAs and channels should be building blocks for a license, just as atoms are the building blocks of molecules. The Commission should set forth basic principles and rules to the effect that it will award a single license to whomever represents all interested and eligible educators in a service area and let those entities decide among themselves what the service area will be and how many channels will be covered. A license might cover one channel group in one BTA; it might cover some or all channels in the BTA; or it might cover multiple channels in multiple BTAs or even entire states. To give further flexibility, The Schools suggest that initial filing windows be avoided. The Commission should allow educators in each community to decide when they want to file. Once an application has been filed and put on public notice, other eligible parties within the defined service would be expected to notify the Commission and the applicant of their desire to participate. Negotiated settlements would follow.

The Schools expect that before EBS is open to further licensing, educational groups will be able to work out among themselves model consortia agreements which applicants can follow. The Commission could look to these if an application was challenged for not being in the public interest because, for example, it was unfair to educational institutions within the service area. The Commission might also restructure service areas for similar reasons. Nonetheless, The Schools expect that the need for Commission intervention in the negotiation process would be minimal and that the educational community will be able to devise fair model consortia agreements.

## **7. Additional Public Interest Benefits**

There are also additional public interest benefits to pursuing the Schools' proposal. Part of the Commission's goal in this proceeding and in general is to enhance the deployment of broadband services to American consumers and businesses. The proposal will allow for the creation of consortia that can lease to commercial entities for the deployment of broadband services. In addition, it will promote the further deployment of broadband to schools, in particular, through lease agreements that will likely include significant, evolving levels of broadband service at little or no cost to schools within each service area.

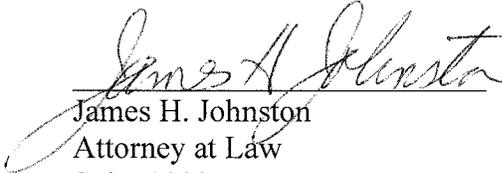
The Schools also anticipate that their proposal may have a much more significant impact than competing proposals in easing demand for priority 1 services under the E-rate program. The proposal allows all EBS-eligible institutions within a service area to be part of the consortium (including the K-12 institutions which are likely receiving discounts from the E-rate program), and all members would be able to receive some level of service from the commercial operator as part of any lease agreement. This service would likely replace some of the broadband services being purchased today through the E-rate program, as well as likely offset some of the future costs associated with schools in the future years of the program. This reduction in demand for E-rate funds would allow the Commission to ensure that more schools are able to benefit from Priority 2 funding, while simultaneously easing pressure to increase Universal Service collections in order to meet the rapidly growing demand for broadband services from schools.

## **8. Conclusion**

The Commission has a unique opportunity in this proceeding to refocus EBS and return it to its original mission of aiding education. It should reject preferences and auctions borrowed

from the commercial domain. It should treat all educators fairly and equitably and award future licensees to those that represent all eligible and interested educational institutions in a service areas. In short, the Commission should determine how the future award of EBS licenses can be used to aid education in the United States and then adopt procedures to achieve that goal.

Respectfully submitted,



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