

**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

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

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October 23, 2003

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## SUMMARY

Teton supports the Commission's goal of establishing regulatory policies that will promote competition, innovation and investment in the 2.5 GHz band. Teton also supports the Coalition proposal as the most viable alternative to transitioning use of the band, with certain clarifications. Teton supports the Coalition's market driven approach and, most importantly, its proposal to include an Opt-Out for operators like Teton who are serving the public (hereinafter referred to as the "Opt-Out"). In contrast to the Coalition approach, commenters who advocate for a transition to a new band plan or new power limitations by a date certain have no regard for preserving the needed services that operators like Teton provide. The Commission must not require all MDS and ITFS licensees to transition to a new band plan or new power limitations by a date certain. Such a result would be wholly disruptive to service to the public, and would not be in the public interest.

Teton is, today, deploying advanced facilities-based services in four rural communities in Montana and Idaho. It is providing competition to cable, satellite and DSL service, and it is promoting the availability of broadband service to unserved rural Americans by actively building and operating wireless, fixed, broadband systems. Teton serves 20,000 video subscribers, and its wireless broadband data subscribers have doubled since filing its comments on September 8th. Teton brings video and high speed data services to rural customers who are typically overlooked, unserved, and on the wrong side of the digital divide. In short, Teton is satisfying important spectrum policy objectives without an immediate need to implement the sweeping rule changes the Commission is currently considering. The Commission must have a focus in this proceeding, similar to its aim in other proceedings, to promote the availability of spectrum-based services to

rural communities. Satisfying this objective must include protection of existing rural services like Teton's.

There are important steps the Commission can take in this proceeding to protect rural operators, services, and consumers. Any Opt-Out adopted by the Commission should extend to all rural carriers who are offering bona fide services of any type in rural areas, whether or not they meet a pre-determined, arbitrary benchmark for penetration. The Commission must also ensure that the Opt-Out extends to all MDS and ITFS licenses that comprise an operating wireless system, and that the operator of that system can exercise the Opt-Out on behalf of all system licensees. In addition, the Commission should make clear that compensation for lost subscribers should be no less than current marketplace valuations for DSL or cable subscribers, whichever is applicable.

Teton urges the Commission to seriously consider the comments and reply comments filed by Teton and other rural operators in this proceeding, and adopt equitable rules, policies and procedures that will protect the operations and financial investment made by operators like Teton in reliance on their FCC licenses. FCC licenses confer valuable rights that are more than a mere privilege and induce licensees like Teton to make substantial capital investments. More guidance from the Commission may be necessary in order to guarantee just compensation for rural operators who may be deprived of the economically viable uses of their licenses due to new rules and regulations adopted by the Commission in this proceeding.

Finally, the FCC must not interfere with negotiated contractual rights contained in ITFS and MDS leases, and it must not void such leases under any circumstances. The FCC should continue to limit eligibility and prohibit ownership of this spectrum by cable operators and DSL providers in order to promote competition. The FCC should auction ITFS white space to any

and all interests, not just ITFS eligibles with “cut-off” applications. ITFS licensees should be permitted, at their sole discretion, to assign or lease their licenses to commercial system operators. BTA build out certifications that have already been filed by BTA authorization holders should entitle such licensees to a renewal expectancy under whatever new rules the FCC adopts for this service.

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To: The Commission

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

Teton Wireless Television, Inc. ("Teton") hereby submits its reply comments in response to the comments filed to the Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1</sup>

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<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"). All comments filed on Sept. 8, 2003 in this proceeding will hereinafter be short cited.

As Teton stated in its comments, it supports the Commission's goal of establishing regulatory policies that will promote competition, innovation and investment in the band that encompasses the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS"). Teton also supports the Coalition<sup>2</sup> proposal as the most viable alternative to transitioning use of the band, with certain clarifications. Teton urges the Commission to take note of the concerns raised by rural operators in this proceeding and to take a reasoned approach to adoption and implementation of rule changes in order to protect operators, like Teton, who are serving rural communities with advanced services today.

## **I. INTRODUCTION**

In its comments in this proceeding, Teton, a facilities-based provider of video and data services in four rural markets in Idaho and Montana, described its recent launch of wireless broadband data services and noted that it already had 400 data subscribers. Today, Teton is pleased to report that its data subscribers have doubled, and it is now bringing high-speed, wireless, broadband data service to 800 subscribers in Idaho and Montana. There is a backlog of demand for the high-speed wireless data service Teton offers. Teton also continues to offer a competitive choice to the satellite and franchised cable operators in its communities by offering fixed wireless video subscription services to more than 20,000 video subscribers in Montana and Idaho. 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 needed competitive choice to consumers in its rural markets.

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<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 Ass'n Int'l, Inc., Nat'l ITFS Ass'n, and Catholic Television Network, A Proposal for Revising the MDS and ITFS Regulatory Regime*, RM-10586 (filed Oct. 7, 2002) ("White Paper").

A recent article in *America's Network*, entitled "Rural Bright Spots" highlights the value of the service Teton provides (Teton is referred to in this article as Teewinot Wireless Data):

Teewinot is a bright spot in the telecom industry - one of many places that many industry watchers don't think to look, such as Lenora, Kansas, or Jonesboro, Arkansas. . . . Rural carriers are no longer your old-fashioned telephone company - in fact, some are more advanced than their larger counterparts in delivery video and high-speed data services. Video is a particularly strong cash cow for rural carriers. Many rural communities are without cable TV, leaving satellite as their only multi-channel video service option. [Donna] Nims of Teewinot Wireless Data says most of the company's markets have only spotty cable coverage, at best. "Without us, our customers don't have an option for video unless they're paying for a satellite dish," she says. "We overlap with cable companies in the towns, but overall only about 50% of the homes we pass are cabled." Teewinot's MMDS technology is particular well suited for remote rural areas. "We can service people within 30 miles of the headend," says Jason Wright, technical manager for the carrier. When Qwest, the local incumbent carrier, begins rolling out DSL, it often serves to [wet] customers' appetite for high-speed services, adds Wright. But often customers can't be served by DSL and turn to Teewinot instead. Teewinot, which began delivering video before it rolled out data services, has found it easier to both acquire and retain customers with a bundled offering. The Carrier plans to start offering video and data service in Jackson Hole, Wyoming; Sun Valley, Idaho; and Walla Walla, Washington later this year, and may add voice to its packages within the next 18 to 24 months.<sup>3</sup>

There are several important points to be gleaned from this excerpt. First, in the markets Teton serves, half of the homes have no access to cable, and Teton is the only alternative to the consumer purchasing an expensive satellite dish. Second, Teton can cost-effectively serve sparse populations, spread out over large geographic areas, with just one headend that can provide service to customers up to 30 miles away. This is critical to the viability of rural service. Third, when carriers begin offering DSL service in Teton's markets, the service is often unavailable to

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<sup>3</sup> Shira Levine, *Rural Bright Spots*, *America's Network*, Sept. 15, 2003, available at <http://www.americasnetwork.com/americasnetwork/article/articleDetail.jsp?id=69279>.

Teton's customers. Teton brings video and high speed data services to customers who are typically overlooked, unserved, and on the wrong side of the digital divide.<sup>4</sup>

Over the past ten years, Teton has invested more than \$18 million in licensing, constructing and deploying fixed wireless systems in rural markets in Idaho and Montana. As described above, Teton is, today, deploying advanced facilities-based services in four rural communities, it is providing competition to cable and DSL service, and it is promoting the availability of broadband service to unserved rural Americans by actively building and operating wireless, fixed, broadband systems. 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. Teton urges the Commission, in this proceeding, to protect its rural operations and customers.

## **II. THE COALITION PROPOSAL IS THE MOST VIABLE OF ALL THE TRANSITION PLANS DISCUSSED; OPERATORS LIKE TETON WHO ARE SERVING THE PUBLIC MUST HAVE AN OPT-OUT**

Teton supports the Coalition proposal and believes that the transition plan detailed in the *White Paper* is the most viable of all the transition plans discussed as part of this proceeding. Teton supports the Coalition's market-driven approach in which a transition will not occur until a proponent determines that marketplace conditions call for a transition in a given market. As Sprint characterized it in its comments, the Coalition proposal provides for the "gradual evolution of services on a market by market basis."<sup>5</sup> Most importantly, Teton supports the Coalition proposal to include an Opt-Out right for operators like Teton who are serving the public.

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<sup>4</sup> For a discussion of the origin, evolution and current policy issues surrounding the phrase "digital divide" see generally, N. Allard, *Digital Divide: Myth, Reality, Responsibility*, 24 Hastings Comm. & Ent. L. J. 449 (2002).

In contrast to the Coalition approach, commenters who advocate for a transition to a new band plan or new power limitations by a date certain have no regard for preserving the needed services that operators like Teton provide. Some of these commenters are licensees who have launched, but have not succeeded in sustaining, successful businesses on the spectrum. Operators like Teton, who have built such businesses and provide competitive choice to consumers in rural markets, should not be penalized for the failures of others. The Commission must not require all MDS and ITFS licensees to transition to a new band plan or new power limitations by a date certain. Such an unnecessarily rigid, one-size-fits-all approach would impede and disrupt rural service and is contrary to the public interest.

Similarly, commenters who advocate the imposition of across-the-board power limitations, or that the entire band should be assigned for low power mobile uses, and who also advocate that television services should not be permitted after a sunset date, have no regard for what these important services mean to families in rural Montana and Idaho. Furthermore, these commenters have no appreciation for the technical reality of providing service in rural areas. A low-power cellular architecture is not financially feasible in rural markets. It is too expensive to deploy multiple cell sites to serve sparse populations. As the Coalition points out, across the board signal strength reductions will make it impossible to continue most services offered over high-power systems. Converting high-site, high-power video operations to cellular network technology is not practical or economically feasible.

While Teton supports the Coalition proposal, it is not prepared to make the transition to a new band plan today because it is serving the public. The segmented band plan does not offer enough channels in the Middle Band System (“MBS”) to support Teton’s rural video and data service. If Teton is forced to involuntarily convert its spectrum to a segmented band plan, Teton

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<sup>5</sup> Comments of Sprint Corporation at 6.

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, cost Teton millions of dollars, and increase prices to its rural customers.

For this reason, the Opt-Out that is part of the Coalition proposal is critical to Teton and similarly situated operators. There are aspects of the Opt-Out, however, that require clarification and, perhaps, modification for rural operators.

### **III. THE COMMISSION SHOULD ADOPT DIFFERENT OPT-OUT STANDARDS FOR RURAL MARKETS**

In other ongoing proceedings, the Commission is focused on promoting the availability of spectrum-based services to rural communities. Indeed, Sections 309(j)(3), (4) of the Communications Act directs the Commission to promote the development and deployment of spectrum-based services to rural areas.<sup>6</sup> In keeping with this directive, at its September 10, 2003 Open Meeting, the FCC adopted a *Notice of Proposed Rulemaking* that focuses on promoting wireless services in rural areas.<sup>7</sup> The *Rural NPRM* proposes to modify FCC rules and policies regarding spectrum allocation and management to promote deployment of spectrum-based services in rural America.<sup>8</sup> Similarly, one of the primary motivators behind the Commission's *Secondary Markets Initiative* is to "enable development of additional and innovative services in

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<sup>6</sup> 47 U.S.C. §§ 309(j)(3), (4).

<sup>7</sup> *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, Notice of Proposed Rulemaking, WT Docket No. 03-66, FCC 03-222 (Oct. 6, 2003) ("*Rural NPRM*").

<sup>8</sup> *Id.* at ¶1.

rural areas.”<sup>9</sup> As the Commission stated in the *Secondary Markets Initiative*: “Facilitating the ability of rural telephone companies and other entities to gain access to spectrum usage rights so that they can provide new and advanced services to rural consumers should help our efforts to promote the further development and delivery of spectrum-based services to rural communities.”<sup>10</sup> Given these initiatives, the Commission cannot intend in this proceeding to adopt regulations that will thwart the efforts of rural operators, like Teton, who are providing needed and valued advanced services in rural areas today. In adopting the Coalition proposal, there are some important steps the Commission can and should take to protect rural operators, services, and consumers.

**A. *The “MVPD” and 5% Penetration Requirements are Inappropriate for Rural Markets***

The Commission should adopt a different Opt-Out standard for operators like Teton who provide service in rural areas. The Opt-Out should extend to all rural carriers, not just Multi-Channel Video Program Distributors (“MVPDs”). The Coalition seems to agree with this point in the *Supplement* to its *White Paper*.<sup>11</sup>

In addition, the Opt-Out should extend to carriers in rural areas, or Rural Service Areas, who are offering bona fide services in these communities whether or not they meet a pre-determined, arbitrary benchmark for penetration. The five percent (5%) penetration benchmark

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<sup>9</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, FCC 03-113, ¶2 (Oct. 6, 2003) (“*Secondary Markets Initiative*”).

<sup>10</sup> *Id.* at ¶45.

<sup>11</sup> In the Coalition’s *Supplement*, submitted to the Commission on November 14, 2002, it stated that all subscribers to an MVPD system, should be counted for purposes of the Opt-Out: “[T]here has been some concern expressed as to whether those subscribers who only receive Internet access service from an MVPD that offers both video programming and Internet access should be counted towards the 5% benchmark. Appendix B did not specifically address that issue and, to eliminate any concern, WCA, NIA and CTN believe that all subscribers to an MVPD system should be counted towards the benchmark, including those that only subscribe to an Internet access service.” See *Wireless Communications Ass’n Int’l, Inc., Nat’l ITFS Ass’n, and Catholic Television Network, First Supplement to A Proposal for Revising the MDS and ITFS Regulatory Regime*, RM-10586, at 5 (filed Nov. 14, 2002) (“*Supplement*”).

advocated by the Coalition may be appropriate for urban markets, but it is unworkable for rural markets. The way the benchmark is conceived in the *White Paper*, operators like Teton would need to demonstrate penetration of five percent (5%) throughout its Geographic Service Area (“GSA”), whether the GSA is a Protected Service Area or a Basic Trading Area (“BTA”), in order to qualify for the Opt-Out. In rural markets and some western BTAs, in which the population is sparse and spread over a large geographic area, this standard is difficult to achieve. Even a successful rural operator like Teton has difficulty meeting five percent (5%) penetration in all markets. Teton can readily meet the standard with respect to its Twin Falls and Idaho Falls, Idaho BTAs, but it barely makes the standard in Missoula, Montana and it does not meet the standard in Pocatello, Idaho. Still, Teton is offering a bona fide, valuable service in Missoula and Pocatello, that includes both wireless video and wireless broadband data, and Teton should be entitled to an Opt-Out in these markets. The Commission cannot be in a position of essentially saying to the residents of Missoula and Pocatello that service to them, through no fault of their own, is not as worthy of protection as service to the residents of Twin Falls and Idaho Falls. Teton is serving the video and broadband needs of residents in each of these markets and must be afforded the option of Opting-Out of any required spectrum transitions in each.

**B. *The Commission Should Ensure that the Opt-Out Right Extends to All System Licensees and that the Measure of Compensation for Lost Subscribers is Fair***

The Commission must ensure that the Opt-Out extends to all MDS and ITFS licenses that comprise an operating wireless system, and that the operator of that system, who holds the authorizations or lease rights for the spectrum, can exercise the Opt-Out on behalf of all system licensees. Anything less would threaten the viability of systems, like Teton’s, that are providing service to the public today. Each license is key and integral to the functioning of the system.

In addition, to the extent Teton exercises the Opt-Out, and a spectrum holder in a nearby market begins the Transition Planning Process, and Teton is “required” to participate in the Transition Planning Process which could result in a *de minimus* reduction in Teton’s actual subscribers, the “marketplace rates” used for compensation for lost subscribers should be no less than current marketplace values for DSL or cable subscribers, whichever is applicable.<sup>12</sup>

**IV. THE RECORD MAKES CLEAR THAT OTHER RURAL OPERATORS SHARE TETON’S SUCCESSES AND CONCERNS ABOUT IMPLEMENTATION OF NEW RULES; THE COMMISSION MUST PROTECT RURAL SERVICES, OPERATORS AND CONSUMERS IN THIS PROCEEDING**

One of the Commission’s objectives in this proceeding is to promote the availability of broadband for all Americans.<sup>13</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>14</sup>

Many rural commenters in this proceeding discussed the significant capital that they have invested to deploy wireless broadband services in the band and expressed distinct concern over whether the Commission will protect the businesses they have built in reliance on their FCC licenses. These operators support the view of the Spectrum Policy Task Force that as part of this

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<sup>12</sup> *White Paper*, Appendix B at 18.

<sup>13</sup> *NPRM*, 18 FCC Rcd at 6740 ¶ 33.

<sup>14</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).

proceeding, the Commission should consider and adopt different standards and protections for rural MDS incumbents who are serving the public with valuable advanced wireless services today. The following are excerpts of some of the important comments filed in this proceeding by rural commenters:

Rather than require rural MDS carriers to reduce their signal strength or have fewer channels available to them, they should be permitted to utilize their own band plan. . . . These rural carriers should also have the flexibility to convert their operations to a low-power cellular band plan when and if technology and market conditions make it possible and necessary to do so. Spectrum is typically less congested in rural areas and greater flexibility is possible and warranted. Rather than mandate low-power operations, the Commission should permit rural carriers to determine what operations will best suit their customers.<sup>15</sup>

The Commission should allow market forces to determine deployment of advanced wireless services to rural areas. The rural broadband market is developing in a reasonable and timely manner in the absence of any such requirements.<sup>16</sup>

The Rural Commenters are concerned that the proposed new band plans will impose excessive and disruptive costs upon incumbent rural MDS licensees and their customers. These concerns are greatest if fledgling wireless broadband service providers are forced to move to new frequency bands. . . . the problem is that the Rural Commenters and other MDS licensees have already spent millions of dollars to implement wireless broadband MDS services, and will have to spend additional millions pursuant to the proposed changes to the MDS band plan. Particularly in the rural areas served by the Rural Commenters, broadband MDS margins are small and business plans have not included expenditures of substantial sums for frequency relocations. . . . if an MDS licensee is involuntarily forced to transition to a new frequency band, the entity pulling the transition trigger (the “cost-causer”) should bear the costs associated with the elimination of interference.<sup>17</sup>

By now W.A.T.C.H. TV’s story is well known to the Commission. After nearly twelve years and well over \$20,000,000 of its own investment, W.A.T.C.H. TV has successfully transformed its operations from the 11-channel analog video-only service it launched in 1992 into a state-of-the-art network that utilizes all available MDs and ITFS spectrum to provide over 200 channels of digital

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<sup>15</sup> Comments of the National Telecommunications Cooperative Association at 4.

<sup>16</sup> Comments of BellSouth at iii.

<sup>17</sup> Comments of Consolidated Telecom, Polar Communications Mutual Aid Corporation, Santel Communications Cooperative, Inc. (“Rural Commenters”) at 2, 7.

video and audio programming and high-speed Internet access to more than 12,500 households through the Lima market. . . . W.A.T.C.H. TV's success, however, will be for naught if the Commission's response to the *NPRM* is to effectively prevent W.A.T.C.H. TV from maintaining its existing services to consumers. . . . Yet, reverse field and put W.A.T.C.H. TV out of business is exactly what the *NPRM* suggests the Commission might do. The *NPRM* is riddled with suggestions that the Commission intends to force the elimination of all high-power, high-site use of the 2500-2690 MHz band by some date-certain in the future, seeking comment on a variety of means to that end. To W.A.T.C.H. TV, the differences between the proposed timetables to a mandatory transition to cellular architecture are of no moment, since no matter when it occurs any mandatory transition to cellular architecture would sound the death knell for W.A.T.C.H. TV.<sup>18</sup>

VCI is a company that has successfully and profitably provided broadband services to both urban and rural customers, working within the existing MMDS and ITFS rules and band structure. As such, it is our concern that any changes to these rules and band structure be carefully thought out, so as to not penalize operators who have already invested millions of dollars in deploying services in reliance upon the Commission's existing rules and the protections proffered by the Commission to licensed spectrum holders. . . . VCI is opposed to the establishment of a timetable for conversion of the entire 2500-2690 MHz band to low-power operations, as mentioned in Paragraph 46 of the *NPRM*. VCI contends that any rule change that would enable the imposition of an involuntary conversion to a new band plan would be inequitable toward licensees that have invested in acquisition and development of MMDS licenses, particularly BTA licenses which were purchased at auction, in reliance upon the then-existing FCC rules. . . . In Paragraph 1 of the Coalition Plan, it is proposed that Proponents pay the conversion costs of all affected ITFS operators. We propose that this compensation requirement be extended to affected non-Proponent MMDS licensees and operators, as well.<sup>19</sup>

The Spectrum Policy Task Force stated in its recent report that "a level of certainty regarding one's ability to continue to use spectrum, at least for some foreseeable period, is an essential prerequisite to investment, particularly in services requiring significant infrastructure and lead time." That is true of MDS and ITFS. The Commission should not expect facilities based carriers or wholesale users such as EarthLink to seriously consider relying on MDS/ITFS spectrum for broadband service if they have no certainty that the underlying network will be protected from harmful interference.<sup>20</sup>

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<sup>18</sup> Comments of W.A.T.C.H. TV Company at 1-3.

<sup>19</sup> Comments of Virginia Communications, Inc. at 2.

<sup>20</sup> Comments of EarthLink, Inc. at 13.

Grand concludes that the interest of the *rural* public, a segment of the country's population whose telecom needs is often more difficult and more expensive to meet, differs from its urban brethren and therefore requires somewhat different considerations from the Commission in its rules making process.<sup>21</sup>

The Rural Commenters urge the Commission not to adopt any new rules, procedures or policies that may jeopardize the operation of, or cause harmful interference to, existing video systems currently providing service to rural and otherwise unserved areas through the use of MDS and ITFS licenses in the 2.1 and 2.5 GHz spectrum bands. Such systems provide much-needed service to rural subscribers, many of whom would not otherwise have access to local over-the-air network broadcasts, cable news outlets, and educational and public interest programming without "wireless cable" service, and the Commission should not force rural licensees to abandon these systems because of the adoption of a new band plan or a new set of service rules. In order to protect rural video subscribers, the Commission should not require mandatory transition to a new and plan prior to December 31, 2012, a date by which all current incumbent MDS, ITFS and MDS Basic Trading Area ("BTA") authorizations will have expired and will have been considered for renewal by the Commission.<sup>22</sup>

Teton urges the Commission to seriously consider the comments and reply comments filed by Teton and other rural operators in this proceeding, and adopt equitable rules, policies and procedures that will promote competition, innovation and investment in wireless broadband while, at the same time, protecting the operations and financial investment made by operators like Teton in reliance on their FCC licenses. 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>23</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

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<sup>21</sup> Comments of Grand Wireless Company, Inc.-Michigan at 1 (Aug. 26, 2003).

<sup>22</sup> Comments of Adams Telecom, Inc., Central Texas Communications, Inc., & Leaco Rural Telephone Cooperative, Inc. at 2.

<sup>23</sup> *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 217 (D.C. Cir. 1939) (emphasis added).

definite term to conduct a broadcasting business requiring . . . substantial investment is *more than a mere privilege or gratuity.*”<sup>24</sup> More guidance from the Commission may be necessary in order to guarantee just compensation for rural operators who may be deprived of the economically viable uses of their licenses due to new rules and regulations adopted by the Commission in this proceeding.<sup>25</sup>

## V. MISCELLANEOUS

Finally, Teton responds to some of the specific comments filed by others in this proceeding. First, the FCC must not interfere with the negotiated contractual rights contained in ITFS and MDS leases, and it must not void such leases under any circumstances. Teton and other operators rely on these leases, and the leased spectrum, and have built businesses in reliance on the negotiated long-term availability of this leased spectrum. All leased spectrum is integral to the service offered by operators like Teton, and is just as important to rural service as the spectrum that is licensed to operators like Teton.

Second, Teton agrees with EarthLink and others that the FCC should continue to limit eligibility and prohibit ownership of this spectrum by cable operators and DSL in order to promote competition. As EarthLink stated in its comments:

The Commission’s own analysis also shows that a cross ownership ban is appropriate on policy grounds. As discussed in the *NPRM*, the Commission’s information indicates that the Herfindahl-Hirschman Index (HHI) for the “typical broadband internet market” ranges from 4500 to more than 6000. According to the *Horizontal Merger Guidelines* issued by the Federal Trade Commission and the Department of Justice, markets in which the HHI is in excess of 1800 points are considered to be highly concentrated, and

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<sup>24</sup> *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948) (emphasis added) (citation omitted).

<sup>25</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). For further exploration of these issues, see Comments of Teton at 12-15.

transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns. Even in the case of an ILEC with only 31% of the broadband internet market in its incumbent service territory, the purchase of the MDS and ITFS spectrum would likely result in an increase of more than 2% of the market for that DSL provider, with the result that the acquisition of that spectrum would presumptively be anti-competitive under the *Horizontal Merger Guidelines*. As a result, a cross ownership restriction would be clearly justified on policy grounds.<sup>26</sup>

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 must refrain from opening eligibility 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. 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.

Third, Teton agrees with most commenters in this proceeding that the FCC should not allow unlicensed underlay operations in the band.

Fourth, the FCC should auction ITFS white space to any and all interests, not just ITFS eligibles with "cut-off" applications. Many ITFS eligibles have been precluded from applying for ITFS frequencies because of the freeze on new station applications that has been in effect for many years. Whether ITFS auctions occur or not, ITFS licensees should be permitted, at their sole discretion, to assign or lease their licenses to commercial system operators. The FCC should also assign ITFS white space spectrum on a BTA basis consistent with the regime used for MDS.

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<sup>26</sup> Comments of Earthlink, Inc. at 17-18 (quoting NPRM, 18 FCC Rcd at 6774-75 ¶¶ 123-124) (citing *1992 Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, § 1.51, available at [http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/15.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html)) (visited September 5, 2003). The HHI for a market with an incumbent cable operator providing 65% of the broadband internet service and the ILEC providing 31% of the broadband internet

Finally, Teton agrees with Sprint that BTA build out certifications that have already been filed by BTA authorization holders should entitle such licensees to a renewal expectancy under whatever new rules the FCC adopts for this service.

Respectfully submitted,

**TETON WIRELESS TELEVISION, INC.**

\_\_\_\_\_  
/s/

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October 23, 2003

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service using DSL would go from an HHI of 5186 to an HHI of 5314, an increase of 128 points, if the DSL provider's market share increased by 2% to 33%.)

## CERTIFICATE OF SERVICE

I, Caitlin A. Coyle, do hereby certify that I have on this 23rd day of October, 2003, had copies of the foregoing **REPLY COMMENTS of TETON WIRELESS TELEVISION, INC.** delivered to the following via electronic mail:

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