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August 30, 2004

Via Hand Delivery

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

Re: WIRELESS TELECOMMUNICATIONS BUREAU, BROADBAND DIVISION

Petition for Reconsideration of Dismissal of Application for Modification of ITFS Station KTB85 (BMPLIF-19950915HW); WT Dkt. 03-66

Dear Ms. Dortch:

Transmitted herewith, on behalf of The School Board of Miami-Dade, Florida, is an original and eleven copies of its petition for reconsideration of the dismissal of its above-referenced application. This application was dismissed pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *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. As this involves a decision in that rule making proceeding, we are also filing this petition electronically.

Please contact the undersigned if you having any questions concerning this petition.

Respectfully submitted,

Thomas J. Dougherty, Jr.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of	)	
	)	
THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA	)	File No. BMPLIF-19950915HW
	)	
For Authorization to Modify Facilities of ITFS Station KTB-85, Miami, Florida	)	

Directed To: The Commission

PETITION FOR RECONSIDERATION

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA (the "School Board"), pursuant to Rules 1.106 and 1.429, hereby requests the Commission to reconsider its dismissal of the above-captioned application pursuant to paragraph 263 of the *Report and Order and Further Notice of Proposed Rulemaking*, released on July 29, 2004, *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 (the "*Rebanding Report and Order*"). In support of this request, the following is respectfully submitted:

I. BACKGROUND

The School Board provides public education in Miami-Dade County, Florida. As a part of its educational mission, the School Board has employed ITFS facilities for years. It holds licenses to operate ITFS Stations WHA-956 on the A-Group, WHG-230 on the C-Group, and

KTB-84 and KTB-85 on the F-Group in Miami, Florida. ITFS is critical to the School Board's ability to educate over 400,000 students.[1]

In furtherance of its goals, on September 15, 1995 the School Board filed the above-captioned modification application (the "Miami-Dade Application") seeking authority to, *inter alia*, change the authorized location of KTB-85 transmitting facilities (and, as a result, its protected service area or "PSA") and change the station's channels from F-Group to G-Group. A grant of this application would eliminate one of the few "grandfathered" ITFS stations; that is, those operating on MDS E- or F-Group channels.

In this time frame, the School Board's sister agency, The School Board of Palm Beach County, Florida (the "Palm Beach School Board"), filed an application to increase the power and make other changes to its cochannel station KZB-29, at Riviera Beach, Florida (File No. BMPLIF-950524DM) (the "Palm Beach Application"). The Palm Beach School Board amended the application on September 15, 1995. The amendment reduced the proposed antenna height "in order to protect the protected service area (PSA) requested by the Miami applicants ...."[2] The amendment included shadow studies showing that the signal of the modified Riviera Beach station would not intrude into the 15-mile PSA proposed by the Miami applications.[3] In addition,

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1 http://www.dadeschool.net.

2 Amendment, at page 1 of Engineering Statement. The Commission announced the acceptance for filing of both applications by *Public Notice*. Rep. No. 23836C, rel. Sep. 30, 1996.

3 While the rules were changed to change the PSA from a formula that provided a 15-mile radius PSA for omnidirectional stations to a 35-mile radius, the 15-mile radius PSA continued to apply to applications filed before September 18, 1995. *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 Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 11 F.C.C. Rcd. 17003, para. 5 (1996).

the amendment voluntarily proposed carrier offset to "reduce the interference received from Miami."[4]

In the *Rebanding Report and Order*, the Commission decided to dismiss all mutually-exclusive ITFS applications, rather than decide which should be granted and which should be denied.[5] The Miami-Dade Application is listed on Appendix E of the *Rebanding Report and Order* as a dismissed application. Pending applications that were subject of a qualified settlement agreement were not dismissed.

Mutually-exclusive applications were not the only dismissed applications. The *Rebanding Report and Order* also ordered the Wireless Telecommunications Bureau to dismiss "all pending applications to modify MDS and ITFS stations, except for modification applications that could change an applicant's PSA, or applications for facilities that would have to be separately applied for under the rules we adopt today."[6] The reason for this decision was that the adoption of the geographic service area concept eliminated the need for these applications.[7]

The Palm Beach County Application would be properly dismissed under this test. It proposed a modified facility at the currently authorized site and, accordingly, its grant would not change its PSA. Its other proposed changes are of the type that would not require an application under the new GSA rules. In fact, the only modifications requested by the Palm Beach County School Board application are a reduction in the existing antenna height from 321.5 to 305 feet, and the addition of carrier offset. Accordingly, the Palm Beach County School Board application

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4 Amendment, at page 1 of Engineering Statement.

5 Para. 263.

6 *Rebanding Report and Order*, at para. 58.

7 *Id.*

should be dismissed. The Miami-Dade Application, by contrast, proposes a change of transmitter site and, as a result, a change in the PSA. It would not for that reason be dismissed under the *Rebanding Report and Order* as unnecessary under the new GSA rules.

II. DISCUSSION

As explained below, there are very unique and compelling circumstances justifying the reconsideration of the decision of the Commission to dismiss the Miami-Dade Application.

A. The Dismissal of the Palm Beach County School Board Application Eliminates Mutual-Exclusivity, if any, that Would Otherwise Require Dismissal of the Miami-Dade Application.

Assuming for the sake of discussion that the Miami and Palm Beach applications in fact were in electrical conflict, that conflict is eliminated by the decision in the *Rebanding Report and Order* to dismiss pending applications that propose neither a PSA change nor facilities that would require separate authorization under the new GSA rules. The Palm Beach Application fits that description. All it requests is a reduction of existing antenna height and authorization of carrier offset. Clearly no authorization is required to make those changes under the GSA rules.[8] Since the Palm Beach Application must be dismissed, the Miami-Dade Application cannot be considered – and indeed is not -- mutually-exclusive.[9] It, thus, is similarly situated to other non-

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[8] Under Rule 27.1209(b)(1), separate authorization for a system modification is required only if international agreements require coordination, Rule 1.1307 requires the filing of an environmental assessment to implement the modification, or the modified station would affect a radio quite zone under Rule 1.924.

[9] The Commission does not apply mutually exclusive selection procedures involving applications that are not eligible for grant. *See, e.g., Turner Independent School District*, 8 F.C.C. Rcd. 3153, 3153 (1993). This change of rules eliminated eligibility for this type of application, or the ability to claim interference protection under the old rules. The Commission's authority to establish eligibility standards by general rule may be exercised even where

mutually-exclusive applications, which the Commission has decided to grant. Accordingly, the Miami-Dade Application can and should be processed separate from the Palm Beach Application.[10]

B. Dismissal of the Miami-Dade Application in These Circumstances Would Not Serve the Public Interest

Setting aside for the moment the fact that the Miami-Dade Application cannot logically be considered mutually-exclusive with an application subject to dismissal, in the unique circumstances presented by this case grant of the Miami-Dade Application would create no impairment to the Palm Beach GSA under the new rules, and, for that reason as well, it makes no sense to consider these applications mutually-exclusive. The core to the concept of application mutual-exclusivity is that one proposal limits or precludes another. Under the old rules, mutual-exclusivity was deemed to exist when the grant of one application would result in facilities causing electrical interference to the other proposed station. That definition, however, is inappropriate in these unique circumstances. With the change in rules, what is at stake are GSAs, not PSAs.[11] In this particular case, the grant of a GSA to one of the applicants does not impair the GSA granted to the other applicant. The reason is the unique circumstance that results where, as here, the GSA overlap splitting rule is applied to two proposals separated by an

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qualification changes disqualify pending applicants, thereby denying them hearing rights they might have otherwise enjoyed. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[10] It is a maxim of administrative law that agencies are required to treat similarly situated applicants in a similar fashion. Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

[11] Rule 27.1209(b). Indeed, the *Rebanding Report and Order* instructs the Wireless Telecommunications Bureau to dismiss pending ITFS applications for facilities changes that could be accomplished without prior authorization under the GSA rules.

existing cochannel station.[12] Specifically, the Miami-Dade and Palm Beach County proposals are for different geographic areas on either side of existing cochannel station KTZ22, licensed to Broward County School Board at Fort Lauderdale, Florida. The need for each of the Miami and Palm Beach G-Group stations to split GSAs with KTZ22 means that Palm Beach County's G-Group proposal does not present any limitation on the GSA available to the Miami-Dade G-Group station, and the Miami-Dade County G-Group proposal does not present any limitation on the GSA available to Palm Beach County G-Group station. Each of the Miami-Dade and Palm Beach County applicants receives the same GSA regardless of whether the other's proposal is licensed. This situation is depicted on Exhibit A to this petition. To consider the two modification applications mutually-exclusive in this rare, and probably unique, circumstance would make no sense.

C. Grant of the Application Would Eliminate One of the Few Grandfathered F-Group ITFS Stations

The Miami-Dade Application requests authorization to change authorized F-Group ITFS station KTB85 to G-Group channels. KTB85 is one of the few "grandfathered" ITFS stations in the country. The existence of grandfathered ITFS stations on E- and F-Group channels has been a thorny issue since the E- and F-Group channels were reallocated to MDS in 1983. Reduced to its most fundamental level, the problem is determining how MDS and ITFS stations operating on the same channels in the same areas can coexist without destructive interference. No one has been able to resolve this problem in the 21 years since this reallocation decision. While the rebanding of the MDS and ITFS frequencies would seem to offer new opportunities to resolve

[12] Rule 27.1206(a)(1).

this dilemma, the Commission was not able to develop a solution. Instead, the *Rebanding Report and Order* contains a NPRM that asks for further comment on the issue.

In discussing the issue, the NPRM portion of the *Rebanding Report and Order* asks for comments on a series of proposals that are "zero sum" outcomes; that is, either the educator loses channels or protected status or the commercial licensee loses channels or protected status.[13] None of the proposals presented in the NPRM portion of the *Rebanding Report and Order* would resolve the problem to the satisfaction of all concerned interests, thus reflecting the continuing complexity of the issue.

Grant of the Miami-Dade Application would change KTB85 from grandfathered F-Group channels to G-Group channels, thus eliminating one of the few grandfathered ITFS stations in a "win – win" manner. Denying the Miami-Dade Application would cast aside this one unique opportunity to eliminate a grandfather ITFS station situation and leave to another day the issue of how KTB85 and cochannel MDS stations in Miami will coexist. Clearly, the public interest favors the former.

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13 *Rebanding Report and Order*, at ¶¶ 333-343.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA requests that the Commission return the above-captioned application to pending status and process the application.

Respectfully submitted,

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA

By: _____

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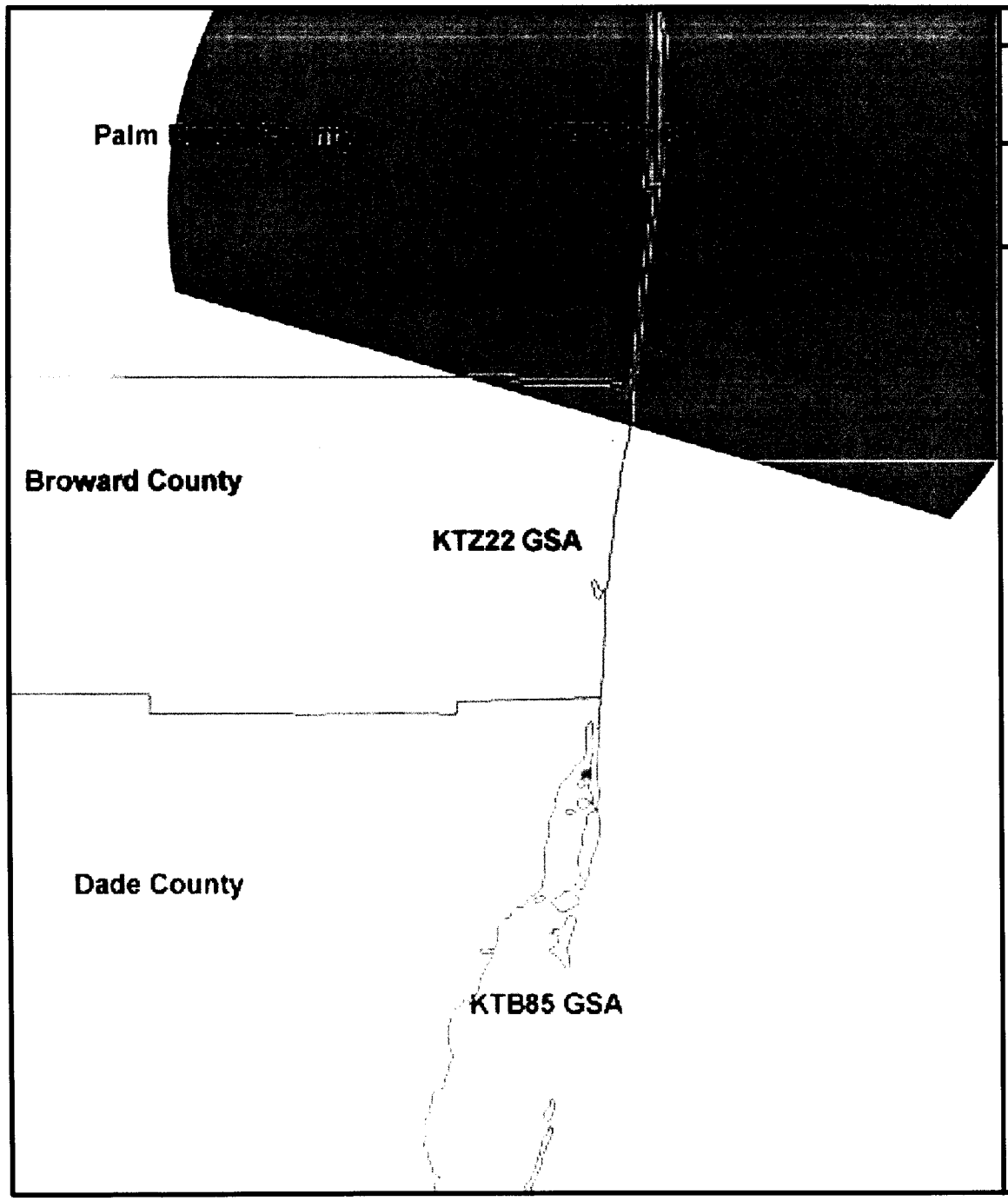
Dated: August 30, 2004



EDX SignalPro™: KTB85 to KZB29

MILES

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BellSouth

KTZ22/ Fort Lauderdale GSA

20040827

Exhibit A

CERTIFICATE OF SERVICE

I, Suzi Natal of Gardner Carton & Douglas LLP hereby certify that I caused a true copy of the foregoing Petition for Reconsideration to be sent to the following person this 30th day of August, 2004, by U.S. First Class Mail, postage pre-paid:

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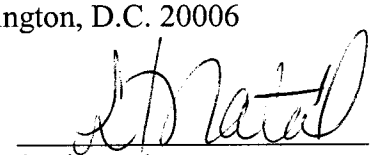

Suzi Natal

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