November 27, 2002

Via Electronic Comment Filing System

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Network for Instructional TV, Inc. (FRN: 0004-0634-91)
Reply Comments on RM-10586 (DA 02-2732)
Re: "A Proposal for Revising the MDS and ITFS Regulatory Regime"

Dear Ms. Dortch:

Network for Instructional TV, Inc. ("NITV")[1] files these Reply Comments in connection with "A Proposal for Revising the MDS and ITFS Regulatory Regime" (the "White Paper") submitted October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network (collectively, the "Petitioners").

NITV generally supports the White Paper's important changes to MDS and ITFS regulations.[2] Like the majority of this proceeding's participants, NITV believes that the White Paper's basic goals of speeding the transition to next-generation services for this spectrum and balancing the interests of commercial and educational licensees serve the public interest.[3]

In light of the Comments filed in this proceeding, NITV wishes to draw attention to several issues: licensees' entitlement to default plan spectrum allocations, the need for immediate suspension of construction requirements, the need to articulate clear standards for dispute resolution with respect to transition plans and the need to implement rules to provide additional assurances that parties who seek to become Proponents will fully carry out their obligations. In

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[1] NITV is a non-profit corporation that, with its affiliates, distributes educational programming and services to students and teachers through a network of 23 ITFS stations and over the Internet. Since its establishment in 1979, NITV has worked closely with local educators in support of traditional distance learning using ITFS stations licensed to NITV and its affiliates. NITV's Internet presence includes its TeachersFirst.com division, which was created in 1998 to supply original lesson plans, web resources and other content to educators and students, and TeachersAndFamilies.com, which provides parents, teachers and students with free and other online resources that improve learning experiences for children. These initiatives have been designed around the promise of providing wireless data and other services to the more than 50 U.S. school districts receiving ITFS service from NITV and its affiliates.

[2] *See Comments on RM-10586 Re: "A Proposal for Revising the MDS and ITFS Regulatory Regime"* submitted by NITV and North Carolina Association of Community College Presidents on November 14, 2002.

[3] Only one commenter, RioPlex, objects to the bandplan set forth in the White Paper's proposal, but offers no alternative that offers the benefits of a national bandplan necessary to incent equipment makers, as well as others, to develop new technology capable of working in this band.

particular, NITV notes that the Illinois Institute of Technology ("IIT") and the ITFS Spectrum Development Alliance, Inc. ("ISDA") propose several modifications to the White Paper that merit further attention.

Default Plans

NITV supports IIT's position, which ISDA appears to support, that Proponents should not be permitted to substitute nonstandard allocations for an ITFS licensee's default frequency plan during a transition without first obtaining the licensee's consent. In their First Amendment, the Petitioners clarify that the White Paper contemplates that an ITFS licensee to be transitioned will receive the specific channels specified in Appendix B of the White Paper, except where an ITFS licensee requests more than one program track.[4] NITV agrees that certainty and integrity in transition plans requires licensees to be able to rely upon an assignment of licenses in the new bands where negotiations with the Proponent do not result in an alternative arrangement. The default allocations promote clarity and permit licensees and Proponents to negotiate mutually beneficial deviations without permitting Proponents to impose such deviations unilaterally. To the extent a licensee desires more than one program track, this should be satisfied by use of digital compression technology, or, with the consent of the licensee, by allocation of an additional channel in the MBS. Accordingly, Proponents should not be permitted to impose an alternative to a licensee's default plan without that licensee's consent.

Suspension of Construction Deadlines

NITV agrees with many participants, including the Petitioners, that the public interest supports the immediate suspension of outstanding construction obligations and of the operation of facilities that would be rendered obsolete by the new rules. Without suspension of these requirements, licensees' construction deadlines in individual authorizations and BTA build-out requirements would require licensees to engage in constructing potentially wasteful facilities. Moreover, sustaining these requirements during the FCC's consideration and adoption of new MDS/ITFS rules would result in unnecessary burdens on staff and licensees in light of the many extension requests that would inevitably result.

As IIT argues and NITV agrees, a blanket freeze on facilities modifications is unnecessary. NITV believes that ITFS licensees should be permitted to make minor modifications to preserve or enhance the provision of educational services; however, unlike IIT, NITV believes that such modifications should not cause unacceptable interference to co- or adjacent-channel licensees. Moreover, due to potential interference concerns, NITV disagrees with ISDA's position that licensees should be permitted to relocate their transmission facilities for any reason upon losing access to tower sites. No licensee should be required to accept more interference than the FCC Rules contemplate.

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[4] The First Amendment states that where an ITFS licensee requests more than one program track in the Mid-Band Segment ("MBS"), the Proponent will have discretion to call for the ITFS licensee to have no more than one 6 MHz channel for each requested program track. In that instance, if the Proponent elects to meet its obligation to the ITFS licensee without digitization, the ITFS licensee would receive fewer Low-Band Segment ("LBS")/Upper-Band Segment ("UBS") and Transition Band channels.

Dispute Resolution Procedures

NITV believes that IIT and ISDA raise legitimate concerns that the White Paper's proposed dispute-resolution process for transition plans is unduly narrow and raises the potential for abuse by Proponents. Both IIT and ISDA suggest that where a participant submits a counterproposal to a Proponent's proposed transition plan, and thereafter the Proponent invokes the dispute-resolution process to seek a determination that its plan is "reasonable" and entitled to implementation, the White Paper limits the resulting adjudication to a review of the "reasonableness" of the Proponent's plan. In other words, the White Paper can be read to foreclose consideration of the counterproposal in the dispute-resolution process, particularly where "safe harbors" specified in the rules characterize a transition plan as "reasonable." Moreover, the White Paper suggests that a participant may only submit a written counterproposal where the participant determines that the transition plan is not "reasonable as it relates to [the participant's] interests." According to the White Paper, such procedures are necessary to prevent licensees from attempting to use the process to extract "greenmail" from proponents.

The White Paper's proposed dispute-resolution process is so firmly rooted in preventing licensee "greenmail" that it forecloses even consideration of counterproposals that are "better mousetraps" rather than mere vehicles for extracting concessions. NITV rejects any suggestion that counterproposals submitted in an effort to promote an ITFS licensee's educational needs, for example, should be subject to a presumption of bad faith or be deemed irrelevant to a determination of what is "reasonable." Although NITV agrees that expediting the transition to the new bandplan is an important public-interest goal, such concerns should not obviate the need for legitimate consideration of counterproposals that are reasonable and made in good faith.

Moreover, NITV emphasizes the importance of clearly defined standards to determine the scope of "reasonable" transition plans to expediting the transition process and to minimizing FCC resources devoted to dispute resolution. Like ISDA, NITV urges the FCC to promote this certainty by adopting safe harbors in an evenhanded manner that also reflects the rights and interests of licensees.

Transition Procedures

NITV acknowledges that the White Paper's proposed transition process heavily favors transition Proponents in an effort to expedite transitions to a new bandplan. The process is set up to expedite and limit consideration of the merits of, and objections to, a proposed transition plan. NITV believes that Proponents to a transition plan will bear significant risk and cost in implementing a market transition and that market realities may necessitate expedited consideration of transition plans. However, NITV also believes that the public interest requires Proponents to be held to substantial upfront commitments to ensure that transitions will be effectuated and that procedural safeguards are necessary to ensure that transitions do not override the educational programs of ITFS licensees.

NITV shares IIT and ISDA's view that the White Paper's 21-day timeframe for licensee review of a transition plan must be extended to at least 60 days to provide licensees with a full and fair opportunity to assess the merits of a proposed plan and to provide a meaningful counterproposal where warranted. Expedience should not occur at the expense of licensees' opportunity to conduct a thoughtful and careful review of a transition plan that may dramatically affect their spectrum rights and the interests of those who rely upon the educational service provided via ITFS spectrum.

IIT notes, and NITV agrees, that approved transition plans must be implemented promptly, by a date certain, with sufficient notice to permit educators to properly plan for the transition. Accordingly, the White Paper's suggestion that a transition timeline must not exceed 18 months of the conclusion of the Transition Planning period should be understood to represent a strict deadline for completion of a transition. NITV believes, however, that limited extensions of this deadline should be permitted for delays that are due to circumstances outside the Proponent's control. IIT has suggested, and NITV agrees, that a six-month notice period before effectuating a transition would provide licensees with sufficient time to prepare for the transition.

NITV supports IIT's proposal to permit ITFS licensees to implement some or all of their portion of a transition plan, subject to reimbursement by the Proponent based on documented out-of-pocket costs up to the level provided in the Proponent's upfront estimate in the Proponent's transition plan. Such a rule would permit ITFS licensees who elect to invoke this procedure to maintain control over transition functions such as the installation of transmitters and receivers, thus reinforcing the licensee's ability to obtain equipment that meets its educational needs without reliance upon the Proponent. For example, an ITFS licensee in those circumstances could apply the costs to be reimbursed to more expensive or better quality equipment, bearing the additional expense itself. NITV agrees with IIT that such a rule properly aligns incentives of the Proponent and the affected licensee by discouraging the inflation of transition costs. The rule also likely would further engage licensees in the transition process, thus boosting the likelihood that the transition would unfold quickly and result in improved service overall.

NITV believes that new rules should provide all commercial Proponents with the incentive to approach transitions with urgency and commitment. Accordingly, NITV agrees with IIT and ISDA that Proponents who propose and initiate a transition process and thereafter fail to timely meet their transition obligations should be subject to a heightened burden. In NITV's view, such Proponents should not be allowed to serve as a Proponent in that market again unless such failure was caused by events beyond the Proponent's control or unless a majority of the licensees that are not directly or indirectly owned by the Proponent in the affected market consent. NITV also agrees that Proponents should be required to provide assurances of their financial ability to meet their transition obligations at the time they first present the transition plan.

Enforceability of Existing Agreements

NITV takes issue with ISDA's suggestion that the FCC should clarify that existing private agreements among ITFS licensees and commercial operators are enforceable "only to the extent that they govern analog operations in the MBS." NITV believes instead that the FCC should not, by rule, attempt retroactively to alter the legal effect of the rule changes on private agreements; rather, the parties themselves are in the best position to determine, as a contract-law matter, their respective rights and responsibilities. ISDA's proposed rule, which would permit a party to disregard their agreements with respect to LBS, UBS and digital MBS facilities, would require the FCC to interpret contractual rights that are better left to private negotiation. NITV suggests instead that the FCC establish a date certain to permit parties to execute amended contracts and submit them to the FCC, if they so desire, or otherwise parties should be permitted to continue performing agreements in accordance with their then-existing terms and conditions. Most contracts establish a private dispute resolution process that can be used to help resolve disagreements without burdening FCC staff.

Finally, NITV agrees with IIT that a Proponent should not be permitted to pressure licensees to enter into or to amend a lease agreement as a precondition to transitioning that licensee to MBS channels. As IIT has asserted, if Proponents voluntarily assume an obligation to pay ITFS licensees' transition costs through providing upgraded downconverters and migrating the licensees' program tracks, the Proponent should not be permitted to require the licensee to change an existing contractual relationship with the Proponent to receive this benefit.

Conclusion

NITV believes that the issues identified by IIT and ISDA require additional public comment in this proceeding to ensure that the interests of educational licensees are properly balanced with those of transition Proponents. Accordingly, NITV respectfully requests that the NRPM that the FCC adopts in this proceeding should reflect the issues identified in these Reply Comments. In this way, the public can have a full and fair opportunity to provide input on the proposed changes to the MDS/ITFS regulatory regime and on potential issues raised by the White Paper.

Sincerely,

Thomas Pyle

Thomas A. Pyle, Executive Director and CEO
Network for Instructional TV, Inc.

cc: Qualex International
Charles Oliver, Wireless Telecommunications Bureau

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