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

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

REPLY COMMENTS OF BELLSOUTH CORPORATION AND BELLSOUTH WIRELESS CABLE, INC.

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February 17, 1998

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Summary

The overwhelming consensus among the commenters, BellSouth included, is that the FCC is not required to, and should not, subject mutually-exclusive Instructional Television Fixed Service ("ITFS") applications to auction. It is inconceivable that without any explanation, Congress would depart from past practices and for the first time treat ITFS entities differently than it treats all other educational entities. The commenters correctly observe that Congress' focus in amending Section 309 of the Communications Act ("Act") was not on educational services such as ITFS, but on the application of auctions to commercial broadcast services. All commenters save one conclude that Congress' failure to specifically exclude ITFS from auctioning could only have been an oversight.

The commenters agree that reading into the Act a requirement that mutually-exclusive ITFS applications be subject to auction ignores the fundamental similarities between ITFS and noncommercial broadcast stations which are exempted from auctioning under the Act. These similarities have caused the FCC to treat ITFS entities and educational broadcasters alike, particularly with respect to funding and other financial matters. The FCC itself reflects this lack of regulatory distinction between ITFS and noncommercial educational broadcasting in its description of ITFS as a subset of noncommercial educational broadcasting.

There also is widespread recognition among the commenters (including ITFS licensees) that the complexity of the auction process, and the financial resources, time and effort required to participate in it, are likely to be overly burdensome for the vast majority of educational institutions. The adoption of ITFS auction procedures could have the unintended effect of discouraging educators and noncommercial entities from applying for ITFS frequencies. The need for funds to finance participation in auctions may encourage ITFS applicants to shift their focus from traditional instructional programming to programming or services that have the potential to return a profit. This

could undermine the essential educational character of ITFS.

It is well recognized that a statute should not be interpreted to accomplish an absurd or illogical result. Under the circumstances, it would be absurd to infer from the omission of a specific exception that Congress intended to depart from past practices and treat ITFS entities different from other educational entities, including noncommercial broadcasters. If the FCC nevertheless remains undecided on this matter, fundamental fairness requires that the Commission seek clarification from Congress before implementing ITFS auction procedures.

In the event the FCC ultimately decides to subject ITFS to the auction process, the applicable rules and procedures must take into account the unique characteristics and needs of the service, ITFS licensees and consumers. Auctions should not be used to choose among mutually-exclusive ITFS applications already pending before the FCC. These applications, the majority of which were submitted in the October 1995 window, were filed with the reasonable expectation that any mutual exclusivity would be resolved by the comparative point system. To change the selection process now would be arbitrary and capricious, and contrary to the public interest.

The Commission should not increase instances of mutual exclusivity by forcing ITFS entities to bid for license areas greater than or incompatible with the area to which they provide educational services by employing a geographic licensing scheme. Open outcry would be the most appropriate auction design for ITFS because of its relative ease and the non-interdependence of ITFS licenses.

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REPLY 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 their Reply Comments to the comments filed by other parties in response to the above-referenced Notice of Proposed Rulemaking (the "NPRM").[1]

Introduction

In its Comments in this proceeding, BellSouth demonstrated that the Balanced Budget Act of 1997[2] does not require the Commission to subject mutually exclusive Instructional Television Fixed Service ("ITFS") applications to auction. There is virtually unanimous agreement among other commenters as well that ITFS was never intended to be auctioned, and should not be auctioned. The

[1] BellSouth filed comments in this proceeding on January 26, 1998 ("BellSouth Comments").

[2] Pub. L. No. 105-33, 111 Stat. 251 (1997)("Budget Act").

evidence of record is overwhelming. To single out ITFS as the only noncommercial educational service subject to competitive bidding procedures would be indefensible from a public policy standpoint, would be inconsistent with Congressional and FCC historical treatment of ITFS, and most certainly would undermine ITFS as an important educational tool.

BellSouth also demonstrated that, if the FCC nonetheless decides to subject ITFS to the auction process, the applicable rules and procedures must be carefully crafted to take into account the unique characteristics and needs of ITFS as well as ITFS licensees and consumers.

Discussion

I. ITFS Spectrum Should Not Be Be Auctioned

All commenters save one agree that the FCC is not required to, and should not, subject ITFS to auction. Compelling practical and public policy considerations support this conclusion.

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 certain types of licenses.[3] Under former Section 309(j) of the Act, all non-subscription services were exempt from auctions, and all noncommercial services, including ITFS, were included in this exemption.[4]

Subsequently, the Budget Act amended Section 309(j) to require the FCC to use auctions to resolve mutually exclusive applications for any initial license or construction permit not subject to specific exemptions listed in the statute.[5] Section 309(j) as amended exempted from competitive bidding "noncommercial educational broadcast stations" and "public broadcast stations," defined as

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[3] 47 U.S.C. § 309(j)(2)(a) (prior to 1997 amendment).

[4] *Id.*

[5] 47 U.S.C. § 309(j), 397(6).

"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."[6] Most commenters agree that Congress' failure to specifically exclude ITFS stations was a drafting oversight.

If the Budget Act actually represents a fundamental shift in Congress' treatment of ITFS, it is reasonable to expect that, at a minimum, the reasons or need for this change in policy would have been noted or discussed in legislative history. Yet there is absolutely no mention of ITFS in the Act's legislative history.[7] Further, as several commenters correctly observed, 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.[8] It is inconceivable that Congress would depart from or repudiate its historical treatment of ITFS (and educational services in general) without so much as a word of explanation. This supports the view that failing to mention ITFS was, simply put, an oversight.

Interpreting the Act to require ITFS licenses to be auctioned also 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 to do so, on the basis of the "general

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[6] *Id.*

[7] *Id. See also* Wireless Cable Association International ("WCA") Comments at 5. There is absolutely no evidence in the Balanced Budget Act or in the legislative history that Congress intended to reverse course and subject mutually-exclusive applications for new ITFS stations to competitive bidding.

[8] *See e.g.* NIA Comments at 3-4; ITFS Parties Comments at 2-3; BellSouth Comments at 9.

educational noncommercial status" of the service.[9] Because the general educational nature of ITFS has not changed, the Commission's analysis should be the same.

The majority of commenters in this proceeding agree that reading into the Act a requirement that mutually-exclusive ITFS applications should be subject to auction ignores the fundamental similarities between ITFS and noncommercial educational stations. These similarities have led the Commission historically to treat the services in a virtually identical manner for regulatory purposes. The Commission itself notes in the NPRM that "ITFS ... has certain characteristics in common with noncommercial educational and public broadcasting services which are specifically exempted from our Section 309(j) auction authority."[10]

Many commenters observed that ITFS eligibility, like eligibility for noncommercial educational broadcast stations, is restricted to educators and educational institutions, and that both types of licenses must be devoted to educational use.[11] These fundamental similarities have caused the FCC to treat ITFS entities and educational broadcasters alike, particularly with respect to funding and

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[9] *Implementation of Section 9 of the Communications Act - Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 5333, 5341 (1994) ("*Regulatory Fees Order*"). Although the regulatory fee legislation clearly distinguished between commercial and noncommercial television stations, no such distinction was made regarding radio stations. Nonetheless, the Commission concluded on its own that Congress intended for noncommercial radio stations to be exempt from regulatory fees. *Implementation of Section 9 of the Communications Act - Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 6957, 6966 (1994).

[10] NPRM at ¶ 100.

[11] *See e.g.* BellSouth Comments at 5; ITFS Parties Comments at 4-5; WCA Comments at 7-9; National ITFS Association ("NIA") Comments at 4. If anything, the rules require ITFS stations to be more focussed than public broadcasting stations with respect to their nonprofit and educational mission. ITFS Parties Comments at 4.

other financial matters.[12] For example, in determining that ITFS licensees, like educational broadcasters, should be exempted both from application fees and from fees associated with auxiliary services, the Commission recognized that the difference between "instructional" and "noncommercial educational" is a matter of semantics.[13] The Commission applies to both ITFS applicants and noncommercial broadcast applicants the less stringent "reasonable assurance" standard when reviewing financial qualifications, based on the "directly analogous nature of the funding sources and procedures which face the shared educational purposes of both services.[14] As noted earlier, the FCC exempted ITFS, like noncommercial broadcasting, from regulatory fees based on the "general educational noncommercial status" of the service.[15]

The Commission just this past December exempted 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.[16] The Commission specifically stated that "the public interest would not be served if we were to exercise our permissible authority to require *broadcasters*,

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[12] BellSouth Comments at 7; WCA Comments at 6.

[13] *Implementation of Section 9 of the Communications Act, Report and Order*, MD Docket No. 94-19, released June 8, 1994 at ¶ 20. *See also* BellSouth Comments at 5-6; Joint Comments of Schwartz, Woods and Miller on behalf of Board of Trustees of Community Technical Colleges (Connecticut) *et. al.* ("Joint Comments I") at 3; NIA Comments at 4.

[14] *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924, 5926 (1992).

[15] *Regulatory Fees Order* at 5341.

[16] *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420 at ¶¶ 283, 284 (rel. Dec. 30, 1997) ("*Universal Service Reconsideration Order*"). *See* BellSouth Comments at 6; WCA Comments at 7.

including ITFS licensees ... to contribute to universal service."[17] Along similar lines, in the current rulemaking proceeding concerning the provision of two-way services over ITFS and Multipoint Distribution Service ("MDS") frequencies, the Commission identifies ITFS as a "non-pay, non-commercial broadcast service."[18] The lack of regulatory distinction between ITFS and noncommercial educational broadcasting is such that even the FCC describes ITFS as a subset of educational broadcasting. The lines between these services have blurred to the extent that, for most regulatory purposes, they are now non-existent.[19]

To single out ITFS applicants for inclusion in an auction process could have the unintended and fundamentally unfair effect of discouraging educators and noncommercial entities from applying for ITFS frequencies. As the commenters recognize, 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.[20] By contrast, the complexity of the auction process, and the financial

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[17] *Universal Service Reconsideration Order* at ¶ 283 (emphasis added).

[18] *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 97-360, MM Docket No. 97-217, at B-2 (rel. Oct. 10, 1997).

[19] This being so, it would be both logical and consistent for the Commission to find that Congress considers ITFS to be a "noncommercial broadcast service" for purposes of competitive bidding.

[20] *See e.g.* Joint Comments I at 3, WCA Comments at 11-12; BellSouth Comments at 7. The only commenter to even suggest that auctions are preferable to the current ITFS licensing scheme is the Hispanic Information and Telecommunications Network ("HITN"). However, HITN's analysis is based on a comparison of auctions to broadcast comparative hearings and lotteries. HITN Comments at 6-8. Almost any licensing scheme would be preferable to full-blown comparative hearings and lotteries. The time-tested comparative point system amounts to little more than a paper hearing that does not tax an applicant's resources and can be concluded in very short order. It is ludicrous to suggest that auctions would be a superior licensing scheme.

resources, time, effort and expertise required to participate in it, are likely to be overly burdensome for the vast majority of educational institutions.[21] The ITFS Parties themselves (a group of 10 ITFS licensees and applicants including some of the most innovative and respected educators and ITFS licensees in the nation) express their concern over these problems:

> One likely result of using competitive bidding toward disputed frequencies is that the most worthy applicants (that is, those most closely focussed on providing educational services of value to the community), will be the least able to compete. Indeed, it's doubtful whether many public educational entities would be able to participate in an auction for frequencies, either because of legal or financial restrictions. Regardless of whether local educational entities can bid, even if they do bid and prevail, the result of the competitive bidding process is that funds that otherwise would be put to use to provide education will be used to purchase the frequencies. This stunning reversal of policy inevitably will mean that the ITFS station's programming services will be less valuable than they could be otherwise, an intention that should not be attributed to Congress in the Balanced Budget Act.[22]

The CPB similarly observes that "[e]ducational institutions were created to teach students - an altruistic pursuit. An ITFS auction will pit educators against each other in a contest to determine who will spend the most money, not who will best use ITFS technology to prepare students."[23]

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[21] *See e.g.* Corporation for Public Broadcasting ("CPB") Comments at 4-5. Local schools and universities typically 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 one that typically will require approval of the local school board and/or school district, regional educational authority, or even the state department of education. This is likely to be a highly charged, drawn-out process in which few local schools would be willing to participate. BellSouth Comments at 7-8.

[22] ITFS Parties Comments at 5.

[23] CPB Comments at 6. *See also* Joint Comments I at 3.

The comparative point system was specifically designed to identify the applicant most likely to provide the service that best meets the educational and instructional needs of the community in issue.[24] In recognition that local educators are best positioned to evaluate and meet the educational needs of their communities, the comparative point system awards the highest number of points to ITFS applicants that are physically located in the community to be served.[25] A system of competitive bidding, which turns on an applicant's financial strength rather than its proximity to and familiarity with the community to be served and the relative merit of its proposed educational services, would render this critical public interest factor irrelevant.[26]

In order to bid in an auction, an applicant must be able to establish a sensible value for a particular license. Educators do not value ITFS licenses in monetary terms, but as essential tools in providing expanded educational services to their students.[27] Valuing any ITFS license, moreover, is time-consuming and expensive, requiring detailed business plans and technical studies. Few educators have experience or expertise with such matters.

The commenters also note that the need for funds to finance participation in an auction may encourage ITFS applicants and licensees to shift their focus from traditional instructional

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[24] *Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service*, 101 F.C.C. 2d 50, 60 (1985). *See also* WCA Comments at 12; Joint Comments I at 3. The comparative point system has furthered the sound objective of a locally-based instructional service by qualified applicants.

[25] *I.d. See also* 47 C.F.R. § 74.913.

[26] Indiana Higher Education Telecommunications System ("IHETS") Comments at 4-5; WCA Comments at 12-13.

[27] *See e.g.* NIA Comments at 5; BellSouth Comments at 9.

programming to programming or services that have the potential to return a profit.[28] Similarly, ITFS applicants and licensees may be compelled to pursue additional funding from current or prospective excess capacity lessees at the expense of receiving other benefits that promote education directly.[29] The public interest would not be served by the adoption of a licensing scheme that forces ITFS licensees to divert their attention and their limited resources from maximizing the educational potential of the service.

It is well-recognized that a statute should not be interpreted to accomplish an absurd or illogical result.[30] Reading into the Budget Act a requirement that ITFS should be subject to auctions is contrary to explicit and longstanding Congressional and FCC policies concerning noncommercial educational services in general, and ITFS in particular, and undermines the essential educational character of ITFS. Under these circumstances, it would indeed be absurd to infer from the omission of a specific exemption that Congress intended to depart from past practices and treat ITFS entities

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[28] IHETS Comments at 5-6.

[29] Such benefits could include, but are by no means limited to (1) increased facilities and staff funding and other grants and underwriting (2) construction of additional receive sites, booster stations, repeaters or other transmission facilities (3) furnishing of special equipment (4) assistance in developing and/or securing specific educational programming and (5) assistance with the utilization and deployment of high speed data and other advanced services.

[30] *National Treasury Employees Union v. United States Merit Sys. Protection Bd.*, 743 F.2d 895, 914 (D.C. Cir. 1984) (Congressional silence in the face of an illogical change of policy suggests Congress did not consider or intend such change); *Bechtel Constr. v. United Bhd. Of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987) ("Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious"); *Del Mar v. Caspe, 272 Cal. Rptr. 446* (Cal. App. 6 Dist. 1990) (exceptions may be implied where necessary to avoid absurd or unjust consequences); *Kempft v. Michigan Bell Tele Co.*, 358 N.W. 2d 378, 383 (Mich. App. 1984).

different from other educational entities, including noncommercial broadcasters.[31]

If in spite of all the evidence supporting the conclusion that mutually exclusive ITFS applications should not be subject to auction, the FCC remains undecided on this matter, fundamental fairness requires that the Commission seek clarification from Congress before implementing any ITFS auction procedures.

II. If The FCC Undertakes ITFS Auctions, It Must Consider The Unique Characteristics Of ITFS In Auction Design And Bidding Procedures

If, despite the foregoing, the FCC believes it must or should subject mutually exclusive ITFS applications to auction, great care should be taken to tailor ITFS auctions to the unique characteristics and needs of the service, ITFS licensees and ITFS consumers.

A. Pending Applications Should Not Be Subject to Auction

Virtually all of the commenters agree that mutually-exclusive ITFS applications now pending before the Commission should be processed in accordance with the comparative point system in place at the time the applications were filed.[32] Such a result is required as a matter of law and public policy.

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[31] HITN is alone among commenters in suggesting that the Budget Act is unambiguous on this issue, and that the FCC therefore need only consider the plain language of the statute. HITN Comments at 4. This is a gross oversimplification that fails to take into consideration the significant policy issues raised by BellSouth and other commenters, as well as the specific language of the statute. The exception in Section 397(6) applies to entities that are "eligible" to hold a noncommercial educational broadcast license. ITFS entities by definition meet both the eligibility and use requirements for such licenses. The question thus becomes whether Congress intended to specifically exclude ITFS entities or create an exemption to include all noncommercial educational stations. Again, there is no evidence to suggest that Congress expressly decided to depart from long standing policy and, for the first time, differentiate ITFS from other noncommercial educational services.

[32] The lone exception is HITN, which apparently does not oppose subjecting pending ITFS applications to auction, provided a six-month window is opened prior to the commencement of the auction during which time applicants would be encouraged to "settle" their differences and "buy-outs" would be permitted. HITN Comments at 10. If the FCC ultimately decides to subject pending

Unlike the comparative process for commercial broadcasters, which has been subject to judicial challenges and remains unsettled, the ITFS comparative point system has been in place and unchallenged since 1985. ITFS applications now pending before the FCC, the bulk of which were submitted in the October 1995 window, 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 the long-standing licensing procedures.[33] Such a result also would be contrary to the public interest.[34]

Commenters also recognize that there is great practical benefit to the current system over an auction regime. Because the comparative point system awards points based on readily identifiable factors, it is relatively easy to handicap.[35] This affords ITFS licensees and their excess capacity lessees a degree of certainty unattainable with auctions, and allows them to incorporate this certainty

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ITFS applications to auction, BellSouth agrees that a settlement period would be both fair and prudent. However, six months is far too long and would only serve to unnecessarily delay the introduction of new services.

[33] BellSouth Comments at 10; Joint Comments of College of Albemarle *et. al.* ("Joint Comments II") at 3-4; WCA Comments at 16-17; NIA Comments at 6-7.

[34] For example, as one commenter notes, since the October 1995 window significant time, effort and capital has been devoted to resolving instances of mutual exclusivity in order to develop a statewide ITFS network. Switching at this late date to auction procedures would abrogate two and one-half years of work, and require that the interference resolution process commence anew when the ITFS auction is completed, thereby substantially delaying the launch of new services. Joint Comments II at 2-3.

[35] *See* BellSouth Comments at 11; WCA Comments at 15.

into their strategic decisions and business plans.[36] The uncertainty of the auction process would undermine these plans.

As noted earlier, and as recognized by a number of commenters, the current point system also offers greater certainty that the Commission's ITFS licensing priorities favoring local, accredited institutions, will be realized.[37] ITFS auctions are likely to undermine these long-standing priorities.

B. A Geographic Licensing Scheme Is Not Appropriate For ITFS

BellSouth demonstrated in its Comments that the Commission should not use a geographic licensing scheme such as Basic Trading Areas ("BTAs") for ITFS auctions, but instead should continue to make determinations of mutual exclusivity based on predicted interference.[38] Superimposing geographic license areas such as BTAs on already-established and far smaller educational districts or ITFS station service areas would artificially 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.

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[36] ITFS applicants and their excess capacity lessees may have already made extensive plans and expended significant funds based on reasonable assumptions tied to the comparative point system. WCA Comments at 15.

[37] *See e.g.* IHETS Comments at 3-5; WCA Comments at 11-12.

[38] BellSouth Comments at 11-12.

C. Open Outcry Auctions Are Best Suited For ITFS

As BellSouth noted in its Comments, the Commission repeatedly has emphasized its intention to tailor the design of each auction to fit the characteristics of the authorizations to be awarded.[39]

Where, as with ITFS, there is little interdependence among licenses or groups of licenses, the Commission has determined that a simple auction design, such as open outcry, should be favored over more complex methods such as simultaneous-multiple round auctions. Open outcry auctions also are better suited for ITFS because they can be conducted relatively quickly and in a cost-effective manner.[40] This is essential for the typical local educator who has limited financial resources and little or no experience in matters such as competitive bidding and auctions. The Commission's guiding principles in structuring any auction involving ITFS should be ease and simplicity.

Conclusion

The vast majority of commenters agree with BellSouth that Congress did not intend to, and therefore the FCC should not, subject ITFS to auctions. To do otherwise would defy both logic and common sense, be inconsistent with the Commission's past interpretation of similar legislation as well as its historical treatment of ITFS, and would be contrary to the public interest. The FCC can and must exclude ITFS from auctions.

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[39] *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 1 Communications Reg. (P&F) 2079 (1995). *See also* BellSouth Comments at 13; WCA Comments at 21-22.

[40] BellSouth Comments at 13-14; WCA Comments at 22-23.

If the Commission nevertheless decides to subject mutually exclusive ITFS applications to auction, its rules and procedures must take into account the unique features of ITFS. At a minimum, mutually-exclusive applications now pending before the Commission should be processed in accordance with the comparative point system in place at the time the applications were filed. Determinations of mutually exclusivity should continue to be based on predicted interference, and open outcry should be selected as the auction design because of its relative ease and the non-interdependence of ITFS licenses.

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