

January 7, 2004

The Hon. Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *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* – WT Docket No. 03-66 -- **WRITTEN EX PARTE PRESENTATION**

Dear Chairman Powell:

On behalf of the National ITFS Association (“NIA”), the Catholic Television Network (“CTN”), and the Education Community (“EC”), which collectively represent the vast majority of Instructional Television Fixed Service (“ITFS”) licensees in the United States, we are writing to reemphasize our strong opposition to the proposal by New America Foundation (“NAF”) that the Commission reverse its own recent decision in ET Docket No. 00-258 to preserve the ITFS spectrum allocation and instead reallocate 90 MHz of ITFS spectrum at 2500-2590 MHz band for unlicensed use.¹

It appears that NAF has a short memory. Not long ago, the Commission removed a nearly four-year cloud over the future of ITFS when it rejected suggestions that the Commission reallocate the 2500-2690 MHz band for IMT-2000 or, alternatively, mobile satellite services.² In so doing, the Commission found that “consideration of [the 2500-

¹ See, e.g., Reply Comments of New America Foundation, Media Access Project, *et al.*, WT Docket No. 03-66, at 7, 23-25 and 40-41 (filed Oct. 23, 2003) (“NAF Reply Comments”). NIA is a non-profit, professional organization of ITFS licensees, applicants and others interested in the ITFS. The goals of 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 is an association of Roman Catholic archdioceses and dioceses that operate many of the largest parochial school systems in the United States. In total, CTN’s members operate ITFS facilities that serve over 500,000 students and 4,000,000 households throughout the United States. As the Commission is aware, NIA and CTN, in coalition with the Wireless Communications Association International, Inc., submitted the white paper that eventually gave rise to the Commission’s *Notice of Proposed Rulemaking* in this proceeding. See “A Proposal for Revising the MDS and ITFS Regulatory Regime,” Wireless Communications Ass’n Int’l, Nat’l ITFS Ass’n and Catholic Television Network, RM-10586 (filed Oct. 7, 2002) (“Coalition Proposal”). EC is comprised of national education organizations that collectively represent virtually all of the interests of elementary and secondary schools, community colleges and universities, some of whom hold ITFS licenses and all of whom benefit from the educational services ITFS facilities provide. A detailed description of EC’s membership is attached hereto as Exhibit A.

² The possibility that ITFS spectrum might be reallocated for IMT-2000 services was raised during the United States’ preparations for the 2000 World Radiocommunication Conference (“WRC-2000”). See, e.g., International Telecommunication Union Radiocommunication Study Groups, “United States of America IMT-2000 Survey on Spectrum Utilization,” Document 8-1/TEMP/112-E, p. 19, 30 (Feb. 20,

2690 MHz] band for advanced wireless services has created uncertainty about the future of the broadband fixed services being developed under the current [MDS/ITFS] allocation and service rules,” and that it was “important to remove this uncertainty.”³ Thus, finding that “the 2500-2690 MHz band *is extensively used by incumbent ITFS and MMDS licensees,*” and that “the services currently being provided and planned in the 2500-2690 MHz band . . . *have significant value,*” the Commission decided not to reallocate any of the 2500-2690 MHz band for other services.⁴ Instead, the Commission added a mobile allocation for the 2500-2690 MHz band to give MDS/ITFS the same sort of flexibility that is driving efficient utilization of other wireless spectrum.⁵

Importantly, the Commission recognized at that time that that its rules did not permit MDS and ITFS licensees to take advantage of the flexibility it was affording them. Specifically, the Commission stated that “*we will have to explore in a separate future proceeding the service rules that will apply to permit mobile operations in the band.*”⁶ That “separate future proceeding,” of course, is the Commission’s *Notice of Proposed Rulemaking* (“NPRM”) in WT Docket No. 03-66. As the Commission made clear in the *NPRM*:

1998); International Telecommunication Union Radiocommunication Study Groups, “United States of America IMT-2000 Survey on Spectrum Utilization,” Document 8-1/USA/24-E, p. 4 (Oct. 29, 1998); International Telecommunication Union Radiocommunication Study Groups, “Proposed Text for Section 1.1 of the Draft CPM Report to WRC-2000,” Document 8-1/TEMP/164-E, Table 4, p. 3 (Mar. 18, 1999). Shortly before WRC-2000, the Satellite Industry Association filed a petition for rulemaking requesting that the Commission reallocate the 2500-2520 MHz and 2670-2690 MHz bands for the Mobile Satellite Service. *See* Petition for Rulemaking filed by the Satellite Industry Association, RM-9911 (filed Apr. 28, 2000). WRC-2000 subsequently identified the 2500-2690 MHz band, among others, as possible spectrum for IMT-2000 services. *See* Provisional Final Acts of the World Radiocommunication Conference (Istanbul, WRC-2000). Thereafter, the Cellular Telecommunications & Internet Association filed a petition for rulemaking requesting that the Commission begin the process of designating additional spectrum for IMT-2000 services in a manner consistent with the decisions adopted at WRC-2000. *See* Petition for Rulemaking filed by the Cellular Telecommunications & Internet Association, RM-9920 (filed July 12, 2000). The Commission launched that rulemaking on January 5, 2001, and on September 24, 2001 issued its decision preserving the MDS/ITFS allocation at 2500-2690 MHz in its entirety. *See Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 16 FCC Rcd 596 (2001); *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 16 FCC Rcd 17222 (2001) (“*AWS First Report and Order*”).

³ *AWS First Report and Order*. 16 FCC Rcd at 17223.

⁴ *Id.* at 17223, 17238 (emphasis added) (footnotes omitted)

⁵ *Id.* at 17236-7.

⁶ *Id.* at 17238 (emphasis added); *see also id.* at 17237 (“[W]e emphasize that existing technical rules, including interference rules, will be maintained until a rulemaking proceeding has been completed that will address any changes to those rules that may be necessary.”)

The rule changes proposed in this *NPRM* would facilitate the provision of high-speed data and voice services accessible to mobile as well as fixed users on channels that today are used primarily for one-way video operations to fixed locations. . . *We emphasize, however, that we do not intend to evict any incumbent licensees from the affected band if they have been in compliance with our rules and continue to comply with our rules when we modify or augment them nor do we intend to undermine the educational mission of ITFS licensees. Far from evicting existing licensees, we anticipate that the streamlined regulations and revised spectrum plan adopted in this proceeding will facilitate the provision of advanced wireless communications services by incumbent licensees.*⁷

It therefore comes as no surprise that at the Commission's recent Rural ISP Showcase, the Chairman cited the *NPRM* as a vehicle for accelerating broadband deployment, particularly in rural or other underserved areas.⁸ Not coincidentally, presentations at the Showcase by Sioux Valley Wireless ("SVW") and Evertek, Inc. ("Evertek"), plus other publicly available information, confirm that MDS/ITFS broadband service is already being deployed in rural areas, even in the face of an outdated regulatory scheme that only now is being substantially revised. To cite just a few examples:

- Sioux Valley Wireless ("SVW"), a wholly owned subsidiary of Sioux Valley Energy in Colman, South Dakota, provides MDS/ITFS-based wireless broadband service to 1,500 customers in the Sioux Falls, SD metro and rural areas. SVW began providing "first generation" two-way wireless broadband service in 1998 upon obtaining a developmental two-way MDS authorization from the Commission.⁹
- NextNet Wireless and Evertek have expanded Evertek's broadband wireless access system across five new Iowa markets, having already launched the service in Pocahontas, Iowa in December

⁷ *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 MHz and 2500-2690 MHz Bands*, 18 FCC Rcd 6722, 6725 (2003) (emphasis added) (footnotes omitted) ("*NPRM*").

⁸ See Remarks of Chairman Michael K. Powell at the FCC Rural Wireless ISP Showcase and Workshop (Nov. 4, 2003).

⁹ See "Company and Organization Descriptions at Rural Wireless ISP Showcase and Workshop," available at <http://www.fcc.gov/osp/rural-wisp/rural-wisporgs.html>; Reply Comments of Sioux Valley Wireless, WT Docket No. 03-66 (filed Oct. 23, 2003).

2001. The expansion covers over 19,000 subscribers in Sheldon, LeMars, Kingsley, Holstein, and Ida Grove, IA.¹⁰

- Virginia Communications, Inc. (“VCI”) utilizes MDS/ITFS spectrum to provide wireless broadband service to consumers in Prescott, Arizona. VCI’s customer base includes residents, businesses, and both educational and municipal facilities in Prescott and surrounding rural areas, some of which have no cable modem or DSL service or even any landline telephone service. Among other things, the company recently entered into two contracts to provide broadband services on nearby Native American reservations. In just three years, VCI has invested over \$3,000,000 to establish its current level of service and, to address a large backlog of customer orders, continues to make large monthly investments to expand its wireless infrastructure.¹¹
- On January 8, 2003, Navini Networks, Inc. (“Navini”) and Rioplex Wireless, Ltd. (“Rioplex”) announced plans to deploy a second generation MDS/ITFS-based wireless broadband network to serve customers in the lower Rio Grande Valley, an area covering much of South Texas. The deployment will be the first full coverage broadband service in the area (encompassing 5,000 square miles), and will provide service to every county in the Rio Grande Valley from Western Rio Grande City to South Padre Island.¹²
- NextNet Wireless and Plateau Telecommunications (“Plateau”) have entered into an agreement under which Plateau, using NextNet’s equipment, will deliver broadband wireless services over MDS/ITFS spectrum to underserved business and residential subscribers across a 28,000 square mile footprint in New Mexico. Initially, Plateau will make its wireless broadband service available to over 60,000 households in multiple locations within the footprint.¹³

¹⁰ See “NextNet and Evertex Expand Plug-and-Play Broadband Wireless System to Five New Markets, Covering Over 19,000 Subscribers,” *Business Wire* (Nov. 11, 2002).

¹¹ See Comments of Virginia Communications, Inc., WT Docket No. 03-66 (filed Apr. 8, 2003).

¹² See “Rioplex Wireless Deploying World’s Largest Next-Generation Wireless Broadband Network,” *PR Newswire* (Jan. 8, 2003).

¹³ See “NextNet and Plateau Telecommunications Ink Deal for America’s Largest NLOS Plug-and-Play Broadband Wireless Deployment,” *Business Wire* (Nov. 13, 2003).

- NextNet Wireless and Grand Forks Wireless are delivering MDS/ITFS-based broadband service to residential and business subscribers in Yuma, Arizona.¹⁴
- 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 video and audio programming and broadband service to more than 12,500 subscribers in Lima, Ohio and its rural outskirts.¹⁵
- Teewinot Wireless Data has launched MDS/ITFS-based 3G wireless broadband service in Missoula, Montana. As observed by Senator Conrad Burns (R-Montana) at the launch of the service, “[p]eople in rural states like Montana need to have access like this to ensure their inclusion in the rapidly expanding information age. . . . A solid technological infrastructure such as this is part of the foundation needed to encourage small business growth in our communities.”¹⁶

As such, it is baffling that NAF would now ask the Commission to reverse field and divest ITFS licensees of 90 MHz of their spectrum in the 2500-2590 MHz band. NAF must be unfamiliar with that portion of the *AWS First Report and Order* where the Commission found that a reallocation of even 60 MHz from the 2500-2690 MHz band “would cause severe disruptions to ITFS/MMDS incumbents if they were forced to vacate a segment of the band. . . . [A] reduction in authorized spectrum capacity would cause a major escalation of costs, and those increased costs would likely result in ITFS/MMDS service cutbacks or, at a minimum, a failure to expand broadband fixed services to all areas of the country.”¹⁷

¹⁴ See “NextNet and Grand Forks Wireless Deliver Broadband Wireless Access to Yuma, Arizona,” *Business Wire* (June 25, 2002).

¹⁵ See, e.g., Barthold, “W.A.T.C.H. Out!” *Telephony* (Aug. 27, 2001); Comments of W.A.T.C.H. TV Company, WT Docket No. 03-66, at 1-2 (filed Sept. 8, 2003).

¹⁶ See generally Mansell, “IPWireless Gaining Customers,” *Kagan Broadband Fixed Wireless*, at 6 (May 6, 2002); Rush, “3G Arrives in Montana,” *CED Broadband Direct* (June 3, 2002); “3G Broadband Wireless Comes to Montana; U.S. Senator Conrad Burns Hails the Nation’s First Mobile Broadband Deployment,” <http://www.teewinot.tv/PR060302.htm> (June 3, 2002).

¹⁷ *AWS First Report and Order*, 16 FCC Rcd 17237-8 (footnotes omitted). It appears that on this point NAF has failed to convince the Commission’s staff as well. Apparently because NAF had not sufficiently addressed the issue in its nearly 100 pages of comments and reply comments in this proceeding, the staff recently asked a representative of NAF’s cohort, Media Access Project (“MAP”), whether sufficient space would remain in the 2500-2690 MHz band for MDS/ITFS licensees displaced from the 90 MHz of

Moreover, NAF's suggestion that the Commission reallocate ITFS spectrum to promote rural broadband deployment flies in the face of record evidence that licensed spectrum, not more unlicensed spectrum, is the key to promoting rural broadband. This point was made quite clearly just last week in a Commission filing by a prominent representative of the rural interests with whom NAF claims affinity:

A whopping 38 percent of [the National Telecommunications Cooperative Association's] members who responded to NTCA's 2003 wireless survey indicated that they are utilizing unlicensed spectrum to provide wireless services. . . . While interference was not yet cited as a major problem among NTCA members completing the survey, many have indicated that they are seeing more and more interference from unlicensed devices. Therefore, they contend, *unlicensed spectrum is not a reliable method of providing wireless service to rural America. . . . Despite the costs associated with licensed spectrum, NTCA members indicated that they would prefer more licensed spectrum to more unlicensed spectrum by a 71% to 29% margin.*¹⁸

Of course, adoption of the Coalition Proposal will provide a significant increase in the amount of licensed spectrum that will be available to rural service providers for the provision of additional advanced wireless services while, conversely, adoption of NAF's proposal will merely give these rural operators more of what they neither need nor want.

It is also curious that NAF chooses to characterize ITFS licensees as "spectrum slackers"¹⁹ -- as reflected in the *AWS First Report and Order* and the record compiled in response to the *NPRM*, ITFS licensees have continued to provide substantial service to the public notwithstanding the recent prolonged period of uncertainty over whether their spectrum would be taken from them and reallocated for AWS.²⁰ While it is true that

spectrum NAF and MAP have demanded for unlicensed services. *See Ex Parte* Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, WT Docket No. 03-66 (filed Nov. 26, 2003). With no technical support, and without acknowledging the above-quoted Commission findings to the contrary, the MAP representative simply stated that "all [MDS/ITFS] licensees are entitled to keep is identical throughput," and that "they will still have superior throughput at the end of the day." *Id.* Neither NAF nor MAP have since explained how this could be so, or how they arrived at this specious conclusion.

¹⁸ Comments of National Telecommunications Cooperative Ass'n, WT Docket No. 02-381, at 11-12 (filed Dec. 29, 2003) (footnotes omitted) (emphasis added).

¹⁹ NAF Reply Comments at 11.

²⁰ *See, e.g.*, Reply Comments of The Education Community, WT Docket No. 03-66, at 3-8 (filed Oct. 23, 2003) (discussing record evidence of ITFS-based educational services); Reply Comments of University of Cincinnati, WT Docket No. 03-66, (filed Oct. 23, 2003); Reply Comments of University of Minnesota, WT Docket No. 03-66 (filed Oct. 21, 2003); Reply Comments of University of South Florida, WT Docket No. 03-66 (filed Oct. 22, 2003); Reply Comments of Mississippi EDNET Institute, Inc., WT Docket No. 03-66 (filed Oct. 23, 2003); Reply Comments of Milwaukee Public Schools, WT Docket No. 03-66 (filed Oct. 23,

ITFS deployments to date in certain markets are not as extensive as the Commission may have hoped, that is attributable both to the uncertainty created by the threat of reallocation for IMT-2000 and to an outdated regulatory scheme that the *NPRM* is specifically designed to change. As noted in the Chairman's own statement in support of the *NPRM*:

The 2.5 GHz band has labored for years under the heavy hand of command-and-control regulation. The regime has not served the American people or the Commission's licensees particularly well. Our rules have, at times, been complex and stifling, and have shifted in their objectives Despite the uncertainty caused by these regulatory shifts, many licensees have strived to provide innovative and quality services. In particular, some ITFS licensees have conscientiously provided valuable educational opportunities and services to the communities they serve. . . . This Notice is not intended to undermine those efforts. Instead we seek to expand the rights and opportunities of 2.5 GHz licensees, affording them greater flexibility to deliver services to the American people.²¹

Should NAF have any further doubts on this point, it should consult with representatives of wireless broadband equipment vendor Alvarion, whom NAF has cited in the past in support of its pro-unlicensed rhetoric:

"The first MMDS data networks faced an impossible situation," said Patrick Leary, chief evangelist at Alvarion, an equipment manufacturer. "You have all of these ITFS stations interleaved among the MMDS channels, and the rules basically written to support a one-way television broadcast network based on a 35-mile super cell. The bureaucratic encumbrances simply did not allow the spectrum to be used optimally for data. Fortunately, the FCC is in the process of drawing up new rules that should make the spectrum data friendly."²²

2003); Reply Comments of San Jose State University, WT Docket No. 03-66 (filed Oct. 23, 2003); Reply Comments of Network for Instructional TV, Inc., WT Docket No. 03-66 (filed Oct. 16, 2003); Reply Comments of San Diego County Superintendent of Schools *et al.*, WT Docket No. 03-66 (filed Oct. 23, 2003); Joint Comments of ITFS Parties, WT Docket No. 03-66 (filed Sept. 8, 2003); Joint Comments of Nat'l ITFS Ass'n and Catholic Television Network, WT Docket No. 03-66 (filed Sept. 8, 2003); Comments of The George Mason University Instructional Foundation, Inc., WT Docket No. 03-66 (filed Sept. 8, 2003); Comments of South Carolina Educational Television Commission, WT Docket No. 03-66 (filed Sept. 8, 2003); Comments of the School Board of Broward County, WT Docket No. 03-66 (filed Sept. 8, 2003); Comments of Archdiocese of New York, WT Docket No. 03-66 (filed Sept. 8, 2003); Comments of the Diocese of Brooklyn, WT Docket No. 03-66 (filed Sept. 8, 2003); Joint Comments of Stanford University and Northeastern University, WT Docket No. 03-66 (filed Sept. 8, 2003).

²¹ *NPRM*, 18 FCC Rcd at 6858 (Separate Statement of Chairman Michael K. Powell).

²² Sweeney, "A Second Chance for MMDS," *Broadband Wireless Online* (September/October 2003), available at <http://www.shorecliffcommunications.com/magazine/volume.asp?Vol=40&story=353>. See

This is just one example of how NAF takes obvious liberties with its portrayal of the law and the facts to bolster its case. For instance, NAF relies heavily on Section 7(a) of the Communications Act for the proposition that the ITFS community somehow has the burden of proving that its spectrum should not be reallocated for unlicensed use.²³ Aside from being absurd on its face, NAF's argument misconstrues the statute entirely. Section 7(a) only states that where a proponent introduces a "new technology or service," its opponents bear the burden of proving that the new technology or service is not in the public interest.²⁴ No such "new technology or service" is present here – as reflected in the appendices to NAF's own reply comments, unlicensed wireless broadband service and the technology used to deliver it have been available for some time.²⁵ In point of fact, NAF is merely arguing that the Commission should take the draconian step of stripping ITFS licensees of their spectrum for the benefit of unlicensed providers of wireless broadband services. These same unlicensed providers already have access to a huge amount of spectrum in the 900 MHz, 2.4 GHz and 5 GHz bands and yet the services that they are providing are, for all practical purposes, inferior to the first generation MDS/ITFS broadband services already being provided in many markets. Ironically enough, NAF's reading of Section 7(a) actually *supports* full preservation of the ITFS allocation, as it would permit more robust deployment of ITFS spectrum for the next generation MDS/ITFS technologies that can deliver a variety of portable and mobile broadband services that are not currently available.²⁶

Moreover, while NAF is correct that educators are using unlicensed spectrum as a vehicle for creating campus-based Wi-Fi hotspots and other short-range applications,²⁷ it is hardly true that unlicensed spectrum is a legitimate substitute for licensed ITFS spectrum.²⁸ Unlike Wi-Fi, which provides links of less than 200 feet absent large outdoor antennas at subscriber premises, MDS/ITFS-based services can provide service to small, customer-friendly portable and mobile devices over distances of many miles. Indeed, the Commission has noted time and again that MDS/ITFS service is optimally suited for

also NAF Reply Comments, at 46-47 (discussing deployment of Alvarion equipment for unlicensed wireless broadband service).

²³ NAF Reply Comments at 13-14.

²⁴ 47 U.S.C. § 157(a).

²⁵ *See* NAF Reply Comments, Appendix B.

²⁶ *See, e.g., Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6*, 6 FCC Rcd 3760, 3763-4 (1991) (in the context of Section 7, "new technology or service" does not refer to continued use of existing technology to provide an existing service).

²⁷ *See, e.g.,* NAF Reply Comments at 23.

²⁸ Licensed ITFS base stations are currently permitted to operate at an EIRP of up to 33 dBW or 2000 watts. *See* 47 C.F.R. § 74.635. Unlicensed spectrum below 3 GHz operating in the point-to-multipoint mode is generally limited to an output power of 1 watt and, in the 2400-2483.5 MHz unlicensed band, only 6 dBW or 4 watts EIRP. *See id.* § 15.247(b)(4)(i).

delivery of wireless broadband service over large geographic areas, particularly in rural communities that have little or no broadband service available to them.²⁹ Just as the service providers represented by the National Telecommunications Cooperative Association need more licensed spectrum that can be used for advanced services, not more unlicensed spectrum, to provide wide-area services, so too does America's educational community need ITFS to meet the same wide-area needs.

The Commission should be skeptical of NAF's warning about an oncoming "campus crisis" over unlicensed WiFi spectrum, particularly since the coalition who joined in NAF's reply comments includes just one educator, the Rockwood Area School District. To date, the educational constituents of NIA, CTN or EC have not indicated that such a crisis exists.³⁰ Indeed, basic mathematics undercuts NAF's argument – after the Commission's recent decision to allocate the 5.470-5.725 GHz band for unlicensed services,³¹ unlicensed users now have access to a total of 664.5 MHz of spectrum (*i.e.*, the 902-928 MHz, 2400-2483.5 MHz, 5.15-5.35 GHz and 5.470-5.825 GHz bands), *more than three times the amount of spectrum available in the entire MDS/ITFS allocation at 2500-2690 MHz.*³² Again, NAF will find that Alvarion is a good resource on this point: "There's really not that much [MDS/ITFS spectrum]," commented [Patrick] Leary. "There's actually a lot more available in the unlicensed bands."³³ Simply put, NAF's

²⁹ See, e.g., *Implementation of Section 6002(b) of Omnibus Budget Reconciliation Act of 1983; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services*, 15 FCC Rcd 17660, 17792 (2000) ("[MDS/ITFS] transmissions have a greater radius than upperband fixed wireless service, generally 35 miles versus three to five miles for upperband services. . . [MDS/ITFS's] larger radius makes the service well-suited for not only residential customers, but customers in rural, underserved, and unserved areas as well.").

³⁰ The lack of educator participation in NAF's filings highlights the fact that NAF has no real constituency among educators. Like any Washington-based think tank, NAF exists to advance the broader political agenda of those who fund it, without having any meaningful connection to the educational entities it purportedly speaks for. By contrast, NIA, CTN and EC were created by and for educators who, unlike NAF, have invested enormous resources towards creating the very same ITFS services NAF now seeks to destroy. Unlike the member educators of NIA, CTN and EC, NAF has little to lose if its lobbying efforts inflict lasting damage upon educational use of wireless spectrum.

³¹ See *Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, ET Docket No. 03-122, FCC 03-287 (rel. Nov. 18, 2003).

³² NAF also takes no notice of recent Commission proposals to amend Part 15 so that unlicensed wireless broadband users are better able to serve larger areas over their existing spectrum. More specifically, the Commission has proposed to modify its rules to permit advanced antenna technologies to take advantage of the higher power levels permitted for point-to-point operations in the 2400-2483.5 GHz band. See *Modification of Parts 2 and 15 of the Commission's Rules for Unlicensed Devices and Equipment Approval*. ET Docket No. 03-201, FCC 03-223, at ¶¶ 5-15 (rel. Sept. 17, 2003).

³³ Sweeney, *supra* note 22.

rhetoric cannot camouflage the fact that unlicensed users are not spectrally disadvantaged and no amount of anti-ITFS diatribe can make it otherwise.³⁴

NAF also blatantly mischaracterizes the record when it asserts that Sprint and IPWireless supported NAF's contention that ITFS licensees could maintain their existing level of service "in far less spectrum."³⁵ In fact, neither party recommended that the Commission reallocate *any* of the MDS/ITFS spectrum at 2500-2690 MHz, nor did they otherwise suggest that ITFS licensees should have any of their spectrum taken from them.³⁶ NAF's citation of Sprint's comments on the NPRM is especially egregious, since Sprint made it very clear in the opening pages of its filing that it is a staunch supporter of the Coalition Proposal, which is predicated on leaving ITFS licensees with the same amount of spectrum that they have now.³⁷ Likewise, Sprint's reply comments make it clear that NAF is absolutely incorrect when it suggests that Sprint supports any reduction of the ITFS allocation:

Sprint fully supports and acknowledges the important public interests served by ITFS licensees. Sprint's support of and involvement with the educational community extends well beyond its ITFS lease relationships. Through its leases with hundreds of ITFS licensees across over 90 markets, Sprint has entered into relationships that provide educational institutions ranging in size from small K-12 schools to State universities with operational support, engineering support, equipment, tower site maintenance and access, receive sites, and lease payments. The consideration received by ITFS licensees supports their individual educational missions and instructional needs. In that regard it has been

³⁴ In tandem with Media Access Project (but joined by no one in the educational community), NAF recently lambasted the Commission's decision to allocate the 5.470-5.725 GHz band for unlicensed services, claiming the Commission's action "is like opening real estate for development in Siberia and claiming it's the same as opening up beach front property in California." See "FCC Spectrum Action May Help Wi-Fi, But It Won't Help Last-Mile Competition or Rural Broadband," Joint Press Release of New America Foundation and Media Access Project (Nov. 13, 2003). The NAF/MAP press release conveniently fails to mention that NAF never participated in the Commission's 5.470-5.725 GHz proceeding (a curious posture by a supposed champion of unlicensed spectrum), nor does it mention the fact that the power limits adopted by the Commission were the result of a compromise agreement among government agencies, private industry and the Department of Defense that was deemed necessary to protect incumbent DOD operations in the 5 GHz band. Also, many of the unlicensed educational applications NAF cites in its filings are not "last mile" in nature, and thus stand to benefit immediately from the Commission's allocation of an additional 255 MHz of unlicensed spectrum at 5.470-5.725 GHz (nearly doubling the amount of unlicensed spectrum already available in the 5 GHz band). Finally, if the "last mile" truly is what NAF is concerned about, then its proposal to displace ITFS in favor of unlicensed services is a redundant exercise since, as discussed above, it is well established that MDS/ITFS spectrum is ideally suited for "last mile" broadband service.

³⁵ NAF Reply Comments at 27.

³⁶ See *id.* at 27 n.33.

³⁷ See Comments of Sprint Corporation, WT Docket No. 03-66, at iii-iv (filed Sept. 8, 2003).

Sprint's experience that *each ITFS licensee has its own unique requirements*, and the Commission historically has recognized this fact by providing ITFS licensees with broad flexibility to negotiate excess capacity leases that meet their particular needs.³⁸

NAF's preoccupation with existing levels of ITFS usage is equally misguided, for it ignores the evidence in this docket demonstrating that preservation of the current ITFS allocation at 2500-2590 MHz is essential to support future ITFS usage after the new MDS/ITFS rules are adopted. As already noted by NIA and CTN, for example, the Coalition Proposal's 42 MHz mid-band segment (the "MBS") is intended to ensure continued provision of high-power, high-site ITFS service (which remains by far the most efficient vehicle for simultaneous distribution of educational and instructional material to multiple receive locations on a wide area basis). The Coalition Proposal also ensures that sufficient spectrum will remain available in the Lower Band and Upper Band Segments (the "LBS" and "UBS") for those ITFS licensees who wish to utilize low power, cellularized facilities for broadband service.³⁹ As noted in the Joint Comments of ITFS Parties filed in response to the *NPRM*:

Recent developments in technology have made it possible for ITFS and MDS stations to provide high-speed, two way wireless data transmission services, including for broadband Internet access. It is critical for the Commission to understand that these technological innovations are particularly timely for the ITFS Parties, given the explosion in online education and other data services, which increasingly requires broadband access to rich-media content. The technical and regulatory proposals in the Coalition Proposal for the ITFS/MDS band support a broad range of such services, including two-way real-time video and other bandwidth intensive applications necessary for effective distance learning. If the FCC fails to adopt the proposed new band plan and rules for the ITFS/MDS spectrum, the capacity, usefulness, and value of the band for these purposes would be significantly diminished.⁴⁰

In sum, the record should give the Commission pause as to precisely who NAF is advocating for in this proceeding. Plainly it is not educators, unless the Commission is prepared to concede that Rockwood Area School District represents every educational institution that has an interest in wireless technology. NIA, CTN and EC submit that NAF's own filings and other surrounding evidence indicate that NAF is merely wrapping itself in the banner of education to mask the fact that it is really lobbying for a handful of

³⁸ See Reply Comments of Sprint Corporation, WT Docket No. 03-66, at 26-27 (filed Oct. 23, 2003) (emphasis added).

³⁹ See Reply Comments of Wireless Communications Ass'n Int'l, National ITFS Ass'n and Catholic Television Network, WT Docket No. 03-66, at 16-18 and 23-24 (filed Oct. 23, 2003).

⁴⁰ Joint Comments of ITFS Parties, WT Docket No. 03-66, at 3-4 (filed Sept. 8, 2003).

commercial wireless Internet service providers (“WISPs”) that have chosen to utilize unlicensed spectrum yet claim they cannot make due with the 664.5 MHz of unlicensed spectrum the Commission has already given them.⁴¹ Here NIA, CTN and EC wish to emphasize that they recognize the valuable services WISPs provide to the public, and that they generally have no axe to grind with the WISP community. Unfortunately, NAF’s filing suggests the reverse is not true.

Hence, NIA, CTN and EC are compelled to note that many of the WISPs that rely on unlicensed spectrum have only a small number of subscribers in rural and other geographically large areas. One would think, then, that 664.5 MHz of unlicensed spectrum would be sufficient unless WISPs are using cheap, spectrally inefficient equipment to deliver service to their customers. NIA, CTN and EC are content to leave that inquiry for another day. However, to the extent that spectral inefficiency predominates among unlicensed WISPs, NAF’s participation in this proceeding presents a telling irony: for all its bluster about government subsidies, NAF effectively is asking the Commission to give a 90 MHz spectrum subsidy to commercial service providers who do not want to spend the money necessary to either upgrade their networks to make efficient use of unlicensed spectrum, purchase licensed spectrum, or take advantage of secondary market leasing opportunities. And, of course, as the record in WT Docket No. 02-381 illustrates, the vast majority of rural telecommunications service providers want access to more *licensed* spectrum that can be used to provide broadband services, rather than more of the unlicensed spectrum they are currently using with unsatisfactory results.⁴² Under these circumstances, the inequity and sheer folly of sacrificing ITFS on the altar of unlicensed service should be self-evident.

⁴¹ Aside from Rockwood Area School District and other think tanks, the only parties who joined NAF’s reply comments on the *NPRM* consist almost entirely of WISPs or WISP user groups who provide or use unlicensed wireless broadband service for a fee or through municipally-based “freenets.” See NAF Reply Comments at 2-3. NAF’s filings also recently received the endorsement of the Texas ISP Association, a WISP-supported trade group. See Reply Comments of The Texas ISP Association, WT Docket No. 03-66 (filed Nov. 19, 2003). To the best of NIA/CTN/EC’s knowledge, not a single educator has filed separately in support of NAF.

⁴² See *supra* note 18.

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For all of these reasons, NIA, CTN and EC once again urge the Commission to reject NAF's self-righteous fronting for unlicensed WISPs and instead adopt the Coalition Proposal as recommended in their comments and reply comments in this proceeding. Should there be any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

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The Education Community

American Association of Community Colleges (AACC)
American Association of School Administrators (AASA)
American Association of State Colleges and Universities (AASCU)
American Association of University Women (AAUW)
American Council on Education (ACE)
American Federation of Teachers (AFT)
Association of American Universities (AAU)
Association of Community College Trustees (ACCT)
Association of Educational Service Agencies (AESAs)
The Association of Jesuit Colleges and Universities (AJCU)
Association of Research Libraries (ARL)
California Community Colleges (CCC)
Central Dakota Telecommunications Consortium
Consortium for School Networking (COSN)
Council of Chief State School Officers (CCSSO)
Denver Public Schools (DPS)
EDUCAUSE
Florida Community College System
Huntsville City Schools Educational Television
International Society for Technology in Education (ISTE)
Kirkwood Community College
KRCB Television, Santa Rosa, California
National Alliance of Black School Educators (NABSE)
National Association of Independent Schools (NAIS)
National Association of State Universities & Land-Grant Colleges (NASULGC)
National Education Association (NEA)
National Education Knowledge Industry Association (NEKIA)
National Parent Teacher Association (PTA)
National Rural Education Association (NREA)
North Carolina Community Colleges
Rural School and Community Trust
The National Association of College and University Business Officers (NACUBO)
United States Distance Learning Association (USDLA)
University Continuing Education Association (UCEA)