

# FISH & RICHARDSON P.C.

1425 K STREET, N.W.  
11TH FLOOR  
WASHINGTON, DC 20005

Telephone  
202 783-5070

Facsimile  
202 783-2331

Web Site  
www.fr.com

Edwin N. Lavergne  
202 626-6359

Email  
lavergne@fr.com

Frederick P. Fish  
1855-1930

W.K. Richardson  
1859-1951

June 1, 2009

## VIA ELECTRONIC FILING

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554



ATLANTA

AUSTIN

BOSTON

DALLAS

DELAWARE

HOUSTON

MUNICH

NEW YORK

SAN DIEGO

SILICON VALLEY

TWIN CITIES

WASHINGTON, DC

Re: **Ex Parte Communication**

WT Docket No. 03-66; 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

Dear Ms. Dortch:

In the above-referenced proceeding, the Commission is faced with the difficult task of deciding how to fairly license unassigned Educational Broadband Service ("EBS") spectrum within the confines of a commercial auction law that mandates auctions for mutually exclusive EBS applications.<sup>1</sup> In this letter, the Catholic Television Network ("CTN") puts forth a new proposal to license EBS white space based on CTN's analysis of the comments and reply comments filed in this proceeding and discussions with several major stakeholders.

The proposal, which is endorsed by the United States Conference of Catholic Bishops and the National Catholic Educational Association, is intended as a compromise to reconcile fundamental differences among participants in this proceeding so as to allow the Commission to finally resolve this issue and license EBS throughout the nation. If adopted, the proposal would (1) avoid completely the need for auctions, (2) provide white space licensing opportunities for both new entrants and incumbents, and (3) be relatively easy to administer.

<sup>1</sup> See 47 U.S.C. § 309(j)(1) ("If ... mutually exclusive applications are accepted for any initial license ..., then, except [for exempted services, which do not include EBS], the Commission shall grant the license ... to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection."). In the *Second Further Notice of Proposed Rulemaking* in the above-referenced proceeding, the Commission asked for comment on how to license unassigned EBS spectrum through competitive bidding or through other means that would avoid the need for competitive bidding. 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*, 23 FCC Red 5992, 6062-63 ¶¶ 186-87 (2008).

Letter to Marlene H. Dortch

June 1, 2009

Page 2

### **Background**

Many of the parties that filed comments or reply comments in this proceeding agree that auctions are not well-suited for EBS.<sup>2</sup> However, there is significant disagreement among participants regarding how EBS white space should be licensed. With some over-simplification, the proposals generally fall into one of three categories:

- **GSA Expansions followed by Auctions.** The National EBS Association (“NEBSA”) and several other EBS licensees propose to expand all existing EBS geographic service areas (“GSAs”) outward to fill white space. The only channels that would be available to new entrants would be those primarily in rural markets where no EBS channels currently are licensed. The white space in these rural areas would be licensed to the highest bidder through auctions after a brief settlement period.<sup>3</sup>
- **Auctions with Settlement Opportunities for Incumbents.** Bridge the Divide Foundation, Inc. and a few other parties propose to auction all EBS white space. However, incumbent EBS licensees would first have the opportunity to reach a full-market settlement (*i.e.*, to divide the entire white space within a Basic Trading Area (“BTA”) among the incumbents) rather than go to auction. If a settlement is not reached, the white space would be licensed to the highest bidder through auctions. New entrants would be permitted to bid only when no incumbent licensee has submitted a bid.<sup>4</sup>
- **Favoring Local Educators.** CTN and the broader education community have proposed to make all white space available to both new entrants and incumbents through a process that favors local educational institutions and that encourages collaboration. Under CTN’s proposal, the Commission would first invite interested parties to advise the Commission of their intent to apply for EBS white space. This would be followed by the issuance of licenses to applicants that serve the most enrolled students in each BTA.<sup>5</sup>

---

<sup>2</sup> See, e.g., Comments of American Association of School Administrators, *et al.* (“AASA”) at 10-11, Comments of NEBSA at 6-7, Comments of Myers Lazrus at 6-10, and Reply Comments of Chicago Instructional Technology Foundation, Inc. (“CITF”) at 7.

<sup>3</sup> See Comments of NEBSA at 18, 22 and 23-26. See also Comments of Hispanic Information and Telecommunications Network, Inc. (“HITN”) at 9-12 and 12-13, Comments of Source for Learning at 5-6 and 9-11, Comments of North Carolina Association of Community College Presidents at 1-3, Reply Comments of Minnesota Tele-Media at 1, and Reply Comments of Illinois Institute of Technology at 1.

<sup>4</sup> See Comments of Bridge the Divide Foundation, Inc. *et al.* at 5-8 and 9. See also Comments of HITN at 5-6.

<sup>5</sup> See Comments of CTN at 5-7 and Comments of AASA at 7, 12, and 13.

Letter to Marlene H. Dortch

June 1, 2009

Page 3

Each of these approaches has been criticized for one reason or another. GSA expansions have been criticized for giving preferential treatment to incumbents and for violating the Communications Act.<sup>6</sup> Auctions, with or without settlement opportunities for incumbents, have been criticized for pitting educators against each other and forcing them to spend limited funds that otherwise would be spent on education.<sup>7</sup> Proposals to favor local educators have been criticized for using comparative criteria to select among competing applicants in violation of the Communications Act.<sup>8</sup>

Over the past several months, CTN has tried to address these concerns by proposing alternative licensing scenarios to other participants in this proceeding. Unfortunately, none of the scenarios proposed has been acceptable to all parties. Notwithstanding the lack of an industry-wide consensus, CTN has considered the concerns raised by all parties and presents this proposal as an alternative to its initial proposal. On balance, CTN believes that this alternative proposal provides a fair and efficient mechanism for the Commission to license EBS white space without unduly favoring incumbents or new entrants.

### **Alternative Proposal**

Under CTN's proposal, which is described more fully in the attachment to this letter, the Commission would establish a 30-day filing window during which any eligible local entity could apply for EBS white space. An eligible entity could file only one application for one channel group in one BTA and could request a license covering all of the white space in the BTA or a specific contiguous geographic area within the white space in the BTA.

After the close of the 30-day filing window, the Commission would issue a public notice, which identifies the names of the applicants in each BTA, along with the specific channels applied for and the geographic area applied for by each

---

<sup>6</sup> See, e.g., Reply Comments of AASA at 5 and 8 (There is no "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." The Commission must "treat all educators equally rather than giving a preference to those who obtained licenses thirteen or more years ago...").

<sup>7</sup> See, e.g., Comments of AASA at 10 (The "very notion that the Commission would require schools to compete against each other for licenses and would give the U.S. Treasury funds that are earmarked for education is so appalling that little needs to be said against it.") and Comments of Myers Lazrus at 8 (EBS auctions would turn into "a de facto contest among commercial lessees to see which advances the most money in service of what should be a secondary purpose for EBS spectrum, i.e., commercial leasing.").

<sup>8</sup> See, e.g., Comments of NEBSA at 4 and 7 (Establishing "eligibility restrictions based on the number of students served" seems in essence to be applying a comparative evaluation among interested parties) and Reply Comments of CITF at 9 (The "proposals of AASA and CTN do not avoid mutually exclusive applications; they simply give them a different name.").

Letter to Marlene H. Dortch

June 1, 2009

Page 4

applicant. Applications that do not conflict with other applications in the BTA would be accepted for filing and, after review, granted. Other applicants would be given 90 days to reach a voluntary settlement dividing the channels and/or service areas among themselves. If a settlement is not reached, the Commission would dismiss the applications. If a settlement is reached, new applications would be filed implementing the settlement, which would be accepted for filing, and after review, granted.

After processing the initial round of applications, the Commission would issue a second public notice identifying any channels remaining in any BTA (*e.g.*, unapplied-for channels or channels that remain available because applications were dismissed for failure to reach a settlement). The licensing process described above would be repeated except that there would be no localism requirement – *i.e.*, any eligible entity could apply for available channels, subject to the one application per entity limit, as long as it has not already been issued a white space license.

After processing the second round of applications, any channels remaining would be licensed through GSA expansions upon application of incumbent licensees, which would include newly-licensed entities that obtain white space licenses.

### **Benefits of the Proposal**

In crafting this proposal, CTN has attempted to address as many of the concerns expressed in this proceeding as possible – recognizing that no solution will be acceptable to everyone. The proposal has the following benefits:

- The need for auctions is eliminated completely.
- It is all inclusive. Any eligible educator can apply for an EBS license, including incumbents and new entrants.
- It is relatively easy for the Commission to administer and for applicants to participate. The entire process should be completed within a year.
- Parties are incentivized to settle. First round applicants will have an incentive to settle because if their applications are dismissed, they will know that the pool of eligible applicants in the second round will expand to include non-local entities. Second round applicants will have an incentive to settle because if their applications are dismissed, they will know that nearby licensees will be eligible to apply for GSA expansions to absorb any available white space.

Letter to Marlene H. Dortch

June 1, 2009

Page 5

- The limit of one application per applicant ensures that a single entity or group of entities do not create application mills and limit licensing opportunities for other educators.
- New licenses for EBS white space areas will be issued with substantial service and educational use requirements, ensuring that the white space will actually be used for educational purposes.
- Applications can be filed for areas smaller than a BTA if desired by the applicant.
- Applications from non-local entities are permitted after the first licensing round.
- GSA expansions are permitted after the second licensing round.

### **Conclusion**

CTN has devoted significant time evaluating different licensing scenarios and discussing those scenarios with other participants in this proceeding. It has become clear that no single proposal will satisfy everyone. Continuing to wait for such a proposal to emerge will only delay the licensing of EBS spectrum. Accordingly, CTN puts forth this proposal in an effort to address as many concerns as possible and to fairly and efficiently license EBS white space.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this letter is being filed electronically.

Sincerely yours,

*/s/ Edwin N. Lavergne*

Edwin N. Lavergne  
Donna A. Balaguer

Counsel to  
Catholic Television Network  
United States Conference of  
Catholic Bishops  
National Catholic Educational Association

FISH & RICHARDSON P.C.

Letter to Marlene H. Dortch

June 1, 2009

Page 6

cc: VIA EMAIL

Chairman Michael J. Copps

Commissioner Jonathan S. Adelstein

Commissioner Robert M. McDowell

Jennifer Schneider

Renee Roland Crittendon

Angela Giancarlo

James Schlichting

Joel Taubenblatt

Blaise Scinto

John Schauble