

May 12, 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:

In meetings with Commission staff on April 22, 2004, the Network for Instructional TV, Inc. (NITV), an ITFS licensee, supported changes to the Commission's ITFS eligibility requirements so as to permit "voluntary sales of ITFS licenses to commercial interests if educational interests are safeguarded with a set-aside." **We write to emphasize that NITV stands virtually alone among ITFS licensees in its desire to see educational eligibility restrictions removed from the band and in its apparent belief that set-asides will provide any real educational value.**

The Catholic Television Network (CTN), the National ITFS Association (NIA), and the Education Community – collectively representing the majority of ITFS licensees in the United States and the educational community as a whole – take strong issue with NITV's position, which is not representative of ITFS licensees or educators.

We recognize that while the sale of ITFS spectrum to a commercial entity might be beneficial to an individual licensee (*i.e.*, the sale of ITFS spectrum might provide funding to NITV), cumulatively, such sales would be harmful to education because they would eventually result in the complete (or near complete) loss of ITFS as a valuable educational tool for distance learning, broadband access, and other needed services. Thus, open eligibility would result in a *de facto* reallocation of ITFS from educational to commercial control.

In considering this issue, we urge the Commission to be mindful of the strong strategic relationships ITFS licensees have forged with commercial operators based on secondary market leasing of ITFS excess capacity, not sales. These leasing relationships were encouraged by the FCC as a means of developing and enhancing instructional services, while making significant capacity available for commercial applications. Leases are far superior to sales, because they provide educators with the ability to ensure that the appropriate facilities for educational services will be made available. They also provide funding, equipment, services, and technical support for educational applications. These benefits have previously been found by the FCC to serve the public interest. If the

secondary market in the future is based on sales of ITFS spectrum, the benefits of these relationships would be forever lost.

With respect to the issues raised by NITV, we also point out the following:

Loss of control of the spectrum by educators would not be in the public interest. If the Commission allows the ITFS educational reserve to diminish, even by the “voluntary” choice of ITFS licensees, it will diminish the voice of education in future technologies. With the ITFS reservation, educators have a place “at the table” where plans for new wireless technologies are determined. As a result, educators play an important role in deciding how such technologies will be used to advance the interests of education, in addition to commercial interests. If educators are “bought out,” their place at the table will be lost.

The notion that ITFS spectrum sales would be “voluntary” is a myth. NITV suggests that the sale of ITFS spectrum to commercial entities would be a choice available to individual licensees on a case-by-case basis. We believe that, if ITFS licensees have the “choice” to lease or sell their spectrum, commercial entities will have little incentive to negotiate a lease and will instead hold out for a sale, or they will require, as a term of any lease, that they have a right to acquire the ITFS channels down the road. This is already happening in on-going ITFS lease negotiations, apparently in anticipation of a rule change. The reality is that coercion, not choice, will reign.

Access to set-aside capacity is no substitute for control of spectrum, and would be essentially worthless to educators. There are several reasons why merely providing educators with *access* to a portion of ITFS spectrum capacity controlled by others, as proposed by NITV, is no substitute for educational *control* of the entire ITFS spectrum.

1. Set-asides of bits and pieces of spectrum cannot practicably be used. For example, if NITV’s plan involves setting aside 5% of a licensee’s spectrum when the spectrum is sold to a for-profit entity, under the new band plan that would result in an .825 MHz set-aside in the lower or upper band segments and a .3 MHz set-aside in the mid-band segment, for a typical four-channel ITFS licensee. If an educator is expected to build out its own facilities, these set-asides would be insufficient to actually operate any wireless system that could provide any useful educational services.
2. Educators need to decide for themselves how best to use ITFS spectrum to meet their varied and changing educational needs. Educators simply cannot be dependent on commercial operators, and their business needs, to make available the facilities and services actually needed by educators. For example, if NITV’s plan is for the FCC to set aside a portion of the capacity of a former licensee’s

channels on the purchaser's system, of what valid educational use will that capacity be if the system merely contemplates cell phones?

3. Educators must be able to use the amount of their licensed spectrum that they need. They must not be restricted to an arbitrarily predetermined percentage of spectrum as proposed by NITV. Any fixed set-aside would create a ceiling on educational use, rather than a floor as currently exists under ITFS excess capacity leasing rules.

4. The Direct Broadcast Satellite (DBS) service provides strong evidence that educational set-asides do not promote real educational use. DBS carriers select the "educational" program services that they will carry on their four percent set-aside capacity. In doing so, they tend to select services that will most enhance the commercial value of their overall programming, rather than services that provide actual education to real students. Under NITV's proposal, the same result would inevitably occur.

For these reasons, CTN, NIA and the Education Community urge the Commission to retain the educational eligibility requirements for ITFS.

Respectfully submitted,

CATHOLIC TELEVISION NETWORK

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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)