November 14, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Network for Instructional TV, Inc. (FRN: 0004-0634-91)
North Carolina Association of Community College Presidents
Comments on RM-10586 (DA 02-2732)
Re: "A Proposal for Revising the MDS and ITFS Regulatory Regime"

Dear Ms. Dortch:

Network for Instructional TV, Inc. ("NITV")[1] and the North Carolina Association of Community College Presidents ("NCACCP")[2] (together, the "Commenters") file these Comments regarding "A Proposal for Revising the MDS and ITFS Regulatory Regime" (the "Proposal") submitted October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network (collectively, the "Petitioners"). The Commenters generally support the Petitioners' effort to modify the MDS and ITFS regulatory regime to reflect new opportunities and realities in the market for wireless services and to further enhance the quality and scope of educational service offerings. However, the Proposal raises some concerns that require further attention before implementing these worthy goals, and accordingly, the Commenters request that a Notice of Proposed Rule Making ("NPRM") adopted by the FCC seek public comment on the issues described below.

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[1] NITV is a non-profit corporation that, with its affiliates, distributes educational programming and services to students and teachers through a network of 23 ITFS stations and over the Internet. Since its establishment in 1979, NITV has worked closely with local educators in support of traditional distance learning using ITFS stations licensed to NITV and its affiliates. NITV's Internet presence includes its TeachersFirst.com division, which was created in 1998 to supply original lesson plans, web resources and other content to educators and students, and TeachersAndFamilies.com, which provides parents, teachers and students with free and other online resources that improve learning experiences for children. These initiatives have been designed around the promise of providing wireless data and other services to the more than 50 U.S. school districts receiving ITFS service from NITV and its affiliates.

[2] The North Carolina Association of Community College Presidents includes the presidents of North Carolina's 58 community colleges. Its Technology Committee provides leadership and coordination for a state-wide consortium of community colleges that have licenses and pending applications for ITFS channel groups in all of the markets in North Carolina.

Many ITFS licensees have entered into airtime lease agreements with commercial wireless operators who provide technical services and financial support in exchange for airtime capacity. The Commission has long encouraged ITFS partnerships with commercial operators to facilitate the commercial availability of spectrum while providing ITFS licensees with critical funding and technical support to provide educational service. Without this assistance, educators would be unable to continue to provide the instructional services currently offered via ITFS frequencies.

The Commenters support the Proposal's primary goals, which represent a thoughtful and thorough effort to identify and address the marketplace demands for wireless services and the need for a new set of rules to overcome technical and regulatory obstacles that have hindered deployment of next generation services via MDS/ITFS spectrum. The Proposal's new bandplan offers tremendous promise in protecting traditional high-power, high-site operations (via the Mid Band Segment ["MBS"] channels) while paving the way for a spectrally efficient migration to advanced mobile services using the Low Band Segment ("LBS") and Upper Band Segment ("UBS") channels. In addition, the Proposal's recommendations to streamline MDS/ITFS licensing and to delete or modify obsolete rules would have innumerable benefits in speeding the deployment of next-generation service to the public. Accordingly, the Commenters support the chief objectives of the Proposal and firmly believe that these objectives represent a positive step toward maximizing the educational and commercial benefits of MDS/ITFS.

The Commenters are concerned, however, with the Proposal's call for ITFS auctions. In addition, the Commenters believe that certain rules, including the proposed notification requirements for Pre-Transition Data Requests, relocation reimbursement procedures and proposed changes in construction requirements for ITFS facilities, require additional consideration.

ITFS Auctions

The Petitioners assert that the FCC should auction the mutually exclusive ITFS applications, many of which have remained pending for seven years or more. Despite the decades-long allocation of ITFS spectrum for noncommercial, educational use, which is typically exempt from the FCC's competitive bidding processes, the Petitioners urge the FCC to auction ITFS spectrum among the mutually exclusive ITFS applications. The Petitioners argue that the spectrum must be auctioned now because Congress is unlikely in the near term to clarify that the ITFS spectrum is exempt from competitive bidding, despite requests from the FCC for legislation or clarification to serve this purpose.[3] The Commenters believe that requiring educational institutions and government-related educational bodies to acquire -- at auction --

[3] A December 23, 1999 letter from then-FCC Chairman William Kennard to Senator Ernest Hollings urged Congress to move forward with legislation to specifically exempt ITFS spectrum from competitive bidding under Section 309(j) of the Communications Act of 1934. The letter stated that the FCC would plan to auction the spectrum in the absence of Congressional action; however, no legislation has been enacted to provide the exemption.

spectrum already reserved for educational uses would undermine the public interest. Nevertheless, the Commenters acknowledge that the frequencies requested in these mutually exclusive applications have languished in the wake of Congress' inaction on the issue. Therefore, the Commenters reluctantly agree with the Petitioners that the FCC should initiate auctions so that this highly demanded spectrum does not remain unused.

The Commenters wish to affirm, where the Petitioners have been silent, that the noncommercial educational nature of ITFS service must take priority over commercial service in any ITFS auction conducted pursuant to the Proposal. The Petitioners acknowledge their lack of consensus on how to structure an ITFS BTA auction while still accommodating rules that permit limited licensing of up to eight channels on ITFS frequencies to "wireless cable entities."[4] The Commenters oppose permitting commercial entities to claim eligibility as "white knights" during the period for accepting universal settlements of the mutually exclusive ITFS applications. Although the Commenters generally support the notion of "white knight" settlements, the Commenters believe that the class of "white knights" must be limited to non-profit educational organizations and institutions. Otherwise, ITFS spectrum allocation, over time, will become just another commercial allocation, providing commercial operators with a reduced incentive to provide much-needed technical support and services to ITFS licensees. Accordingly, if ITFS auctions are to proceed, the Commenters disagree with the proposal to permit commercial entities to claim eligibility as "white knights" during a universal settlement period.

Notification Requirements for Pre-Transition Data Requests

The Petitioners recommend transitioning current MDS/ITFS services to a new bandplan by requiring proponents who trigger a transition process in a given market to install, at their cost, replacement downconverters at all eligible ITFS receive sites to protect post-transition ITFS services operating on MBS channels from interference from non-MBS signals. The Commenters recommend modification of the Petitioners' proposal to notify ITFS licensees of their eligibility for replacement downconverters via "Pre-Transition Data Requests." In the Commenters' view, such modifications are necessary to ensure that ITFS licensees have a full and fair opportunity to establish their eligibility. The Proposal provides that ITFS receive sites are entitled to receive a replacement downconverter pursuant to a transition process if, among other things, a reception system was installed at the site on or before the date the ITFS licensee receives its Pre-Transition Data Request.[5] Under the Proposal, a recipient may lose rights to receive replacement downconverters by failing to respond to a Pre-Transition Data Request within 21 calendar days and, thereafter, if a potential transition proponent fails to make contact with the licensee by telephone during "normal business hours." Such Data Requests are to be served upon the ITFS licensee, with an "informational copy" to the licensee's Universal Licensing System ("ULS")

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[4] *See Proposal* at n. 113. The Commenters do not generally oppose rules that permit "wireless cable entities" to make limited commercial use of certain available ITFS frequencies in a market. *See* 47 C.F.R. § 74.990.

[5] *See Proposal* at App. B, p. 6.

contact representative, which is often a law firm or consultant who assists the licensee with FCC matters.

The Commenters believe that given the potentially severe adverse effect on the ITFS licensee of a failure to respond to the Pre-Transition Data Request, several changes to the notification requirements are warranted. First, the Commenters believe that the time period for responding to the Pre-Transition Data Request should be extended from 21 days to 60 days. This extension would provide educator licensees with sufficient time to obtain all necessary information to prepare their response in light of the reality of many schools' mandatory holidays and summer breaks. In addition, a transition proponent's Transition Plan also should be required to contain a certification of compliance with the service obligations associated with the Pre-Transition Data Request with respect to the licensee and the contact representative. These efforts will provide assurance that ITFS licensees will have a full and fair opportunity to review and respond to the Pre-Transition Data Request and will enhance the likelihood of sustaining the post-transition provision of service via the MBS channels. Although the Commenters applaud the Petitioners' efforts to develop rules that will emphasize the importance of responses to the Pre-Transition Data Request on certain rights, it is the Commenters' view that the rules require modification to ensure that ITFS licensees have every reasonable opportunity to preserve their rights to replacement downconverters.

Relocation Reimbursement Procedures

The Commenters concur with the Petitioners that each Transition Plan adopted by a transition proponent should provide for the establishment of an escrow or "similar mechanism" to ensure that a transition occurs as planned. In this regard, the Commenters support the use of a "trust fund" model[6] to add certainty and predictability to the transition process. Such a mechanism could be implemented through the use of a central clearinghouse to administer reimbursements for relocation-related expenses. Transition proponents could be required to submit upfront transition-related payments designated for qualifying licensees, with disbursements made upon the proponent's effective discharge of its obligations. In addition, a clearinghouse could also facilitate alternative dispute resolution in the event of disagreements over the scope of reimbursable expenses. The Commenters believe, however, that public comment is necessary to clarify the scope of such expenses. In this way, licensees and proponents can estimate relocation costs more accurately and can speed the Transition Planning Period.

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[6] The Commenters believe that a "trust fund" concept may represent a reasonable approach to streamlining reimbursement processes by providing an intermediary to direct relocation-related disbursements. *See, e.g.*, H.R. 5638, 107th Cong. (the "Commercial Spectrum Enhancement Act").

Construction Requirements

The Commenters support the Petitioners' efforts to seek adoption of a uniform substantial service requirement, which would among other things require a licensee to demonstrate "substantial service" at the time of renewal rather than adhere to fairly short construction deadlines on a site-by-site basis. The Commenters agree that the relatively short construction deadlines now applicable to ITFS stations have resulted in extensive paperwork burdens on FCC staff and on ITFS licensees and have hindered operators' ability to build out markets.[7]

To further that end, the Commenters also recommend deleting that portion of 74.932(d) of the Commission's rules that provides that an ITFS station that is not operated for a period of one year is considered to be permanently discontinued and its license forfeited. As the Proposal indicates, many ITFS licensees may have to discontinue their service, perhaps for an extended period, to facilitate the transition to new advanced services. These services may even continue during the transition on other frequencies. The Commenters believe that these licenses should not be jeopardized so long as the licensee can demonstrate compliance with the substantial service requirement at the time of renewal.

In the alternative, if the Commission elects to continue establishing site-by-site construction deadlines for ITFS facilities, the Commenters agree with the Petitioners that the FCC should adopt longer construction periods. To this end, the Commenters recommend the establishment of a three-year construction period for all new and modified ITFS facilities. The Commenters agree that extension of the construction deadlines would reduce processing burdens on FCC staff and licensees and would facilitate market-wide build-out of systems without needlessly jeopardizing licenses for specific channel groups.

Conclusion

Although the Commenters support the Proposal's primary objectives and agree that significant changes in MDS/ITFS are necessary and beneficial to the public interest, the Commenters respectfully submit that the concerns identified in these Comments merit public comment. Such comment is necessary to help ensure that new rules adopted in connection with the Proposal balance the interests of ITFS licensees and commercial operators.

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[7] Moreover, the FCC's recent decision to partially reallocate MDS spectrum corresponding to channels 1, 2 and 2A, *see "FCC Allocates Spectrum for Advanced Wireless Services and Proposes Licensing and Service Rules," News Release*, (November 7, 2002), raises significant uncertainty that justifies suspending BTA build-out requirements and MDS/ITFS construction deadlines. It would be wasteful for licensees to build or maintain stations that may be reallocated to some other band. Moreover, the reallocation decision would have a ripple effect within systems because these channels typically are used for upstream response-station transmissions.

Sincerely,

Thomas A. Pyle, Executive Director and CEO
Network for Instructional TV, Inc.

Dr. Michael Taylor, Chairperson, Technology Committee
North Carolina Association of
Community College Presidents

cc: Qualex International
Charles Oliver, Wireless Telecommunications Bureau

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