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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAY 14 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Amendment of Parts 21 and 74 to Enhance)
the Ability of Multipoint Distribution Service)
and Instructional Fixed Television Fixed)
Service Licensees to Engage in Fixed)
Two-Way Transmissions)

RM-9060

COMMENTS OF CATHOLIC TELEVISION NETWORK, INC.

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SUMMARY

CTN believes that the rules proposed in the Petition offer substantial opportunities for ITFS institutions to improve the educational potential of "distance learning." However, it believes that substantial work remains before the Commission could adopt well-grounded rules to "cellularize" ITFS and MDS services. Given the complex nature of the proposal and their broad impact on ITFS, CTN recommends that the process move forward in a negotiated rulemaking with all potentially affected parties having an opportunity to participate in the planning as well as the development of the proposed restructuring.

In any rulemaking, however, CTN believes that the Commission must consider the proposed changes in light of their potential educational benefits and their effect on the independence of ITFS licensees. Any new rules for expanded services on ITFS frequencies must preserve the essential educational character of ITFS and take into account the serious and growing needs of educators and children who use and benefit from "distance learning." The Commission must consider how to expand the educational use of ITFS frequencies operating in a digitized, interactive mode in a way that corresponds to these future needs. The Petition also raises a number of engineering, legal and financial issues which potentially affect the autonomy of ITFS stations. Rules and policies adopted for the purposes proposed in the Petition must preserve the ability of ITFS licensees to maintain independent control of their stations whether or not they participate in the "cellularized" system.

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COMMENTS OF CATHOLIC TELEVISION NETWORK, INC.

Catholic Television Network, Inc. ("CTN"), by its undersigned attorneys, hereby submits its initial "Comments" on the above-captioned Petition for Rulemaking.¹ CTN is an association of 16 Instructional Television Fixed Service ("ITFS") stations operated by Roman Catholic Archdioceses and Dioceses throughout the United States, including the San Francisco Bay Area, Boston, Brooklyn, Chicago, Dallas, Detroit, Los Angeles, New York, Orange, Orlando, Rockville Centre, San Bernardino, Youngstown, Buffalo, St. Louis, and Wichita.

Each of the members of CTN operates an accredited diocesan school system which offers formal, for-credit instruction for students enrolled in kindergarten through the 12th grade, as well as adult education classes. Each of the members

¹ See Public Notice, DA 97-637 (released Mar. 31, 1997). The Commission initially set the filing deadline for comments as April 30, 1997. However, in a Public Notice, released April 28, 1997, the Commission extended this deadline until May 14, 1997.

of CTN is also the licensee of one or more ITFS stations and is authorized by the Commission to transmit ITFS programming to receive sites associated with its educational mission. In accordance with the Commission's Rules, CTN's members use their ITFS facilities to transmit "formal educational programming offered for credit to enrolled students."² In addition to their ITFS programming activities, many of the members of CTN have entered into excess capacity lease agreements with local wireless cable system operators. As ITFS licensees whose station operations and permissible services may be affected by the proposals in the Petition, CTN and its members have a substantial interest in this proceeding.

I. THE PROPOSALS IN THE PETITION RAISE POLICY ISSUES REQUIRING CAREFUL DELIBERATION BY THE COMMISSION AND BY BOTH ITFS AND MDS INTERESTS.

The Petition proposes a complex and comprehensive restructuring of the Commission's rules governing ITFS and the Multipoint Distribution Service ("MDS"). This restructuring extends to all aspects of these services, including the processing of applications, the procedures for evaluating harmful interference, the nature of interference protection, and the services which can be provided by licensed stations. The apparent goal of these proposals is to make the spectrum available for a multiservice competitor to cable television systems and other telecommunications service providers by enhancing each licensee's ability to use

² 47 C.F.R. § 74.931(a)(1).

the spectrum for two-way digital transmissions of video, internet, data and voice services.

It is obvious that the commercial wireless cable industry's longstanding, but as yet unfulfilled, desire to bolster its competitive viability supplies the driving force for this Petition.³ However, there are potentially significant and substantial educational benefits to ITFS licensees as a result of the proposed rule changes. Indeed, the Commission has already found that the opportunity for schools to provide interactive data services would serve as a significant complement to traditional classroom instruction by bringing children into the information era.⁴ For this reason, CTN anticipates that many ITFS licensees would be willing to work with wireless cable operators to effectuate the mutual benefits of expanded ITFS and MDS services in a manner consistent with the proposals in the Petition.

Nevertheless, the comprehensive restructuring of an entire industry, as has been proposed in the Petition, necessarily implicates a variety of complex legal, engineering and policy issues. Thus, while CTN generally supports the concepts underlying the Petition, and recommends their expeditious consideration, it also recommends that the Commission proceed with caution and evaluate carefully

³ See Petition, at 6 ("Over the past year, it has become clear that merely providing consumers with more of the same video programming through digitization may not be enough for wireless cable to succeed in the video marketplace"), 14 (adoption of proposed rules will serve the public interest "for it will bolster the competitive viability of wireless cable").

⁴ See Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Frequency Range, FCC 97-5, ¶¶ 16-18 (released Jan. 9, 1997).

both the proposed rules and their impact on the policies governing ITFS and MDS. Given the complex nature of the proposals, their broad impact on ITFS, and the limited time which has been made available by the wireless cable industry and the Commission to evaluate these proposals, CTN believes that substantial work remains before the Commission could adopt well-grounded rules to "cellularize" ITFS and MDS services.

Moreover, it is equally clear that the rules should not be generated primarily from the perspective of the wireless cable industry. The restructuring proposed in the Petition requires all potentially affected parties to have an opportunity to participate in the planning as well as development of the proposed changes to ITFS and MDS. For example, it appears to CTN that the proposals in the Petition fail to take into account the needs of ITFS educators, and that more planning is needed to cure this deficiency.

CTN believes that the rules should be developed with the same cooperative effort proposed in the Petition for delivery of the services made possible by the rules. Accordingly, CTN recommends that the Commission convene a Federal Advisory Committee to bring together parties associated with the engineering, legal, commercial and non-commercial operations of MDS and ITFS to evaluate the service proposals and work out the most efficient plan to implement them.⁵ Such a committee would provide a real opportunity for the affected parties to hear the concerns of other parties and to debate the significant policy issues raised by

⁵ See Federal Advisory Committee Act, 5 U.S.C. App. 2.

the proposals in the Petition. Given the complexity of restructuring these video distribution services, the significant legal, engineering and policy issues, and the varied interests involved, such discussions would undoubtedly provide substantial, useful information and thereby facilitate the process initiated by the Petition.

II. THE COMMISSION MUST PRESERVE THE INSTRUCTIONAL PURPOSE OF ITFS.

For the past 30 years, ITFS spectrum has been reserved for instructional use, and now these are the only frequencies reserved for instructional service in the United States.⁶ The Commission has reiterated throughout this period that the purpose of the ITFS frequency allocation is "to provide for the licensing of transmitting facilities to send visual and accompanying aural instructional material to selected receiving locations in accredited public and private schools, colleges and universities for the formal education of students."⁷ Moreover, the Commission has continually recognized the "critical importance of education, and the significant role that ITFS can play in providing improved educational opportunities for all."⁸

⁶ See Educational Television, 39 FCC 846 (1963), recon. denied, 39 FCC 873 (1964). Educators and instructional organizations have used the ITFS spectrum reservation in a variety of ways to increase the educational opportunities and experiences of students and professionals.

⁷ Id. at 852-53.

⁸ Instructional Television Fixed Service, 75 RR 2d 755, 757 (1994) ("The policy debate at issue is not the mechanism by which ITFS channel time is made available to wireless cable operators. . . but how we preserve the primary purpose of ITFS in light of our proposal here") ("Channel Loading Order"); see also

The rules proposed in the Petition would permit licensees to "cellularize" both the ITFS and MDS spectrum in order to facilitate two-way audio, video, data and voice transmissions. While the availability of this technology would offer exciting educational opportunities for ITFS licensees, any enthusiasm must be tempered by the resounding commercial emphasis of the proposed rules. The Petition indicates that the primary purpose of the proposals is to maximize the commercial use of 190 MHz of spectrum at 2.5 GHz. Indeed, notably absent from the Petition is any concrete proposal to preserve the primary purpose of ITFS spectrum in light of the Commission's long-standing commitment to reserving these frequencies for instructional use.

CTN submits that any new rules for expanded services on ITFS frequencies must take into account the serious and growing needs of educators and children who use and benefit from "distance learning." Costs of education are rapidly increasing; the need for new and diverse educational tools for educators is becoming more critical. Additional capacity on ITFS frequencies is essential to meet cost and interactive communication needs in the future, just as a large volume of channel paths may be needed for commercial businesses. And, as the Commission is well aware, educators must adapt to the growing reliance of society

Instructional Television Fixed Service, 101 FCC 2d 49, 78, 81 (1985) ("The ITFS spectrum is primarily intended for the transmission of formal education for schools"; "formal education is the cornerstone of the ITFS service") ("ITFS Second Report"), recon. denied, 59 RR 2d 1355 (1986), vacated in part sub nom. Telecommunications Research & Action Center v. FCC, 836 F.2d 1349 (D.C. Cir. 1988).

on access to information. A comprehensive system of interactive video, voice and data services made available to schools would help meet these needs.

The Petition appears not to have taken this educational perspective into account. It suggests elimination of the instructional programming requirements which currently mandate that, if leasing excess capacity, an ITFS licensee must provide "at least 20 hours per channel per week of ITFS programming on its authorized channels."⁹ In place of this requirement, the Petition proposes that an ITFS licensee would be able "turn around" its entire channel capacity for data transmissions and satisfy any educational programming requirements on a channel licensed to another entity associated with the wireless cable system.¹⁰ The "turned around" channels could then be used to provide a commercial entertainment service, operated and funded by commercial service providers.

This proposal needs modification because it does not provide a mechanism for ITFS to maintain and expand the instructional character of ITFS in a way that corresponds to the future cost and interactive needs of educators. It is clear from the Commission's policies that the instructional use requirement for ITFS attaches to the channels not the licensees. Therefore, the benefits of the ITFS spectrum

⁹ See 47 C.F.R. § 74.931(e)(9).

¹⁰ See proposed rule Section 74.931(e)(9). The Commission has rejected a proposal to eliminate all ITFS programming requirements so that ITFS licensees could lease their entire capacity, finding that it would be improper to authorize to an educator a portion of the ITFS spectrum which would not even include a minimum amount of ITFS programming. See Channel Loading Order, 75 RR 2d at 764; Wireless Cable Order, 6 FCC Rcd 6764, 6773-74 (1991).

reserve must accrue to education, for which the frequencies are allocated.¹¹

Indeed, in the case of ITFS, the Commission has determined that:

Instructional television fixed service stations are intended primarily to provide a formal educational and cultural development [service] in aural and visual form, to students enrolled in accredited public and private schools, colleges and universities.¹²

The Commission has also decided that guidelines for the provision of instructional programming -- as opposed to entertainment programming -- are necessary "in order to preserve the essential nature of the service."¹³

A minimum "substantial use" for ITFS service . . . is an elementary necessity to guarantee the intended use of ITFS channels in the face of the revenue-generating uses which will also be permitted.¹⁴

To be consistent with these policies, the proposed rules must take into account the needs of educators for expanded use of ITFS spectrum and the Commission's insistence on maintaining the primary, instructional character of ITFS.¹⁵

¹¹ See 47 U.S.C. § 309(a) (Commission must determine whether "public interest, convenience, and necessity will be served" by granting an application for a radio station); see also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967) (Commission must consider demands of the public interest).

¹² 47 C.F.R. § 74.931(a) ("purpose and permissible service").

¹³ ITFS Second Report, 101 FCC 2d at 80.

¹⁴ Id. at 85; see Channel Loading Order, 75 RR 2d at 764 (pointing out that "it would be improper to authorize to an educator a portion of the ITFS spectrum which would be devoid of at least a threshold amount of ITFS programming").

¹⁵ The Commission has previously declined to consider modifying the ITFS programming requirements for digital operation. See Request for Declaratory Ruling on Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, DA 95-1854, ¶ 58 (released July 10, 1996).

Also in need of modification is the Petition's proposal simply to retain the 20-hour rule minimum. Because the Petition is premised on operation in a digital mode, this proposal represents a percentage decrease in instructional use over what is available in an analog system. CTN believes that as compression increases the number of channels there must be a proportionate increase in the number of channel paths available for education. For example, if compression increases the channel capacity by four, then the instructional use should increase by four.

The 20-hour programming minimum was designed to ensure that there is "substantial use" of the ITFS spectrum for its intended instructional purpose in an analog mode of operation.¹⁶ Clearly, any digital use of ITFS should bring a corresponding and proportionate increase in "instructional use" for ITFS licensees.¹⁷ Accordingly, the Commission must consider how to proportionately increase the benefits of the instructional service as a result of the potential increase in capacity.¹⁸

¹⁶ See ITFS Second Report, 101 FCC 2d at 85-88. As the Commission is aware, some ITFS excess capacity leases attempt to limit instructional use to the minimum programming time required by the Commission's rules.

¹⁷ The proposal in the Petition appears to create an incentive inconsistent with the primary purpose of the ITFS spectrum reservation. That is, ITFS licensees may have an incentive to use the available capacity for as little instructional programming as possible to garner potentially increased revenues.

¹⁸ CTN is not suggesting that the Commission must necessarily increase the ITFS programming requirement. The programming requirement is simply a means to ensure an instructional use. Minimal instructional use requirements could include use of the spectrum for data services, such as internet access time. See Petition, at 23 n.45.

In summary, it is critical for educators that, if the services available on ITFS channels are expanded, then the availability of educational services must also expand. On the one hand, increasing the instructional use of the ITFS channels would ensure that the intended purpose of the ITFS spectrum is not so diminished as to effect a de facto allocation to commercial use. On the other hand, such a rule would guard against ITFS licensees entering into excess capacity lease agreements which require less than substantial use of the spectrum for instructional purposes. Only then can the Commission be assured that the use of the ITFS frequencies is consistent with their allocation.

III. THE COMMISSION MUST PROTECT THE AUTONOMY OF ITFS FREQUENCIES AND ITFS LICENSEES.

The proposed rules for cellularization of MDS and ITFS stations raise a number of issues potentially affecting the autonomy of ITFS stations.

Engineering issues. The proposed rules are drafted so that any ITFS or MDS station would be permitted to "cellularize" its frequencies. Before adopting these rules, the Commission should evaluate at least two potential scenarios.

- First, what would be the impact of cellularization of a specific market if one or more of the ITFS licensees was not a part of the cellularized system?
- Second, what would be the impact of cellularization if only one ITFS licensee in a market decided to cellularize its station?

Any proposal to cellularize ITFS frequencies must be permissive, not mandatory, leaving the choice with the existing ITFS licensee of whether to switch

from the broadcast to cellular model.¹⁹ Assuming that some licensees do not participate in a market-wide change-over to the cellular model and decide to continue their broadcast operations, in accordance with the Commission's existing rules, its broadcast transmissions would overlay the cellularized market. Before authorizing the cellular model, the Commission should consider whether cellularization would impact the operations of such an ITFS station. Similarly, the Commission should consider whether the rules would permit a single licensee to cellularize its frequencies effectively, in the absence of a some form of joint venture with other licensees.

Obviously, the issue in both these scenarios is whether the ability of an ITFS licensee to use its authorized frequencies is dependent upon the transmission system planned by the wireless cable operator. If an ITFS licensee must operate in conjunction with the other licensees in the market to obtain the benefits of cellularization, then the proposed rules impose a de facto consortium arrangement on ITFS licensees and wireless cable operators, and the implications of such an arrangement should be considered fully.²⁰

¹⁹ See Channel Loading Order, 75 RR 2d at 758 (the ability to channel load is permissive, "not one ordered by the Commission, and one in which the ITFS licensee would engage, in its sole discretion").

²⁰ The Petitioners should be required to demonstrate that the autonomy of ITFS licensees could be preserved by showing that the ITFS spectrum could accommodate both cellular and broadcast transmissions in the same geographic area without harmful interference to either. See Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecast, 56 RR 2d. 625, 632 (1984) (petitioner has burden to justify the worth of rulemaking petition).

The Petition does not directly address the impact of its technical rules on the issues raised by these situations.²¹ Generally, the Commission's policies should not unduly restrict the autonomy and business of individual licensees. If, on further review, it appears that the form of a commercial system would dictate the form of operation of ITFS stations in a market, further consideration of this issue should be undertaken to develop some means to address this concern.²²

Another more complicated set of questions is raised by the Petition's proposal to permit transmissions of more or less than 6 MHz on contiguous channels, which may be licensed to different entities.²³ Usually, in a cellular system, the licensee/operator has rights to use a substantial block of spectrum for both upstream and downstream transmissions. The 190 MHz of ITFS and MDS spectrum in the 2.5 GHz band is licensed in alternating 6 MHz channels, and each licensee in a geographic area is generally limited to four channels. In order to accomplish what the Petition proposes, ITFS and MDS licensees would have to offer up their spectrum to an integrated system where single transmission paths may operate on spectrum licensed to multiple entities. This proposal not only raises the issue of whether ITFS licensees would retain their independence, it also

²¹ See Petition, at Apps. C-D. The technical exhibit is designed to confirm the validity of the model proposed for predicting accumulated signal power from multiple response stations.

²² The Commission has in the past recognized that "leasing inherently involves compromises" with respect to operation of ITFS facilities. ITFS Second Report, 101 FCC 2d at 88-91. As outlined herein, the cellularization proposal raises even more complicated issues regarding licensee autonomy.

²³ See Petition, at 30.

raises the issue of who would the Commission look to for accountability to the public and other stations for such transmissions?²⁴ Accountability is one of the essential parameters of "licenseeship." Further consideration of the implications of this proposal should be undertaken before the Commission proposes rules which permit licensees to cellularize.

Interference issues. Professing a desire to reduce the burden on FCC Staff of processing the flood of applications necessary to authorize cellularization, the Petition suggests that the Commission's independent technical review of applications and interference issues would be eliminated in the absence of a petition to deny specific applications.²⁵ The Petition suggests that the Commission should employ a process whereby licensees within a market and in adjacent markets will be allowed to negotiate interference agreements and enter into private arrangements governing the design of the wireless cable system.²⁶ According to the Petition, there would be no "independent review" by the Commission Staff of applications designed to cellularize markets.

²⁴ Compare proposed rule Section 74.982 (eliminating requirement to transmit call sign because of infeasibility of call sign identification in cellular environment) with Request for Declaratory Ruling on Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations, DA 95-1854, ¶¶ 48-51 (released July 10, 1996) (discussing need for call sign to identify transmitter and declining to eliminate call sign requirement during ITFS operations).

²⁵ See Petition, at 34-36.

²⁶ See Petition, at 36 ("the only time the staff will be required to review the complex interference studies would be in those situations where the applicant could not secure consent to its proposal, and a petition to deny is filed").

While the Commission does permit private coordination efforts among licensees,²⁷ the proposal in the Petition regarding multilateral agreements for spectrum usage among licensees and non-licensees without review raises several issues. For example, shifting the responsibility of spectrum management to private parties raises significant issues regarding control and availability of technical information for new applicants. Who would maintain the database of actual operations in order for third parties to determine whether and how new applications affect other stations? Presumably, the Commission would be responsible for maintaining license records for ITFS and MDS stations which have been cellularized, particularly, as a repository of information for stations outside the cellularized system which may be affected by interference. But, in the environment the Petition proposes, where a "licensee may also, jointly with affected adjacent channel licensees transmit, utilizing bandwidth in excess of its authorized frequencies,"²⁸ it would appear very difficult for adequate records to be maintained. The Commission should ensure that there is no lack of access to such information which might hamper the ability of ITFS eligibles and licensees to file new applications.

Financial issues. The proposed rules contemplate transforming the use of ITFS spectrum from the current "broadcast" model, where each licensee serves a

²⁷ See, e.g., 47 C.F.R. § 24.237(a-b) (requiring broadband PCS licensees to coordinate privately with potentially-affected stations).

²⁸ See proposed rule Section 21.905(b).

relatively large geographic market with a single transmitter, to a cellular system of two-way digital transmissions, where each licensee needs multiple transmitting stations, booster stations and response station transmitters. In comparison to the broadcast transmission equipment needed for operation of an ITFS station, the cost associated with such restructuring could be substantial. To finance this transformation and the operation of the new digitized, cellular system, the Petition envisions agreements between ITFS licensees and wireless cable operators. The Commission should address several important financial issues relating to this joint venture.

- Would the equipment costs limit the ability of ITFS licensees to remain independent of wireless cable operators? The Commission should consider whether it should adopt policies to ensure that ITFS licensees maintain their autonomy in such joint arrangements.

- In the event that the commercial enterprise is unsuccessful, would an ITFS licensee, or group of licensees, be able to continue operating in a cellular mode? As educational entities, ITFS licensees cannot afford to be saddled with debts of a wireless cable operator incurred in constructing a new cellular-based system, nor is there any assurance that they could operate a subscriber-based service to help defray the costs.²⁹ As the Commission is well aware, the wireless cable industry has struggled to achieve any viable commercial presence despite the

²⁹ Channel Loading Order, 75 RR 2d at 760-61 (recognizing that ITFS licensees need financial assistance to operate their facilities).

Commission's best efforts to promote the industry as a competitive alternative to cable television. The Commission should consider safeguards to ensure that the proposed change in transmission systems would preserve the independence of ITFS licensees.³⁰

IV. CONCLUSION

For the reasons outlined above, CTN believes that the Petition offers substantial opportunities to improve the educational potential of "distance learning" through ITFS. To develop these proposals further, CTN recommends that the process move forward in a negotiated rulemaking with the opportunity for involvement of all potentially affected interests. Moreover, in any rulemaking, the Commission must consider how to expand the educational use of ITFS frequencies operating in a digitized, interactive mode to meet the present and future needs of educators. Also, rules and policies adopted for the purposes proposed in the

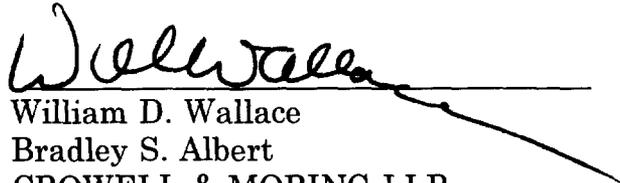
³⁰ For example, the Commission should consider whether an NTIA infrastructure grant could be used by ITFS licensees to cover the costs of equipment necessary to cellularize its operations. See NTIA, "Telecommunications and Information Infrastructure Assistance Program," 62 Fed. Reg. 3946 (Jan. 27, 1997).

Petition must preserve the instructional character of ITFS frequencies and the control of ITFS frequencies by educators.

Respectfully submitted,

CATHOLIC TELEVISION NETWORK, INC.

By:

A handwritten signature in black ink, appearing to read "W. Wallace", is written over a horizontal line. The signature is cursive and extends to the right of the line.

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CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 14th day of May, 1997, caused to be served true and correct copies of the foregoing "Comments of Catholic Television Network, Inc." upon the following parties via hand delivery (indicated by an *) or first-class United States mail, postage prepaid:

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