

FEB 16 1999

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

To: The Commission

**INSTRUCTIONAL TELECOMMUNICATIONS FOUNDATION, INC. ("ITF")**

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

ITF's Petition for Reconsideration drew opposition from a number of quarters. None of the Oppositions, however, establish an intellectually viable rationale for the grant of interfering ITFS applications. In this Reply, we shall catalog the various objections raised and rebut them.

Objection #1: ITF's arguments are "circular" and "rely upon the assumption that cooperation and resolution of conflicts by the applicants will be the exception rather than the rule."<sup>1</sup>

<sup>1</sup> Opposition of Region IV Education Service Center, et al., p. 3; see also the nearly identical Opposition of UT Television. Collectively, these entities will be referred to hereinafter as "Region IV."

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Specifically, Region IV avers:

The ITFS [sic] premise is cynical and not reflective of the real world. Educational institutions, whether elementary and high school or on the college and university level, exist in a collegial environment. Cooperation between and among educators is not the exception as ITF would have us believe, but rather the norm.<sup>2</sup>

Current Commission Rules establish a "reconciliation period" during which it is intended that incompatible proposals be conformed. It appears that Region IV is arguing that despite the applicants' failure to resolve problems during the reconciliation period, their mutually exclusive applications should be granted because normally educators are collegial. This is not a well-considered position.

ITF agrees that collegial problem resolution clearly is preferable. The issue is what happens when such fails or is not applied.<sup>3</sup> The current Rules say that the answer is for the Commission to allow incompatible systems to go on the air and interfere with each other; we have set forth in other pleadings, and will elaborate herein, why we disagree.

Objection #2: ITF's proposal will mean lengthy processing delays

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<sup>2</sup> Id., pp. 3-4.

<sup>3</sup> In ITF's experience, we have found educators at times to cooperate admirably in reconciling technical proposals, but on other occasions to be obdurate. Region IV also ignores that in cases of complex "daisy chains," reconciling interfering applications can be very cumbersome. Like ITF, Petitioners anticipate that such daisy chains will result from the current Rules. (Petitioners' Opposition, p. 10.)

because the Commission staff will have to identify which ITFS applications are mutually exclusive.<sup>4</sup> The parties advancing this argument are correct in seeking to avoid two-way applications processing delays. They are incorrect in averring that ITF's proposal for identifying MXed applications will lead to any increase in application processing time.<sup>5</sup> Indeed, ITFS's proposal tracks the timing of the current rules exactly. We have asked that the Commission staff be involved in identifying mutually exclusive applications only during the reconciliation period. Those applications which have not been the object of a petition to deny or found to be MXed (by the Commission, applicants, or the public) would go on the automatic grant queue at the same speed as they would under current Rules. The difference is that those which are identified as mutually exclusive would be adjudicated so that no interference would occur with Commission sanction.

We acknowledge that Commission procedures have to be assessed for efficiency in light of constrained staff resources. However, as we will amplify later in this pleading, we see little evidence that having the Commission referee complicated and acute

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<sup>4</sup> Opposition of Petitioners, p. 6; Opposition of BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), p. 8.

<sup>5</sup> For a full exposition of ITF's proposal, see our Opposition to Petitions for Reconsideration, pp. 5-6.

outbreaks of interference will prove to be efficient.

Objection #3. BellSouth says ITF advocates "paternalistic government regulation", yet supports an after-the-fact interference remedy."<sup>6</sup> We find BellSouth's positions on interfering applications to be deliciously contradictory. BellSouth acknowledges that interference is a serious matter, and that expedited Commission action is needed after interference already has occurred.<sup>7</sup> However, BellSouth labels prevention as paternalistic.

BellSouth seeks to portray Commission sanction for interference to be a virtue rather than a vice, arguing that limiting automatic grants delays service to the public.<sup>8</sup> We believe that interference---which BellSouth acknowledges to be unacceptable---is contrary to the public interest because of the disruption caused to licensees, the Commission, and, not least, consumers.

The more we consider BellSouth's proposal for an after-the-fact remedy, the less sense it makes. BellSouth wants to embroil the Commission staff in white-hot disputes, where interference is already occurring. BellSouth has made it clear that it wants a fast resolution, but proposes no standards by which the

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<sup>6</sup> Opposition of BellSouth, p. 7.

<sup>7</sup> BellSouth Petition for Reconsideration, pp. 7-10; BellSouth Opposition, pp. 8-9.

<sup>8</sup> BellSouth Opposition, p. 8.

resolution would be attained.<sup>9</sup> Because interference will occur between facilities which are granted in the same window, it will not be possible to resolve disputes on the basis of protecting an incumbent. While current Rules establish a basis for determining winners and losers when applications are mutually exclusive, BellSouth proffers no standard for determining which licensee would prevail when interference occurs. Indeed, since multiple licensees all will be operating within Commission technical standards pursuant to properly-issued licenses, it appears that there will be no legal basis for shutting any of them down.

Objection #4: The Petitioners aver that automatic grants are consistent with past Commission practice.<sup>10</sup> The Petitioners do not challenge the numerous Commission precedents cited in our Petition for Reconsideration.<sup>11</sup> Instead, they compare the Commission's procedures under the ITFS Rules with those that pertain to PCS, LMDS, WCS, and similar services. They also raise the analogy of the MMDS Rules under which to BTA winners secure facilities authorizations, and argue that "ITFS facilities are virtually indistinguishable from those used in other services."<sup>12</sup>

None of these comparisons is apposite.

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<sup>9</sup> BellSouth Petition for Reconsideration, pp. 7-10.

<sup>10</sup> Opposition of Petitioners, pp. 6-8.

<sup>11</sup> ITF Petition for Reconsideration, pp. 8-9.

<sup>12</sup> Id., p. 8.

The Commission allocates exclusive areas of operation to auction winners in the services Petitioners cite.<sup>13</sup> Interference standards are policed at the perimeters of these areas. Adjacent channel interference to the winners' facilities is essentially ignored on the grounds that it is self-interference.

The difference in the ITFS service is that no one is granted primacy, as is the case within an MMDS BTA, for example. As the Petitioners would have it, numerous incumbents would be allowed to submit many different sorts of applications in the same window, including those for boosters, response hubs, main station power increases, transmitter site moves, downstream frequency changes, downstream polarization changes---the list is long. Although existing one-way facilities would be protected, the fact that no one possesses a BTA authorization trump card allows any number of inconsistent modification applications to be automatically granted for overlapping service areas. Extensive co-channel and adjacent channel interference will be permissible; significantly, adjacent channel interference cannot be assumed to be self-interference because multiple adjacent-channel ITFS licensees operate in close proximity.

While there are strong technical similarities between two-way ITFS systems and the other services Petitioners list as

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<sup>13</sup> In certain cases, there are grandfathered operations on these frequencies within the service area. These are either frozen and protected, or migrated to other spectrum.

"virtually indistinguishable," there is a world of difference in the patterns of ITFS licensure. Clearly, the Petitioners wish ITFS were as unencumbered as other two-way wireless services. But it isn't, and ignoring interference won't make it so.

Objection #5: Existing technical standards will protect ITFS in the two-way environment. Petitioners argue that power limitations and out-of-band emissions limits will control interference when mutually-exclusive ITFS stations are granted.<sup>14</sup> This argument is specious. The current Rules allow for both co-channel and first adjacent interference between modified systems at any D/U level. This situation would be made worse by Petitioners' proposal to expand the list of interfering applications to include a wide variety of downstream modifications in addition to booster and response hub proposals.

Objection #6: Commission action to determine winners and losers in MX proceedings would produce undesirable side effects such as greenmail or favoring well-financed ITFS applicants at auction.<sup>15</sup> The parties that make these arguments do not address the fact that similar perverse effects will result from multiple applicants' being allowed to build interfering facilities. What more effective greenmail technique is there than, say, changing a station's downstream polarization and blasting out a neighbor's

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<sup>14</sup> Opposition of Petitioners, p. 8.

<sup>15</sup> Id. at pp. 5, 12; Region IV Opposition, pp. 3, 5.

response hub?<sup>16</sup> And if multiple licensees are allowed to build interfering systems, will not the one that has the most money possess an advantage?<sup>17</sup>

Under current Rules, we will experience the worst of all worlds: greenmail, economic swashbuckling, and interference.

Objection #7: The Petitioners complain that under ITF's proposal, the Commission will have to devise and administer a system for selecting between mutually-exclusive ITFS applications. One criticism is that if auctions are not employed, the Commission will have to choose between quite dissimilar technical proposals.<sup>18</sup> We observe that under former Section 74.913, the principal weight was given not to the nature of the application, but to the nature of the applicant.<sup>19</sup> Such standards are equally applicable to one-way and two-way applications. Further, it appears that Section 74.913(b)(3),

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<sup>16</sup> BellSouth argues that under its proposal for after-the-fact adjudication, greenmail complaints will be dismissed as frivolous. (BellSouth Petition for Reconsideration, p. 9) ITF believes that it may not be obvious who is greenmailing whom, since all interfering systems will be on the air and providing "service."

<sup>17</sup> Like those opposing our Petition, ITF does not believe that auctions should be employed in the ITFS service. We observe, however, that real party in interest restrictions will mean that auctions between ITFS licensees will not be influenced significantly by the resources of commercial operators, whereas the ability to build interfering facilities will.

<sup>18</sup> Opposition of Petitioners, pp. 11-12.

<sup>19</sup> See former Sections 74.913(b)(1) and (2).

pertaining to the number of channels occupied, also remains relevant. In sum, assuming the statute is revised---as ITF hopes it will be---only relatively minor changes to prior Rules will be needed, rather than the "insurmountable" difficulties alleged by the Petitioners.

The Petitioners' other criticism is that it would take time for the Commission to decide between mutually exclusive applicants. ("[A]ny system for choosing from among competing applicants, be it paper hearing, lottery, auction or other construct, will inevitably add months, if not longer, to the licensing process.")<sup>20</sup> ITF concedes that adding months to the licensing process is a disadvantage. However, we strongly believe that it is a far better prospect than the entirely unacceptable alternative posed by the current Rules, not to mention the elaborations proposed by the Petitioners and BellSouth.

#### Summary and Conclusion

We agree with that there has been a history of problems in ITFS application processing. We also agree that the remedies contained in the current Rules will lead to the rapid grant of mutually exclusive ITFS applications.

However, the proposals put forth by the Petitioners, BellSouth, and others are intended to "fight the last war,"

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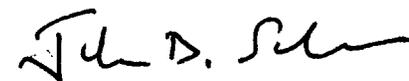
<sup>20</sup> Opposition of Petitioners, p. 10.

without taking into account that they will create new problems that are worse than those we have seen in the past. The Commission confronts no perfect alternative in this highly encumbered service, but the procedures ITF advocates represent a better choice than those in the current Rules---and far better than those advocated by the wireless cable industry.

Respectfully submitted,

INSTRUCTIONAL TELECOMMUNICATIONS  
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Dated: February 10, 1999

Certificate of Service

I, Rob Smok, hereby certify that I have served a copy of Instructional Telecommunications Foundation's foregoing Opposition to Petitions for Reconsideration on the following by first class mail, postage prepaid, on this 12<sup>th</sup> day of February, 1999.

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