

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

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101	)	WT Docket No. 03-66
of the Commission's Rules to Facilitate the	)	RM-10586
Provision of Fixed and Mobile Broadband	)	
Access, Educational and Other Advanced	)	
Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further	)	WT Docket No. 03-67
Competitive Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
Amendment of Parts 21 and 74 to Engage	)	
in Fixed Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the	)	WT Docket No. 02-68
Commission's Rules with Regard to	)	RM-9718
Licensing in the Multipoint Distribution	)	
Service and in the Instructional Television	)	
Fixed Service for the Gulf of Mexico	)	

To: The Commission

**COMMENTS OF TETON WIRELESS TELEVISION, INC.**

Terry Smith  
Willis E. Twiner  
Teton Wireless Television, Inc.  
6659 Kimball Drive  
Suite B-201  
Gig Harbor, WA 98335  
(253) 858-5981

September 8, 2003

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY .....	ii
I. INTRODUCTION .....	3
II. TETON’S WIRELESS SYSTEMS IN IDAHO AND MONTANA ARE SATISFYING IMPORTANT SPECTRUM POLICY OBJECTIVES .....	4
A. Promoting the Availability of Broadband for All Americans .....	4
B. Facilitating the Development of Alternative Facilities-Based Providers .....	5
C. The Commission Should Not Open Eligibility for MDS and ITFS Spectrum to Cable and DSL .....	6
III. IF THE COMMISSION ADOPTS SIGNIFICANT CHANGES TO THE BAND PLAN OR THE TECHNICAL RULES, IT SHOULD AFFORD RURAL OPERATORS FLEXIBILITY IN IMPLEMENTATION .....	7
A. Different Rules or Exemptions Might be Appropriate For Rural Providers .....	7
B. Neither Option for Resolving the Incompatibility Between High Power One Way Services and Low Power Cellular Services is Immediately Viable for Operators Like Teton .....	9
C. The Commission Should Not Impose a Date Certain for All Licensees to Complete the Transition Process .....	10
IV. THE COMMISSION MUST ADOPT A TRANSITION PROCESS THAT ADEQUATELY COMPENSATES MDS OPERATORS WHO ARE PROVIDING SERVICE TO THE PUBLIC AND MUST UNDERGO INVOLUNTARY CONVERSION .....	13
V. MISCELLANEOUS .....	15

## SUMMARY

In the *NPRM*, the Commission proposes sweeping changes to its rules and policies governing the licensing of the Instructional Television Fixed Service (“ITFS”) and the Multipoint Distribution Service (“MDS”). The Commission seeks to promote competition, innovation and investment in wireless broadband services and to simplify the licensing process for MDS and ITFS licensees. As a veteran wireless operator in the industry, Teton agrees that the licensing process for MDS and ITFS will benefit from streamlining. Teton also appreciates the collective desire of the Commission and the Coalition to promote greater flexibility in the use of MDS and ITFS frequencies. Indeed, market demands may one day require Teton to consider converting the use of its spectrum in order to accommodate new service offerings. Today, however, Teton is meeting market demands, serving the public, and satisfying many of the Commission’s important spectrum policy objectives using MDS and ITFS spectrum under the Commission’s current regulatory regime. Teton supports the Commission’s goal of establishing regulatory policies that will promote competition, innovation and investment in the MDS and ITFS band, but it urges the Commission to take a reasoned approach to implementation of such policy changes in order to take into consideration the different economic, technical, spectral and market considerations facing rural operators like Teton, who are serving the public with advanced services today. Incumbents like Teton, together with all of their MDS and ITFS licensees/lessors, should be afforded exemptions or “opt-outs” to implementation of any new rules. If incumbent operators like Teton are nonetheless forced to involuntarily convert their spectrum to a new use, then the Commission must adopt mechanisms for just compensation.

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

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101	)	WT Docket No. 03-66
of the Commission's Rules to Facilitate the	)	RM-10586
Provision of Fixed and Mobile Broadband	)	
Access, Educational and Other Advanced	)	
Services in the 2150-2162 and 2500-2690	)	
MHz Bands	)	
	)	
Part 1 of the Commission's Rules - Further	)	WT Docket No. 03-67
Competitive Bidding Procedures	)	
	)	
Amendment of Parts 21 and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and the	)	
Instructional Television Fixed Service	)	
Amendment of Parts 21 and 74 to Engage	)	
in Fixed Two-Way Transmissions	)	
	)	
Amendment of Parts 21 and 74 of the	)	WT Docket No. 02-68
Commission's Rules with Regard to	)	RM-9718
Licensing in the Multipoint Distribution	)	
Service and in the Instructional Television	)	
Fixed Service for the Gulf of Mexico	)	

To: The Commission

**COMMENTS OF TETON WIRELESS TELEVISION, INC.**

Teton Wireless Television, Inc. ("Teton") hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1</sup> In the *NPRM*, the Commission proposes sweeping changes to its rules and policies governing the licensing of the Instructional Television Fixed Service ("ITFS") and the Multipoint Distribution Service

---

<sup>1</sup> *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 and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003) ("*NPRM*").

(“MDS”). The Commission seeks to promote competition, innovation and investment in wireless broadband services and to simplify the licensing process for MDS and ITFS licensees.

As a veteran wireless operator in the industry, Teton agrees that the licensing process for MDS and ITFS will benefit from streamlining. Teton also appreciates the collective desire of the Commission and the Coalition<sup>2</sup> to promote greater flexibility in the use of MDS and ITFS frequencies. Indeed, market demands may one day require Teton to consider converting the use of its spectrum in order to accommodate new service offerings. Today, however, Teton is meeting market demands, serving the public, and satisfying many of the Commission’s important spectrum policy objectives using MDS and ITFS spectrum under the Commission’s current regulatory regime. Teton supports the Commission’s goal of establishing regulatory policies that will promote competition, innovation and investment in the MDS and ITFS band,<sup>3</sup> but it urges the Commission to take a reasoned approach to implementation of such policy changes in order to take into consideration the different economic, technical, spectral and market considerations facing rural operators like Teton, who are serving the public with advanced services today. Incumbents like Teton, together with all of their MDS and ITFS licensees/lessors, should be afforded exemptions or “opt-outs” to implementation of any new rules. If incumbent operators like Teton are nonetheless forced to involuntarily convert their spectrum to a new use, then the Commission must adopt mechanisms for just compensation.

---

<sup>2</sup> The “Coalition” refers to the Wireless Communications Association International, the National ITFS Association and the Catholic Television Network, collectively. See Wireless Communications Association International, Inc., National ITFS Association, and Catholic Television Network, *A Proposal for Revising the MDS and ITFS Regulatory Regime*, RM-10586 (filed Oct. 7, 2002) (“White Paper”).

<sup>3</sup> *NPRM*, 18 FCC Rcd at 6740 ¶ 32 (citing FCC Staff Report, *Spectrum Policy Task Force Report in ET Docket No. 02-135*, rel. Nov. 2002 (“Spectrum Policy Report”).

## **I. INTRODUCTION.**

Teton has been operating wireless systems and serving the public in rural communities in the Pacific Northwest for more than a decade. Teton provides a variety of services to the communities it serves in response to what each market demands. Teton provides fixed two-way wireless broadband Internet access service to the residents of Missoula, Montana and Idaho Falls, Idaho in competition with local digital subscriber line (“DSL”) and cable companies. Teton’s broadband data systems in Idaho Falls and Missoula were launched just weeks ago, and already it has 400 wireless broadband subscribers. Teton’s experience demonstrates the need and desire for broadband service and competitive choice in rural America. This month Teton will launch wireless broadband service in Twin Falls, Idaho. It is also planning to launch broadband service in the Walla Walla, Washington / Pendleton, Oregon market later this year. Teton projects it will have 3,000 data subscribers company-wide by the end of 2004.

Teton also offers a competitive choice to the satellite and franchised cable operators in its communities by offering fixed wireless video subscription services in Missoula, Montana, and Idaho Falls, Twin Falls, and Pocatello, Idaho. Teton serves more than 20,000 video subscribers in these communities combined. Teton understands that other wireless MDS operators were not successful in offering video subscription services, and that plans to offer such services in urban markets have been largely abandoned, but Teton has a thriving business and offers a competitive service to the public that is obviously needed in the rural communities it serves.

In each of its markets, Teton has rights to all the available MDS and ITFS spectrum, either through license or lease. Teton is an incumbent MDS licensee and it holds the Basic Trading Area (“BTA”) authorizations for each of its markets. In Twin Falls (population 162,000) Teton holds MDS authorizations for 17 channels and lease agreements for the remaining 16 channels. In Idaho Falls (population 223,000), Teton holds MDS authorizations

for 9 channels and leases the remaining 24 MDS and ITFS channels. In Missoula (population 175,000) and Pocatello (population 101,000) Teton holds MDS authorizations for 13 channels and leases the remaining 20 ITFS channels in each market.

## **II. TETON'S WIRELESS SYSTEMS IN IDAHO AND MONTANA ARE SATISFYING IMPORTANT SPECTRUM POLICY OBJECTIVES.**

### ***A. Promoting the Availability of Broadband for All Americans.***

One of the Commission's objectives in the current proceeding is to promote the availability of broadband for all Americans.<sup>4</sup> The Commission acknowledges that "[i]n recent years, the MDS industry has invested several billion dollars to develop broadband fixed wireless data systems in this band, including high-speed access to the Internet for residential customers, small and medium businesses, and educational institutions. Such systems offer a significant opportunity to provide competition to cable and (Digital Subscriber Line) DSL services in the provision of broadband services in urban and rural areas."<sup>5</sup>

Over the past ten years, Teton has invested more than \$18 million in licensing, constructing and deploying fixed wireless systems in Idaho and Montana. As described above, Teton is, today, deploying advanced telecommunications in four rural communities, it is providing competition to cable and DSL service, and it is promoting the availability of broadband service to rural Americans by actively building and operating wireless, fixed, broadband systems. In short, Teton is satisfying important spectrum policy objectives without an immediate need to implement the sweeping rule changes the Commission is currently considering for MDS and ITFS.

---

<sup>4</sup> *Id.* at 6740 ¶ 33.

<sup>5</sup> *Id.* (quoting *White Paper* at ii. *See also*, FCC Staff Report issued by the Office of Engineering and Technology, Mass Media Bureau, Wireless Telecommunications Bureau, and International Bureau, *Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems*, ET Docket No. 00-232, Interim Report at ii, rel. Nov. 15, 2000).

**B. Facilitating the Development of Alternative Facilities-Based Providers.**

Another Commission objective in this proceeding is to facilitate the “development of possible alternative broadband residential facilities-based providers.”<sup>6</sup> The Commission notes that “[t]hroughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service . . . 29% of residential broadband subscribers use DSL service, and about 3% of subscribers use various radio-based technologies. As we noted above, wireless broadband service in the 2500-2690 MHz band may offer consumers another broadband alternative, which may lead to reduced prices and more competition in the delivery of high-speed internet access.”<sup>7</sup>

Teton’s residential facilities-based services in Montana and Idaho compete directly with the services offered by cable television and DSL. Teton offers faster Internet access service at comparable pricing in Missoula, where Teton’s broadband service at its slowest speed of 384 kbps is offered for \$44.95 per month.<sup>8</sup> Slower DSL service at 256 kbps is offered by Blackfoot Communications for \$41.90 per month and by Micromania for \$46.00 per month. In Idaho Falls, Teton offers Internet access service at the same speed as Cable One, the franchised cable operator, for \$30 less per month. Teton’s Internet access service at a speed of 1 Mbps is offered for \$59.85 per month, compared with Cable One’s offering at the same speed for \$89.95.

---

<sup>6</sup> *Id.* at 6741 ¶ 35.

<sup>7</sup> *Id.* (quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4803-4 ¶ 9 (2002) (“*Declaratory Ruling*”); *See also, Declaratory Ruling* at 4819 ¶ 33).

<sup>8</sup> Teton offers broadband service at speeds up to 1 Mbps.

Multiple entrants - particularly facilities-based entrants<sup>9</sup> like Teton - in *all* local markets, will ensure more robust competition, lower prices and innovative services. Teton urges the Commission to provide a measure of flexibility in its implementation plans that will allow operators like Teton, who are serving the public today, to continue developing and operating advanced fixed wireless systems in the MDS and ITFS band. Such a move by the Commission will ensure that a monopoly or duopoly for Internet broadband access services does not evolve in markets like Teton's. Rural consumers deserve more than merely a choice between DSL and cable modem services.<sup>10</sup> Indeed, Teton's successful launch of service in Missoula and Idaho Falls, yielding 400 data subscribers in just weeks, should be a strong indication to the Commission that there is public demand for the facilities-based choice Teton offers.

***C. The Commission Should Not Open Eligibility for MDS and ITFS Spectrum to Cable and DSL.***

The data from Teton's markets in Idaho and Montana suggest that cable companies and DSL providers had a virtual monopoly or duopoly before Teton launched its Internet access service. Given this, Teton believes that the Commission should refrain from opening eligibility

---

<sup>9</sup> The Commission has emphasized the importance of facilities-based competition, particularly to the provision of advanced telecommunications services noting "[w]e remain committed to removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated in the 1996 Act. Nonetheless, we have recognized that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities. Because facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to consumers. Moreover, facilities-based competition offers the best promise of ultimately creating a comprehensive system of competitive networks....One particular benefit that we hope will arise from the growth of facilities-based competition is increased availability of advanced services." *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2000).

<sup>10</sup> The benefits to competition from a duopoly are only marginally better than what exists under a monopoly situation. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, First Report, 10 FCC Rcd 8844 (1995); *see also, 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Report and Order, 15 FCC Rcd 9219, 9256 ¶ 83 (1999) ("As we have extensively documented, the introduction of new providers and the end of the cellular duopoly has led to substantial consumer benefits through reductions in the price of service and in new and enhanced services").

for MDS spectrum to cable and DSL interests. At a minimum, the Commission should retain the cable/MDS cross ownership restrictions in rural markets where DSL and cable have a virtual lock on the broadband market.<sup>11</sup> The justification for the cable/MDS cross ownership restrictions, which the Commission implemented in Section 21.912 of the rules, continues to be valid.<sup>12</sup> “The intent was to encourage entry of alternative providers of multichannel video service into markets dominated by incumbent cable systems in order to spur competition. The cross-ownership restriction addressed Congress’ concern that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public.”<sup>13</sup> As the Commission suggests, such companies might attempt to protect their market power by purchasing MDS and ITFS spectrum, warehousing it, and effectively precluding current as well as future entry by competitors.<sup>14</sup> Given the dominance of cable and DSL in rural markets like Teton’s, opening eligibility for MDS and ITFS to cable and DSL interests would almost certainly have a negative impact on competition and diversity.

**III. IF THE COMMISSION ADOPTS SIGNIFICANT CHANGES TO THE BAND PLAN OR THE TECHNICAL RULES, IT SHOULD AFFORD RURAL OPERATORS FLEXIBILITY IN IMPLEMENTATION.**

***A. Different Rules or Exemptions Might Be Appropriate For Rural Providers.***

The *NPRM* states that the Commission endeavors to allow the “maximum extent of flexibility possible that would not impair the rights of others to offer valued services in the

---

<sup>11</sup> Given the relative newness of Teton’s services, it would be difficult for Teton to provide useful market share information as the Commission requests. See *NPRM*, 18 FCC Rcd at 6776 ¶ 126.

<sup>12</sup> See 47 U.S.C. § 612; see 47 C.F.R. § 21.912.

<sup>13</sup> *NPRM*, 18 FCC Rcd. at 6772 ¶ 119.

<sup>14</sup> *Id.* at 6774 ¶ 122.

band.”<sup>15</sup> While the Commission seeks in this proceeding to provide added flexibility in the MDS and ITFS band for new services, Teton hopes the implementation of that flexibility will not have the effect of impairing the rights of operators like Teton to continue offering the valued broadband services in rural America that they offer today. Teton’s markets are largely second and third tier markets in the Pacific Northwest that are just beginning to experience the benefits of competition in the provision of advanced services by facilities-based providers.

The Commission questions in the *NPRM* “whether every market requires a uniform band plan,”<sup>16</sup> and whether operating at higher power in rural areas might be acceptable: “[W]e note that our *Spectrum Policy Report* raises the possibility of allowing licensees in uncongested rural areas to operate at higher power levels, provided they do not thereby generate unacceptable interference in urban areas.”<sup>17</sup> The Spectrum Policy Task Force “addressed the issue of whether the Commission’s approach to spectrum management should vary in different portions of the spectrum, in different geographic areas, or for different types of uses . . . it was generally recognized that the economic and technical considerations in rural areas are different than in urban areas, and there is some support in the record for applying different rules to spectrum usage in urban and rural areas.”<sup>18</sup>

Teton wholeheartedly agrees with these sentiments and believes that if the Commission does not develop different rules for implementation in rural areas, then it should, at a minimum, afford rural licensees who are providing valuable advanced communications services to the public today with the flexibility to forego implementation of any spectrum changes until the

---

<sup>15</sup> *Id.* at 6742 ¶ 39.

<sup>16</sup> *Id.* at 6746 ¶ 54.

<sup>17</sup> *Id.* (citing *Spectrum Policy Report* at 58-60).

<sup>18</sup> *Spectrum Policy Report* at 58.

demands of their markets require transition. Teton believes the closest operating MDS system to any Teton system that is operating today is 110 miles away. This is the distance between Boise, Idaho, where Sprint Corporation operates a fixed wireless system, and Twin Falls, Idaho. Operators like Teton in remote rural areas, together with their MDS and ITFS licensees/lessors, who have little or no possibility of interfering with other operators, should not be required to transition the use of their spectrum to new segmented band plans and /or mandatory across the board power limitations, unless and until their rural customers demand it.

***B. Neither Option for Resolving the Incompatibility Between High Power One Way Services and Low Power Cellular Services is Immediately Viable for Operators Like Teton.***

The Commission asserts in the *NPRM* that there are two basic ways to resolve the incompatibility between high power one way services and low power cellular services. The first is to separate the uses into different band segments.<sup>19</sup> The second is to require an across the board reduction in signal strengths at system boundaries.<sup>20</sup> Neither of these options is immediately viable for operators like Teton. The segmentation option offers only seven channels for the kind of high power downstream operations Teton operates today with thirty or more channels. Teton cannot continue to offer competitive choice for video subscribers in the communities it serves with only seven channels; such a service would not be viable. If Teton is forced to involuntarily convert its spectrum to a segmented band plan, Teton would be required to replace its transmission and reception systems with costly digital transmitters, receivers, downconverters and other customer premises equipment, which would undoubtedly disrupt or halt service to the public and would cost Teton millions of dollars.

---

<sup>19</sup> *NPRM*, 18 FCC Red at 6745 ¶ 49.

<sup>20</sup> *Id.*

The Commission's other proposal for resolving the incompatibility between high power and low power uses is to impose an across the board power reduction in signal strengths for MDS and ITFS licensees. This option is also not immediately viable for operators like Teton who are serving rural communities that are sparsely populated. A mandatory reduction in power would mean that Teton could no longer reach the communities its facilities reach today without, at a minimum, installation of additional costly transmission facilities throughout its BTA.

It was the recommendation of the Spectrum Policy Task Force that the Commission should "explore ways to promote spectrum access and flexibility in rural areas . . . these rules should also afford spectrum users the flexibility to operate at higher power in less congested areas, which are typically rural, so long as such higher power operations do not cause interference and do not receive additional interference protection."<sup>21</sup> Teton agrees with this conclusion and prays that the Commission will observe this recommendation as part of the rule changes that are presently under consideration. Teton needs the ability to continue operating its systems with its current channel configuration and at its current power so long as the citizens of the rural communities it serves continue to need and desire a competitive choice.

***C. The Commission Should Not Impose a Date Certain for All Licensees to Complete the Transition Process.***

Consistent with the recommendations contained in the *Spectrum Policy Report*, suggesting that rural markets have different economic and technical characteristics which may warrant separate rules for spectrum usage, Teton requests that the Commission refrain from imposing a date certain for all MDS and ITFS licensees to complete some kind of transition process to a new segmented band plan or across-the-board power limitations. Rather, the Commission should allow for market by market transitions in response to the demands of each

---

<sup>21</sup> *Spectrum Policy Report* at 59.

market, recognizing that the service offerings and power requirements that are appropriate and necessary for rural markets are different than the requirements for urban markets. If the Commission does not implement different rules for MDS operations in rural areas, then it should, at a minimum, provide incumbents with “opt-outs” or exemptions to implementation.

While the Coalition suggests that only licensees who are also Multichannel Video Program Distributors (“MVPDs”) can invoke the “opt-out” right, and not licensees who lease to MVPDs like Teton, such a result would obviously halt service to the public and would not be in the public interest.<sup>22</sup> Any opt-out rights or exemptions must be afforded to all licensees in a system that desire such an exemption. It would be discriminatory to offer an “opt-out” to an MVPD, but not to the MDS and ITFS licensees whose spectral rights form the foundation of the operating system.

If the Commission does not afford rural operators together with their MDS and ITFS licensees with an exemption from the transition process or an “opt-out,” then Teton favors the three-phase transition process that was described by the Commission in the *NPRM*: “a voluntary negotiation period, during which incumbents could bargain freely for the best inducements they could obtain from Proponents, followed by a mandatory negotiation and conversion phase, during which Proponents could compel incumbents to reduce their signal strengths by offering to fund their conversions, based on specific criteria to be defined in our rules. In the final stage, Proponents would be entitled to compel incumbents to take whatever steps are necessary to reduce their signal strengths at the incumbents’ own expense.”<sup>23</sup>

---

<sup>22</sup> *White Paper*, Appendix B at pp. 16-17.

<sup>23</sup> *NPRM*, 18 FCC Rcd at 6764 ¶ 103.

Such a transition process would offer operators like Teton the best chance of recovering fair compensation for their lost businesses and the funding necessary for the involuntary conversion they may have to undergo. Even the best of the transition proposals may not go far enough, however, to justly compensate incumbent licensees like Teton who paid for their spectrum rights through the initial licensing process for incumbents, and then paid for their spectrum rights again through the subsequent BTA auctions. Such licensees have built businesses using the spectrum they paid for with the justifiable expectation that they would be able to continue using their licenses to serve the public in whatever manner the public demands.

FCC licenses confer valuable rights that are more than a mere privilege and induce licensees like Teton to make substantial capital investments. Indeed, the D.C. Circuit Court has found that the “granting of a license by the Commission creates a *highly valuable property right*, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted.”<sup>24</sup> The court also has noted that “[w]hile a station license does not under the Act confer an unlimited or indefeasible property right...nevertheless the right under a license for definite term to conduct a broadcasting business requiring...substantial investment is *more than a mere privilege or gratuity*.”<sup>25</sup> More guidance from the Commission may be necessary in order to guarantee just compensation for displaced licensees and operators like Teton.

---

<sup>24</sup> *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 217 (D.C. Cir. 1939) (emphasis added).

<sup>25</sup> *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948) (emphasis added) (citation omitted).

**IV. THE COMMISSION MUST ADOPT A TRANSITION PROCESS THAT ADEQUATELY COMPENSATES MDS OPERATORS WHO ARE PROVIDING SERVICE TO THE PUBLIC AND MUST UNDERGO INVOLUNTARY CONVERSION.**

The Coalition’s proposed transition plan, which requires each incumbent MDS operator to fund its own transition to a segmented band plan and share in the cost of converting ITFS licensees, seems to assume that all or nearly all MDS incumbents and operators are in favor of converting to a segmented band plan and providing low power mobile services over the spectrum. The Coalition’s *White Paper* does not contemplate compensating incumbent operators for the loss of their businesses and, not only that, would require such incumbents to pay for converting their spectrum to a use that is not desired, necessary, or economic for such operators in view of the services they currently provide the public: “MDS licensees will be required to bear their own expenses in transitioning to the new bandplan and complying with the post-transition rules.”<sup>26</sup> The three-phase transition process discussed by the Commission in the *NPRM* offers a far more reasoned and fair approach than the approach suggested by the Coalition, but it may not go far enough to protect incumbent licensees.

While incumbents like Teton will not be “relocated” to other spectrum, a forced, involuntary conversion to a new band plan or a mandatory reduction in power would require Teton to build an entirely different network and would be tantamount to a relocation in its own band.<sup>27</sup> The Commission must address how to adequately compensate operators like Teton in converting operational systems that are providing service to thousands of residential and business customers using up to 33 licensed channels. Previous relocation efforts, like the PCS relocation

---

<sup>26</sup> *White Paper*, Appendix B, p. 5.

<sup>27</sup> Government regulation can be so onerous as to constitute a taking which constitutionally requires compensation. *See Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962) (If the effect of a regulation is to deprive an owner of all or most economically viable uses of its property, the regulation will be deemed a taking); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-5 (1984) (Noting that governmental action short of acquisition of title or occupancy amounts to a taking if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter).

rules the Coalition and the Commission reference, have involved the relocation of internal microwave links, not operational systems providing mass market services.

When the Commission initially established rules and policies for relocating incumbent fixed microwave licensees to accommodate emerging technologies in its *Emerging Technologies* proceeding,<sup>28</sup> it stated that in the event of an involuntary relocation of an incumbent licensee, the emerging technology licensee must (1) guarantee payment of all costs of relocation to a *comparable* facility, including all engineering, equipment, site and FCC fees, and any reasonable, additional costs; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination; and (3) build and test the new system to determine comparability.<sup>29</sup> In order for the new facilities to be comparable, such facilities must be equal or superior to the incumbent's existing facilities. Comparability is based on communications throughput, system reliability, and operating costs. The FCC required PCS licensees to provide incumbents "merely with enough throughput to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system."<sup>30</sup> The FCC further required new entrants to compensate incumbents for any increased recurring costs associated with the replacement facilities (e.g., additional rental payments and increased utility fees) for a period of five years.<sup>31</sup>

---

<sup>28</sup> See, e.g., *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992) ("*Emerging Technologies First R&O*"), Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993).

<sup>29</sup> *Emerging Technologies First R&O*, 7 FCC Rcd at 6890 ¶ 24; see also 47 C.F.R. §101.75(a).

<sup>30</sup> *Amendment to the Commission's Rules Regarding a Plan for Sharing Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, 8841 ¶ 29 (1996) (citations omitted) ("*Microwave Relocation First R&O*"). Thus, if a dispute arises, the FCC would determine an incumbent's needs by looking at actual system use rather than total capacity at the time of relocation.

<sup>31</sup> *Id.* at 8842 ¶ 31.

The FCC also found that compensation for the depreciated value of old equipment would not enable incumbents to construct comparable replacement systems without imposing additional costs on the incumbents.<sup>32</sup> Although replacement facilities must be at least equal to the incumbent's system with respect to throughput, system reliability, and operating costs, the FCC stated that other aspects of the system (e.g., bandwidth) need not be equivalent.<sup>33</sup> In addition, the FCC limited reimbursement of transaction expenses (e.g., attorney and consultant fees) that are directly attributable to an involuntary relocation to two percent of the "hard" costs involved (i.e., the actual costs associated with providing a replacement system, such as equipment and engineering expenses).<sup>34</sup> Although consideration of these costs is a necessary starting place for MDS incumbents like Teton who provide service to the public, rather than stand-alone internal links, reimbursement for these costs alone will not adequately compensate incumbents. Licensees who must convert and abandon the services they are presently offering must be made whole for lost opportunity costs, and for other ancillary costs like the costs associated with existing leases and operating agreements, the costs of developing and replacing equipment, and the incumbent's lost right to revenues under existing customer service contracts. The Commission's existing relocation rules do not even remotely deal with these issues and they must.

## **V. MISCELLANEOUS.**

Finally, Teton is generally in favor of the following proposals contained in the *NPRM*. Teton agrees that the Commission should implement a blanket licensing regime for MDS, and

---

<sup>32</sup> *Id.* at 8844 ¶ 34.

<sup>33</sup> *Id.* at 8843 ¶ 33.

<sup>34</sup> *Id.* at 8848 ¶¶ 42,43.

that BTA Authorizations holders should not be required to obtain individual station licenses for transmitters. BTA licensees should be allowed to place transmitters anywhere in their service area without prior authorization so long as they comply with applicable service rules.<sup>35</sup> Teton also believes the Commission should expand the eligibility criteria for ITFS to include commercial entities. Current ITFS licensees obviously will have the ability to retain their licenses if they choose. Teton is in favor of the Commission merging MDS and ITFS into a single Broadband Communications Service with streamlined processing rules.

Respectfully submitted,

**TETON WIRELESS TELEVISION, INC.**

/s/

---

Terry Smith  
Willis E. Twiner  
Teton Wireless Television, Inc.  
6659 Kimball Drive,  
Suite B-201  
Gig Harbor, WA 98335

September 8, 2003

---

<sup>35</sup> *NPRM*, 18 FCC Rcd at 6756 ¶ 83.

## CERTIFICATE OF SERVICE

I, Caitlin A. Coyle, do hereby certify that I have on this 8th day of September, 2003, had copies of the foregoing **COMMENTS of TETON WIRELESS TELEVISION, INC.** delivered to the following via electronic mail:

Bryan N. Tramont  
Office of Chairman Powell  
Federal Communications Commission  
445 12th Street, S.W., 8<sup>th</sup> Floor  
Washington, DC 20554  
Via Electronic Mail: [btramont@fcc.gov](mailto:btramont@fcc.gov)

Barry Ohlson  
Office of Commissioner Adelstein  
Federal Communications Commission  
445 12th Street, S.W., 8<sup>th</sup> Floor  
Washington, DC 20554  
Via Electronic Mail: [bohlson@fcc.gov](mailto:bohlson@fcc.gov)

Jennifer Manner  
Office of Commissioner Abernathy  
Federal Communications Commission  
445 12th Street, S.W., 8<sup>th</sup> Floor  
Washington, DC 20554  
Via Electronic Mail: [jmanner@fcc.gov](mailto:jmanner@fcc.gov)

John Schauble  
Public Safety and Private Wireless Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
Via Electronic Mail: [jschaubl@fcc.gov](mailto:jschaubl@fcc.gov)

Charles Oliver  
Public Safety and Private Wireless Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554  
Via Electronic Mail: [coliver@fcc.gov](mailto:coliver@fcc.gov)

Paul Margie  
Office of Commissioner Copps  
Federal Communications Commission  
445 12th Street, S.W., 8<sup>th</sup> Floor  
Washington, DC 20554  
Via Electronic Mail: [pmargie@fcc.gov](mailto:pmargie@fcc.gov)

Sam Feder  
Office of Commissioner Martin  
Federal Communications Commission  
445 12th Street, S.W., 8<sup>th</sup> Floor  
Washington, DC 20554  
Via Electronic Mail: [sfeder@fcc.gov](mailto:sfeder@fcc.gov)

D'Wana Terry  
Public Safety and Private Wireless Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
Via Electronic Mail: [dterry@fcc.gov](mailto:dterry@fcc.gov)

Nancy Zaczek  
Public Safety and Private Wireless Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554  
Via Electronic Mail: [nzaczek@fcc.gov](mailto:nzaczek@fcc.gov)

Stephen Zak  
Public Safety and Private Wireless Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 3-C124  
Washington, DC 20554  
Via Electronic Mail: [szak@fcc.gov](mailto:szak@fcc.gov)

Gary Michaels  
Auctions and Industry Analysis Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4-A760  
Washington, DC 20554  
Via Electronic Mail: gmichael@fcc.gov

Catherine Seidel  
Office of the Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554  
Via Electronic Mail: cseidel@fcc.gov

Andrea Kelly  
Auctions and Industry Analysis Div.  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 4-A760  
Washington, DC 20554  
Via Electronic Mail: akelly@fcc.gov

Qualex International  
Portals II  
445 12th Street, SW  
Courtyard Level  
Washington, DC 20554  
Via Electronic Mail: qualexint@aol.com

/s/ Caitlin A. Coyle  
Caitlin A. Coyle