BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
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 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718

To: The Secretary
The Commission

COMMENTS OF
NY3G PARTNERSHIP

Bruce D. Jacobs
Tony Lin
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Counsel for NY3G Partnership

January 10, 2005

Summary

NY3G Partnership congratulates the FCC for the progress it has made in this proceeding in its effort to better manage valuable and underutilized ITFS and MMDS spectrum. The Commission's recent order will make possible the provision of much needed high-speed, two-way broadband services to communities across the country. In the New York City market, NY3G intends to deploy innovative and affordable services to the market's more than fifteen million residents, with an emphasis on those that have been historically underserved by legacy communications providers.

The F group situation in the New York City market presents what appears to be a unique issue that, as the Further Notice of Proposed Rulemaking acknowledges, needs to be addressed before this spectrum can be fully brought into use. It is apparently the only instance in which the grandfathered co-channel ITFS and MMDS licensees continue to have substantial overlapping service areas and the grandfathered ITFS licensee also has the capability and FCC authority to use other ITFS spectrum to cover the receive sites of its grandfathered facilities.

To assist in the analysis of the problem, NY3G commissioned Dr. Thomas Hazlett to conduct an economic study of the market. The study confirms the importance of eliminating the regulatory complications that have created incentives for inefficient behavior in the New York City market. The situation is analogous to that of the vacant storefronts that characterized Moscow in the 1990s, where convoluted property rights made assembling ownership of those rights into productive packages complex, costly, and time consuming, effectively preventing development. The study concludes that the F group channels in New York City can be fully utilized only if the Commission affirmatively addresses these problems. By adopting the right spectrum management policies, the FCC could save consumers up to several hundred millions of

dollars annually and facilitate broadband availability, a key priority of the Commission and the Administration.

There are two ways for the Commission to accomplish this goal. The first is to enforce the existing rules. As NY3G describes in a petition being filed today (a copy of which is attached), the grandfathered ITFS licensee on the F group channels in New York City is in violation of the Commission's rule limiting ITFS licensees to four ITFS channels (one channel group) per area of operation. This violation is exacerbated by its inefficient use of the F group channels merely to simulcast programming available on its main ITFS station, which operates on the B group channels, and its failure to take advantage of an approved application it submitted to move its main ITFS facility to a location that would permit it to serve all of its registered receive sites without the use of the F group channels, as TVC argued in that application proceeding.

Alternatively, the Commission could establish rules of general applicability in this proceeding that would put the grandfathered MMDS licensee in an undisputed position to develop its spectrum. In this regard, NY3G urges the Commission to adopt its proposal to require grandfathered ITFS licensees to operate on a secondary, non-interference basis to co-channel MMDS licensees in markets where the co-channel licensees continue to have substantial overlapping service areas and where the grandfathered ITFS licensee has other ITFS channels capable of serving the registered receive sites of its grandfathered facilities. As the Hazlett Study concludes, this approach is economically efficient because spectrum rights would be assigned to the entity likely to make the most beneficial use of them, reducing transaction costs and expediting investment and usage. In contrast, ITFS licensees are focused on the provision of video programming, which can be provided by a host of alternatives at a tiny fraction of the opportunity cost of the radio spectrum.

NY3G's proposal is fair to grandfathered ITFS licensees. MMDS licensees would be required to bear the reasonable costs associated with relocating grandfathered ITFS licensees to alternative facilities, frequencies, or technologies. Given the abundance of technologies capable of providing one-way video programming and the availability of digital technology, the ability of grandfathered ITFS licensees to continue to provide instructional and educational video programming would be preserved fully. Moreover, as discussed earlier, this approach is particularly justified in New York City, where the incumbent ITFS licensee inefficiently uses its grandfathered facilities merely to simulcast programming provided on its other ITFS channels, without any technical need to do so.

NY3G's proposal is supported by the Commission's 1983 order redesignating the E and F group channels for MMDS and restricting grandfathered facilities to the provision of video services to a fixed number of receive sites. More generally, the proposal is completely within the Commission's authority and consistent with well-established Commission precedent regarding the relocation of incumbent services.

NY3G opposes requiring MMDS licensees to operate on a secondary, non-interference basis to grandfathered ITFS licensees. Such a proposal would be inconsistent with the Commission's redesignation order, which has been in effect, substantively unaltered, since 1983. Moreover, it would delay the expeditious deployment of broadband services and generate unnecessary transaction costs, contrary to sound economic policy as explained in the Hazlett Study.

NY3G opposes using the "split-the-football" methodology to resolve the mutual exclusivity between grandfathered ITFS licensees and co-channel MMDS licensees. Grandfathered ITFS licensees do not have PSAs. Moreover in the New York City market,

applying this methodology would be inefficient, effectively requiring co-channel licensees to serve only half a market.

The Commission should not rely exclusively on voluntary negotiations. NY3G's experience demonstrates that hold-up problems between licensees, exacerbated by regulatory uncertainty regarding spectrum rights, can be substantial, and reliance on negotiations is likely to lead only to continued delay in the deployment of services, as indicated in the Hazlett Study.

NY3G opposes lifting the spectrum cap on ITFS licenses. The FCC rule limiting ITFS licensees to four ITFS channels on one channel group was implemented to promote diversity of programming and ownership. Those same competitive justifications continue to exist. Instead of lifting the spectrum cap generally to address those hypothetical situations where an ITFS licensee might legitimately require additional spectrum to provide service, the FCC should rely on its current practice of requiring such licensees to seek a waiver of the rule. With respect to the Commission's concern that the rule reduces the ability of ITFS licensees to operate on more than one high-power channel, NY3G does not object to modifying the language of the four-channel rule to permit ITFS licensees to use channels from different channels groups, so long as the four-channel limitation is maintained.

Table of Contents

Background 2

Discussion 5

I. The Commission should require grandfathered ITFS licensees to operate on a secondary, non-interference basis to co-channel MMDS licensees in markets where the co-channel licensees continue to have substantial overlapping service areas and where the grandfathered ITFS licensee has other ITFS channels capable of serving the registered receive sites of its grandfathered facilities 7

A. NY3G's proposal promotes efficiency and flexibility and would result in the expeditious deployment of new broadband technologies 8

B. NY3G's proposal is supported by the original MMDS rulemaking 11

C. NY3G's proposal is fully within the Commission's authority and consistent with well-established Commission precedent regarding the relocation of incumbent services 12

II. There is no basis to require co-channel MMDS licensees to operate on a secondary, non-interference basis to grandfathered ITFS licensees 15

III. The Commission should not apply the "split-the-football" methodology to resolve problems of mutual exclusivity between grandfathered ITFS licensees and co-channel MMDS licensees 17

IV. The Commission should not rely exclusively on voluntary negotiations to resolve problems of mutual exclusivity between co-channel licensees 20

V. The Commission should maintain the ITFS spectrum cap 21

Conclusion 22

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
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 RM-10586
	)	
Part 1 of the Commission's Rules - Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9718

COMMENTS

NY3G Partnership ("NY3G"), formerly Grand MMDS Alliance New York F/P Partnership, by its attorneys, hereby files these comments in response to the Report and Order and Further Notice of Proposed Rulemaking in the above-captioned rulemaking proceeding.[1]

[1] *See In the Matter of 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*, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135 (2004) ("*FNPRM*"). The *FNPRM* was published in the Federal Register on December 10, 2004. *See* 69 F.R. 72048 (December 10, 2004). The Commission recently renamed MMDS and ITFS to BRS and EBS, respectively. In light of the important historical context, NY3G uses the original designations throughout this filing.

Background

NY3G Partnership. In 1985, NY3G was chosen as the tentative selectee of the F group channels in New York City and, shortly thereafter, entered into negotiations with the incumbent ITFS licensee, Trans Video Communications, Inc. ("TVC") to address potential interference concerns and facilitate the deployment of NY3G's service. Although the parties had initially reached an agreement, the nearly ten-year delay in the processing of the associated FCC applications resulted in the dissolution of that agreement.[2] Since the release of the *FNPRM*, NY3G has reinitiated these efforts and spoken with TVC on several occasions. At present, NY3G operates an MMDS station on the F group channels from the Empire State Building in New York City and is authorized to provide only west-facing service.[3] In response to the preceding *NPRM*,[4] NY3G proposed various solutions to resolve the co-channel problem between grandfathered ITFS licensees and MMDS licensees.[5]

With the legal ability to provide service within its protected service area ("PSA"), NY3G expects to use its F group channels to deploy low-power facilities capable of providing two-way, high-speed broadband services to a variety of mobile terminals, including PDAs, laptops and

---

[2] A more detailed history of the co-channel conflict in the New York City market is provided in the attached petition. *See* NY3G Partnership, Petition to Modify (January 10, 2005), attached as Exhibit 1.

[3] *See* Letter to Grand MMDS Alliance New York F/P Partnership from Charles E. Dziedzic, Assistant Chief, Video Services Division, Reference No. 1800E6, File No. 5455-CM-P-83, at 4 (May 6, 1997).

[4] *See In the Matter of 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*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722 (2003) ("*NPRM*").

[5] *See, e.g.*, Grand Alliance, Reply Comments (October 23, 2003); Letter to Marlene H. Dortch from Bruce D. Jacobs (June 1, 2004).

mobile videophones. NY3G intends to focus on the provision of affordable service to consumers that have historically been underserved by legacy communications providers. NY3G anticipates that once the Commission firmly clarifies NY3G's spectrum rights, it will be able to deploy a system expeditiously. NY3G has actively pursued discussions with and issued a Request for Information ("RFI") from several vendors, including Alvarion, Inc.; Axcera; ArrayComm, Inc.; Motorola, Inc.; Navini Networks, Inc.; NextNet Wireless, Inc.; and Vcom, Inc.

Trans Video Communications, Inc. TVC is the incumbent ITFS licensee, operating on both the B and F group channels in New York City. Its main station operates on the B group channels, and it uses two F group stations simply to simulcast programming from its B group channels to a fixed number of receive sites.[6] In 2003, the FCC approved a modification application filed by TVC requesting to move its main B channel facility to the Empire State Building ("ESB").[7] As support for the application, TVC argued that its grant would eliminate the need for TVC to continue to use the F group relays, freeing up that spectrum for use by the co-channel MMDS licensee.[8] Based on its own research and discussions with Commission staff, NY3G believes that there is no other market in the country where there is a continuing situation between grandfathered ITFS licensees and co-channel MMDS licensees and certainly none where the ITFS licensee also uses its co-channel facilities solely as repeaters, without any need to do so.

---

[6] *See, e.g., In the Matter of Trans Video Communications, Inc*., 18 FCC Rcd 18216, at ¶¶ 6, 13 (2003); *see also* Application, BPIF-95, FCC Form 330-P, at Section V, p.1 (November 4, 1966) (explaining that the F group transmitters are used only as relays).

[7] *See* Public Notice, Report Number 1627, at p. 26 (October 8, 2003); *see also* Letter to Bruce D. Jacobs from D'wana R. Terry, 18 FCC Rcd 12314 (June 25, 2003).

[8] *See* attached Exhibit 1.

Further Notice of Proposed Rulemaking. In the Report and Order portion of the *FNPRM*, the Commission fundamentally restructured the MMDS/ITFS spectrum, "enhanc[ing] flexibility in order to encourage the highest and best use of spectrum . . . and the growth and rapid deployment of innovative and efficient communications technologies and services." *FNPRM*, at ¶ 1. The Commission adopted a new band plan, grouping high-power and low-power operations into separate, contiguous segments. *See id*. at ¶ 6. As the Commission noted, "[t]he new band plan . . . provides new incentives for the development of low-power cellularized broadband uses of the [MMDS/ITFS] band, which have been thwarted by the legacy band structure." *Id*. The Commission did not resolve how co-channel MMDS and ITFS licensees were to operate under the new regime.

In the *FNPRM*, the Commission requested that interested parties provide comments regarding how the Commission could equitably allocate the spectrum rights between such licensees.[9] Where the alleged PSAs of co-channel licensees almost entirely overlap,[10] the Commission proposed requiring grandfathered ITFS licensees to operate on a secondary non-interference basis to co-channel MMDS licensees.[11] The Commission noted that such a proposal would be in keeping with the intent and spirit of the Commission's 1983 order redesignating the E and F group channels from ITFS to MMDS and would promote efficiency and flexibility, "achieving the availability of new broadband technologies to all Americans as quickly as

---

[9] *See FNPRM*, at ¶ 337.

[10] *See infra* Part III (demonstrating that grandfathered ITFS licensees do not have PSAs).

[11] *See FNPRM*, at ¶ 338. The Commission did not define "secondary, non-interference basis" in the context of co-channel operations, but in another section of the *FNPRM* the Commission noted that secondary operations meant the temporary use of spectrum "to enable incumbents to continue operations until new licensees [offered] incompatible new service; not to enable incumbents to conduct long-term secondary operations." *Id*. at ¶ 297.

possible." *FNPRM*, at ¶ 338. The Commission further inquired whether, in that scenario, co-channel MMDS licensees should be required to bear the cost of relocating grandfathered ITFS licensees so that they will be able to continue their present grandfathered operations. *See id*.

The Commission also suggested, as a possible alternative, expanding the rights of grandfathered ITFS licensees by granting such licensees a geographic service area ("GSA") and permitting the licensees to modify their equipment to comply with the new rules. *See FNPRM*, at ¶ 339. Under this alternative proposal, co-channel MMDS licensees would be permitted to operate only on a secondary basis. *See id.* As a third approach, the Commission proposed relying on voluntary negotiations between co-channel licensees to eliminate mutual exclusivity. *See id*. at ¶ 340.

Where the alleged PSAs of the co-channel licensees overlap to some extent, but not entirely, the Commission proposed adopting the "split-the-football" approach. *See FNPRM*, at ¶ 341. Under this process, co-channel licensees would draw a boundary line through the "football-shaped" area where the PSAs of facilities for co-channel licensees intersect. *See id.*

The Commission also requested comments regarding whether it should eliminate the rule limiting ITFS licensees to four channels on one channel group. *See FNPRM*, at ¶ 346. The Commission suggested that the rule would technically prohibit an ITFS licensee from operating on high-power channels in different channel groups and that it might artificially limit the ability of educators to assign spectrum to ITFS licensees in a better position to utilize such spectrum. *See id*. at ¶¶ 345-46.

Discussion

As an initial matter, NY3G notes that the problem of conflicting spectrum rights of co-channel licensees appears to be unique to the F group channels in the New York City market and, accordingly, can and should be resolved without resort to the implementation of new rules of

general applicability.[12] As NY3G demonstrates in a contemporaneous filing, enforcement of the Commission's existing ITFS rules is sufficient to resolve the F group co-channel conflict in the New York City market.

TVC is in violation of the Commission's rule limiting ITFS licensees to four ITFS channels (one channel group) per area of operation, and there is no evidence that TVC requested or that the Commission ever granted a waiver of this restriction. Moreover, TVC uses the F group channels merely to simulcast programming available on its main ITFS station, which operates on the B group channels. Such use is inefficient and would not warrant a waiver of the Commission's rule. It is also unnecessary. TVC applied for and received authorization to move its main ITFS facility, eliminating any need for its continued use of the F group channels, as TVC argued in that application proceeding.[13] For these reasons, NY3G has urged the Commission to modify TVC's interrelated ITFS authorizations and restrict its operations to the B group channels. In the alternative, as discussed further below, NY3G proposes that the Commission adopt new rules that clarify the secondary status of co-channel grandfathered ITFS licensees, subject to reasonable requirements for assistance with relocation costs. NY3G also comments on various alternative proposals raised in the *FNPRM.*

---

[12] For procedural purposes, NY3G has separately filed a Petition to Modify the interrelated B and F group licenses of TVC. *See* attached Exhibit 1. That pleading is incorporated by reference herein.

[13] The Commission has authority to hold TVC to its statements inducing grant of that application. *See, e.g., In the Matter of The Trustees of Indiana University*, 8 FCC Rcd 5555, at ¶¶ 3, 23 (1993) (relying on licensee's commitment, as justification for grant of an application, that it would surrender its two E group channels if Commission granted modification application regarding licensee's B group channels).

I. THE COMMISSION SHOULD REQUIRE GRANDFATHERED ITFS LICENSEES TO OPERATE ON A SECONDARY, NON-INTERFERENCE BASIS TO CO-CHANNEL MMDS LICENSEES IN MARKETS WHERE THE CO-CHANNEL LICENSEES CONTINUE TO HAVE SUBSTANTIAL OVERLAPPING SERVICE AREAS AND WHERE THE GRANDFATHERED ITFS LICENSEE HAS OTHER ITFS CHANNELS CAPABLE OF SERVING THE REGISTERED RECEIVE SITES OF ITS GRANDFATHERED FACILITIES

As the Commission acknowledges, its former interleaved band plan and regulatory regime created an economic environment which was not conducive to the deployment of wireless broadband services. *See FNPRM*, at 13. Although the Commission's recent order makes great strides in remedying this situation, its new rules will not enable the provision of such services on the F group channels in the nation's largest market, New York City, where the grandfathered co-channel ITFS and MMDS licensees continue to have overlapping service areas and uncertain spectrum rights.

NY3G urges the Commission to adopt its proposal to require grandfathered ITFS licensees to operate on a secondary, non-interference basis to co-channel MMDS licensees in markets where the co-channel licensees continue to have substantial overlapping service areas and where the grandfathered ITFS licensee has other ITFS channels capable of serving the registered receive sites of its grandfathered facilities. MMDS licensees would bear the reasonable costs, if any, of relocating grandfathered licensees to other facilities, frequencies, or alternative media, capable of permitting those licensees to continue their current, grandfathered video operations.[14] Given the abundance of technologies capable of providing one-way video programming and the availability of digital technology, the ability of grandfathered ITFS licensees to continue to provide instructional and educational video programming would be fully

[14] *See, e.g.,* 47 C.F.R. §§ 101.75, 101.91 (incumbent licensee must be relocated to "comparable facilities" in terms of throughput, reliability, and operating costs).

preserved.[15] Moreover, as an alternative to relocation, an MMDS licensee could simply carry the ITFS licensee's programming.

Consistent with Commission precedent in other proceedings involving the relocation of incumbent services, relocation costs would consist of the actual "hard costs" associated with providing a comparable replacement system.[16] In NY3G's particular situation, such costs would include leasing the necessary space on the Empire State Building, physically relocating TVC's B group transmitter to that location, and reorienting TVC's F group receive antennas. Consistent with Commission precedent, NY3G would assume any increased operational or maintenance costs associated with the use of the replacement facilities for five years after relocation.[17] To the extent that additional efforts are necessary to preserve fully TVC's ability to serve all of its registered F group receive sites, NY3G will implement the least-cost solutions.

A. NY3G's proposal promotes efficiency and flexibility and would result in the expeditious deployment of new broadband technologies

To assist in the analysis of the New York City F group situation, NY3G commissioned Dr. Thomas Hazlett to conduct an economic study of the market.[18] The Hazlett Study concludes that the F group co-channel situation in New York is the same type of economic problem that the

---

[15] Under digital operations, a licensee would be able readily to transmit on one digitized high-power channel all the instructional programming that it currently provides on four analog channels. *See FNPRM*, at ¶ 314; *see also* Grand Alliance, Reply Comments, at 6-7 (October 23, 2003). During the relocation process and band plan transition period, TVC would be able to continue to use the F group channels and, thus, would not suffer any service outage at any of its receive sites. *See FNPRM*, at ¶ 297 (incumbent licensees may use spectrum until new licensees offer incompatible new services).

[16] *See, e.g.,* 47 C.F.R. § 101.91(a)(1).

[17] *See, e.g.*, 47 C.F.R. § 101.91(b)(3).

[18] *See* Dr. Thomas W. Hazlett, "Efficient Rights Assignments in the 2.5 GHz Band" (January 10, 2005) ("Hazlett Study"), attached as Exhibit 2.

FCC sought to resolve in establishing new rules for the MMDS/ITFS spectrum.[19] In short, when spectrum rights are not clear, transaction costs and hold-up incentives will be high, resulting in spectrum remaining dramatically underdeveloped.[20]

The situation is analogous to that of the vacant storefronts that characterized Moscow in the 1990s. There, the property rights were so convoluted that assembling ownership of those rights into productive packages was complex, costly, and time consuming.[21] For example, "[i]ndividual parties often enjoyed strong economic incentives to hold-up value-creating enterprises, exercising effective veto power which might be used to extract a sizable fraction of total gains."[22] As the Hazlett Study concludes, this characterizes the F group situation in New York City.[23]

The study concludes that the right spectrum policies in New York City, clearly defining the rights of the parties, would create up to several hundred millions of dollars in consumer savings annually[24] and facilitate broadband availability, a key priority of the Commission and the Administration.[25] The study advocates that the Commission "assign . . . clear rights to the parties

---

[19] *See id*. at 11.

[20] *See id*.

[21] *See id*. at 9 ("An individual might own the second floor, and a labor union the first and third floors, with an agency of the local government owning the right to rent the underlying land to either party.").

[22] Hazlett Study, at 9-10.

[23] *See id*. at 10.

[24] *See id*. at 15.

[25] *See FNPRM*, at ¶ 5; President George W. Bush, "A New Generation of American Innovation," at pp. 11-12 (April 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf (last visited January 10, 2005).

that will make most beneficial use of them."[26] As the Hazlett Study explains "when rights are assigned directly to those parties that will deploy them, transaction costs can be reduced, speeding investment and usage."[27] This factor "clearly favors the MDS licensee, with a license to provide wireless broadband in a relatively flexible regulatory framework. ITFS licensees, in contrast, are limited to a much narrower range of services, services which can be (in the case of the F channels) provided via competing platforms at modest cost."[28] In fact, the Commission itself reached the same conclusion, that granting use of the spectrum primarily to MMDS licensees would promote both efficiency and flexibility. *See FNPRM*, at ¶ 338. In the New York City market, such a conclusion is particularly justified because the ITFS licensee inefficiently uses its grandfathered spectrum merely to simulcast programming provided on its other ITFS channels, without any technical need to do so.

In any solution requiring further negotiations between co-channel licensees, the study urges the Commission to adopt a relocation process that "mitigate[s] the hold-up problem, limiting NY3G's liability to actual (and efficient) relocation costs while achieving resolution (and band clearing) expeditiously."[29] As the study concludes, "[t]wo decades of failed negotiations have amply demonstrated that unstructured bargaining can delay consumer gains indefinitely."[30] An expedited relocation process is well within the Commission's authority.[31]

---

[26] Hazlett Study, at 13.

[27] *Id*. at 6. Such an assignment would also eliminate the hold-up problems and regulatory uncertainties that heretofore have stifled deployment of broadband service in this spectrum.

[28] *Id*. at 13.

[29] *Id*.

[30] *Id*.

NY3G's proposal also facilitates competition, consistent with the Commission's objectives in this proceeding.[32] TVC's use of eight channels on two channel groups in the same market impairs NY3G's competitive entry in the nation's largest market. At a time when consolidation among major wireless carriers is accelerating, the Commission should take action that facilitates, rather than frustrates, competition.[33] Under such circumstances, it is imminently reasonable to adopt NY3G's proposal.

B. NY3G's proposal is supported by the original MMDS rulemaking

In 1983, the Commission redesignated the E and F group channels from ITFS to MMDS,[34] concluding that the public interest would be better served by permitting MMDS

---

[31] *See, e.g., Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 8 FCC Rcd 6589, at ¶¶ 2, 20, 23 (1993) (limiting negotiations to a one-year period to encourage the rapid investment in and deployment of unlicensed services); *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 15 FCC Rcd 12315, at ¶ 44 (2000) (adopting a shortened negotiation period because parties were already familiar with relocation issues and had been involved in the relevant proceeding for several years); *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service*, 18 FCC Rcd 23638, at ¶¶ 34-35, 63 (2003) (expediting the negotiations process because advances in digital technology had reduced anticipated obstacles to relocation).

[32] *See FNPRM*, at ¶ 5.

[33] Nextel holds the long-term lease agreement for TVC's spectrum and has considerable MMDS/ITFS assets. *See, e.g., Nextel-Sprint Merger Raises Regulatory Issues*, Communications Daily, December 15, 2004, at 3 (noting that Sprint and Nextel have "dominant" interests in MMDS spectrum).

[34] *See In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service and the Private Operational Fixed Microwave Service*, Report and Order, 94 FCC 2d 1209 (1983) ("*Reallocation Order*"); *aff'd on reconsideration,* Memorandum Opinion and Order on Reconsideration, 98 FCC 2d 129 (1984) ("*Reallocation Order on Reconsideration*").

operators, rather that ITFS operators, to use the E and F group channels.[35] The Commission required that MMDS operators protect then-existing grandfathered ITFS operations but stated that it expected grandfathered ITFS licensees to negotiate in good faith with MMDS permittees to make channels available for MMDS.[36] The Commission prohibited new ITFS applications on the E and F group channels and placed a significant limitation on modifications to grandfathered ITFS facilities, essentially freezing such operations as of 1983 and permitting only video operations to a fixed number of receive sites.[37] The rights created then have since been in effect, substantively unaltered.[38]

C. NY3G's proposal is fully within the Commission's authority and consistent with well-established Commission precedent regarding the relocation of incumbent services

The Commission has broad statutory authority to allocate the electromagnetic spectrum to serve the public interest, convenience and necessity.[39] This includes not only the right to license portions of the spectrum for particular uses, but also the right to reallocate that spectrum. Such reallocations need not be consensual,[40] and license holders may be moved on a service-

---

[35] *See, e.g., In the Matter of Trans Video Communications, Inc.,* 18 FCC Rcd 18216, at ¶ 11 (2003).

[36] *See Reallocation Order*, at ¶¶ 110, 151.

[37] *See Reallocation Order on Reconsideration*, at ¶ 12.

[38] *See, e.g.,* 47 C.F.R. § 74.902(c) (no new ITFS applications will be accepted, except for certain channel swapping applications).

[39] *See* 47 U.S.C. §§ 303(c), (f) (FCC has authority to "[a]ssign bands of frequencies to the various classes of stations" and to make nonconsensual alterations in frequency allocations that "will promote public convenience or interest or will serve public necessity.").

[40] *See Peoples Broadcasting Co. v. U.S.*, 209 F.2d 286, 288 (D.C. Cir. 1953) ("[I]f modification of licenses were entirely dependent upon the wishes of existing licensees, a large part of the regulatory power of the Commission would be nullified.").

wide basis, without license-by-license consideration.[41] Neither licensees nor entire services have a proprietary interest in the spectrum they are authorized to use,[42] and the Communications Act does not "entrench any particular system of broadcasting: existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology."[43]

The Commission has repeatedly exercised its authority to relocate incumbents to make way for new, competitive and innovative services.[44] For instance, in the Commission's *2 GHz Relocation Proceeding* the Commission concluded that the 2 GHz band, which had been allocated to terrestrial microwave licensees, could be used more effectively by emerging

---

[41] *See Community Television, Inc. v. F.C.C.*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) (upholding Commission's rules and procedures for migration of television broadcasting from analog to digital technology).

[42] 47 U.S.C. §301:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

See also F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); *Victor Broadcasting, Inc. v. F.C.C.*, 722 F.2d 756 (D.C. Cir. 1983).

[43] *National Ass'n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (local broadcasters have no vested right to oppose the introduction of Direct Broadcast Satellite service); *see also* 47 U.S.C. §304 (license applicants must waive any right to future claims against the government premised on its lack of regulatory authority to reallocate spectrum).

[44] *See* Hazlett Study, at 7 (discussing the economic motivations and considerations in relocating incumbent licensees).

technologies, including PCS.[45] The Commission, accordingly, reallocated the band for such use, making microwave operations secondary. The Commission established procedures, consistent with those advocated by NY3G here, for relocating incumbents to other frequencies or alternative media, including fiber optics and satellites.[46]

Similarly, in the *18 GHz Relocation Proceeding*, the Commission rebalanced the allotment of spectrum among the FS, FSS, and Mobile Satellite Services in the 18 GHz band.[47] The Commission, again, instituted procedures for the involuntary relocation of affected incumbent licensees, including relocation to alternative media such as fiber, wireline, or satellites.[48]

---

[45] *Redevelopment of Spectrum to Encourage Innovation in the Use of New Communications Technologies*, First Report and Order, 7 FCC Rcd 6886, at ¶ 22 (1992) ("*2 GHz First Report and Order*"); Second Report and Order, 8 FCC Rcd 6589 (1993); *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (1996) ("*2 GHz Cost-Sharing Order*") (collectively, the "*2 GHz Relocation Proceeding*").

[46] *See 2 GHz First Report and Order*, at ¶¶ 19, 24 ("We continue to believe that fiber optics and satellites are viable alternatives to spectrum for some systems and encourage their consideration where practicable.").

[47] *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHZ and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Report and Order, 15 FCC Rcd 13430 at ¶ 17 (2000) ("*18 GHz First Report and Order*"); First Order on Reconsideration, 16 FCC Rcd 19808 (2001) ("*18 GHz First Order on Reconsideration*"); Second Order on Reconsideration, 17 FCC Rcd 24248 (2002) ("*18 GHz Second Order on Reconsideration*") (collectively, the "*18 GHz Relocation Proceeding*").

[48] *See 18 GHz First Order on Reconsideration*, ¶ 61 nn. 173-74; *18 GHz Second Order on Reconsideration*, at ¶ 13 n. 33.

The Commission has not insisted on an even split of spectrum between incumbent and emerging services.[49] Rather, it has compared the relative needs and considered the fact that digital compression might permit more traditional services to operate at *status quo* levels using reduced frequency allocations.[50] For these reasons, NY3G's proposal is fully within the Commission's authority and consistent with well-established precedent.

II. THERE IS NO BASIS TO REQUIRE CO-CHANNEL MMDS LICENSEES TO OPERATE ON A SECONDARY, NON-INTERFERENCE BASIS TO GRANDFATHERED ITFS LICENSEES

The Commission suggested in the *FNPRM*, as a possible alternative, expanding the rights of grandfathered ITFS licensees by granting such licensees a GSA and permitting the licensees to modify their equipment to comply with the new rules. *See FNPRM*, at ¶ 339. The Commission noted that the *Reallocation Order* "seems to suggest that the Commission's intent in 1983 was to grandfather the E and F Group ITFS licensees forever." *Id*.

There is, however, no basis for such an extraordinary conclusion. In fact, accepting such an interpretation would be inconsistent with the 1983 *Reallocation Order* redesignating the E and F group channels for MMDS and would be an irrational departure from the principle that neither licensees nor services have a proprietary interest in the spectrum they are authorized to use. Moreover, as discussed in the Hazlett Study, an assignment of a spectrum right that is not to

---

[49] *See 18 GHz Second Order on Reconsideration*, at ¶ 10 ("Reasoned decision-making does not require splitting the difference . . . .").

[50] *See 2 GHz Cost-Sharing Order*, at ¶ 29 ("Our goal is to foster efficient use of the spectrum, which would be thwarted if all incumbents are relocated to systems with capacity that exceeds their current needs. Also, limiting spectrum to current needs serves the public interest, because we believe that it will promote the development of spectrum-efficient technology capable of increasing capacity without increasing bandwidth."); *18 GHz First Report and Order*, 12 FCC Rcd 7388, at ¶ 32 (1997) (relocating and reducing the spectrum allocated to Broadcast Auxiliary Service, and suggesting that further reductions in spectrum may be prudent with the introduction of digital compression technologies).

the entity which would most productively use that right generates unnecessary transaction costs, which from a societal perspective is inefficient.[51]

The Commission's ultimate responsibility is to "encourage the larger and more effective use of radio in the public interest,"[52] making its touchstone the distribution of service[53] and not the preservation of any particular licensee or class of licensees.[54] Thus, although the Commission suggested that the 1983 *Reallocation Order* purports to grandfather then-existing ITFS licensees "in perpetuity," the order cannot have that effect.[55] The more reasonable and legally defensible interpretation is that the *Reallocation Order* merely states the Commission's intent to preserve the ability of ITFS licensees to provide instructional or education video programming to a fixed number of receive sites. The order did not convey any special rights to ITFS licensees or otherwise restrict the Commission's ability to alter or eliminate altogether, if necessary, ITFS presence on the E and F group channels. In fact, the language of the *Reallocation Order* makes clear that the Commission intended to make room for MMDS and to phase out ITFS from that spectrum.[56]

---

[51] *See* Hazlett Study, at 6, 13.

[52] 47 U.S.C. § 303(g).

[53] *Nat'l Ass'n of Broadcasters v. F.C.C.*, 740 F.2d at 1198 (D.C. Cir. 1984).

[54] *See F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (noting that despite large investments, licenses are limited in duration to permit the Commission to be flexible in response to the "rapidly fluctuating factors characteristic of the evolution of broadcasting . . . .").

[55] *See FNPRM*, at ¶ 339 (citing *Reallocation Order*, at ¶ 110).

[56] *See Reallocation Order*, at ¶ 151.

III. THE COMMISSION SHOULD NOT APPLY THE "SPLIT-THE-FOOTBALL" METHODOLOGY TO RESOLVE PROBLEMS OF MUTUAL EXCLUSIVITY BETWEEN GRANDFATHERED ITFS LICENSEES AND CO-CHANNEL MMDS LICENSEES

There are two key reasons why the split-the-football approach should not be implemented, particularly in a case such as the New York City F group situation.[57] The first reason is that grandfathered ITFS licensees do not have PSAs, a fundamental criteria of the split-the-football methodology. As noted above, in 1983 the Commission severely restricted the operations of grandfathered ITFS licensees.[58] The rights created then have since been in effect, substantively unaltered. Several commenters, nonetheless, argued in the *NPRM* proceeding[59] that the Commission intended to release ITFS licensees from those restrictions when it granted PSAs generally to ITFS licensees in the 1998 *Two-Way Order*.[60] That argument, however, has no merit. In the *Two-Way Order*, the Commission increased the operational and technical flexibility of both ITFS and MMDS licensees by generally granting such licensees PSAs and the ability to modify their systems, by application, to provide two-way services. The Commission did not seek comment regarding any changes to the relative rights of grandfathered ITFS licensees and co-channel MMDS licensees;[61] it did not discuss any redistribution of rights

---

[57] The split-the-football methodology may be appropriate in other markets or for other channels in the New York City market.

[58] *See supra* Part I.B.

[59] *See FNPRM*, at ¶¶ 334-35.

[60] *See In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998) ("*Two-Way Order*").

[61] *See generally, In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Notice of Proposed Rulemaking, 12 FCC Rcd 22174 (1997).

between such licensees; and it did not lift the 1983 freeze on grandfathered ITFS operations. In fact, grandfathered ITFS licensees could not, under the rules effective at that time, provide two-way services without first overcoming the "high hurdle" of obtaining a waiver of the freeze, making a PSA totally unnecessary for such licensees.[62]

The fact that the Commission used the term "all" in granting ITFS licensees PSA protection and established Section 74.903(d) of the Commission's rules codifying this policy does not in anyway controvert the *Reallocation Order*.[63] In using the term "all," the Commission was referring to ITFS licensees, other than grandfathered licensees, that leased excess capacity and those that did not. By this language, the Commission intended to change its then-existing policy that only those ITFS licensees leasing excess capacity could receive PSAs,[64] thereby removing the anomaly that "an ITFS licensee that offered high-speed Internet service pursuant to a lease with a wireless cable operator would enjoy protected service area (PSA) protection, but an ITFS licensee that provided exactly the same service on its own would not."[65]

---

[62] *See, e.g., In the Matter of Trans Video Communications, Inc*., 18 FCC Rcd 18216, at ¶¶ 11-12 (September 5, 2003) (denying TVC's application and waiver request to provide two-way services on its F channel stations).

[63] *See Two-Way Order*, at ¶ 114. The relevant part of 47 C.F.R. § 74.903(d) provides:

> An ITFS entity which did not receive protected service area protection prior to September 17, 1998 shall be accorded such protection by a cochannel or adjacent channel applicant for a new station or station modification, including a booster station, response station or response station hub, where the applicant is required to prepare an analysis, study or demonstration of the potential for harmful interference.

[64] *See, e.g., Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6764, at ¶ 10 (1991).

[65] *Two-Way Order*, at 114; *see also Two-Way Order on Reconsideration*, at ¶ 21; Instructional Telecommunications Foundation, Inc., Comments, MM 97-217, at pp. 14-16 (January 8, 1998) (autonomy of ITFS licensees would be in jeopardy because of the failure of the Commission's

The Commission's imprecise use of the term "all" was not an affirmative decision to grant PSAs to grandfathered ITFS licensees or to override the 1983 *Reallocation Order* in any way. Section 74.903(d) of the Commission's rules must be read in this light, and certainly not in a way that would change the relative rights of co-channel MMDS licensees as established in 1983. To conclude otherwise would suggest that the Commission impermissibly intended to overturn, *sub silentio*, the distribution of rights it unequivocally established in the 1983 *Reallocation Order*.[66]

The second reason for not applying the split-the-football approach in New York City, even assuming *arguendo* that grandfathered ITFS licensees have PSAs, is that the alleged PSAs of co-channel licensees so substantially overlap that the resulting, bifurcated service areas would not be conducive to the effective deployment of services. Neither licensee could efficiently serve half the New York City market, and the present hold-up problem would only be exacerbated.

---

rules to provide PSAs for those ITFS licensees not leasing excess capacity); Letter to Magalie Roman Salas from Paul J. Sinderbrand, MM 97-217, at pp. 4-5 (March 5, 1998) ("The reply comments evidence for the first time support within the ITFS community for the provision of protected service areas . . . to all ITFS licensees regardless of whether they lease excess capacity for commercial operations. The Petitioners do not object to the granting of a PSA to all ITFS licensees.") (emphasis added and citations omitted).

[66] *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."); *Telephone & Data Systems, Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (The Commission may change its prior decisions "by advancing a reasoned explanation for the change, but it may not blithely cast them aside.") (citations omitted); *In re Applications of Minnie O. Foulk and Renee Ridley Biselli*, 2 FCC Rcd 5362, at ¶ 235 (1987) (The "claim that, by the use of a single word, the Commission intended to *sub silentio* overrule its longstanding precedent and consistent interpretations by the Review Board -- as well as the very instructions on FCC Form 301 -- is contrary to common sense.").

If the Commission, nevertheless, were to adopt a split-the-football approach, it should not separately determine the boundary between individual stations of co-channel licensees, where a licensee has multiple stations that operate on the same frequencies in a market, such as in New York City. In such a case, multiple applications of the split-the-football methodology between the same two licensees would double count parts of a licensee's service area, unreasonably and unfairly awarding a greater relative service area to a co-channel licensee with multiple transmitters.[67]

IV. THE COMMISSION SHOULD NOT RELY EXCLUSIVELY ON VOLUNTARY NEGOTIATIONS TO RESOLVE PROBLEMS OF MUTUAL EXCLUSIVITY BETWEEN CO-CHANNEL LICENSEES

While the Commission should permit voluntary negotiations, it should not rely exclusively on them to resolve problems of mutual exclusivity between co-channel licensees.[68] NY3G remains committed to trying to negotiate a mutually acceptable resolution of its problems with TVC, but its twenty-year experience demonstrates that hold-up problems, exacerbated by regulatory uncertainty regarding spectrum rights, can be substantial. As the Hazlett Study indicates, without Commission action to address those deficiencies, exclusive reliance on voluntary negotiations is likely to lead only to continued delay in the deployment of services.[69]

---

[67] *See FNPRM*, at ¶ 60 (The goal of the "split-the-football" methodology is to provide a "rough-justice solution.").

[68] *See, e.g., In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 11 FCC Rcd 1463, at ¶ 73 (1995) (recognizing that voluntary negotiations in and of themselves would not be sufficient to relocate incumbent 800 MHz licensees).

[69] *See* Hazlett Study, at 13.

V. THE COMMISSION SHOULD MAINTAIN THE ITFS SPECTRUM CAP

The FCC rule limiting ITFS licensees to four ITFS channels (one channel group) was implemented to promote diversity of programming and ownership.[70] Those same competitive justifications still exist now. While the Commission suggests the restriction is an artificial restriction that may "limit the ability to assign spectrum to educators who are in a better position than the existing licensee to utilize the spectrum," it offers no reason why its liberal leasing rules, which it found more than adequate to warrant retention of the ITFS eligibility restrictions, would be inadequate to address this perceived problem. Moreover, instead of lifting the spectrum cap generally to address those hypothetical situations where an ITFS licensee might legitimately require additional spectrum to provide service, the FCC should rely on its current practice of requiring such licensees to seek a waiver of the rule.[71] With respect to the Commission's concern that the rule reduces the ability of ITFS licensees to operate on more than one high-power channel, NY3G does not object to modifying the language of the four-channel rule to permit ITFS licensees to use channels from different channels groups, so long as the four-channel limitation is maintained.

---

[70] *See, e.g., Amendment of Part 74 of the Commission's Rules and Regulations with Regard to the Instructional Television Fixed Service*, 57 RR 2d 1166, ¶ 10 (1985) ("absent such a limitation, an ITFS licensee or applicant could secure all available ITFS channels within a given area, thereby precluding others from providing . . . services."); *Amendment of Part 74 of the Commission's Rules and Regulations with Regard to the Instructional Television Fixed Service*, 101 FCC 2d 50, ¶ 51 (1985) (four-channel restriction promotes ownership diversity); *Amendment of Part 74 of the Commission's Rules with Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, at ¶ 39 (1995).

[71] *See, e.g.*, *In the Matter of Board of Regents, Eastern New Mexico University, 10 FCC Rcd 3162* (1995); *In the Matter of Northern Arizona University Foundation*, 7 FCC Rcd 5943 (1992); *In the Matter of Applications of Pojoaque High School*, 18 FCC Rcd 19304 (2003).

Conclusion

For the reasons stated above, NY3G respectfully requests that the Commission take actions consistent with these Comments.

Respectfully submitted,

By: /s/

Bruce D. Jacobs
Tony Lin
Shaw Pittman LLP
2300 N St. NW
Washington, DC 20037-1128

Counsel for NY3G Partnership

Dated: January 10, 2005