

May 21, 2004

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

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*
WT Docket No. 03-66
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

Luxon Wireless Inc. ("Luxon") submits this written *ex parte* presentation to support changes to the FCC's ITFS eligibility requirements contained in Section 74.932 of the Commission's Rules to permit voluntary sales of ITFS licenses to commercial entities.¹ As further explained below, Luxon believes that expanding ITFS eligibility, consistent with the proposal made by Network for Instructional TV, Inc. ("NITV"),² will facilitate new investment and new entrants interested in providing wireless broadband services that will benefit education generally and ITFS licensees specifically. Luxon believes that this plan will both preserve access to ITFS spectrum for current licensees and provide capacity to educators that do not currently hold licenses, expanding the potential for educators to make better use of the spectrum.

Background

Luxon was established in 2003 to acquire, deploy and commercially operate high-quality, carrier-grade wireless broadband services in the state of Florida and other areas. As a "true start-up" enterprise, Luxon focuses on serving residences and commercial businesses that are underserved – or unserved – by wired solutions such as DSL or cable modem. In addition, Luxon is dedicated to working with educational institutions to develop and provide advanced services such as video-on-demand and campus-wide intranets to benefit elementary, high school and college students. To date, Luxon has agreed to spectrum lease terms with ITFS licensees in several markets and is in discussions with licensees in a number of additional markets.

¹ See *Notice of Proposed Rule Making and Memorandum Opinion and Order*, FCC 03-66, 17 FCC Rcd 6722 (2003) ("MDS/ITFS NPRM").

² See Comments and Reply Comments of NITV, filed October 16, 2003 ("NITV Comments"); *Ex Parte* Notification of NITV, filed January 29, 2004.

In Luxon's view, consumers, businesses and educators will increasingly demand higher speeds, higher capacity and "anytime, anywhere" service. Luxon further believes that the MMDS/ITFS spectrum band offers the most suitable combination of characteristics necessary for Luxon to achieve these benefits. Luxon supports the industry's proposals to "re-band" the spectrum to de-interleave the channels and establish segmented spectrum blocks for various flexible uses, as proposed in the *MDS/ITFS NPRM*.

Luxon believes that the combination of multiple non-line-of-sight equipment options, a more certain and sensible spectrum and regulatory structure, and the increasing availability of MMDS/ITFS spectrum³ will create new opportunities for entrepreneurs like Luxon to offer high-quality broadband services to underserved and unserved areas. Affording ITFS licensees the right to **voluntarily** sell their licenses to commercial entities would provide further incentive for investment. Overall, the confluence of these events will create an environment more favorable to entrepreneurs seeking to raise funds for spectrum acquisition and operations, including service to competitive, underserved and unserved markets.

Discussion

Under NITV's plan, ITFS licensees would be permitted to voluntarily sell their licenses to commercial entities, subject to two limitations intended to safeguard the primary purpose of the ITFS spectrum: (1) the assigning ITFS licensee would need to demonstrate to the Commission that the consideration obtained as a result of the license sale would be used to fulfill the educator's mission; and (2) a minimum of five percent of the assigning licensee's spectrum would be set aside exclusively for educational purposes, and made available to educators on a first come, first served basis. Luxon believes that NITV's plan appropriately balances the competing private interests of educators and operators, fosters the public interest objectives of this proceeding and ultimately ensures that the spectrum is put to its "highest and best" use.

³ The availability of MMDS and ITFS spectrum for lease is a consequence of several factors. First, broadband MMDS/ITFS systems require less spectrum than video systems, which were predicated on the aggregation and collocation of a maximum amount of spectrum (*i.e.*, up to 190 MHz). For broadband systems using MMDS and ITFS channels, Luxon believes that 30 MHz may be sufficient to serve its target markets. Second, in recent bankruptcy transactions in which Nextel agreed to acquire assets from WorldCom and Nucentrix, Nextel did not assume all of the leases, resulting in a large number of MMDS and ITFS licensees that no longer have the support of a commercial lessee. Third, in a number of cases, ITFS leases have expired without renewal or extension by the previous lessee.

Luxon is aware that many educators commenting in this proceeding disagree with NITV's position,⁴ and that long-time incumbent operators generally support commercial eligibility for ITFS.⁵ In Luxon's view, the issue of commercial eligibility can be boiled down to the simple questions of access and control. On one hand, some ITFS licensees argue that continued access to ITFS spectrum, as proposed by NITV, is not a substitute for control of the spectrum under an exclusive eligibility standard.⁶ On the other hand, incumbent operators highlight the increased flexibility that educators would have to negotiate benefits "such as cash consideration to fund other educational services, migration to other distribution systems and access to airtime for educational services, all in support of their educational mission."⁷ In short, both see greater benefits if they can control the spectrum as a licensee as opposed to having rights to access the spectrum under the existing lease-only regime or under the five percent set-aside proposed by NITV.⁸

For the most part, new entrants like Luxon have not presented their views on this controversial issue. Luxon's experiences as a start-up operator seeking to acquire spectrum and construct wireless broadband systems thus should provide a novel perspective.

Commercial eligibility will promote competition. A primary objective of this proceeding is to make the MMDS and ITFS regulatory environment more conducive for wireless operators to compete with incumbent DSL and cable modem operators that have captured the vast majority of residential and business subscribers.⁹ Luxon will, once its business plan is implemented, provide a broadband service in areas where consumers have none today, and will also be a viable competitor to existing services in areas where they are available. To reach this point, Luxon will need to raise a significant amount of capital to fund spectrum acquisition, construction and operating costs. To this end, Luxon has made numerous presentations to potential investors over the last year – individuals, venture firms and investment banks. Based on these discussions, Luxon understands that potential investors view the existing leasing requirement as an obstacle to Luxon's ability to access spectrum and a limitation on the use of that spectrum. The

⁴ See, e.g., Comments of The George Mason University Instructional Foundation, Inc., *et al.*, pp.12-17; Reply Comments of The Education Community, filed October 23, 2003, pp.8-14; *Ex Parte* Notification filed by the National ITFS Association, Catholic Television Network and The Education Community, filed May 12, 2004 ("Educator Ex Parte").

⁵ See, e.g., Reply Comments of Sprint Corporation, filed October 23, 2003, pp.26-30.

⁶ See, e.g., Educator Ex Parte, p.2.

⁷ Reply Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., filed October 23, 2003, p.29 (footnotes omitted). As noted by NITV, the Commission has acknowledged the benefits of permitting the sale of non-commercial licenses to commercial entities when the sale proceeds would be used to fund local programming obligations and retire debt. See NITV Comments, p.6, *citing* Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania, *Report and Order*, 17 FCC Rcd 14038 (2002).

⁸ In the Educator Ex Parte, the filers attempt to equate the DBS public interest set-aside with the set-aside proposed by NITV. See Educator Ex Parte, p.3. It is important to note, however, that DBS operators themselves select the public interest programming that will be carried. Under the NITV proposal, the commercial assignee would be required to make the spectrum available *to educational users*.

⁹ See *MDS/ITFS NPRM*, 17 FCC Rcd 6722, 6724.

leasing requirement is impeding Luxon's ability to raise funds necessary for it to acquire spectrum rights, which in turn delays Luxon's ability to offer competitive broadband services. By permitting commercial entities to acquire ITFS spectrum, Luxon would have the ability to overcome these objections and obtain additional capital.

Commercial eligibility will increase broadband access. A second policy objective – supported by the Bush Administration,¹⁰ Congress¹¹ and the Chairman Powell¹² – is the availability of broadband throughout the country. Luxon has determined that many residences and businesses in its target markets do not have access to any broadband services at this time. Luxon would thus be providing a first broadband service where no service exists today. Here again, the investment community would be more willing to invest if Luxon could acquire the ITFS spectrum. The leasing requirement deters potential investors from funding Luxon's efforts, slowing its service deployment.

Commercial eligibility will further education. From its experience in dealing with ITFS licensees, Luxon believes that commercial support has been, and will continue to be, necessary for the build-out of ITFS facilities. Without the financial investment of commercial operators, the educational services now offered through the use of the ITFS spectrum might never have been possible. The same holds true for the future – without the financial and technical support of operators like Luxon, advanced wireless systems may not be constructed using ITFS frequencies. As a committed community enterprise, Luxon has developed a number of advanced services that will be deployed on ITFS spectrum, including video-on-demand, integrated distance learning and campus intranets. ITFS licensees have shown a great deal of interest in receiving these services. Luxon could more readily provide these services to its educational partners if it could provide them as consideration for ITFS license acquisition. Under existing rules, Luxon cannot be as responsive to the needs of educators because it must discount the value of the excess capacity provided under a lease with a limited duration.

¹⁰ See "President Bush Meets with First-Time Homebuyers in NM and AZ," Remarks by the President on Homeownership, March 24, 2004 ("This country needs a national goal for broadband technology, for the spread of broadband technology. . . . You see, the more choices there are, the more prices will go down, and the more prices go down, the more users there will be.")

¹¹ See Section 706 of the Telecommunications Act of 1996, as amended. See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 04-54, *Notice of Inquiry*, FCC 04-55, released March 17, 2004.

¹² See News Release, "Powell Comments on President's Call for Universal, Affordable Broadband," March 24, 2004.

Luxon also believes that the five percent set-aside proposed by NITV will benefit education by making spectrum resources available to the community at large. In the Educator Ex Parte, the claim is made that five percent is not a very useful amount of spectrum.¹³ Luxon points out that this is precisely the minimum amount of spectrum required of ITFS licensees to reserve when they are leasing excess capacity. Moreover, to the extent assigned ITFS spectrum is incorporated into a wireless broadband system utilizing other channels, some of which are subject to frequency re-use at multiple locations, channel shifting should be permitted to calculate the set-aside. For example, if the operator utilized eight ITFS channels, four of which have been assigned to the operator and four of which are leased to the operator, and the aggregate system capacity of the system is 500 mbps, the set-aside would be 12.5 mbps ($4/8 \times 500 \text{ mbps} \times 5\% = 12.5 \text{ mbps}$).

Commercial eligibility will reduce transactional and administrative costs. As a start-up enterprise, Luxon must keep its costs at a minimum. While some costs are unavoidable, certain other transactional and administrative costs could be reduced if Luxon acquired ITFS licenses instead of leases. Under a spectrum lease, Luxon will have ongoing lease payments and contract administration fees, in addition to incurring continuing liabilities throughout the term of the lease. If Luxon acquired the license, it could negotiate a one-time purchase price payment and would have no ongoing costs or liabilities. Similarly, ITFS licensees also would not have obligations to maintain their licenses or the expenses and liabilities associated with administering long-term contracts.

Commercial eligibility will increase flexibility for ITFS licensees. With commercial eligibility, ITFS licensees will have increased flexibility about how best to deploy spectrum assets to meet their educational mission. As mentioned above, this flexibility could include post-assignment access rights, non-cash consideration that would be difficult to obtain under a “pay as you go” lease and additional services. Through its experiences in several markets, Luxon has found that some licensees are struggling to fulfill their educational mission. In one particular case, a licensee that serves less than 50 students and has no technology resources or budget is using payments from an ITFS lease as collateral for a loan used to keep the school operational. In this case, the licensee would benefit immensely from proceeds a license sale could bring. This money could be used to fund operations, renovate buildings, purchase computers and facilitate other mission-critical functions. As another example, ITFS licensees would have the choice to retain spectrum for its sole educational use, funding those activities with proceeds from the sale of the spectrum they assign.

¹³ See Educator Ex Parte, p.2.

Conclusion

As a start-up enterprise seeking spectrum and capital, Luxon believes that the ability of ITFS licensees to sell their spectrum to commercial entities will, in conjunction with re-banding the spectrum, spark new interest in MMDS and ITFS, and more importantly trigger investment in Luxon to facilitate provision of wireless broadband services in underserved and unserved areas of the country.

Sincerely,



Brian W. Gortney, II
President/CEO

cc: Chairman Michael K. Powell
Commissioner Jonathan S. Adelstein
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
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