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October 22, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

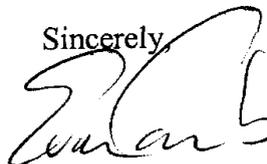
Re: School Board of Palm Beach County Florida
FRN: 0005-9548-39
Application for Modification of ITFS Station for KHU90
FCC File No. 19950524DN (Boynton Beach, FL)
Petition For Reconsideration

Dear Ms. Dortch:

On behalf of School Board of Palm Beach County Florida there are enclosed herewith an original and four copies of a Petition For Reconsideration regarding the above-referenced matter. This filing is being made pursuant to and in accordance with the requirements of 47 CFR §§ 1.106 and 1.4.

Please return a date stamped copy to the courier delivering this filing. Please direct all questions regarding this matter to the undersigned counsel.

Sincerely,



Evan D. Carb

Enclosures

No. of Copies rec'd 014
List ABCDE

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

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OCT 22 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
School Board of Palm Beach County Florida)	WT Docket No. 03-66
)	
Dismissed Modification Application for KHU90)	File No. 19950524DN
At Boynton Beach, Florida)	
)	
)	

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

The School Board of Palm Beach County Florida (“School Board”), through counsel and pursuant to Sections 1.106 of the Commission’s rules, hereby submits its petition for reconsideration (“Petition”) regarding the Commission’s dismissal of the School Board’s application for KHU90 to Boynton Beach, Florida (the “KHU90 Modification”). That application, as part of a market-wide settlement sought to migrate the KHU90 off grandfathered E-group channels and onto channels D1 and D2 in order to accommodate the establishment of a commercial E-group in West Palm Beach licensed to WBSWP Licensing Corporation (WMI841). The Commission dismissed the KHU90 Modification by automated letter and Public Notice released September 22, 2004.¹ The automated letter recites that the KHU90 Modification was dismissed in accordance with directives issued to the Wireless

¹ See Public Notice Report No. 1941 Wireless Telecommunications Bureau Site-by-Site Action, released September 22, 2004 attached hereto as Exhibit 1. See also ULS Automated Letter 3033519 dated September 15, 2004, attached hereto as Exhibit 2.

Telecommunications Bureau (“WTB”) in a July 29, 2004 Report and Order and Further Notice of Proposed Rulemaking.² As discussed herein, the Staff’s dismissal of the KHU90 was improper because it was neither procedurally timely nor was it in accordance with the directives contained within the *Broadband Services Order*. Accordingly the School Board Respectfully requests that the Staff dismissal be overturned and that the KHU90 Modification be reinstated *nun pro tunc* for immediate processing and grant.

I BACKGROUND

KHU90 was licensed to operate on the E-Group channels from Boynton Beach, Florida in 1974. On December 29, 1993 People’s Choice TV, Inc. filed a displacement application to relocate KHU-90 to the D-Group. Such displacement application was mutually exclusive with an application for a new D-Group Station that had been filed by Florida Atlantic University on August 14, 1992. The parties ultimately entered into a Market Settlement Agreement in May of 1995 and filed a Joint Motion for Approval of that Settlement May 24, 1995. Concurrently with the submission of that request for approval of a market-wide settlement, the various parties filed applications to collocate their facilities and to apportion the D-Channels between the School Board and Florida Atlantic University.

² *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*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 03-66, FCC 04-135 (rel. July 29, 2004) (“*Broadband Services Order*”). The *Broadband Services Order* and the Rules and Policies adopted thereby have not yet appeared in the Federal Register and are therefore not yet effective and still subject to reconsideration and appeal. While as discussed herein, the School Board believes the Staff’s premature systematic and extensive application of directives contained within the *Broadband Services Order* to be improper and unlawful, in order to preserve its rights in this matter it is timely submitting its Reconsideration in accordance with 47 CFR §§ 1.4(b)(4) & 1.106.

Accordingly, as part of that arrangement, the School Board filed the modification application BPLIF-19950524DN (KHU90 Modification). Thereafter, by amendment submitted on September 14, 1995, the School Board proposed to reduce the Station's antenna height at the collocation site from 400 ft to 309 feet. The KHU90 Modification was accepted for filing by the Commission on September 30, 1996. As discussed above the KHU90 Modification was thereafter dismissed by the Staff, with the dismissal memorialized on a Public Notice on September 22, 2004. The dismissal was based on a directive contained in the *Broadband Services Order* to dismiss certain pending modification applications.

II DISCUSSION

A. **The Staff's Attempt to Apply The Directives of The Broadband Services Order Prior to the Effective date of Such Order Was Improper.**

Section 1.103 of the Commission's Rules provides that, "the effective date of any Commission Action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules."³ Section 1.4(b)(1) in turn states that the effective date of an Order in a Notice and Comment Rulemaking proceeding is the date on which notice is provided to the public through publication of the Order in the Federal Register.⁴ Because the *Broadband Services Order* will not be effective until publication in the Federal Register, the geographical licensing scheme, and related rules and policies on which the KHU90 Modification dismissal was based will not become effective until that date. Therefore, the

³ 47 CFR § 1.103(a)

⁴ 47 CFR § 1.4(b)(1).

Staff's attempt to apply such rules and policies to effectuate the dismissal in advance of the Order's effective date is inconsistent with existing Commission Rules and would give premature effect to rule and policy changes without adequate notice to the public. Such a conclusion would also be inconsistent with the Commission's obligation to act in accordance with existing rules and policies until such time as those rules are properly and finally changed.⁵

B. Notwithstanding the Premature Nature of the Staff's Attempted Action, the KHU90 Modification was Erroneously Dismissed Because the Marketwide Settlement Exception Applies.

In its decision to dismiss the KHU90 Modification, the Staff simply misapplied the FCC's directive to conclude that the School Board's application fell within the specific class of modifications that the WTB was ordered to dismiss. In dismissing the KHU90 Modification the Staff simply stated:

The Commission directed the Wireless Telecommunications Bureau to dismiss all pending applications to modify MDS or ITFS stations (including booster and hub 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 adopted in the [*Broadband Services Order*]. After reviewing your application, we have determined that your application falls within the class of applications that the Commission ordered dismissed.⁶

⁵ See *Reuters Ltd. v. FCC*, 781 F. 2d 946, 947 & 950 (DC Cir. 1986); *Shering Corp. v. Shalala*, 995 F. 2d 1103, 1105 (DC Cir 1993); 5 USC 553 (B) & (C); *Chrysler Corp. v. Brown*, 441 US 281, 313 (1979); *Lindz v. Heckler*, 800 F. 2d 871, 878 (9th Cir. 1986); *JEM Broadcasting Co., Inc. v. FCC*, 22 F 2d 320, 327 (DC Cir 1994).

⁶ See Automated ULS Letter (Exhibit 2).

However, Paragraph 263 of the *Broadband Services Order* provides that the Commission would only dismiss applications for ITFS stations that were filed prior to adoption of the *Notice of Proposed Rulemaking* where:

[T]he applications are mutually exclusive, and the applicants filed settlement agreements subsequent to the release of the NPRM, and/or applicants filed settlement agreements prior to the release of the NPRM, but the settlement did not comply with our rules.⁷

The KHU90 Modification, however, was filed pursuant to a marketwide settlement (the “Marketwide Settlement”)⁸ that complied with the Commission’s rules,⁹ and was filed with the Commission on May 24, 1995, well before release of the *Notice of Proposed Rulemaking* on April 2, 2003.¹⁰ Thus, the KHU90 Modification and other applications filed pursuant to the Marketwide Settlement fell squarely within the paragraph 263 exception, and should be reinstated.

⁷ *Broadband Services Order* at ¶ 263.

⁸ See Joint Motion for Approval of Settlement and Request for Waiver of Cut-Off Rules (“Joint Motion”) and attached Market Settlement Agreement (attached hereto as Exhibit 3).

⁹ The market-wide settlement was filed pursuant to the authority granted by the Commission in *Instructional Television Fixed Service Reconsideration, Memorandum Opinion and Order. Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to the Instructional Television Fixed Service*, 59 Rad. Reg. 2d 1355, 1381 n.47 (1986).

¹⁰ *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*, Notice of Proposed Rulemaking, 18 FCC Rcd 6722 (2003).

III CONCLUSION

WHEREFORE, for the foregoing reasons, The Commission's dismissal of the School Board's KHU90 Modification must be reversed and the application reinstated nunc pro tunc.

Respectfully submitted,



Evan Carb
RJGLaw LLC
8401 Ramsey Avenue
Silver Spring, MD 20910
(301) 589-2999

Attorney for School Board of Palm Beach County

Dated: October 22, 2004

EXHIBIT 1



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W., TW-A325
Washington, DC 20554

News Media Information (202) 418-0500
Fax-On-Demand (202) 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

Report Number: 1941

Date of Report: 09/22/2004

Wireless Telecommunications Bureau Site-By-Site Action

Below is a listing of applications that have been acted upon by the Commission.

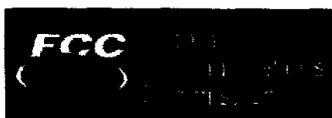
AF - Aeronautical and Fixed

File Number	Action Date	Call Sign	Applicant Name	Purpose	Action
0001763759	09/17/2004	WQBC289	Aeronautical Radio Inc	AM	G
0001873176	09/17/2004	KMK2	CESSNA AIRCRAFT COMPANY	CA	G
0001874481	09/18/2004	KHS4	AERONAUTICAL RADIO INC	CA	G
0001829206	09/14/2004	WDJ9	AERONAUTICAL RADIO INC	MD	G
0001829214	09/14/2004	KWX2	AERONAUTICAL RADIO INC	MD	G
0001874859	09/18/2004	WOM3	SEBRING FLIGHT CENTER	MD	D
0001804811	09/17/2004	WQBC288	Aeronautical Radio Inc	NE	G
0001827977	09/15/2004	WQBB575	Aeronautical Radio Inc	NE	G
0001827981	09/15/2004	WQBB576	Aeronautical Radio Inc	NE	G
0001828045	09/15/2004	WQBB577	Aeronautical Radio Inc	NE	G
0001828269	09/15/2004	WQBB578	Aeronautical Radio Inc	NE	G
0001828275	09/15/2004	WQBB579	Aeronautical Radio Inc	NE	G
0001828279	09/15/2004	WQBB580	Aeronautical Radio Inc	NE	G
0001828295	09/15/2004	WQBB581	Aeronautical Radio Inc	NE	G
0001868363	09/14/2004		LANCASTER COUNTY AIRPORT COMMISSION	NE	D
0001870512	09/15/2004	WQBB644	Delta Connection Academy	NE	G
0001870514	09/15/2004	WQBB643	Phazar Flight Support	NE	G
0001826179	09/15/2004	KJX8	VILLAGE OF NECEDAH	RO	G

VX - Instructional Television Fixed Service

File Number	Action Date	Call Sign	Applicant Name	Purpose	Action
20000818BIC	09/17/2004		CRAIG WIRELESS HONOLULU, INC.	AM	D
20000818BIM	09/17/2004		CRAIG WIRELESS HONOLULU, INC.	AM	D
20000818BIY	09/17/2004		CRAIG WIRELESS HONOLULU, INC.	AM	D
20000818BPX	09/15/2004	WNC738	COLLEGE OF SOUTHERN IDAHO	AM	D
20011001AAA	09/15/2004		PANTHER CREEK CONSOLI' SCHOOL DIST	AM	D
20011024AAB	09/16/2004		COMMUNITY UNIT SCHOOL DIST #3	AM	D
20011024AAC	09/16/2004		COMMUNIITY UNIT SCHOOL DISTRICT #337	AM	D
20011024AAD	09/15/2004		COMMUNITY UNIT SCHOOL DISTRICT #4	AM	D
20020401AAB	09/17/2004	WLX544	NECHES INDEPEND SCHOOL DISTRICT	AM	D
20020506AAA	09/16/2004	WND361	FAYETTEVILLE TECHNICAL COMMUNITY COLLEGE	AM	D
19930805DE	09/13/2004	WLX390	HOXIE SCHOOL DISTRICT #46	MD	G
19950524DL	09/14/2004	KZB28	School Board of Palm Beach County	MD	D
→ 19950524DN	09/14/2004	KHU90	SCHOOL BOARD OF PALM BEACH COUNTY	MD	D ←
19950915DW	09/16/2004	WLX671	HISPANIC INFO TELECOM NETWORK, INC.	MD	D
19950915GW	09/15/2004	KZE20	TRANS VIDEO COMMUNICATION INC	MD	D
19951020L6	09/16/2004	WHR661	CALIFORNIA STATE UNIVERSITY, SAN BERNARDINO	MD	D
19951020P7	09/15/2004	WHR825	BOARD OF TRUSTEES OF VINCENNES UNIVERSITY	MD	D
19951020R1	09/16/2004	WLX231	BOARD OF TRUSTEES OF THE VINCENNES UNIVERSITY	MD	D
19960805EK	09/16/2004	WHR526	HAMPTON ROADS EDUCATIONAL TELECOMMUNICATIO	MD	D
19960919AB	09/15/2004	WHR758	EMERSON COLLEGE	MD	D
19961223DL	09/17/2004	WNC681	HISPANIC INFO & TELECOM NETWORK, INC.	MD	D
19961223DM	09/16/2004	WNC447	HAGERMAN HIGH SCHOOL	MD	D
19961223GR	09/16/2004	WNC446	HAGERMAN MUNICIPAL SCHOOLS	MD	D
19970911AAA	09/17/2004	WLX988	NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAM	MD	D
20000818AXE	09/17/2004	WNC731	IDAHO STATE UNIVERSITY	MD	D
20000818BAE	09/16/2004	WNC261	Hawaii Pacific University	MD	D
20000818CNN	09/16/2004	WHR488	DENVER AREA ED'L TEL CONSORTIUM,INC	MD	D
20000908AAA	09/17/2004	WLX384	CATHOLIC DIOCESE OF HONOLULU	MD	D
20010420AET	09/17/2004	WHF247	IOWA LAKES COMMUNITY COLLEGE	MD	D
20020312AAA	09/17/2004	WLX549	FRANKSTON INDEPEND SCHOOL DIST	MD	D
20020312AAC	09/16/2004	WLX431	ALTO INDEPEND SCHOOL DISTRICT	MD	D
20020322AAQ	09/17/2004	WLX876	LAMAR R-1 SCHOOL DISTRICT	MD	D
20020322AAR	09/17/2004	WLX875	MONETT R-1 SCHOOL DISTRICT	MD	D
20020402AAI	09/16/2004	WND569	GRAPELAND INDEPENDENT SCHOOL DISTRICT	MD	D
20020517AAB	09/16/2004	WND459	UNIVERSITY OF NORTH CAROLINA	MD	D
20020614AAA	09/16/2004	WND396	CENTRAL CAROLINA COMMUNITY COLLEGE	MD	D
20020618AAA	09/17/2004	WND399	MOORE COUNTY SCHOOLS	MD	D
20020723AAG	09/16/2004	WND377	WHITE HALL SCHOOL DISTRICT	MD	D
20020726AAI	09/16/2004	WND376	ALTHEIMER UNIFIED SCHOOL DISTRICT	MD	D
20020809AAA	09/14/2004	WNC410	Northeast Technology Center	MD	D

EXHIBIT 2



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Universal Licensing System

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[FCC Site Map](#)

ULS Application - 19950524DN

Auto Letter - 3033519

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File Number 19950524DN Call Sign KHU90 Radio Service VX - Instructional Television Fixed Service

[Return to Admin](#)

Application Automated Letter

Applicant Name SCHOOL BOARD OF PALM BEACH COUNTY Market Area
Date Letter Generated 09/15/2004 Effective Date of Cancel/Dismiss 09/14/2004 Letter Type Dismissal

Applicant Mailing Information

Applicant SCHOOL BOARD OF PALM BEACH COUNTY
ROBERT B. MIDGETT
505 S. CONGRESS AVENUE
PO Box:
WEST PALM BEACH, FL 33427

Contact Mailing Information or Assignee/Transferee Information

Contact JUDITH GARCIA

505 CONGRESS AVE
PO Box:
BOYNTON BEACH, FL 33426

Dismissal Reasons

Dismissal On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rule Making which fundamentally restructured the band to provide MDS (renamed the Broadband Radio Service) and ITFS (renamed the Educational Broadband Service) licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services. See 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, et al.; WT Docket Nos. 03-66, et al., Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (MDS/ITFS R&O & FNPRM). The Commission directed the Wireless Telecommunications Bureau to dismiss all pending applications to modify MDS or ITFS stations (including booster and hub 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 adopted in the MDS/ITFS R&O & FNPRM. Id., 19 FCC Rcd at 14191 Para. 58. After reviewing your application, we have determined that your application falls within the class of applications that the Commission ordered dismissed. Accordingly, your application is dismissed without prejudice.

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EXHIBIT 3

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLER S. MANDELL
HOWARD J. BARR
LOUISE CYBULSKI *
L. CHARLES KELLER *
MICHAEL J. LENNAHL *
SUZANNE C. SPINA *
* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI
L. L. P.

ATTORNEYS AT LAW
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1776 K STREET, NORTHWEST
WASHINGTON, D. C. 20006
(202) 296-0600

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GREGG P. SHALL
C. THEODORE MALLYCK
OF COUNSEL

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INT

MAY 24

FEDERAL COMMUNICATIONS
OFFICE OF THE SECRETARY

May 24, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: ITFS Joint Motion for Approval of Settlement
West Palm Beach, Florida

Dear Mr. Caton:

There is transmitted herewith an original and four (4) copies of a Joint Motion for Approval of Settlement and Request for Waiver of Cut-off Rules. The settlement resolves mutually-exclusive proposals for the D group channels in West Palm Beach, Florida, by proposing a market-wide channel reallocation and collocation plan.

Should there be any question with respect to this filing, please communicate directly with the undersigned.

Sincerely yours,



L. Charles Keller
Counsel to Wireless Broadcasting
Systems of America, Inc.

Enclosures

cc: Jennifer L. Richter, Esq.
William D. Wallace, Esq.
Mr. W. Douglas Trabert
Mr. Michael J. Specchio

lck/lb
c:\wp\2379f\1x-joint.mot

RECEIVED
MAY 30 1995

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

In re Applications of)	
)	
)	
The School District of Palm Beach County, Florida)	Petition for Displacement of KHU-90; KZB-28
)	KZB-29; WHR-973; WHR-994; KZB-30
)	
People's Choice TV, Inc.)	WMI841
)	
The Board of Regents, A Public Corporation of the State of Florida on behalf of Florida Atlantic University)	BPLIF-920814DB; WLX-269; WHR-877;
)	WHR-894; WHR-895; WHR-896;
)	WHR-897; WHR-901
)	
Wireless Broadcasting Systems of West Palm Beach, Inc.)	
)	
For Construction Permit and License, Modification, and/or Assignment of Facilities in the Instructional Television Fixed and Multichannel Multipoint Distribution Services in the West Palm Beach, Florida, Area)	
)	
To: Chief, Video Services Division		

**JOINT MOTION FOR APPROVAL OF SETTLEMENT
AND
REQUEST FOR WAIVER OF CUT-OFF RULES**

The School District of Palm Beach County, Florida (the "District"), People's Choice TV, Inc. ("PCTV"), Wireless Broadcasting Systems of West Palm Beach, Inc. ("WBS-WP) and the Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University (the "University"), by counsel, hereby submit their Joint Motion for Approval of Settlement and Request for Waiver. In support thereof, the parties respectfully show as follows:

I. Approval of Settlement

These proceedings involve PCTV's, WBS-WP's and the University's mutually exclusive applications concerning stations in the Instructional Television Fixed Service ("ITFS") on the D group channels in the West Palm Beach, Florida, market (the "Market"). Also involved are the parties' proposals to modify existing and proposed ITFS facilities in the Market and to submit others for cancellation in order to allow for better and more spectrum-efficient service to the parties' receive sites.

PCTV's and WBS-WP's proposal to migrate the District's D group station is contained in the Petition for Displacement and application (the "Displacement Application") filed on December 29, 1993.¹ The University's D group proposal is contained in the application in file no. BPLIF-920814DB. PCTV is the conditional licensee of MMDS E group station WMI841. This station cannot be constructed or operated because of the District's grandfathered E group ITFS facility, station KHU-90. WBS-WP is a wireless cable operator currently developing a wireless cable system in the Market which will include PCTV's E group station. Accordingly, PCTV and WBS-WP filed the Displacement Application on December 29, 1993. WBS-WP entered into excess capacity lease agreements with the University in July 1994 and the District in January 1995.

To provide for the private resolution of the mutually exclusive D group proposals, to achieve better and more spectrum-efficient service to the educational licensees' receive sites, and to allow for the commercial use of the E group channels and the development of a wireless cable system in the Area, the parties have entered into a Market Settlement Agreement ("Agreement"),

¹ With respect to the Displacement Application, WBS-WP is the successor to WJB-TV Ft. Pierce Limited Partnership, whose name appeared in the Displacement Application.

which is attached hereto as Exhibit 1. The parties respectfully request the Commission's approval of the Agreement.

At present, though a large number of ITFS stations are operating from various sites in the Market, these stations are not designed, constructed, or operated in a coordinated manner. Some stations are used as repeaters or relay stations. Several stations have been in existence for many years and do not employ the latest and best available technology. No commercial MDS/MMDS stations are operational in the area. As described above, PCTV, the commercial E group conditional licensee, has been unable to construct its E group station because of the District's grandfathered ITFS station on the same frequency group. Finally, the H group channels are not available for commercial use because they are presently utilized by the District.

The parties to the Agreement constitute the licensees or applicants for all of the ITFS and MDS/MMDS channels (except MDS channels 1 and 2A) in the Market. The arrangements outlined herein have been the subject of negotiations between various of these parties for over two years. Through this settlement the parties expect to accomplish the following:

1. to resolve the mutual exclusivity between the D group ITFS applications;
2. to ensure that each of the stations is able to reach all desired educational receive sites in Palm Beach County, thus eliminating the present use of duplicate stations, point-to-point stations, and repeater stations;
3. to ensure the most economical and efficient usage of the spectrum and eliminate disputes between the parties as to that usage;
4. to coordinate the operation and maintenance of these stations, thus taking advantage of possible economies of scale and efficiencies;
5. to collocate all of the ITFS and MDS/MMDS stations in the market at a single transmitter site, thus reducing the possibility of interference between these stations;
6. to develop modern, efficient ITFS systems for both the University and the

District;

7. to allow for the development of a wireless cable television system to serve the public and provide competition in the multichannel video delivery marketplace in the Market;
8. to generate royalties for the benefit of the University and the District to provide a source of funding for their instructional television ventures; and
9. to allow for the carriage by the wireless cable television system of at least some of the District's and the University's programming, so as to enable the public to receive in-home instructional programming, possibly for credit.

A summary of the necessary filings is attached hereto as Exhibit 2.

WBS-WP and PCTV have committed to comply with the requirements of the Commission's Rules and policies for involuntary ITFS migration, as they relate to the posting of a bond and other matters, in the event the Displacement Application is granted.

As attested in the attached declarations, no monetary consideration was exchanged among the parties in consideration for the settlement, and no applications were filed in order to procure the settlement. Because the public interest, convenience and necessity would best be served thereby, the parties respectfully request the Commission to approve the attached Market Settlement Agreement.

II. Request for Waiver of Cut-off Rules

The District and the University also respectfully request waiver of the Commission's cut-off rules in the processing of the major modification applications, and major amendments to pending applications, filed to accommodate the settlement. Waiver of the cut-off rules for major change applications may be granted to accommodate settlement agreements between mutually-exclusive applicants. Memorandum Opinion and Order in MM Docket No. 83-523 (Instructional Television Fixed Service Reconsideration), 59 RR 2d 1355, 1381 n.47 (1986).

Although mutually exclusive applications exist only for the D group, the parties request waiver of the cut-off rules as to all applications described in the Agreement. A summary of these applications is attached hereto as Exhibit 2. Such a waiver is justified for four reasons.

First, the broader channel rearrangement and collocation plan contemplated by the Agreement was necessary to resolve the competing D group proposals. Without the channel reorganization plan, which is only possible through collocation, the D group settlement will collapse. Thus, all of the modifications listed in Exhibit 2 are necessary to the resolution of the mutual exclusivity and therefore fall within the ambit of footnote 47.

Second, the public interest will best be served by waiving the cut-off rules as to all applications contemplated in the settlement, because the settlement provides for optimal use of the microwave spectrum in the Market. In addition to eliminating duplicative and inefficient use of ITFS frequencies, the applications contemplated in the settlement will allow for use of the E and H channels for the commercial use to which they are primarily allocated.

Third, granting waiver of the cut-off rules to all of the applications will not extend waiver beyond the parties whose mutually exclusive proposals are resolved in the settlement.

Fourth, the channel reorganization plan will allow WBS-WP to provide competitive, wireless cable operations to the Market. There is no such competition now. Rapid implementation of wireless cable service will serve the Commission's goals for commercial use of the MMDS/ITFS spectrum.

WHEREFORE, the parties respectfully request that the Commission approve the attached Market Settlement Agreement, exempt the applications it describes from the cut-off rules, and expeditiously process the applications filed in furtherance hereof.

Respectfully submitted,

SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

By William D. Wallace

William D. Wallace
Its Attorney

CROWELL & MORING
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2807

Respectfully submitted,

The Board of Regents, a Public Corporation
of the State of Florida, on behalf of
FLORIDA ATLANTIC UNIVERSITY

By _____

Gregg Gleason
General Counsel

BOARD OF REGENTS' OFFICE
325 West Gaines St., Suite 1522
Tallahassee, Florida 32399
(904) 488-5441

PEOPLE'S CHOICE TV, INC. and
WIRELESS BROADCASTING SYSTEMS
OF WEST PALM BEACH, INC.

By _____

L. Charles Keller
Their Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 296-0600

LCK/lid
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WHEREFORE, the parties respectfully request that the Commission approve the attached Market Settlement Agreement, exempt the applications it describes from the cut-off rules, and expeditiously process the applications filed in furtherance hereof.

Respectfully submitted,

SCHOOL DISTRICT OF PALM BEACH
COUNTY, FLORIDA

By _____
William D. Wallace
Its Attorney

CROWELL & MORING
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Respectfully submitted,

The Board of Regents, a Public Corporation
of the State of Florida, on behalf of
FLORIDA ATLANTIC UNIVERSITY

By Gregg A. Gleason
Gregg Gleason
General Counsel

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PEOPLE'S CHOICE TV, INC. and
WIRELESS BROADCASTING SYSTEMS
OF WEST PALM BEACH, INC.

By L. Charles Keller
L. Charles Keller
Their Attorney

PEPPER & CORAZZINI, L.L.P.
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(202) 296-0600

May 24, 1995

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MARKET SETTLEMENT AGREEMENT

THIS MARKET SETTLEMENT AGREEMENT ("Agreement") is entered into by and among the School District of Palm Beach County, Florida (the "District"); The Board of Regents, a Public Corporation of the State of Florida, on behalf of Florida Atlantic University (the "University"); Wireless Broadcasting Systems of West Palm Beach, Inc. ("WBS-WP"); and People's Choice TV, Inc. ("PCTV").

WHEREAS, the District is the licensee of Instructional Television Fixed Service ("ITFS") stations KZB-28 on the A group at Belle Glade, Florida; KZB-29 on the G group at Riviera Beach, Florida; WHR-973 on channel G3 at West Palm Beach, Florida; WHR-994 on channels G2-G3 at West Palm Beach, Florida; KZB-30 on channels H1-H3 at Loxahatchee, Florida; and KHU-90 on the E group at Boynton Beach, Florida, which is the subject of a Petition for Displacement to the D group channels.

WHEREAS, the University is the licensee of ITFS stations WLX-269 on the A group at Palm Beach, Florida; WHR-877 on the A group at Boca Raton, Florida; WHR-894 on the A group at Boca Raton, Florida; WHR-895 on the A group at Boca Raton, Florida, WHR-896 on the B group at Boynton Beach, Florida; WHR-897 on the C group at Ft. Lauderdale, Florida; WHR-901 on the C group at Palm Beach, Florida; and is the applicant in File No. BPLIF-920814DB for the D group channels at Palm Beach Florida;

WHEREAS, the District and the University currently use some of their ITFS channels either as repeaters or as relays;

WHEREAS, PCTV is the conditional licensee of Multichannel Multipoint Distribution Service ("MMDS") station WMI841 on the E group channels at West Palm Beach, Florida;

WHEREAS, WBS-WP is a wireless cable operator and the lessee of the District's and the University's excess capacity, which WBS-WP will use in a wireless cable television system it is developing to serve the West Palm Beach metropolitan area. WBS-WP has affiliates presently operating similar systems in Melbourne and Fort Pierce, Florida; Sacramento, California; Boise, Idaho; and acquiring a system in Yakima, Washington;

WHEREAS, PCTV cannot construct or commence operating its E group station WMI841 until the District ceases operation of its E group station KHU-90;

WHEREAS, on December 29, 1993, PCTV and WBS-WP filed a Petition for Displacement and Application (the "Displacement Application") to modify KHU-90 to specify operation on the D group channels;

WHEREAS, the Displacement Application is mutually exclusive with the University's D group application (File No. BPLIF-920814DB), making grant of both applications impossible;

WHEREAS, the parties wish to reach a mutually agreeable settlement of their differences;

WHEREAS, the parties recognize that the microwave spectrum in the West Palm Beach metropolitan area could be used more efficiently by centralizing the origination point for all channels and eliminating use of ITFS frequencies as repeaters and/or

relay stations, and allowing commercial use of the E group channels and the H channels;

WHEREAS, the District and the University each recognizes that its ITFS purposes can more efficiently be served by a collocated operation of ten channels each at fifty watts, located on the District's Boynton Beach transmit tower (the "Collocation Site");

NOW, THEREFORE, in consideration of the mutual promises and conditions contained herein, the parties hereto, intending to be legally bound, hereby agree as follows:

1. To accommodate the settlement, PCTV, WBS-WP, the University and the District agree to resolve the mutually exclusive proposals for the D group ITFS channels by dividing the four channels between the University and the District. Accordingly, the University agrees to modify its application in File No. BPLIF-920814DB to specify operation on channels D3-D4 only, and the WBS-WP and PCTV agree to the modification of the Displacement Application to specify operation of KHU-90 on channels D1-D2 only. Furthermore, the District agrees not to object to displacement of station KHU-90 to channels D1-D2, and agrees to relocate the D1-D2 facilities to the Collocation Site.

2. To accommodate the settlement, the University will submit to the FCC for cancellation its authorizations for stations WLX-269, WHR-877, and WHR-894. The University will retain its B group and C group licenses for WHR-896 and WHR-901, respectively, and these facilities will be moved to the Collocation