

March 5, 2008

The Honorable Glenn F. McConnell  
The Honorable Luke A. Rankin  
PO Box 142  
Columbia, SC 29202

Dear Senator McConnell and Senator Rankin:

Thank you for your letter of February 28, 2008 regarding the Educational Broadband Service (EBS) licenses granted to the ETV Commission by the Federal Communications Commission. It is gratifying to know you share our enthusiasm for EBS and its potential to break down barriers to academic achievement, close the digital divide, and advance economic development.

Since the early 1980's when ETV launched the analog version of this delivery system, we have produced and aired thousands of hours of educational programming in every corner of the state in close partnership with all 85 school districts. As a leader in distance learning, ETV worked with the FCC in the concept of a digital transition for EBS.

As you noted, ETV filed comments with the FCC as early as 2003 advocating the development of a new digital system for education. We urged the FCC to allow educational institutions to maintain the licenses, rather than pursuing another option—auctioning the licenses to the private sector. It was not clear then what the new system would look like or how it would operate, but ETV worked to maintain the spectrum to support education and public service in the digital age.

The FCC finalized its rulemaking for the establishment of Educational Broadband in April of 2006. But several months before that, ETV began working closely with the state's political and educational leaders to ensure the transition to EBS would take full advantage of every possible opportunity to advance education and public service. During the past two years, we have convened dozens of meetings with educators and business leaders and have made our enthusiasm for EBS the centerpiece of our budget hearings with the Senate, House and Governor's Office.

As you stated in your letter, ETV has advanced the idea of hiring a world-class telecommunications consultant to ensure that ETV and South Carolina create a system that allows EBS to be utilized to the fullest by the largest number of South Carolinians. In fact, we developed an RFP that would have completed a study in time for the 2006 General Assembly to consider, but due to the Tower Proviso (63.8), the consultant was never hired. However, later in 2006, the Speaker of the House directed the Office of the CIO to conduct a report on wireless broadband.

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While we still believe ETV and the State of South Carolina could benefit from a consultant, due to time constraints, any study now undertaken should be concurrent with an RFP that would seek to lease the spectrum in a public-private partnership. Given the timeline for negotiation, construction, and proof of performance, it is critical that ETV receive authorization to proceed with a lease agreement prior to adjournment this session. That would allow the state time to negotiate a complex public-private partnership, design the EBS system to best meet educational and public service interests based on input from the consultant, and meet critical FCC deadlines.

Since the FCC first drafted its rules for the EBS transition, the ETV Commission has taken seriously its legal and fiduciary responsibilities as license holder of the 67 Educational Broadband Service licenses from the FCC. Regarding our work thus far in planning for and developing EBS for South Carolina, there are four statutory provisions that deal with ETV's authority in dealing with the EBS spectrum.

First, authority is provided by the FCC to the ETV Commission through the licensing of the spectrum. In accepting and renewing the licenses, the ETV Commission agrees to be legally responsible for creating a transition plan for the conversion of Instructional Television Fixed Service to digital EBS in compliance with its rulemaking and deadlines.

The state authority is provided by SC Code Section 59-7-50, which reads in part:

*The Commission may lease or sell the use of its facilities, equipment, programs, publications and other program related materials on such terms as the Commission deems advantageous.*

It is our interpretation that the South Carolina Consolidated Procurement Code would require State Budget and Control Board oversight and approval of the process used for the procurement or selection of a lessor, as well as final approval of the EBS lease agreement.

The Budget and Control Board Office of the State CIO also believed they had authority over the EBS licenses based on the Tower Proviso 63.8.

*(BCB: Wireless Communications Tower) The Budget and Control Board is directed to coordinate tower and antenna operations within South Carolina state government. The Board shall (1) approve all leases regarding antenna placement on state-owned towers and buildings, (2) coordinate all new tower construction on state-owned property, (3) promote and market excess capacity on the State's wireless communications infrastructure, (4) generate revenue by leasing, licensing, or selling excess capacity on the State's wireless communications infrastructure, and (5) construct new communications assets on appropriate state-owned property for the purpose of generating revenue pursuant to this proviso. All revenue from tower and antenna leases and contracts after July 1, 2001, must be remitted to a separate fund established by the Board to create and support a statewide public safety communications system. These funds shall be retained and carried forward and used for the same purpose. Agencies owning tower and antenna assets will be allowed to recover expenses associated with implementing this proviso from this fund. The Board shall annually report to the Chairmen of the Senate Finance and House Ways and Means Committees by October 1 of each year all*

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*revenue collected and disbursed. This report shall also include a summary of each agency's overall revenues, whether retained by the agency or remitted to the separate fund.*

ETV and its legal counsel never agreed with the State CIO that the Tower Proviso-- which addresses antennas on towers and not broadcasts or licenses-- included Educational Broadband. In 2006, ETV staff met with staff from Senate Finance, the Speaker's Office, and Ways and Means to explain how the Tower Proviso was delaying development of EBS.

A provision inserted in S.91 and adopted by the General Assembly in 2007 effectively took away the authority of both ETV and the CIO to pursue EBS any further. It reads as follows:

SECTION 5. Section 11-35-40(2) of the 1976 Code, as last amended by Act 376 of 2006, is further amended to read:

*"(2) Application to State Procurement. This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in Section 11-35-40(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). It also shall apply to the disposal of state supplies as provided in Article 15 (Supply Management). No state agency or subdivision thereof may sell, lease, or otherwise alienate or obligate telecommunications and information technology infrastructure of the State by temporary proviso and unless provided for in the general laws of the State."*

The joint resolution, H.3569, adopted by the General Assembly in 2007 to establish the study committee, also includes a provision that takes away authority to lease the spectrum:

*Excess capacity must not be leased prior to approval of the recommendations of the study committee by the General Assembly.*

As you know, with the creation of the Broadband Technology and Communications Study Committee, ETV presented testimony on both the potential of EBS to advance education and economic development, and the urgency of the timeline. We also did our best to answer the many good questions posed by Senate staff. Since the FCC regulations regarding EBS are new and can seem at times esoteric, we often consulted an attorney in Washington D.C., Mr. Todd Gray of the law firm Dow Lohnes, to assist us in our responses. Since Mr. Gray is one of the nation's foremost experts in EBS transitions, and we concur that time is of the essence, we have again asked him to respond to each of your nine questions.

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IBS is a tremendous opportunity to advance education and economic development, and we look forward to working with you to ensure its timely development for the benefit of all South Carolinians.

Sincerely,

A handwritten signature in black ink, appearing to read "Maurice Bresnahan", with a long horizontal line extending to the right.

Maurice "Moss" Bresnahan  
President and CEO

Attachments: Todd Gray correspondence