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

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FEB 17 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast 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

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415(c) of the Commission's Rules, hereby submits its reply to the comments in response to the issues raised in the *Notice of Proposed Rulemaking* ("*Notice*") in this proceeding relating to the use of auctions to resolve mutually exclusive Instructional Television Fixed Service ("ITFS") applications.[1/]

[1/] *See Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, FCC 97-397 (rel. Nov. 26, 1997)[hereinafter cited as "*Notice*"]. By an *Errata* released on December 11, 1997, the Commission established a deadline of February 17, 1998 for the submission of reply comments in this proceeding. *See Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264 (rel. Dec. 11, 1997)[hereinafter cited as "*Errata*"].

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The comments submitted in response to the *Notice* overwhelmingly support the view that, in drafting the Balanced Budget Act of 1997 (the "Balanced Budget Act") and amending Section 309(j) the Communications Act of 1934 (the "1934 Act") to expand the Commission's competitive bidding authority to include mutually exclusive applications for initial licenses or construction permits in a variety of radio services that had not previously been subjected to competitive bidding procedures,[2/] Congress either simply overlooked the case of ITFS (intending to leave in place the prior exemption of ITFS from competitive bidding) or intended for ITFS stations to fall within the description of "noncommercial educational broadcast stations" and "public broadcast stations" that are exempt from auction authority.[3/] There is ample support for

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[2/] *See* Pub. L. No. 105-33, 111 Stat. 251 (1997)[hereinafter cited as "Balanced Budget Act"].

[3/] *See* Comments of the National ITFS Association, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 2 (filed Jan. 26, 1998) ("... Congress never contemplated the us of competitive bidding for any noncommercial services.")[hereinafter cited as "NIA Comments"]; Comments of the Board of Education of the City of Atlanta *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 8 (filed Jan. 26, 1998) ("The imposition of auction procedures upon ITFS applicants is nowhere specifically mandated by the Balanced Budget Act of 1997 and is entirely inappropriate for this educational service.") [hereinafter cited as "SW&M/Atlanta Comments"]; Comments of the Association for America's Public Television Stations, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 16 (filed Jan. 26, 1998) Balanced Budget Act precludes the use of auctions where ITFS applications are involved.") [hereinafter cited as "AAPTS Comments"]; Comments of the Arizona Board of Regents for the Benefit of the University of Arizona *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 2 (filed Jan. 26, 1998) ("The ITFS Parties believe that, in the Balanced Budget Act of 1997, Congress did no intend for the Commission to require mutually exclusive ITFS applications to go to competitive bidding.") [hereinafter cited as "ITFS Parties Comments"]; Joint Comments of the Board of Trustees of Community-Technical Colleges (Connecticut) *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 3 (filed Jan. 26, 1998) ("The imposition of auction procedures upon ITFS applicants is nowhere specifically mandated by the Balanced Budget Act of 1997 and is entirely inappropriate for this educational service.") [hereinafter cited as "SW&M ITFS Joint Comments"]; Comments of the Indiana Higher Education Telecommunications System, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 7 (filed Jan. 26, 1998) ("Certainly, there is nothing in the

these views.

Indeed, the Commission has itself recognized that the legislative history of the Balanced Budget Act is devoid of any reference to ITFS.[4/] This omission suggests that Congress had no intention of changing its prior policy of exempting ITFS from the Commission's auction authority.[5/] Further, as WCA and others have suggested, because the Commission has previously identified ITFS as a noncommercial "broadcast" service, Congress intended that ITFS fall within the Balanced Budget Act's exemption for "noncommercial educational broadcast stations" and remain exempt from auctions.[6/]

1997 statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgement that ITFS ... should be exempt from competitive bidding policies.") [hereinafter cited as "IHETS Comments"]; Comments of the Rocky Mountain Corporation for Public Broadcasting, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 1 (filed Jan. 26, 1998) ("[I]t is clearly Congress' desire to exempt noncommercial licensees engaging in noncommercial services from the auction process ...")[hereinafter cited as "Rocky Mountain CPB Comments"]; Comments of the School District of Palm Beach County, Florida, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 6 (filed Jan. 26, 1998) ("Certainly, there is nothing in the statute or its legislative history to suggest that Congress expressly decided to abandon its previous judgement that ITFS ... should be exempt from competitive bidding policies.") [hereinafter cited as "Palm Beach Comments"]; Comments of the WCA, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 5 (filed Jan. 26, 1998) ("There is absolutely no evidence in the Balanced Budget Act or its legislative history that Congress intended to reverse course and subject mutually exclusive applications for new ITFS stations to competitive bidding.") [hereinafter cited as "WCA Comments"].

[4/] *See Notice*, at ¶ 99 ("The conference report accompanying the Balanced Budget Act, although referring to broadcast and secondary broadcast services, makes no reference to ITFS.").

[5/] *See* H.R. Rep. No. 213, 103rd Cong., 1st Sess. (1993)(Conference Report) at 481 - 82 (congressional intent to exclude ITFS from competitive bidding process).

[6/] *See* WCA Comments, at 3 - 10; Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 3 - 7 (filed Jan. 26, 1998) [hereinafter cited as "BellSouth Comments"].

A. The Commission Should Exercise Its Discretion To Exempt From Competitive Bidding All Applications For New ITFS Stations.

Given what are, at best, ambiguities in the Balanced Budget Act relative to the treatment of ITFS,[7] the Commission as the expert administrative agency has the discretion to interpret amended Section 309(j).[8] The Commission is not legally required to employ competitive bidding to select from among mutually-exclusive applications for new ITFS stations, but instead may employ its policymaking powers in a manner that would retain the existing point system to resolve mutually exclusive ITFS applications.

There is near unanimity among the commenters with the view that auctions for mutually exclusive ITFS applications would not serve the public interest and would be contrary to the Commission's goals of promoting education.[9] It is telling that all but one of the parties who commented on the issue of using auctions to award ITFS licenses agree that the Commission should not voluntarily shift to competitive bidding for resolving mutually-exclusive applications

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[7] Hispanic Information and Telecommunications Network, Inc. ("HITN") has suggested that amended Section 309(j)(1) is unambiguous because of the inclusion of the words "any" and "shall" when referring to the licenses to be auctioned. *See* Comments of Hispanic Information and Telecommunications Network, Inc., MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 4 (filed Jan. 26, 1998) [hereinafter cited as "HITN Comments"]. That argument, however, fails to recognize that Congress intended to exempt ITFS from the Commission's auction authority in enacting Section 309(j)(2)'s exception for "noncommercial educational broadcast stations." *See* WCA Comments, at 3 - 10; BellSouth Comments, at 3 - 7. If any ambiguity exists, it relates only to whether ITFS falls within the exception for "noncommercial educational broadcast stations."

[8] *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (generally requiring deference to the expert agency's interpretation where a statute is ambiguous).

[9] *See, e.g.,* CPB Comments, at 6; NIA Comments, at 7; SW&M/Atlanta Schools Comments, at 8; AAPTS Comments, at 17; ITFS Parties Comments, at 5; SW&M Joint Comments, at 2; IHETS Comments, at 3.

for new ITFS stations. Indeed, but for the self-serving effort of Hispanic Information and Telecommunications Network, Inc. ("HITN") to eliminate the Commission's long-standing and sound policy of localism in awarding ITFS licenses, every party submitting comments in response to the *Notice* has supported the view that local schools and other educational organizations should not be required to participate in auctions to obtain ITFS authorizations, particularly where they must compete against non-local entities. The use of competitive bidding for ITFS would not only impose unwarranted financial and administrative costs on schools and other ITFS eligibles, but would also likely deter local educators from seeking ITFS licenses in the first place.

It is highly significant that the only party in this proceeding which has promoted the use of auctions for ITFS is HITN, a non-local (or "national") entity that has lost several comparative proceedings[10/] and has long opposed the Commission's policy of localism in ITFS.[11/] Given that HITN is among those non-local, non-accredited entities disfavored under the current rules, HITN's blunt criticism of the existing comparative selection procedures as "unfair, outdated, and cumbersome" must be taken with the proverbial grain of salt.[12/] HITN unabashedly promotes an auction process that would eliminate the policy preference for local applicants, even opposing

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[10/] *See, e.g., HITN*, 7 FCC Rcd 5924 (1992) (denying new ITFS application of HITN in favor of mutually exclusive applicant of local applicant, the University System of the Ana G. Mendez Foundation).

[11/] *See, e.g., Amendment of Part 74 of the Commission's Rules and Regulations In Regard To The Instructional Television Fixed Service*, 59 R.R.2d 1355 (1986).

[12/] HITN Comments, at 3.

the use of bidding credits for local educators should there be an auction.[13/] HITN's efforts to shroud its views in the language of fairness and equity disregard the delicate balance between locals and nationals that was achieved when the Commission designed its current ITFS eligibility standards.[14/] In so doing, the Commission drew a careful policy distinction between local and national applicants, one that "recognizes a strong preference for local entities...."[15/] The preference for local ITFS applicants reflects the Commission's considered judgement that:

> Locally based educational entities have been convincingly demonstrated by the commentors to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities, for designing courses to suit those needs, and for scheduling courses during the school year. They best understand the educational needs and academic standards of their communities and are the most appropriate bodies to produce educational programming or select such programming from the sources available. Thus, they can act most responsibly in designing and developing ITFS systems.[16/]

Thus, the Commission's point system today assures that a local accredited school board applying

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[13/] *See id.* at 11.

[14/] Under that system, points are awarded as follows:

- four points for applicants that are "local";
- three points for accredited schools (or their governing bodies) applying within their jurisdiction;
- two points for seeking licenses for no more than four channels within a locality;
- one or two points depending upon the quantity of educational programming the applicant anticipates transmitting; and
- one point for a grandfathered ITFS licensee migrating off of spectrum subsequently allocated to the Multipoint Distribution Service.

See 47 C.F.R. §74.913(b).

[15/] *See 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, 57 (1985)[hereinafter cited as "*ITFS Point System Order*"].

[16/] *Id.* at 56.

for its first ITFS license will prevail over a national ITFS filer with only minimal contacts within the community.

As WCA pointed out in its comments, the Commission must take pains to ensure that the local foundation of ITFS is not undermined. The current comparative point system has been designed to advance the Commission's objectives for the ITFS,[17] i.e. "to grant licenses to those applicants that are most likely to best meet the educational and instructional needs of the various communities."[18] There is widespread sentiment in this proceeding that, while awarding licenses to those who value them the most (as evidenced by their willingness to bid the most at auction) may encourage growth and competition in commercial services, the use of auctions is simply inappropriate and would be downright destructive when it comes to the awarding of specialized licenses to non-commercial entities for the purpose of providing educational and instructional telecommunications services.[19]

Of the numerous commenters in this proceeding, only HITN supports the use of competitive bidding to resolve currently pending ITFS applications. HITN's backing of that proposal highlights the point made by WCA and others that the use of auctions to resolve

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[17] Significantly, while the comparative hearing processes for broadcast services have long been controversial and lead to the Balanced Budget Act's revision of Section 309(j), the comparative selection procedures for ITFS have long been settled and have not raised similar constitutional concerns.

[18] *ITFS Point System Order*, 101 F.C.C.2d at 69.

[19] *See* SW&M/Atlanta Schools Comments, at 8; SW&M ITFS Joint Comments, at 3; NIA Comments, at 7; BellSouth Comments, at 7-9, 16; CPB Comments, at 6; Palm Beach Comments, at 3-4; ITFS Parties Comments, at 5-6; North Carolina Joint Comments, at 3; Rocky Mountain CPB Comments, at 2; IHETS Comments, at 3-5; WCA Comments, at 11-14; Smith Comments, at 14.

pending mutually exclusive ITFS applications (which have been pending for well over two years) would dramatically change the eligibility rules under which those applications would be processed to the detriment of those who have relied on the current rules.[20/] These applicants and the wireless cable operators to whom they have agreed to lease excess capacity have built up substantial reliance interests in those applications in the intervening time.[21/] It is clear that HITN supports the use of auctions to resolve pending applications because only HITN stands to gain from a change in the rules.[22/] Just as many applicants have already analyzed their applications and have built up expectations concerning the award of ITFS licenses, HITN must realize that many of its pending applications will be dismissed under the current comparative selection procedures. In short, HITN has nothing to lose by supporting the elimination of the current rules and their preference for local applicants. In the event that the Commission chooses to employ auctions for mutually exclusive ITFS applications, it should follow the precedents set in the context of prior auctions and process those pending applications under the rules which existed at the time they were filed.[23/]

[20/] *See* WCA Comments, at 16-17; BellSouth Comments, at 10; NIA Comments, at 6-7.

[21/] *See* WCA Comments, at 15; BellSouth Comments, at 11; Joint Comments of the College of Albemarle *et al.*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, at 2-3 (filed Jan. 26, 1998) [hereinafter cited as "North Carolina ITFS Joint Comments"].

[22/] *See* HITN Comments, at 9-10.

[23/] *See* WCA Comments, at 16-17; BellSouth Comments, at 10; NIA Comments, at 7.

B. The Commission Should Bifurcate This Proceeding To Consider Separately The Relatively Non-Controversial Issues of Auction Authority For ITFS From The More Controversial Issues Involved in Designing Auctions For Commercial Broadcast Services.

In its initial comments, WCA urged the Commission to resolve the issues associated with the use of competitive bidding for new ITFS stations quickly so as not to delay the development of wireless cable as a source of competition in the multichannel video program distribution marketplace.[24/] As a review of the comments filed in response to the *Notice* reveals, the question of the use of auctions for ITFS is a relatively noncontroversial issue when considered in the context of the complex and controversial issues associated with the use of auctions for commercial broadcast services. Merely 14 comments were submitted on the use of auctions for ITFS, expressing overwhelming opposition to that proposal (with the sole exception of HITN, which is discussed above). By contrast, over 150 individuals, licensees and interested entities have commented on various aspects of the *Notice* with respect to commercial broadcast selection procedures. The issues associated with the use of auctions for commercial broadcast services are unlikely to be resolved quickly because of the complexities of the issues, the competing interests of the parties and the controversies that they have engendered to date. Given the relative simplicity of the issue and the near absence of any dispute, the Commission should split the question of auctions for ITFS off from the remaining issues in this proceeding and should resolve them on an expedited basis in a separate rulemaking proceeding.

[24/] *See* WCA Comments, at 3.

WHEREFORE WCA respectfully submits that the Commission should not employ competitive bidding for mutually exclusive ITFS applications and should resolve in an expedited manner the issues associated with competitive bidding to select among ITFS applicants for the reasons that it has expressed in this proceeding.

Respectfully submitted,

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February 17, 1998

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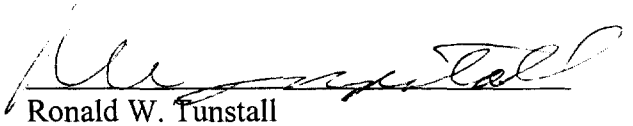
Ronald W. Funstall

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