

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of Part 1 of the Commission's)	
Rules Regarding Environmental Compliance)	WT Docket No. 08-61
Procedures for Processing Antenna Structure)	WT Docket No. 03-187
Registration Applications)	
)	
Wireless Telecommunications Bureau Invites)	
Comment on Draft Environmental Notice)	DA 11-558
Requirements and Interim Procedures)	
Affecting the Antenna Structure Registration)	
Program)	

To: Chief, Wireless Telecommunications Bureau

Reply to Joint Opposition to Petition for Reconsideration

Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (“Blooston”), on behalf of its affected clients (“Petitioners”),¹ hereby submits its Reply to the Joint Opposition to Petition for Reconsideration filed by CTIA – The Wireless Association®, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA – The Wireless Infrastructure Association (collectively, the “Infrastructure Coalition”) and the American Bird Conservancy, Inc., Defenders of Wildlife, and the National Audubon Society (collectively, the “Conservation Groups”).²

For the reasons set forth below, the Petitioners respectfully submit that the grounds put forth by the Infrastructure Coalition and the Conservation Groups in their Joint Opposition for dismissal of the Petition for Reconsideration are erroneous.

¹ The term “Petitioners” is defined in the underlying Petition for Reconsideration filed on April 25, 2011.

² Hereinafter referred to as “Joint Opposition.”

Accordingly, the Commission should grant the Petition for Reconsideration upon completion of its substantive review.

I. The Petition for Reconsideration Complies with the Commission's Rules.

The Joint Opposition argues that the Petitioners' Petition for Reconsideration is fatally defective because it seeks reconsideration of a Public Notice requesting public comment in an ongoing proceeding and, therefore, is interlocutory in nature.³ In support, the Joint Opposition cites *Eligibility Restrictions on C Block Licenses in the Broadband Personal Communications Services*, 19 FCC Rcd 20321, 20326 (2004) (hereinafter, *Broadband Personal Communication Services*) and *Family Broadcasting, Inc.* 16 FCC Rcd 12801, 12802-03 (2004) (hereinafter, *Family Broadcasting*).⁴

While issues arising in the context of a Public Notice can be somewhat murky, it is respectfully submitted that the Joint Opposition's reliance on these two cases is misplaced, inasmuch as the Petitioners did not seek an interlocutory appeal on the merits of the proposed rules. In *Broadband Personal Communications Services*, the Commission dismissed Verizon Wireless' petition for reconsideration because Verizon Wireless sought reconsideration on the merits of what it perceived was the Commission's adoption of final entrepreneur eligibility rules in Auction No. 58.⁵ In dismissing the Verizon Wireless petition because there was no final action, the Commission stated that

³ Joint Opposition at 1-2.

⁴ It is worthy to note that the Infrastructure Coalition and the Conservation Groups have challenged the Petition only on its alleged procedural defects, but not on the merits. By not challenging the merits of the Petition, the Infrastructure Coalition and Conservation Groups appear to tacitly agree with the merits of the Petition.

⁵ *Id.* at 20326.

“[t]he *Auction No. 58 Comment Public Notice* made no final determination as to the application of the Commission’s entrepreneur eligibility rules in Auction No. 58, but rather sought comment on the competitive bidding procedures and conducting an auction pursuant to established PCS service rules, including the eligibility rules adopted by the Commission in 2000 in the *C/F Block Sixth Report and Order*.⁶

Likewise, in *Family Broadcasting*, the Commission’s determination that a petition for reconsideration was interlocutory in nature was based on facts that are in no way similar to the case at hand inasmuch as *Family Broadcasting* concerned an order to show cause/hearing designation order.

Unlike *Broadband Personal Communications Services* and *Family Broadcasting*, the instant Petition for Reconsideration challenges a final procedural determination by the Commission that did not address the merits of the underlying proposal that was the subject of public comment. Rather, the Petitioners have only sought reconsideration of the process for adoption of the interim rules – namely, the Commission’s decision that the rule modifications were procedural in nature and therefore exempt from notice and comment rulemaking in accordance with Section 553 (b)(A) of the Administrative Procedure Act, 5 U.S.C. 553(b)(A) (“APA”). The Petitioners in no way attacked the merits of the Commission’s proposed interim rules – and in fact, saved those concerns for its comments that were filed in this proceeding on May 5, 2011, pursuant to the Commission’s Public Notice entitled *Wireless Telecommunications Bureau Invites*

⁶ *Id.* The Commission disagreed with Verizon Wireless’ assertion that the public notice represented the first notice where the Commission had indicated that it would apply its existing C-block eligibility rules to the C-Block licenses in Auction No. 58. The Commission concluded that “[i]n challenging the applicability of these rules, the Verizon Wireless Petition [was] effectively an untimely petition for reconsideration of that order and [was] therefore procedurally defective.” *Id.* at 20326-27. Additionally, the Commission found, in *Family Broadcasting*, that a petition for reconsideration with respect to the issuance of a hearing designation order was interlocutory.

Comments on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program, dated March 25, 2011 (DA 11-558) (the “*EA Public Notice*”). There is no indication that the Commission’s decision in footnote 3 of the *EA Public Notice* is to be modified later. It is the Commission’s last word on whether a notice and comment rulemaking will be held on this subject. Because the Commission’s action, taken in footnote 3 of its *EA Public Notice*, was a final determination with respect to the process for adoption of the interim rules, that aspect of the *EA Public Notice* was ripe for review under the Commission’s Rules.

The Petitioners could not be expected to have waited to file a petition for reconsideration of a procedural decision until after the underlying substantive rules are adopted and the proceeding is concluded; this is especially true where the challenge goes to the threshold issue as to whether or not the proposed rules must be subject to notice and comment rulemaking under the APA. Moreover, it would be better for all parties concerned to have the Commission deal now with the procedural issue raised by Petitioners, rather than having the U.S. Court of Appeals invalidate the outcome of this proceeding in the event that it agrees that the Commission failed to observe the requirements of the APA and its own rules.

II. The Petitioners Have Standing to File.

The Infrastructure Coalition and Conservation Groups claim that the Blooston lacked standing to file the Petition for Reconsideration on behalf of its clients (the “Petitioners”). In making this assertion, the Infrastructure Coalition and Conservation

Groups rely on Rule Section 1.106(b) which states in pertinent part that “[i]f the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken.”⁷

In this instance, Blooston and its clients had already participated in the instant proceeding. The Commission can take official notice that on May 24, 2007, Blooston filed, on behalf of its clients, reply comments in WT Docket No. 03-187. Additionally, Blooston also filed substantive comments on behalf of the Petitioners in response to the *EA Public Notice* on May 5, 2011 – which filing deadline was well after the filing deadline for a petition for reconsideration. As a result, by the plain language of the rule, Petitioners did not have to separately establish their standing in the instant Petition for Reconsideration.

III. Conclusion.

For the foregoing reasons, there is no basis for summary dismissal of the instant Petition for Reconsideration. Accordingly, Petitioners request that the Commission, upon

⁷ In this regard, the Infrastructure Coalition and Conservation Groups also claim that Blooston was obligated to demonstrate how its own interests would be adversely affected by the issuance of the *EA Public Notice*.

substantive review of the Petition for Reconsideration, grant the petition and conduct a full rulemaking proceeding in accordance with the APA and its rules.

Respectfully submitted,

**BLOOSTON, MORDKOFKY, DICKENS,
DUFFY & PRENDERGAST, LLP**

By: 
Harold Mordkofsky
Richard D. Rubino

Attorneys for the Petitioners

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast, LLP
2120 L Street, N.W., Suite 300
Washington, DC 20037
Tel. (202) 659-0830

Dated: May 17, 2011

CERTIFICATE OF SERVICE

I, Richard D. Rubino, an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, do hereby certify that on this 17th day of May, 2011, I cause a copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to be served via first-class U.S. mail and e-mail upon the following:

Brian M. Josef
Michael F. Altschul
Andrea D. Williams
Christopher Guttman-McCabe
CTIA – The Wireless Association
1400 16th Street, N.W., Suite 600
Washington, DC 20036

Jim Goldwater
National Association of Tower Erectors
345 South Patrick Street
Alexandria, VA 22314

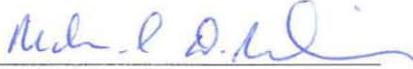
Darin C. Schroeder, Executive Director of Conservation Advocacy
American Bird Conservancy, Inc.
1731 Connecticut Avenue, N.W.
Washington, DC 20009

Mike Daulton, Senior Director – Government Relations
National Audubon Society
1150 Connecticut Avenue, N.W., Suite 600
Washington, DC 20036

Jane E. Mago
Jerianne Timmerman
Ann West Bobeck
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Brian Regan
PCIA – The Wireless Infrastructure Association
901 N. Washington Street, Suite 600
Alexandria, VA 22314

Caroline Kennedy, Senior Director for Field Conservation
Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036-4604


Richard D. Rubino

Dated: May 17, 2011