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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcasting and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH WIRELESS CABLE, INC.

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SUMMARY

The Commission seeks comment on a number of auction-related issues, including whether it should be or is required by recent amendments to the Communications Act ("Act") to hold auctions to resolve mutually exclusive applications for Instructional Television Fixed Service ("ITFS") stations. BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth") urge that the ITFS spectrum should not be auctioned.

The Act does not mandate ITFS auctions. It is inconceivable that, without so much as a word, Congress would effect a sea change in public policy by requiring educators to bid at auction for licenses to provide noncommercial instructional and educational programming services. It is obvious that Congress' failure to specifically exclude ITFS from auctioning was an oversight when one considers the absurdity of conducting an auction among non-profit educational entities. As Congress and the Commission well know, educational institutions and other non-profit entities operate with limited budgets, must request funding from their chartering entities far in advance, and have little experience or wherewithal to value FCC licenses strictly in monetary terms. Furthermore, most if not all of the funds these entities would use to pay for ITFS licenses are public funds earmarked for education. It makes no sense for this money to be transferred from local schools and other non-profit entities to the U.S. Treasury.

The Commission has, on many occasions, treated ITFS as if it were a noncommercial broadcast service. Indeed, in determining that ITFS licensees are exempt from regulatory fees, the Commission interpreted Congress' failure to specifically exempt ITFS from regulatory fees to mean that it should be treated the same as other noncommercial services. The same conclusion is required here.

In the event the Commission decides otherwise, it should carefully consider the unique characteristics of ITFS in designing an ITFS auction. It should not use auctions to choose among mutually exclusive applications already on file. Applications now on file were filed with the reasonable expectation that any mutually exclusivity would be resolved by the comparative point system and that the application processing rules would not be changed retroactively. Moreover, subjecting pending applications to the uncertainty of the auction process could undermine the strategic decisions and business plans of ITFS licensees and their commercial partners, such as BellSouth.

The Commission also should not increase instances of mutual exclusivity by employing a geographic licensing scheme. Open outcry would be the most appropriate auction design because of the non-interdependent nature of ITFS licenses.

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COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH WIRELESS CABLE, INC.

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), pursuant to Section 1.415 of the Commission's Rules, hereby submit the following comments in response to the above-referenced Notice of Proposed Rulemaking (the "NPRM"). The NPRM seeks comment on a number of auction-related issues, including whether the Commission should be or is required to hold auctions to resolve mutually exclusive applications for Instructional Television Fixed Service ("ITFS") facilities and, if so, what auction design and bidding procedures should be used. BellSouth strongly believes it is inappropriate for ITFS spectrum to be auctioned. Should the Commission nevertheless decide to auction ITFS licenses, it should carefully consider the unique characteristics of ITFS in designing the auctions and establishing bidding rules.

Introduction

BellSouth Corporation, through its subsidiaries, provides telecommunications, wireless communications, video programming, directory advertising and publishing, Internet access and information services to more than 27 million customers in 20 countries worldwide. In the United States, BellSouth now offers video service in multiple markets in the Southeast reaching more than 400,000 homes.

BellSouth recently launched state-of-the-art digital wireless cable service in New Orleans. This system offers customers over 150 channels of services, with superior picture and sound quality, including local broadcast stations, national programming networks, premium movie channels, movies-on-command, instructional programming as well as CD-quality music channels provided by five ITFS licensees that lease excess airtime capacity to BellSouth. In 1998, BellSouth plans to begin offering its home entertainment services over additional wireless cable systems in Atlanta, Orlando, Jacksonville, Daytona Beach, Miami and other areas of Florida and Kentucky.

BellSouth's implementation of wireless cable is part of its strategic plan to expand its participation in the home entertainment services industry and, to that end, it is evaluating three principal service delivery platforms: wireless cable, cable television and satellite-based systems. BellSouth also is in the process of real-world testing of new video technologies and ancillary services such as high-speed data services for personal computer users. Based on cost and other competitive factors, BellSouth ultimately will choose the best delivery platform(s) in a given market. Wireless cable is an attractive option at this time because it allows for relatively quick market entry at lower capital cost than wired systems.

ITFS channels account for 20 of the 33 spectrum channels potentially available to wireless cable operators for programming and other services. As a wireless cable operator, BellSouth must have access to the ITFS channels sufficient to aggregate the capacity necessary to enable it to develop a robust product in competition with other multichannel video service providers. In this regard, BellSouth is party to numerous excess airtime agreements with ITFS licensees and applicants. A shift from the present system of resolving mutual exclusivity between and among ITFS applications to an auction regime is likely to have a direct and material adverse impact on BellSouth's ability to assist ITFS entities in fulfilling their educational mission and to enter markets quickly, at comparably lower costs.

Discussion

I. ITFS Spectrum Should Not Be Auctioned

A. The Statute Does Not Require ITFS Auctions

In 1993, Congress amended the Communications Act of 1934 (the "Act") to authorize the FCC to conduct auctions to resolve mutual exclusivity between applications for licenses:

> [T]he principal use of [which] will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers in return (i) for the licenses enabling those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or (ii) for the licensee enabling those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate.[1]

Accordingly, under former Section 309(j) of the Act, all non-subscription services were exempt from spectrum auctions and there was no question that all noncommercial services, including ITFS, were included in this exemption.

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[1] 47 U.S.C. § 309(j) (2)(a) (prior to 1997 amendment).

The Balanced Budget Act of 1997 (the "1997 Budget Act") amended Section 309(j) to require the FCC to use auctions to resolve "mutually exclusive applications...accepted for any initial license or construction permit" not subject to specific exemptions listed in the statute.[2] In an oversight, Section 309(j) as amended exempted from competitive bidding "noncommercial educational broadcast stations" and "public broadcast stations,"[3] defined as "television or radio broadcast station[s]" which are: (1) eligible for FCC licensing as noncommercial educational stations and "owned and operated by a public agency or nonprofit private foundation, corporation or association"; or (2) "owned and operated by a municipality and which transmit only noncommercial programs for educational purposes," but did not specifically exclude ITFS stations. [4]

Interpreting the Act to require ITFS auctions would be inconsistent with past Commission actions in similar circumstances. For example, the FCC exempted ITFS from regulatory fees in the absence of a clear Congressional mandate, on the basis of the "general educational noncommercial status" of the service.[5] Since there has been no change in the general educational nature of ITFS, the Commission's analysis also should not change. It defies logic and common sense to read into the Act a requirement that mutually-exclusive ITFS applications should be subject to auctions in which the highest bidder wins.[6]

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[2]47 U.S.C. § 309(j) (emphasis added).

[3]47 U.S.C. § 309(j), 367(6).

[4] 47 U.S.C. § 397(6).

[5]Implementation of Section 9 of the Communications Act, Notice of Proposed Rulemaking, MD Docket 94-19, released March 11, 1994 at ¶ 60 n. 52; see 47 C.F.R.§ 1.1162(h).

[6] 47 C.F.R. § 73.621.

B. ITFS Auctions Will Not Promote Education

Because ITFS eligibility, like eligibility for noncommercial educational broadcasting services, is restricted to educators and educational institutions, and both types of licenses must be devoted to educational uses, there is no logical reason for ITFS and noncommercial educational broadcasting to be treated differently with respect to auctions.[7]

In keeping with the essential similarity of ITFS and noncommercial educational broadcasters, for example, the Commission exempted ITFS when it adopted its application fee requirements. [8] In determining that ITFS licensees, like educational broadcasters, should be exempted both from application fees and from fees associated with auxiliary facilities, the Commission recognized that the difference between "instructional" and "noncommercial

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[7]In seeking comment concerning the applicability of competitive bidding to mutually-exclusive ITFS applications, the Commission itself notes that the ITFS service has "certain characteristics in common with noncommercial educational and public broadcast stations," including its specific airtime reservation for educational usage and its exemption from application processing fees. NPRM at ¶ 100. Furthermore, ITFS eligibility is strictly limited to educators or noncommercial entities. NPRM at ¶ 100. Only "an accredited institution or . . . a governmental organization engaged in the formal education of enrolled students or . . . a nonprofit organization whose purposes are educational and include providing educational and instructional material to ... accredited institutions and governmental organizations" are eligible to hold ITFS licenses. 47 C.F.R. § 74.932. ITFS entities must provide a minimum amount of instructional programming offered for credit to students enrolled in accredited institutions as well as educational and cultural programming. See 47 C.F.R. § 74.931. These limitations are similar to the eligibility and usage restrictions imposed on noncommercial broadcast licenses. Noncommercial educational broadcast licensees must be "nonprofit educational organizations" that demonstrate that the "proposed station will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service," or, where there is no governmental educational entity such as a board of education, a municipality that desires to provide such services.

[8]NPRM at ¶ 100; Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Memorandum Order and Opinion, 3 FCC Rcd 5987, 5989 (1988) ("Establishment of a Fee Program"); 47 C.F.R. § 1.1112(e)(4).

educational" is a matter of semantics.[9]

The lack of regulatory distinction between ITFS and noncommercial educational broadcasters also is illustrated in the FCC's recent decision to exempt ITFS licensees from the obligation to contribute to the universal service fund on the basis of their noncommercial educational character and similarity to noncommercial broadcasters.[10] Pursuant to Section 254(d) of the Act, which governs universal service contributions, the Commission has the discretion to determine which non-common carrier interstate service providers are required to make universal service contributions. Although the Commission initially determined that all non-common carrier providers of interstate telecommunications should be required to contribute to universal service, on reconsideration it held that non-profit schools, universities, libraries and health care providers, which are eligible for universal service support, are not required to contribute "because such action effectively would reduce the amount of universal service support they receive" and would be "inconsistent with the educational goals of the universal service support mechanisms."[11] Further, because broadcasters and ITFS "compete" with cable, open video systems and DBS providers, which are exempted from universal service obligations, 47 C.F.R. § 54.703, the Commission held that:

> [T]he public interest would not be served if we were to exercise our permissive authority to require broadcasters, including ITFS licensees, that engage in non-common carrier interstate telecommunications to contribute to universal service.[12]

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[9] Implementation of Section 9 of the Communications Act, Report and Order, MD Docket 94-19, released June 8, 1994 at ¶ 20; 47 C.F.R. § 1.1162(h). Establishment of a Fee Program at 5989.

[10] Universal Service Reconsideration Order at ¶ 284.

[11] Universal Service Reconsideration Order at ¶ 284.

[12] Universal Reconsideration Order at ¶ 283 (emphasis added).

It is telling that the Commission refers to ITFS licensees as a subset of "broadcasters" in this instance.[13]

ITFS licensees and other educational broadcasters have consistently been excluded from spectrum auctions. To not exclude ITFS licensees would be fundamentally unfair and contrary to the public interest. It could also have the unintended effect of discouraging educators and noncommercial entities from applying for ITFS frequencies. The comparative point system currently used to select between mutually exclusive ITFS applicants has proven to be an efficient and relatively cost effective selection process. By contrast, the complexity of the auction process, and the financial resources, time, effort and expertise required to participate in it, are likely to be too burdensome for educational institutions. Local schools and universities traditionally operate with very tight budgets and severe restraints on how available funds can be spent. The decision to divert limited financial resources to the competitive bidding process is not one that can be made unilaterally in most instances, but would require the approval of the local school board and/or school district, regional educational authority, or even the state department of education. This process is likely to meet strong resistance because resources originally earmarked for purchasing additional textbooks, increasing teacher salaries and the like would be redirected to the purchase of FCC licenses. If the competing schools are under the auspices of the same funding authority such resistance is even more

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[13]That ITFS entities and educational broadcasters have been recognized as similarly situated, particularly as concerns funding and like financial matters, is further evidenced by the fact that the Commission applies to ITFS applicants the less stringent "reasonable assurance" standard when reviewing financial qualifications. This is the same standard used to evaluate the financial qualifications of noncommercial broadcasters. The decision to apply the same standard to both services was based on the "directly analogous nature of the funding sources and procedures which face the shared educational purposes of both services." Hispanic Information and Telecommunications Network, Inc., 7 FCC Rcd 5924, 5926 (1992).

likely.

Few local schools will be willing to even venture down this road. Of those that are willing, it is unlikely that they could obtain the requisite approvals in time to participate in the auction process or the authority necessary to participate meaningfully in a multi-round auction.[14] Thus, local public schools would be at a severe disadvantage to national ITFS entities and private institutions in the auction process.[15] All of this is directly at odds with the FCC's stated goal of promoting the development of ITFS at the local level.[16]

The Commission must not lose sight of the fact that ITFS licenses typically are nonprofit entities with limited financial resources and a myriad of demands on these resources. In most circumstances, funds received in the U.S. Treasury from an ITFS auction are the funds that would have been used for the purchase of supplies and equipment, teacher training, teacher salaries, etc. This would be an unconscionable result, and one that runs directly counter to the efforts of Congress and the Commission to promote educational opportunities through the use of new technology, and one that surely must have been unintended by Congress.

In order to bid in an auction, an applicant must be able to establish a sensible value for a

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[14]The FCC typically gives 3-4 months advance notice of an auction. School funding processes do not lend themselves to this relatively short time frame.

[15]See Section II., A., infra.

[16] See 47 C.F.R. §§ 74.931; 74.913; Amendment of Parts 2 and 4 of the Commission's Rules and Regulations to Establish a New Class of Educational Television Service for the Transmission of Instructional and Cultural Material to Multiple Receiving Locations on Channels in the 1990-2110 Band, Report and Order, 39 FCC 846 (1963) ("Amendment of Parts 2 and 4"); Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, Second Report and Order, 58 RR 2d 559, 561-62 (1985) ("Amendment of Part 74"), Memorandum Opinion and Order, 59 RR 2d 1355, 1358 (1986); Hispanic Information and Telecommunications Network, Inc. v. FCC, 65 RR 2d 1752, 1754 (D.C.Cir. 1989).

particular license. Educators do not value ITFS licenses strictly in monetary terms and thus any auction procedure is infeasible and manifestly inappropriate. Valuing any FCC license, moreover, is time-consuming and expensive, requiring detailed business plans and technical studies, as well as extrapolation. Because of the unique FCC restrictions placed on ITFS, this is a highly speculative task.

If Section 309 as amended actually represents a sea change in Congress' treatment of ITFS, it is reasonable to assume that, at a minimum, the reasons or need for this change in policy would have been noted and discussed in the legislative history. Yet, there is absolutely no mention of ITFS in the legislative history. It is inconceivable that Congress would depart from or repudiate its historical treatment of ITFS (and educational services in general) with no justification and without so much as a word. [17] Congress' focus in amending Section 309 was not on educational services such as ITFS, but on the application of auctions to traditional broadcast services, specifically commercial broadcasting.[18] Under the circumstances, Congress' failure to address the applicability of auctions to ITFS licensees cannot reasonably be interpreted as a decision to depart from past practices and treat ITFS entities different from other educational entities, including noncommercial broadcasters.

II. If The FCC Undertakes ITFS Auctions, It Must Consider The Unique Characteristics of ITFS in Auction Design and Bidding Procedures

If, notwithstanding the foregoing, the FCC believes it is bound by statute to auction mutually exclusive ITFS applications, great care should be taken to tailor ITFS auctions to the unique characteristics and needs of the service and ITFS licensees.

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[17] See H.R. Rep. No. 217, 105the Cong., 1st Sess. (1997).

[18] Id.

A. Pending ITFS Applications Should Not Be Subject To Auction

Mutually exclusive ITFS applications now pending before the FCC should be processed in accordance with the comparative point system in place at the time the applications were filed. Such a result is required as a matter of law and public policy.

The Commission notes that the comparative process for commercial broadcasters has been subject to judicial challenges, resulting in a processing freeze at the FCC.[19] As a result, few if any of the currently pending broadcast applications could have been filed with reasonable reliance on a particular selection criteria.[20] Under these circumstances, it is not arbitrary and capricious to submit pending commercial broadcast applications to a new selection scheme, as the NPRM proposes.[21]

By contrast, the ITFS comparative point system has been in place and unchallenged since 1985. ITFS applications now pending before the Commission were filed with the reasonable expectation that those applications deemed mutually exclusive would be subject to the comparative point system. To change the selection process now would be arbitrary and capricious, as these applicants had no notice that they might be subject to auction or that the FCC contemplated any change in long-standing licensing procedures.[22]

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[19]NPRM at ¶¶ 5, 15.

[20]Id.

[21]See Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987) ("Maxcell"); Chadmoore Communications, Inc. v. FCC, 113 F.3d 235 (1997) ("Chadmoore").

[22]See Maxcell (Commission's decision to choose among pending mutually exclusive cellular applications by auction rather than comparative hearings was acceptable because the applicants had notice that the selection process might change); Chadmoore (change in rules leading to denial of petitioner's extension application was not arbitrary and capricious because petitioner had notice of potential change).

There is great public benefit to the current system over an auction regime. One such benefit is the relative certainty of being able to predict which applicant is likely to prevail. The Commission should recognize that, because the comparative point system awards points based on readily identifiable factors such as the number of channels requested and amount of educational programming proposed, the relative "strength" of an application will be known before it is even filed. This affords ITFS licensees, and wireless cable operators, a degree of certainty unattainable with auctions, and allows them to incorporate this certainty into their strategic decisions and business plans. To subject currently pending ITFS applications to the uncertainty of the auction process would undermine these plans.

Moreover, the current point system offers greater certainty that the Commission's licensing priorities, favoring local, accredited institutions, are realized. An auction scheme would likely only serve to place licenses in the hands of those entities financially well off enough to overbid, as necessary, those local accredited institutions which the Commission has historically believed are in the best position to provide the type of educational services the Commission found to be in the public interest. ITFS auctions are thus likely to undermine the Commissions' long-standing licensing priorities.

B. A Geographic Licensing Scheme Is Not Appropriate For ITFS

The NPRM seeks comment on the use of geographic licensing areas such as Basic Trading Areas ("BTAs") for ITFS auctions. BellSouth believes the Commission should not use a geographic licensing scheme such as BTAs for ITFS auctions, but instead should continue to make determinations of mutual exclusivity based on predicted interference. Superimposing geographic license areas such as BTAs upon already-established and far smaller educational districts or ITFS

station service areas would artificially and needlessly increase the number of mutually exclusive ITFS applications, force ITFS entities to bid for license areas greater than or incompatible with the area to which they provide educational services, and frustrate the Commission's principal objective for ITFS -- advancing the needs of local students and educators.[23]

For example, under a BTA scheme, two applicants for the same channels within the same BTA would be forced into an auction to determine which entity will hold a license for the entire BTA, even if their proposed facilities could coexist with no interference and they intend to serve entirely separate and distinct educational districts.[24] A geographic licensing scheme thus conflicts with the Commission's longstanding preference for local ITFS entities, which the FCC has long recognized are best equipped to serve the needs of local students.[25] The local preference is based on the recognition that local involvement is critical to serving the intended ITFS audience and that "[l]ocally based educational entities [are] the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities."[26] Auctioning ITFS on a BTA or other geographic basis is contrary to the bedrock principle of localism upon which ITFS was

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[23] See Second Report and Order at 561-62.

[24]It is foreseeable that multiple ITFS applicants in a geographic region might be authorized -- and funded -- by the same governmental entity. Under a geographic auctioning scheme, this entity (perhaps the state education department) would be required to sanction and perhaps underwrite competitive bidding between member schools. This raises a host of funding and related auction anti-collusion issues.

[25]The Commission's desire to promote ITFS "localism" is reflected in fact that the comparative point system for selecting between mutually exclusive ITFS applicants (Section 74.913(b)(1)) awards the highest possible number of comparative points to ITFS applicants within the community or metropolitan area to be served by the proposed station. See 74.932, Note 1.

[26] See Second Report and Order at 561-62.

established.[27]

C. Open Outcry Auctions Are Best Suited For ITFS

The Commission repeatedly has emphasized its intention to "tailor the design of each auction to fit the characteristics of the authorizations to be awarded."[28] It has identified sealed bids, open outcry and simultaneous multiple-round bidding as the primary auction designs.[29]

The Commission's overarching goal in determining the appropriate auction design for a particular service is to award each license to the party that values it most. In pursuit of this objective, the Commission observes three guiding principles for auction: (1) to take into account value interdependency among licenses to be auctioned, to permit efficient aggregation; (2) to award licenses rapidly, so consumers will benefit from their award as quickly as possible; and (3) to avoid bidding procedures that are "overly complex and costly in relation to the task to be accomplished."[30] Among auction options, open outcry auctions would best achieve these objectives for the ITFS.

Where there is little interdependence among licenses or groups of licenses, the Commission has determined that a more simple auction design such as open outcry or sealed bids will produce an economically efficient result without need for the cost and complexity of holding a simultaneous-

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[27] Second Report and Order at 564.

[28] Revision of Rules and Policies for the Direct Broadcast Satellite Service, 1 Communications Reg. (P & F) 2079 (1995) ("DBS Bidding NPRM"); see Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2367 (1994) ("Competitive Bidding Order").

[29] Competitive Bidding Order at 2366-67.

[30] DBS Bidding NPRM at 2095; see Competitive Bidding Order at 2360-61. ("[t]he less the interdependency among licenses, the less the benefit to auctioning them simultaneously").

multiple round auction.[31] The vast majority of local educators seek only to service their immediate school district, consistent with their educational mission and the dictates of the FCC . Thus, local ITFS entities generally have no reason to acquire licenses outside their immediate school districts.[32] A school in Boston, for instance, would not seek an ITFS license in Seattle. Accordingly, sequential oral auctions, which do not rely on interdependency, would be more appropriate than simultaneous bidding for awarding ITFS licenses. [33]

Open outcry auctions can be accomplished quickly, serving the public interest in expeditious award of ITFS licenses in mutually exclusive situations.[34] Because ITFS entities typically have limited financial resources, little or no experience in matters such as competitive bidding and auctions, and limited manpower to bring to bear on such matters, the party that values an ITFS license the most -- the local educator -- will be at a significant disadvantage in a lengthy auction process. The Commission's guiding principles should be ease and simplicity in structuring any

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[31] DBS Auction Order at 2095; Competitive Bidding Order at 2366

[32]An auction scheme that puts a premium on interdependent licensing, moreover, would tend to encourage mercenary applicants who are focused more on aggregating ITFS licenses than providing distance-learning to local students.

[33]Simultaneous multiple-round bidding is the most appropriate auction design where the value of a particular license depends on the purchaser's ability to aggregate the license with other licenses, for example, to create a regional or national PCS network. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Notice of Proposed Rulemaking, 6 Communications Reg. (P & F) 2111, 2126 (1996).

[34] See DBS Bidding NPRM at 2096 ("[a]n oral outcry auction has the advantage of being simple and rapid"); Implementation of Section 309(j) for the Communications Act - Competitive Bidding, Fourth Report and Order,9 FCC Rcd 2330, 2331 (1994) ("IVDS Auction Order"), Sixth Memorandum Opinion and Order, 9 FCC Rcd 19341, 19350 (1996) ("Further IVDS Auction Order").

auction involving ITFS.[35]

Open outcry would be the most cost-effective design for auctioning ITFS licenses. In circumstances where the licenses are not expected to garner high bids and are not interdependent, the relatively straightforward procedures of an open outcry auction clearly would be most appropriate.[36] Because of the limited financial resources of most educators and the extensive eligibility and use restrictions on ITFS licenses, auction of the ITFS spectrum cannot be expected to yield significant auction revenues. As the Commission has stated, simultaneous multiple round auctions entail significantly greater cost and complexity than open outcry or sealed bid auctions.[37]

Sealed bids procedures, like open outcry bidding, are also simple and inexpensive. As the Commission has concluded, however, they do "not provide bidders with timely information about license values" and do not afford bidders an "opportunity to increase their bid amounts during the course of the auction."[38] In an ITFS auction, which will have inexperienced auction participants and highly subjective monetary license values, the exchange of information among bidders permitted in an open outcry format would promote the most fair and economically efficient outcome.[39]

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[35]The Commission could further simplify the auction process and reduce costs to applicants by employing remote electronic bidding rather than undertaking live auctions.

[36]The Commission determined that open outcry was the appropriate auction design for 594 licenses in the Interactive Video and Data Service ("IVDS") based on similar considerations. Further IVDS Auction Order at 19350.

[37]See IVDS Auction Order at 2331.

[38]Implementation of §309(j) of the Communications Act - Competitive Bidding, Third Report and Order, 9 FCC Rcd 2941, 2949 (1994).

[39]BellSouth notes that the ITFS application filing and processing scheme is under review in connection with MM Docket No. 97-217. See In the Matter of Amendment of Parts 1, 21 and 74

Conclusion

Congress' failure to specifically exclude ITFS from auctioning was an oversight. To conclude otherwise defies both logic and common sense, and would be inconsistent with the Commission's past interpretation of similar legislation on such matters, as well as its historical treatment of ITFS. The Commission can and must exclude ITFS from auctions.

If the Commission nonetheless decides to subject mutually exclusive ITFS applications to auction, great care must be taken to draft rules and procedures that take into account the unique characteristics and needs of the service and ITFS licensees. At a minimum, mutually exclusive applications now pending before the FCC should be processed in accordance with the comparative point system in place at the time the applications were filed. Determinations of mutual exclusivity should continue to be based on predicted interference, rather than on a geographic basis, and open

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to Enable Multipoint Distribution Service and Instructional Television Fixed Services Licensees to Engage in Fixed Two-Way Transactions, Notice of Proposed Rulemaking, MM Docket No. 97-217, released October 10, 1997. Any ITFS auction design would have to account for the complexities of processing two-way applications as dictated in the outcome of that proceeding.

outcry should be selected as the auction design because of its relative ease and the non-interdependent nature of ITFS licenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Yvette King, a legal secretary at the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that I have this 26th day of January, 1998 caused to be delivered by hand the foregoing "Comments" of BellSouth Corporation and BellSouth Wireless Cable, Inc. to the following:

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