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May 26, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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 Ms. Dortch:

Network for Instructional TV, Inc. ("NITV") understands the Commission may now have before it a proposal to strip incumbent ITFS/MMDS licensees of spectrum in order to create two "new" MDS channels that would be auctioned to facilitate the entry of new competitors. NITV is strongly opposed to such a proposal because it fails to give adequate time for the secondary markets to work to reallocate spectrum to its best and highest uses, as NITV has urged in supporting "open eligibility" to allow the voluntary sale of ITFS licenses to commercial interests if educational interests are safeguarded with a set-aside.

Rather than resort to a reallocation of ITFS/MMDS spectrum to possibly accommodate an auction of spectrum, the FCC should open eligibility with a set-aside to benefit all educators, and allow the secondary market enough time to result in the transfer of spectrum to those who value it the highest. **NITV would not be opposed to accommodating changes in the band plan to, for example, include the MDS-1 and MDS-2 channels, if it did not result in stripping spectrum from incumbents.** NITV has actively participated in every stage of this proceeding and cannot find any record that justifies creating "new" spectrum at the expense of incumbent ITFS and MMDS licensees. Certainly, there has been no notice and opportunity to comment in this proceeding on the creation of two new MDS channels, at the expense of incumbent licensees, for an auction.[1] WCA effectively demonstrates the legal infirmities in creating new MDS channels to auction and the increased litigation risk that will serve as a negative overhang to the entire industry.[2]

NITV remains concerned that continued objections by some ITFS licensees, that a set-aside of capacity will have no benefit to education, leaves the FCC with few other choices --

[1] *See* Wireless Communications Association International, Inc. ("WCA"), Ex Parte Presentation, filed May 25, 2004, p. 1.
[2] *Id.*, p.2.

none of which promote competition and investment or benefit education as effectively as the proposed set-aside.

The premise underlying NIA/CTN's claim that "set-asides of bits and pieces of spectrum cannot practically be used" is plainly wrong.[3] Their premise assumes an educator would build its own facilities using the set-aside capacity. NITV does not propose that educators would build their own facilities, but would simply enjoy access to the facilities built by the commercial assignee of the ITFS license and they would be free to negotiate for additional access, as now possible when leasing.

Moreover, as Luxon Wireless submits in its May 21, 2004 *ex parte* letter:

> Luxon also believes that the five percent set-aside proposed by NITV will benefit education by making spectrum resources available to the community at large. [In the NIA/CTN Ex Parte], the claim is made that five percent is not a very useful amount of spectrum. Luxon points out that this is precisely the minimum amount of spectrum required of ITFS licensees to reserve when they are leasing excess capacity. Moreover, to the extent assigned ITFS spectrum is incorporated into a wireless broadband system utilizing other channels, some of which are subject to frequency re-use at multiple locations, channel shifting should be permitted to calculate the set-aside. For example, if the operator utilized eight ITFS channels, four of which have been assigned to the operator and four of which are leased to the operator, and the aggregate system capacity of the system is 500 mbps, the set-aside would be 12.5 mbps (4/8 x 500 mbps x 5% = 12.5 mbps).[4]

In other words, the set-aside would work to make capacity available across the entire system of channels, if necessary as a practical matter, just as the leasing rules currently provide that capacity can be accessed across the system. This set-aside would become a permanent condition on the license and remain an obligation regardless of future assignments of the license. Moreover, ITFS licensees would be free to bargain to retain as much capacity or spectrum that they desire, in addition to the minimum set-aside for education.

NITV's set-aside proposal avoids the potential loss of this spectrum while preserving the benefits to education of using facilities to be constructed by commercial interests. **NITV continues to believe that its proposed set-aside concept best balances the desire to promote new investment and competition with the public interest benefits of making wireless broadband capacity available to all educators, not just those few who happen to hold ITFS licenses.**

NITV understands that the Commission's proposal may prevent ITFS licensees from selling their Mid-Band Segment spectrum to commercial entities. NITV opposes this proposal, as well. Given that this spectrum likely would be governed by the old processing rules and subject to higher powered operations, the Mid-Band segment would be the least desirable

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[3] *See* NIA/CTN Ex Parte Presentation, filed May 12, 2004, p. 2.
[4] Luxon Ex Parte Presentation, filed May 21, 2004, p. 5.

spectrum to deploy for commercial operations. It also leaves those ITFS licensees that wish to afford themselves of the new open eligibility rules with spectrum they may no longer want to hold to further their educational missions.

NITV also believes consideration of a reverse auction is not proper at this time. NITV remains opposed to a reverse auction where ITFS licensees put their licenses in an auction but can retrieve them if they do not want to sell. Because so much ITFS spectrum is subject to spectrum leases, it is in the public interest for licensees to determine when is the best time to consider a sale and on terms and conditions of their choosing. For example, an ITFS licensee may choose to sell spectrum in return for reserved capacity. That would not be possible in a reverse auction.

A reverse auction could also have the unintended consequence of delaying the deployment of commercial and educational services as parties concentrate on auction participation in lieu of negotiating directly with licensees for capacity in the secondary markets.

For these reasons, NITV opposes stripping incumbent licensees of spectrum and supports allowing the secondary markets sufficient time to see that the spectrum is put to its highest and best uses to benefit all of education and to promote competition and investment.

Respectfully submitted,

/s/ LTG. Julius W. Becton, Jr., USA (Ret.)

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