

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Promoting Efficient Use of Spectrum Through) WT Docket No. 00-230
Elimination of Barriers to the Development of)
Secondary Markets)

To: The Commission

**JOINT COMMENTS OF
THE NATIONAL ITFS ASSOCIATION
AND THE CATHOLIC TELEVISION NETWORK**

The National ITFS Association (“NIA”) and the Catholic Television Network (“CTN”), by their attorneys, hereby submit these joint comments in response to the Commission’s *Report and Order and Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above captioned proceeding.¹ The *FNPRM* is intended to facilitate the development of secondary markets among a broad range of incumbent licensees in order to promote more flexible and efficient use of spectrum.²

These comments focus on questions raised in paragraphs 307 and 308 of the *FNPRM* concerning the possibility of extending the secondary market polices adopted in this proceeding to Instructional Television Fixed Service (“ITFS”) licensees regulated under Part 74 of the Commission’s rules. As discussed below, NIA and CTN support the extension of the polices adopted in this proceeding to ITFS, subject to three important caveats. First, in order to preserve the educational nature of ITFS, the substantive use

¹ *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, FCC 03-113 (rel. October 6, 2003) (“*FNPRM*”).

requirements applicable to ITFS leasing must remain unchanged. Second, in order to avoid unnecessary and disruptive changes to existing ITFS contractual relationships, new rules and policies should be applied on a prospective basis only. Third, the Commission should clarify that ITFS lease agreements may continue to have a maximum term of 15 years, subject to license renewal.

I. INTRODUCTION

A. NIA and CTN

NIA, established in 1978, is a non-profit, professional organization of ITFS licensees, applicants and others interested in ITFS. The goals of the NIA are to gather and exchange information about ITFS, to act as a conduit for those seeking information or assistance about ITFS, and to represent the interests of ITFS licensees and applicants. CTN, established in 1967, is an association of Roman Catholic archdioceses and dioceses that operate many of the largest parochial school systems in the United States. CTN's members use ITFS frequencies to distribute educational, instructional, inspirational, and other services to schools, colleges, parishes, community centers, hospitals, nursing homes, residences, and other locations. Collectively, CTN's members serve over 600,000 students and 4,000,000 households throughout America.

B. Use of ITFS Spectrum

ITFS spectrum was set aside for educational use in 1963. Today, there are thousands of ITFS stations operating in the 2500-2690 MHz band serving millions of students and lifelong learners throughout the United States. Approximately 1,275 entities hold about 2,400 ITFS licenses for stations utilizing some 8,000 ITFS channels. Licensees include state government agencies, state universities and university systems,

² *FNRPM* at ¶ 214.

public community and technical colleges, private universities and colleges, public elementary and secondary school districts, private and parochial schools, public television and radio stations, hospitals and hospital associations, and private, non-profit educational entities.

C. Secondary Market for ITFS Spectrum

As the Commission is well aware, ITFS spectrum is unique because there *already exists* an active secondary market for this spectrum as a result of rules and policies adopted by the Commission two decades ago.³ These rules and policies were designed to facilitate the delivery of enhanced educational services and to spur multi-channel video competition. As a result, the Commission permitted, and indeed encouraged, ITFS licensees to share capacity on their ITFS stations for non-ITFS uses.⁴ Today, under a typical lease arrangement, an ITFS licensee will lease a portion of its channel capacity to a commercial entity in return for financial, technical, and operational support.⁵

The Commission's policies for ITFS leasing developed both by rule making and through case-by-case determinations. ITFS excess capacity leases must be submitted to the Commission for review and, while the Commission's practice has not always been consistent, it has formally approved many such leases (in some cases after requiring

³ See *FNPRM* at ¶ 80 n. 169.

⁴ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Service, the Multipoint Distribution Service, and the Private Operational Fixed Service, *Report and Order*, 94 FCC 2d 1203 (1983), *recon. denied*, 98 FCC 2d 129 (1984).

⁵ As new technologies evolve, more ITFS licensees may want to "piggy-back" their educational use of the spectrum on the commercial operator's wireless platform rather than attempting to construct stand-alone educational systems. This is because in a cellularized broadband environment, greater spectrum efficiencies may be achieved if a single entity can take full advantage of rules that permit channels to be leased, subdivided, and combined.

substantive changes in lease terms). The most significant substantive requirements that apply to ITFS leases at this time are as follows: (i) there must be certain minimum educational uses of ITFS spectrum (typically, a minimum of 20 hours per 6 MHz channel per week); (ii) for analog facilities, there must be a right to “recapture” an additional amount of capacity for educational purposes (typically, 20 more hours per channel per week); for digital facilities, the licensee must reserve at least 5% of its transmission capacity for educational purposes; (iii) the lease term may not exceed 15 years; (iv) the ITFS licensee must retain responsibility for compliance with FCC rules regarding station construction and operation; (v) only the ITFS licensee can file FCC applications for modifications to its station’s facilities; and (vi) the ITFS licensee must retain some right to acquire the ITFS transmission equipment, or comparable equipment, upon termination of the lease agreement.

As the *FNPRM* acknowledges, the policies applicable to ITFS are “unique to this leasing environment.”⁶ They are unique because they are intended to preserve educational use of ITFS spectrum – a goal which is not applicable to other wireless services. In addition, while a typical ITFS lease agreement is generally consistent with the Spectrum Manager leasing model described in the *FNPRM*,⁷ the level of “active, ongoing oversight,” particularly when transmission facilities are owned and operated by commercial lessees, may not rise to the level contemplated under the policies adopted in this proceeding. Nevertheless, the Commission consistently has approved such

⁶ *FNPRM* at ¶ 307.

⁷ See *FNPRM* at ¶12 (Under the spectrum manager leasing option, “the licensee acts as a ‘spectrum manager’ with regard to the spectrum rights it chooses to lease. ... The licensee must retain both *de jure* control of the license and *de facto* control of the leased spectrum. As noted above, *de facto* control requires the licensee to maintain an active, ongoing oversight role to ensure that the spectrum lessee complies with the Communications Act and all applicable Commission policies and rules.”).

agreements, and NIA and CTN believe they are consistent with ITFS licensees' obligations under the Communications Act.

D. Extending the New Leasing Models to ITFS

Because the existing secondary market for ITFS spectrum has proven beneficial for both educational lessors and commercial lessees, and because the existing rules and policies applicable to ITFS are consistent with the Communications Act, there is no legal imperative to change the existing rules and policies. Nonetheless, NIA and CTN understand that there may be inefficiencies and perhaps some confusion if the Commission's policies applicable to ITFS differ from those applicable to other wireless services.

Moreover, some ITFS licensees may prefer the Spectrum Manager model over existing lease arrangements as a means of clarifying existing ambiguities concerning licensee responsibility and liability. Other ITFS licensees may prefer the De Facto Transfer model, as a means of turning over more direct operational control and responsibility to their commercial lessees.⁸ The De Facto Transfer model may be particularly useful when a commercial lessee operates multiple cellularized digital facilities providing two way mobile or portable data or voice services because, in such a situation, it can be difficult for an ITFS licensee to provide effective oversight.

II. THE SUBSTANTIVE USE REQUIREMENTS APPLICABLE TO ITFS LEASING MUST REMAIN UNCHANGED

In order to preserve the educational nature of ITFS, it is *imperative* that if the leasing policies adopted in this proceeding are extended to ITFS, appropriate adjustments

⁸ See *FNPRM* at ¶ 13 (Under the *de facto* transfer leasing option, the "spectrum lessee, rather than the licensee, exercises *de facto* control of the leased spectrum. ... The licensee retains *de jure*, or legal control

be made to ensure that the substantive use requirements applicable to ITFS remain in place. Stated differently, the Commission must ensure that its secondary market policies do not erode the educational nature of ITFS spectrum.⁹

In this regard, the record in WT Docket No. 03-66¹⁰ unequivocally demonstrates the importance of the educational use requirements for ITFS. In WT Docket No. 03-66, the Commission asked several questions concerning potential rule changes that would affect current ITFS leasing requirements. For example, the Commission asked whether different educational use requirements should henceforth be applied to ITFS licensees.¹¹ In response, there was widespread support for the proposition that the Commission should not make substantive changes to the requirements for ITFS lease agreements.¹² Changes to ITFS leasing rules are not necessary for secondary markets to function properly. Moreover, if changed requirements are applied retroactively, they would have a chilling effect on the future leasing of ITFS and other spectrum.¹³

of the leased spectrum and may impose other terms and conditions on the lessee, as agreed to by the parties.”).

⁹ For example, the policies adopted in this proceeding allow wireless licensees to lease “any amount of spectrum” to a third party. *See e.g.*, FNPRM at ¶ 13. However, such a policy would be flatly inconsistent with the Commission’s ITFS rules, which require licensees to reserve a portion of their spectrum for educational use.

¹⁰ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003) 18 FCC Rcd 6722 (2003).

¹¹ 18 FCC Rcd 6722, 6771.

¹² *See e.g.*, Joint Comments of the NIA, CTN, and the Wireless Cable Association, International in WT Docket No. 03-66, filed September 8, 2003 (“Coalition Joint Comments”) at 128-132; Joint Comments of ITFS Parties in WT Docket No. 03-66, filed September 8, 2003, at 4; Comments of Sprint Corporation in WT Docket No. 03-66, filed September 8, 2003, at 19.

¹³ *See e.g.*, Coalition Joint Comments, at 129 (“The Commission should not interfere with these existing leases... Indeed, a retroactive change in the leasing rules would have a chilling effect on future leasing of

NIA and CTN continue to believe that the current substantive requirements for ITFS leasing serve ITFS licensees, their current and prospective leasing partners, and the public interest in the preservation of ITFS spectrum for educational purposes. Thus, if the Commission determines to apply its newly adopted secondary markets policies to ITFS leasing, it should do so in a way that preserves the existing substantive requirements unique to that context.

III. NEW RULES SHOULD BE PROSPECTIVE AND EXISTING LEASES SHOULD BE GRANDFATHERED

If the Commission chooses to apply its new secondary market policies to ITFS, NIA and CTN urge that it do so only prospectively. Specifically, NIA and CTN propose that following the effective date of any new rules, all new ITFS lease agreements be required to comply with the new requirements. However, all ITFS lease agreements executed prior to the effective date should be “grandfathered” so long as they continue in effect.¹⁴ This status should continue for the remaining term of any grandfathered lease (including any extensions thereof not to exceed the current ITFS lease term limit of 15 years), even if the lease is amended so long as such amendments do not modify substantive lease provisions affecting control of ITFS spectrum and facilities.

If the Commission fails to grandfather existing ITFS leases, hundreds of such leases now in effect would need to be modified, and the nature of the obligations and responsibilities of the parties thereunder would be changed. This would place a significant unnecessary burden on ITFS licensees and their lessees to undertake a review

ITFS and other spectrum – if secondary markets are to work, the Commission must provide lessees with absolute certainty...”).

¹⁴ Grandfathered status would mean that such agreements would not have to comply with Subpart X of Part 1 of the FCC’s rules.

of affected leases, agree on matters that need to be changed, and negotiate appropriate changes. Given that existing leases were lawful when signed, and were filed and often approved by the Commission, there is no reason to force changes to such leases until they expire or are voluntarily changed by the parties.

VI. LEASE TERM

There is language in the *FNPRM* suggesting that leasing arrangements under the new secondary markets regime are limited in time to the term of the license of the spectrum being leased.¹⁵ Although the rules do not specifically so provide, there are provisions in the rules contemplating extension of leases into a new license term, subject to Commission renewal of the pertinent license and a notification procedure.¹⁶ Taken together, these provisions appear inconsistent with the current, carefully considered allowable term for ITFS lease agreements, which is 15 years (assuming the ITFS license is renewed).

It is unclear whether this is what the Commission intended. If so, it is particularly important that both existing ITFS leases (which NIA and CTN urge be grandfathered), and future ITFS leases, be permitted to extend up to 15 years (subject, of course, to license renewal). At the time of the adoption of the 15-year limitation (which was raised from the previous limit of 10 years), the Commission determined, after careful consideration, that lease terms of up to 15 years were appropriate and necessary to permit commercial lessees to recoup their substantial capital investments, to put commercial systems on an even footing with competing systems, and to provide greater certainty to

¹⁵ *FNPRM* at ¶ 42.

¹⁶ See Sections 1.9010(l) and 1.9030(k) of the new rules.

ITFS licensees.¹⁷ These factors continue to support allowing ITFS leases to run for 15 year terms, if both parties to the lease so agree.

Respectfully submitted,

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¹⁷ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112, 19183 (1998).

CERTIFICATE OF SERVICE

I, Nadine Curtis, hereby certify that copies of the foregoing Joint Comments of the National ITFS Association and the Catholic Television Network have been served by Hand or by First Class Mail this 5th day of December, 2003, on the following:

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