

to fall within the scope of the exemption for “non-commercial educational broadcast stations,” and “public broadcast stations,” the Commission has suggested that it may be obligated under the Balanced Budget Act to resolve mutually exclusive applications for new ITFS licenses through auction.<sup>31/</sup>

To date, WCA and virtually every other interested party has overwhelmingly supported the view that Congress simply either overlooked the case of ITFS (intending to leave in place the prior exemption of ITFS from competitive bidding) or intended that ITFS stations fall within the description of “noncommercial educational broadcast stations” and “public broadcast stations” that are exempt from auction authority.<sup>32/</sup> Indeed, it is highly significant that the only

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<sup>31/</sup> *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*, 12 FCC Rcd 22363, 22405-5 (1997).

<sup>32/</sup> 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 use 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”); 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 not 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

party which has promoted the use of auctions for ITFS is Hispanic Information and Telecommunications Network, Inc. ("HITN"), a non-local (or "national") entity that fares poorly under the Commission's current "point" system that favors local ITFS applicants, and thus has long opposed the Commission's policy of promoting localism in the ITFS service.<sup>33</sup>

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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 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"].

<sup>33/</sup> Comments of Hispanic Information and Telecommunications Network, Inc., MM Docket No. 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264 (filed Jan. 26, 1998). Under the Commission's current 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).

WCA reiterates that 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, *i.e.*, "to grant licenses to those applicants that are most likely to best meet the educational and instructional needs of the various communities."<sup>34</sup> The record before the Commission reflects 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.<sup>35/</sup>

Moreover, the application of competitive bidding to the ITFS service ultimately will undermine the Commission's overriding objective of promoting competition, since it creates a substantial risk that *bona fide* applicants ready and willing to initiate local ITFS service and lease excess channel capacity to wireless cable operators will be cast aside in favor of "national" filers who have a history of allowing ITFS channels to lay fallow or, in some cases, have lost their

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<sup>34</sup> *ITFS Point System Order*, 101 F.C.C.2d at 69. Significantly, while the comparative hearing processes for broadcast services have long been controversial and led 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.

<sup>35</sup> 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.

ITFS authorizations for failure to construct. In this regard, it should be noted that HITN appears to fall squarely within the latter category.<sup>36</sup>

Nonetheless, if notwithstanding the above the Commission still harbors any doubt as to whether Congress intended to exempt the ITFS service from competitive bidding, WCA again submits that the Commission can resolve the matter definitively simply by asking Congress to amend Section 309(j)(2)(C) of the Communications Act of 1934 to specifically exclude ITFS licenses from competitive bidding requirements. WCA's proposed draft language for such an amendment is attached hereto as Exhibit 3.

*E. The Commission Must Act Expeditiously To Conclude the Two-Way NPRM.*

To date the Commission has been very supportive of the wireless cable industry's attempt to expand into the arena of two-way services, and the agency now appears to be on the verge of adopting formal rules in response to the *Two-Way NPRM* that will allow wireless cable operators and ITFS licensees to develop and market interactive services which take full advantage of digital technology. WCA commends the Commission's efforts, but notes that expeditious

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<sup>36</sup> See, e.g., Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File Nos. BMPLIF-980321DX and BMPLIF-980312DY (June 8, 1998); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File No. BMPLIF-980129DU (June 4, 1998); Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, FCC File No. BMPLIF-950523DV (Sept. 9, 1996), *recon. denied*, Letter from Barbara J. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Gerald Zuckerman, Esq. and Paul J. Sinderbrand (Dec. 4, 1996).

completion of the *Two-Way NPRM* is now even more imperative given that wireless cable operators have recently initiated successful launches of digital wireless cable systems in a number of markets, and are expected to continue doing so in the near future. The first digital wireless cable systems have already been launched in Los Angeles by Pacific Bell, by GTE in Hawaii, and by BellSouth in New Orleans, Atlanta, and eventually a number of other major markets throughout the Southeast.<sup>32/</sup> Other wireless cable operators are expected to follow suit, meaning that by the end of next year many incumbent cable operators in major markets will for the first time face competition from a second multichannel provider with digital capability *and* the capacity to deliver two-way services such as high-speed Internet access to subscribers. Accordingly, WCA submits that the public interest strongly militates in favor of a speedy resolution of the *Two-Way NPRM* so that the competitive potential of the wireless cable industry may finally be fulfilled.

### III. CONCLUSION.

The past year has yielded substantial progress toward a fairer, more pro-competitive regulatory environment for alternative MVPDs, and WCA looks forward to the Commission's continued efforts in that regard. As discussed above, however, it has become clear that the Commission's vision of providing consumers with a *bona fide* choice of MVPD providers cannot come to fruition absent legislative relief that unshackles the Commission from outdated statutory

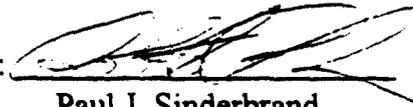
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<sup>32/</sup> See, e.g., Barthold, "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998) [noting, *inter alia*, that BellSouth has launched digital wireless cable systems in New Orleans and Atlanta, and is scheduled to launch additional systems in Orlando, Jacksonville and Daytona]; Hogan, "GTE Steps Up Marketing Efforts in Hawaii", *Multichannel News*, at 34 (July 20, 1998).

restraints that inhibit the very same competition that the Commission is attempting to promote. WCA thus strongly believes that the above-described legislative recommendations, combined with the Commission's ongoing assessment of its program access, ownership attribution and inside wiring rules, and near-term completion of the *Two-Way NPRM*, represent the best formula for producing exactly the type of proactive, public interest-minded regulation which the current MVPD marketplace requires at this time. WCA thus urges the Commission to act ahead of the curve and initiate the actions recommended above.

Respectfully submitted,

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July 31, 1998

## **EXHIBIT 1**

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## PROPOSED AMENDMENT TO CABLE/MDS OWNERSHIP RESTRICTIONS

PROPOSED. that the Communications Act of 1934, as amended, be amended to modify the Cable/MDS cross-ownership restriction as follows:

1. Section 613(a) (47 U.S.C. 533(a)) is amended as shown below:

(a) ~~It shall be unlawful for~~ The Commission may promulgate rules prohibiting a cable operator ~~from~~ to holding a license for ~~multichannel~~-multipoint distribution service, or ~~from~~ to offering satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system. In the event that the Commission promulgates such rules. The Commission --

(1) shall waive the requirements of ~~this paragraph~~ its rules for all existing ~~multichannel~~-multipoint distribution services and satellite master antenna television services which are owned by a cable operator on the date of enactment of this paragraph;

(2) may waive the requirements of ~~this paragraph~~ its rules to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming; ~~and~~

(3) shall exempt from the requirements of its rules any otherwise prohibited cross-ownership that would not have a material anti-competitive effect on the relevant market or that would otherwise serve the public interest;

(4) shall exempt from the requirements of its rules any interest in a cable operator, a multipoint distribution service, or a satellite master antenna television service that is located in a non-urbanized area of fewer than ten thousand persons; and

(5) shall not apply the requirements of ~~this paragraph~~ its rules to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under Section 623(l).

**EXHIBIT 2**

**PROPOSED AMENDMENT TO AUTHORITY TO  
REGULATE SERVICES, FACILITIES AND EQUIPMENT**

PROPOSED, that the Communications Act of 1934, as amended, be amended to clarify the authority of the Federal Communications Commission with respect to the promulgation of rules relating to cable inside wiring as follows:

Section 624(i) (47 U.S.C. 544(i)) is amended by inserting the following language at the end of the section:

“; the provisions of this subsection shall not be construed to limit the authority of the Commission to regulate the disposition or sale of home run wiring (as that term has been defined by the Commission) or to define the demarcation point for subscriber wiring at any point within a multi-family dwelling unit building”

**EXHIBIT 3**

**PROPOSED AMENDMENT TO  
SPECTRUM AUCTION AUTHORITY**

PROPOSED. that the Communications Act of 1934, as amended, be amended to clarify the status of the 1993 ITFS auction exemption as follows:

**Section 309(j). Spectrum Auction Authority**

Insert at the end of section 309(j)(2)(C) the following:

“and for licenses in the Instructional Television Fixed Service.

## CERTIFICATE OF SERVICE

I, Deanna L. Susens, hereby certify that true copies of the foregoing Comments were served this 31st day of July 1998, by ensuring the hand delivery of said Comments to the following:

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