

LAW OFFICES  
**COHN AND MARKS**

JOEL H. LEVY  
ROBERT B. JACOBI  
ROY R. RUSSO  
RONALD A. SIEGEL  
LAWRENCE N. COHN  
RICHARD A. HELMICK  
WAYNE COY, JR.  
J. BRIAN DE BOICE

SUSAN V. SACHS  
KEVIN M. GOLDBERG  
JOSEPH M. DI SCIPIO

SUITE 300  
1920 N STREET N.W.  
WASHINGTON, D.C. 20036-1622

TELEPHONE (202) 293-3860  
FACSIMILE (202) 293-4827  
HOMEPAGE WWW.COHNMARKS.COM

OF COUNSEL  
MARCUS COHN  
LEONARD H. MARKS  
STANLEY S. NEUSTADT  
RICHARD M. SCHMIDT, JR.

DIRECT DIAL: (202) 452-4836  
INTERNET ADDRESS:

December 28, 1998

**VIA HAND DELIVERY**

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

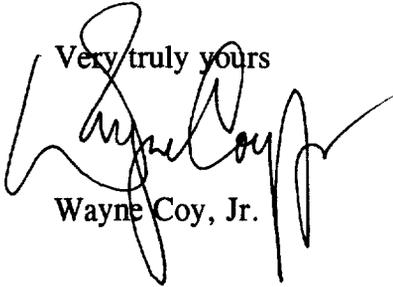
**Re: Petition for Reconsideration  
MM Docket No. 97-217**

Dear Ms. Salas

Transmitted herewith, on behalf of The National ITFS Association, are the Original and five (5) of its Petition for Reconsideration in the above-captioned matter.

Should you have any questions with respect to this filing, please contact the undersigned.

Very truly yours

  
Wayne Coy, Jr.

Enclosure  
Copy to each Commissioner

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BEFORE THE

# Federal Communications Commission

In the Matter of	)	
	)	
Amendment of Parts 1, 21, and 74 to Enable	)	MM Docket No. 97-217
Multipoint Distribution Service and	)	
Instructional Television Fixed Service	)	File No: RM-9060
Licensees to Engage in Fixed Two-Way	)	
Transmissions	)	

To: The Commission

## Petition for Reconsideration

The National ITFS Association (“NIA”), by its attorney, pursuant to Section 1.429 of the Commission’s Rules, respectfully requests that the Commission reconsider its *Report and Order* (“*Order*”) in the above captioned proceeding. NIA respectfully urges that the Commission has reached results in this matter which are contrary to the public interest, as well as to the interests of the educational community for whose benefit the ITFS system was created. This very serious error results primarily because the Commission has ignored, or at least misunderstood, the genesis and purpose of the *Joint Statement* submitted in this proceeding on behalf of NIA and the Wireless Cable Association (“WCA”). That statement set forth a compromise resolution of the major issues raised by the transition to digital operation by the national organizations which represent the educators and the wireless cable operators. The *Order* fails to recognize that the position

urged in the *Joint Statement* is being urged by *both*, rather than only by the educators. In support of its position, NIA states:

### **Background**

1. NIA is a national association of more than 74 educators in 29 states and the District of Columbia who are using Instructional Television Fixed Service ("ITFS") frequencies to provide educational services to students enrolled in for-credit courses in elementary, secondary, college, post-graduate, and career training. They include public, private, and parochial schools, community and junior colleges, public and private universities, and non-profit corporations.

2. The purpose of the organization is to promote the effective use of the ITFS spectrum for its intended educational uses and to encourage and assist potential user institutions to develop local or regional instructional networks using ITFS. In addition, the Association, through a quarterly newsletter, keeps its members informed as to regulatory and judicial decisions affecting the industry, and presents articles of interest to educators generally involved in distance learning.

3. NIA is an active participant in proceedings before the Commission, having filed Comments and Reply Comments in every Docket affecting ITFS since 1984. NIA has been, and remains, a believer in the concept of an informed working partnership with the wireless cable industry as a way to promote investment in educational facilities. In support of that belief, NIA frequently finds itself urging care and caution in various Rule Making proceedings when the balance in the partnership seems precarious or imperiled.

## History

4. In an earlier, pre-digital, stage of the proceedings affecting the wireless cable/ITFS industries, the FCC sought guidance from the industries themselves rather than trying to craft a workable solution without benefit of the input from the people actually working in the industry. On April 26, 1993, the Commission released a *Notice of Proposed Rule Making*, MM Docket No. 93-106, 8 F.C.C. Rcd. 2828 (1993), in which the FCC proposed to permit ITFS licensees to shift, or “channel load” the required ITFS programming to as few as one channel. The dual objects of the *Notice* were to insure full spectrum utilization, by freeing up channels for licensee leasing, while preserving the primary purpose of the spectrum reserved for ITFS uses. During the course of the reply comment period in that docket, the Wireless Cable Association submitted an industry-wide channel loading compromise agreement it had entered into with numerous educators.

5. Five months later, on September 27, 1993, in granting an extension of time for filing reply comments, the FCC specifically sought comments on the compromise proposed by the wireless cable operators, the ITFS Parties and NIA, as published in the *Federal Register*, October 7, 1993. In that extension *Order*, the FCC noted that “...the compromise contained five elements, all of which, the parties note, must be adopted in order to remain a supportable agreement.” There were numerous other comments filed in the proceeding, some supporting the compromise, but many of which advocated either stronger or more lenient terms and conditions. Among the larger group of dissenters were other ITFS parties who felt the compromise had gone too far toward a *de facto* reallocation of the reserved spectrum. On the other side of the coin were equally intent parties from the wireless industry who were advocating their own position(s).

6. But the Commission recognized the value of the parties themselves negotiating a solution without the need for it to sort out the relative merits of all positions on all of the issues presented. Whether the Commission would have reached the same positions on any or all of the issues became less important when the Commission recognized that the players in the affected industries had balanced all of their differing interests into a single workable resolution. In retrospect, no matter what they agreed to, would be preferable than whatever conclusions the Commission might reach on its own, so long as the combination of positions on the major issues promoted the development of the wireless cable industry while preserving sufficient spectrum for the present and future use of the educators for whom all of the spectrum had initially been reserved. In this setting, it was gratifying that the Commission's *Report and Order* closely paralleled the compromise agreement, notwithstanding the ardent adversarial positions taken by others on both sides of the fence.

#### **The Current Docket**

7. With this background, it was with great anticipation and high expectations that the same parties sat down to negotiate many of the same issues in the digital environment in order to provide the Commission with the same sort of guidance it had so readily adopted in the pre-digital context. The parties gathered from California, Florida, Arizona, Louisiana, Wisconsin, Colorado, and the District of Columbia to hammer out a working compromise on the issues. At first there was hope that a few meetings would do it, but it soon became clear that the issues in a two-way environment and the stakes of the parties looking into an indefinite future were far more complex and not so easily reconciled. Numerous meetings, exchanged drafts and counterdrafts followed, and still the possibility of reaching a negotiated compromise looked dim. Still the parties

persisted, believing that they were in a better position to balance the competing interests and provide what they hoped would be the definitive guidance that the FCC had sought from them earlier.

8. More than a year later, and largely with the FCC-imposed deadline in front of them, the parties reached a conclusion that met their needs and served the public interest. However, it is to be emphasized that, as in the earlier docket, the positions in each issue are totally and completely interdependent on the positions reached in any and all of the other positions. The parties started from the same point that the FCC did - to allow "ITFS licensees maximum flexibility in tailoring their relationships with wireless cable operators" while imposing the minimal lease-restrictions "designed to safeguard the primary educational purpose of the ITFS spectrum" (See ¶76 of the *Order*). All parties to the negotiation were aware of the need to enhance "the competitive viability of wireless cable through maximization of flexibility and service offerings" so that wireless cable's success would support the underlying educational purposes of ITFS" (¶77). Most importantly and unqualifiedly, the parties to the agreement were seeking, as the Commission so succinctly put it:

"By our action here, we intend to balance the maximization of flexibility for all MDS and ITFS applicants, licensees, and operators **with the need to accommodate ITFS growth where new uses or needs may be unforeseen now but may arise later**, or where the ITFS licensee's relationship with the wireless cable operator ends" (Emphasis ours.) ¶77 of the *Order*.

9. Rather than have any and all of the interested parties present their points of view to the Commission, the parties met to work toward a consensus that the FCC could use to fashion a coherent and practical answer to the many issues it faced in this proceeding. The parties quickly found that it would be unlikely, if not impossible, to reach agreement on the issues one at a time.

Rather a negotiated consensus could only come when all of the issues were considered a single interdependent concept. And so it was that the *Joint Statement* came to be presented to the Commission by both the Wireless Cable Association and NIA, acting in conjunction with each other and in the cooperative spirit cited by the Commission.

10. Although it would serve no point to discuss the starting positions of the parties on any given issue or to recount how the parties worked their way to a final position, such bargaining could not have taken place in a vacuum without the interplay of the positions on other issues. For example, the ITFS parties acceded to the wireless industry's urgent need for a fifteen year lease term to match the typical wired cable franchise term only if they (the ITFS parties) could be assured that positions taken on one or more other issues would balance that concession out by granting them an equally important concession. One example of such a "balancing concession" was the right to recapture additional capacity. Upon a demonstration of legitimate educational need, educators could reclaim up to 25% of their licensed spectrum over a five year period (even though this already conceded an unrecoverable lease-hold interest in 75% of their licensed spectrum). This recovery of spectrum was to be limited to 5% at any one time- with one year prior notice to the wireless operator, thus balancing the need for certainty for the wireless operator with the ability to increase in capacity to meet ever-expanding educational needs. Since the FCC is not monitoring or regulating the amount of money paid by a wireless operator for the excess capacity lease, any diminution of the value of the recapturable capacity is certainly measurable by an educator based on its assessment of its educational needs, and its need for flexibility to meet those needs. Some educators, in fact perhaps, many educators, may never exercise any of these options, and some of them may be willing to agree to that contractually. Others may be willing

to delay the exercise of options, etc. But, without the right of limited recapture (never more than 25% of its licensed capacity), an educator would be without any flexibility to meet its licensed and authorized activities for 15 years.

11. No attempt was ever made to inhibit or restrain any interested party from filing Comments in this proceeding. Nor could there be any legal justification for doing that. Yet the parties that worked so hard on the agreement felt that such restraint was not necessary because it was hoped that the FCC, as it had in the earlier stage of the development of this industry, would give appropriate weight to an all-industry compromise that had already done the job of balancing the varying needs of the parties. We are simply seeking more than the “deference” in the formulation of FCC policy. (¶79) Based on the prior history, we had reason to believe we would be treated with greater respect and care. The fact that fewer ITFS parties participated individually as Commenters is far more a reflection of severely restricted budgets than lack of fervor. Conversely, the large expenditures on behalf of a very small number of wireless operators does not mean they felt more strongly about their position, but merely that they had much more money to spend. On the contrary, by virtually ignoring the significance of the *Joint Statement*, the FCC is severely dampening the ardor of those who would seek to hammer out differences in the future, thus leaving it up to the FCC to find a solution without further guidance.

12. In light of the stated purposes of the proceeding, as stated in ¶¶76 and 77, the Commission needs to reexamine the compelling nature of the *Joint Statement* in terms of the public policy implications of the interdependence of the issues dealt with therein.

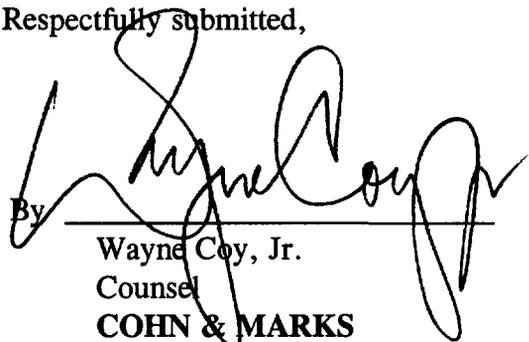
## Other Matters

13. Notwithstanding the arguments above, there are two other matters which are raised by the decision of the Commission that were not dealt with in the *Joint Statement*, but which, in the sole opinion of NIA (now not speaking in support of an industry agreement). First, in the matter of the handling of major modifications of existing facilities, the *Order* provides for simplified streamlined processing in the cases involving two-way transmissions. However, the same streamlined processes do not seem to be available to other ITFS modifications. It is illogical if not perverse to simplify procedures which may involve super or sub-channelization, novel two-way applications but retain archaic rules for routine upgrades and other changes for ITFS licensees without excess capacity leases. The delays associated with the “window” filing procedures are major obstacles to meet changing educational needs. In a mixed system, where some of the licensees seek two-way related changes but others do not, such variance in the way applications are allowed, processed, and granted may delay implementation of the very sort sought by the *Order*.

14. The Commission should implement a clearly defined and workable set of expedited procedures for resolution of disputes involving harmful interference between and among licensees with and without leases for three very important reasons. First, transmissions vital to the education of enrolled students will not be interrupted for longer than absolutely necessary. Second, frivolous or easily resolved claims of interference can be dispatched without undue delay. And third, the mere presence of the expedited mechanism will encourage private settlement of disputes, bringing parties together without the need of FCC action.

For all of the above reasons, The National ITFS Association urges the Reconsideration of the *Report and Order* in this docket to bring the results in line with the all-industry positions and the public interest.

Respectfully submitted,

By 

Wayne Coy, Jr.  
Counsel

**COHN & MARKS**

1920 N Street, NW, Suite 300

Washington, D.C. 20036-1622

(202) 452-2836

December 28, 1998

## **JOINT STATEMENT OF POSITION**

For over a year, representatives of the National ITFS Association, Inc. ("NIA") and the Wireless Cable Association International, Inc. ("WCA") have been meeting in an effort to come to agreement on issues of mutual interest deriving from the emerging use of digital technology on Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channels. The underlying goal of these negotiations has been to craft a regulatory environment that assures that the educational community reasonably shares in the benefits that digital technology will permit, while permitting the wireless cable industry to become a viable competitive force in the marketplace (which benefits both the wireless cable industry and the ITFS community). After significant compromise by each side, NIA and WCA have come to agreement that the public interest will best be served by incorporation of the following concepts into the rules and policies of the Federal Communications Commission. Moreover, NIA and WCA have agreed to create a standing working group to address current and future issues of concern. Because the following concepts reflect a series of compromises between the parties on matters that are inextricably intertwined, NIA and WCA jointly urge the Commission to adopt them en toto without change.

- I. In order to assure the substantial educational use of the ITFS spectrum, each ITFS licensee shall, at a minimum, have the right to use 25% of capacity of its channels. In any digitized system the ITFS licensee shall be required to deliver no less instructional material than is currently required for analog ITFS systems under Section 74.931(e) of the Commission's Rules.
  
- II. In order to assure the immediate availability of capacity for immediate ITFS usage, each ITFS licensee leasing capacity for digital usage shall refrain from leasing an amount equal to no less than 5% of the capacity of its channels.
  
- III. Each ITFS licensee that leases excess capacity for digital services must maintain the ability to recapture for the transmission of ITFS programming at least an additional 20 % of the capacity of the channels it leases. The lowest permissible annual rate of recapture shall be 5% of the capacity of its ITFS channels, with a maximum one year advance notice per instance of recapture. The right to recapture may be deferred during the first five years of any excess capacity lease agreement upon agreement of the parties. The parties may agree to an economic adjustment of the ITFS licensee's consideration under the agreement upon recapture, provided that any economic detriment shall not be disproportionate to the amount of capacity recaptured and shall

not include any "Baseline Consideration." "Baseline Consideration" shall be defined to include: (1) any transmitters, transmit antenna, combiners and waveguide necessary to operate the station ("Station Equipment"), (2) any transmit site lease costs necessary to house the Station Equipment; and (3) the utility and maintenance costs necessary to maintain and operate the Station Equipment.

- IV. All ITFS licensees should be permitted to "channel load" any or all of their capacity onto any ITFS channel within the same multi-licensee system. Such "channel loading" shall not be considered negatively at the time the ITFS licensee seeks renewal of its authorization.
- V. Any ITFS licensee should be permitted to "swap" channels with any other ITFS or MDS licensee in the 2.5 GHz band operating in the same geographic area. Particularly in order to promote the introduction of advanced technologies, applications for Commission approval of such swaps should be given expedited consideration by the Commission.
- VI. In recognition of the difficulties that may be faced in converting spectrum used for return paths to downstream uses, each ITFS licensee that leases channels to be employed for return paths shall be required to maintain at least 25% of its licensed channels to be used for downstream transmissions during the term of the lease and following termination of its leasing arrangement.
- VII. ITFS licensees should be permitted to enter into excess capacity leases of up to fifteen years duration, provided that any lease extending beyond the term of a licensee's authorization provides for termination of the lease in the event the Commission denies an application for renewal.
- VIII. Excess capacity lease agreements that provide for digital usage and were entered into prior to the release of an order adopting these concepts shall be grandfathered for their duration.
- IX. ITFS licensees should have opportunities equal to those afforded MDS licensees to implement advanced technologies utilizing their spectrum.
- X. Authorizations for return paths and boosters on ITFS channels should be issued in the name of the ITFS licensee of that channel.

**CERTIFICATE OF SERVICE**

I, Maryam B. Jeffrey, do hereby certify that a true and correct copies of the foregoing PETITION FOR RECONSIDERATION were hand-delivered this 28th day of December 1998 to the following:

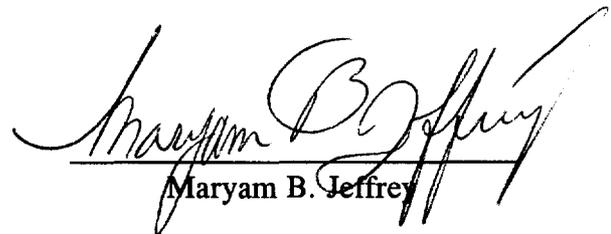
Chairman William E. Kennard  
Room 814  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Susan Ness  
Room 832  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth  
Room 802  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Michael K. Powell  
Room 844  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Gloria Tristani  
Room 826  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

  
Maryam B. Jeffrey