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 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
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

COMMENTS OF
TRANS VIDEO COMMUNICATIONS, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

This proceeding offers an opportunity to improve educational service and maximize spectrum efficiency. In providing for the transition to the new EBS service for grandfathered E- and F-Channel ITFS licensees, the Commission should allow the resolution of any spectrum conflicts through private negotiation or equitable sharing rules, and should not, as suggested in its FNPRM, require such licensees to "operate on a secondary non-interference basis to the co-channel MDS licensee" in cases of substantial overlap. The educational communities that grandfathered ITFS licensees serve should have the same opportunity to benefit from the transition to broadband services as communities served by non-grandfathered ITFS and MDS licensees.

Grandfathered ITFS stations should not be deprived of their longstanding spectrum rights, as such a loss would severely hamper their ability to continue to serve the public interest. The protection previously granted to grandfathered ITFS licensees has enabled them both to continue to serve their educational communities and to garner additional funding that provides necessary support for their educational missions by leasing excess capacity to commercial service providers. These existing protection rights, which are equivalent to those of other ITFS stations, mean that grandfathered ITFS stations can and should participate in the creation of Geographic Service Areas ("GSAs") under the transition plan in substantially the same manner as other ITFS stations.

In the transition, negotiations should be the primary approach to resolving GSA overlaps for co-channel MDS and ITFS stations. If settlement is not reached through negotiations, it would be reasonable to adopt the equitable approach of "splitting the football" of geographic protection when there is some overlap of MDS and ITFS GSAs. This "rough justice" approach would allow both ITFS and MDS to transition to the new regime. If the "splitting the football" approach is not adopted by the Commission, however, it should respect the rights that were granted to the grandfathered ITFS licensee "in perpetuity" rather than granting new and unprecedented superior rights to co-channel MDS licensees.

There would be no adequate policy justification for depriving incumbent ITFS licensees of their spectrum rights in favor of co-channel MDS licensees. MDS has not become an effective competitor in the market for the delivery of video programming, and there are also a number of alternative spectrum resources available for the provisioning of broadband services. By contrast, a loss of spectrum rights for grandfathered ITFS licensees cannot readily be replaced by alternative spectrum resources.

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ON FURTHER NOTICE OF PROPOSED RULEMAKING

Pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. § 1.415),

Trans Video Communications, Inc. ("TVC"), submits the following comments on the

Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket.[1] TVC has been licensed for over 35 years in the Instructional Television Fixed Service ("ITFS"), and operates ITFS stations in Manhattan, Brooklyn, and Queens, New York. Two of these stations operate as grandfathered ITFS facilities on the F-Channel Group.

TVC is filing these comments in response to the Commission's questions in the FNPRM regarding the transition of grandfathered ITFS stations to the new Educational Broadband Service ("EBS"). TVC believes that the transition presents an opportunity to improve educational service and maximize spectrum efficiency, and supports the Commission's proposals to allow the resolution of spectrum conflicts through private negotiation or equitable sharing rules. However, TVC strongly opposes the Commission's first alternative proposal to "require grandfathered E and F Group ITFS licensees to operate on a secondary non-interference basis to the co-channel MDS licensee" in cases of substantial overlap.[2]

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[1] 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, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) ("*FNPRM*"). A summary of the *FNPRM* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,048.

[2] *Id*. at 14290 ¶ 338.

I. TVC AND THE EDUCATIONAL COMMUNITY IT SERVES NEED THE TV SPECTRUM FOR WHICH TVC HAS BEEN LICENSED AND THEY SHOULD NOT BE DEPRIVED OF THEIR LONGSTANDING SPECTRUM RIGHTS.

Grandfathered ITFS licensees such as TVC actively provide interactive educational and instructional programming for schoolchildren, adult education students, and professionals and others seeking to improve their skills in today's economy. They thus serve a critically important role in helping our Nation maintain and improve its competitiveness in the world. Our schools need and deserve better and more cost-effective educational programs and services.

The interactive educational television services provided by ITFS licensees are an important and effective resource for addressing these national challenges. In an area like the one TVC serves, where the educational pressures are increasing, the cost efficiency of providing instructional programming via EBS broadcasts, supported by revenues received from leasing excess capacity to BRS providers, is vital to the continued availability of these services. Indeed, TVC and its educational community very much needs and is dependent upon the advanced services envisioned in the Report and Order of 6/10/04. Given the economic and educational needs of the communities TVC serves, no alternative use of the licensed spectrum would better promote the public interest. As the Commission states in the FNPRM, penalizing "the ITFS licensees who make extensive use of this

spectrum" would be inconsistent with "the importance of ITFS to the educational mission."[3]

In the transition to the new spectrum plan, TVC and its educational community critical educational resources need not and should not be deprived of their longstanding spectrum rights. The protection provided to grandfathered ITFS licensees, most recently through the grant of Protected Service Areas in 1998, has enabled them both to continue to serve their educational communities and, by leasing excess capacity to commercial service providers, garner funding that provides vital support for their educational mission. Demoting grandfathered ITFS licensees to secondary status as part of the transition would grievously undercut their ability to continue to serve the public interest.

Indeed, the transition to the new EBS/BRS banding plan provides an important opportunity to reach a more appropriate balancing of educational needs in the public interest. The granting of contingent MDS licenses on operational E- and F-Channels in 1983 was based on a determination at the time that the spectrum was needed for the delivery of commercial wireless multichannel video services. But the demand for and viability of those services did not come to fruition, while the need for educational services has grown. And although the Commission has identified the need for expanded broadband data service capacity, the BRS spectrum is by no means the sole source of such capacity. As between granting new spectrum rights to co-channel commercial MDS licensees to provide more

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[3] *Id.* at 14224 ¶ 156.

commercial broadband services and protecting the rights of longstanding providers of critical educational services, the public interest balance compellingly favors the latter.

II. THE COMMISSION SHOULD TREAT GRANDFATHERED ITFS STATIONS LIKE ALL OTHER ITFS STATIONS FOR THE TRANSITION TO EBS.

The Commission's treatment of grandfathered ITFS stations under the new EBS regulatory regime should be comparable with its treatment of other ITFS licensees. As the Commission stated in proposing the transition to the new EBS regime:

> We emphasize, however, that we do not intend to evict any incumbent licensees from the affected band . . . nor do we intend to undermine the educational mission of ITFS licensees.[4]

Like other incumbent licensees, grandfathered ITFS licensees, which have served their educational communities for 20 years or more, should not be unfairly hamstrung in their ability to pursue their educational mission.

Moreover, equal treatment of grandfathered ITFS licensees in the transition is an important means of promoting efficient spectrum use in each market. Many grandfathered ITFS licensees, including TVC, have leased excess capacity to

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[4] 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, *Notice of Proposed Rulemaking and Memorandum Opinion and Order,*), 18 FCC Rcd 6722, 6725 ¶ 2 (2003) ("*NPRM*").

commercial partners. Their expectation under the new EBS regime must be that such leases will continue, albeit modified to reflect the new spectrum plan. If the Commission were to limit the protection of grandfathered ITFS stations in the transition, the expectations of these commercial partners would be overridden, and the potential for their introduction of new broadband services would be jeopardized. The Commission should not disturb the settled expectations of existing participants in these markets by failing to grant all grandfathered ITFS licensees the same spectrum rights as all other ITFS licensees under the new EBS/RBS band plan.

Disturbing the status quo with respect to excess capacity leases would also radically undercut the ability of EBS licensees to maintain their critical mission. The Commission has recognized the important financial benefits that educational providers are able to obtain by leasing their excess capacity spectrum, and the public interest in preserving those financial benefits:

> [R]evenues are key to this ITFS-MMDS partnership. Leasing channel capacity . . . generates revenues that may be vital to the continuing operations of authorized ITFS systems, to the successful deployment in many markets of ITFS service, and to the service's public interest benefits.[5]
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> . . .

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[5] Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions. MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19152 ¶ 77 (1998) (quoting Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service, MM Docket No. 93-106, *Report and Order*, 9 FCC Rcd 3360, 3364 ¶ 13 (1994)), *recon.*, 14 FCC Rcd 12764 (1999) ("*Two-Way R&O*").

> [W]ireless cable strengthens ITFS significantly by providing a source of funds to promote the educational purposes of ITFS, even if educational programming is not transmitted on all ITFS channels.[6]

Thus, any alteration of the status quo regarding the scope of grandfathered ITFS licensees' PSA protection would threaten a loss of educational services they provide to their communities.

Just as importantly, the educational communities that grandfathered ITFS licensees serve should have the same opportunity to benefit from the transition to broadband services as communities served by non-grandfathered ITFS and MDS licensees. Again, as the Commission stated in first proposing the transition:

> Far from evicting existing licensees, we anticipate that the streamlined regulations and revised spectrum plan adopted in this proceeding will facilitate the provision of advanced wireless communications services by incumbent licensees.[7]

Ultimately, the transition to broadband services benefits consumers, and for EBS, it will benefit students and adult learners. There is no reason for the communities served by grandfathered ITFS stations not to benefit from new technologies to the same degree as communities served by other EBS stations.

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[6] *Id.* at 19152 n.177.

[7] *NPRM*, 18 FCC Rcd at 6725 ¶ 2.

III. TRANSITION OF GRANDFATHERED ITFS STATIONS MUST PRESERVE THEIR EXISTING PROTECTION RIGHTS.

All ITFS and some MDS stations initially held protected spectrum rights vis-à-vis their neighbors based on precedence in time and geography. But in 1983, the Commission issued geographic overlay licenses for MDS stations on E- and F-Channels. Those licensees' spectrum rights were conditioned on their ongoing obligation to protect pre-existing ITFS facilities from harmful interference.[8] Thus, at that time, grandfathered ITFS licensees' spectrum rights were based on precedence in time and facilities.

Subsequently, the Commission granted all ITFS stations a geographical Protected Service Area ("PSA") in an effort to move away from site-based protection requirements.[9] By granting PSAs to all ITFS stations in 1998, the Commission made the protection from interference for grandfathered ITFS stations essentially the same as that available for all ITFS stations.

The Commission's Staff later declined to limit this PSA protection. Prior to the Commission's grant of PSAs to all ITFS stations, TVC had filed a license modification application seeking a protected service area covering excess capacity

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[8] *See* 47 C.F.R. § 21.902(b) (2003); 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, Gen. Docket No. 80-112, *Report and Order*, 94 FCC 2d 1203, 1247-48 ¶ 110 (1983) ("*E & F Group Reallocation Order*").

[9] *See Two-Way R&O*, 13 FCC Rcd at 19173 ¶ 114.

airtime transmissions by its commercial lessee over its F-Channel Station KNZ70.[10] The Wireless Telecommunications Bureau ultimately dismissed TVC's application, declaring that TVC's request for a PSA was moot under the *Two-Way R&O* because a PSA had already been granted.[11] The Memorandum Opinion and Order explained that Section 74.903(d) of the Commission's Rules had been amended in 1998 to provide a PSA for every ITFS licensee, including TVC, and concluded as follows:

> Thus, regardless of whether TVC intended to offer service over its excess channel capacity on its own or pursuant to a lease, Section 74.903(d) sets forth TVC's protection from harmful interference with respect to its operation of Station KNZ70. [12]

TVC's co-channel MDS licensee subsequently filed a Petition for Clarification or Limited Reconsideration of the Commission's holding that TVC's application was moot.[13] The Commission's Staff dismissed the Petition, and declined to address its request for clarification, stating that any challenge to the prior "description of TVC's

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[10] Application for Authorization to Construct New or Make Changes in an Instructional Television Fixed and/or Response Station(s), or to Assign or Transfer Such Stations (FCC Form 330), File No. BMPLIF-19950728ER (filed July 28, 1995).

[11] Trans Video Communications, Inc.: Modification of License of Instructional Television Fixed Service Station KNZ70 in Queens, New York, *Memorandum Opinion and Order*, 18 FCC Rcd 18211, 18214 ¶ 9 (2003). The Staff also held that TVC had not made the kind of showing that would have been required if its request had been for a waiver to expand its own receive sites rather than for a PSA covering its commercial lessee.

[12] *Id.*

[13] Trans Video Communications, Inc.; For Modification of License of Instructional Television Fixed Service Station KNZ70 in Queens, New York, File No. BMPLIF-19950728ER, *Petition for Clarification or Limited Reconsideration* (filed Oct. 6, 2003).

entitlement to a protected service area" should have been directed to the *Two-Way R&O* rather than the Memorandum Opinion & Order that had dismissed TVC's application.[14] The end result of these decisions is the confirmation that, since 1998, TVC, like all other ITFS licensees, has been entitled to a PSA.

As a result, grandfathered ITFS stations should participate in the creation of Geographic Service Areas ("GSAs") under the transition plan in substantially the same manner as other ITFS stations.

In creating GSAs for grandfathered ITFS stations, the Commission must also take into account that overlay MDS licensees only received such rights to operate as they could exercise without causing interference to the co-channel ITFS station. These interference protection rights were granted to grandfathered ITFS licensees "in perpetuity."[15] The MDS licensees thus had the limited right to develop operational facilities in geographic areas not served by a co-channel ITFS station, but also could have funded the relocation of the grandfathered ITFS licensee to other available facilities, thereby freeing the E- or F-Channel frequencies for their own unrestricted commercial use. Especially to the extent they have not yet done so, it would be unjustified to grant them new rights, superior to any they have previously held, in preference to the pre-existing incumbent ITFS licensee.

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[14] Application of Trans Video Communications, Inc.; For Modification of License of Instructional Television Fixed Service Station KNZ70 in Queens, New York, File No. BMPLIF-19950728ER, *Order on Reconsideration*, 19 FCC Rcd 18644, 18646 ¶ 7 (2004). The Staff also noted that such comments could be addressed in the instant rulemaking proceeding. *Id.*

[15] *E & F Group Reallocation Order*, 94 FCC 2d at 1247 ¶ 110.

IV. THERE IS NO ADEQUATE PUBLIC POLICY JUSTIFICATION FOR DEPRIVING INCUMBENT ITFS LICENSEES OF THEIR SPECTRUM RIGHTS IN FAVOR OF CO-CHANNEL MDS LICENSEES.

The need for preserving and enhancing the educational services already being provided by ITFS licensees remains great, and there can be little public interest justification for significantly hampering their continued operation in order to provide even more spectrum for commercial services. The original purpose of the 1983 *MDS Allocation Order* was to spur the development of competition to cable television systems and to promote efficient use of the spectrum, not to terminate existing ITFS operations.[16] In areas where spectrum is being utilized efficiently by grandfathered ITFS licensees, such as TVC, this utilization should be allowed to continue and grow.

The purpose of the current proceeding is to

> provide both existing ITFS and MDS licensees and potential new entrants with greatly enhanced flexibility in order to encourage the highest and best use of spectrum domestically and internationally, and the growth and rapid deployment of innovative and efficient communications technologies and services.[17]

This purpose should apply with equal force to grandfathered ITFS licensees as to any other licensee.

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[16] *E & F Group Reallocation Order*, 94 FCC 2d at 1206 ¶ 4.

[17] *FNPRM*, 19 FCC Rcd at 14167 ¶ 1.

ITFS licenses such as TVC, unlike many of their MDS counterparts, have efficiently used their spectrum for almost four decades. TVC has been broadcasting continuously on its four ITFS F-channels since 1966, and provides 288 hours a week of educational programming on its stations. Additionally, TVC has leased its excess capacity on these channels essentially continuously since 1983.[18] These leases have both provided for efficient utilization of the spectrum and provided critical funding to support TVC's educational services.

In 1998, the Commission adopted the *Two-Way R&O*, which was intended to "facilitate the provision of a wide array of new, enhanced services including new digital and two-way communications services."[19] Hearkening back to the original purpose of the 1983 *MDS Allocation Order,* the Commission noted that growth in the wireless cable industry had remained limited, and faced new challenges from alternative delivery systems.[20] These challenges have intensified, leading the

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[18] TVC leased capacity to C S Television from January 1985 through September 1994 and to Hasan & Hasan, Inc. from November 1984 through June 1987. In addition, from 1986 until 1994, TVC licensed excess capacity on these channels to Grand Alliance (operating as Ultravision, Inc.), the predecessor to current MDS co-channel licensee NY3G. Grand Alliance never made use of the leased spectrum during this time, however, and ultimately defaulted, resulting in the termination of the contract. Currently, TVC leases excess capacity to Nextel Communications. This lease has been in effect since late 1994.

[19] *Two-Way R&O*, 13 FCC Rcd at 19113 ¶ 1.

[20] *Id.* at 19115-16 ¶¶ 7-8 (footnotes omitted).

Commission to conclude that "MMDS has never become a significant competitor in the market for the delivery of video programming."[21]

The anticipation at the time of the *Two-Way R&O* was that MDS providers would emerge as a competitor not only for video services, but for high speed two-way communications as well. Some five years later, however, wireless cable provided only a minimal share of the market for broadband services.[22] Alternative means of delivering broadband services continue to offer substantial growth potential.[23] While TVC supports the Commission's policy objective of maximizing

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[21] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, MB Docket No. 02-145, 17 FCC Rcd 26901, 26938 ¶ 74. (2002). MMDS subscribership had declined from over a million at the end of 1996 to about 200,000 by 2003. *Compare* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifth Annual Report*, CS Docket No. 98-102, 13 FCC Rcd 24284, 24336-37 ¶ 83, *with* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, MB Docket No. 03-172, 19 FCC Rcd 1606, 1663-64 ¶ 86 (2004).

[22] Only 0.4% of all advanced services lines were provided to subscribers by satellite or terrestrial wireless providers as of June 2004. *See* "High-Speed Services for Internet Access: Status as of June 30, 2004" (W.C.Bur. Dec. 2004) (rel. Dec. 22, 2004).

[23] Besides existing DSL and cable modem offerings, already serving tens of millions of customers, many carriers are engaged in multi-billion dollar deployment of fiber networks to provide faster two-way broadband services. *See, e.g.,* Steve Rosenbush, *Verizon's Gutsy Bet*, BusinessWeek, Aug. 4, 2004, at 52. The Commission has also recognized Broadband over Power Lines as a potential broadband competitor. Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, ET Docket No. 04-37, *Report and Order*, 19 FCC Rcd 21265 (2004). ("This new technology offers the potential for the establishment of a significant new medium for extending broadband access to American homes and businesses."). The City of Philadelphia is implementing plans to provide city-wide Wi-Fi coverage, which will be another substantial source of

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the availability of broadband access, MDS licensees are but one among several viable sources for such development. By contrast, the loss of PSA protection for grandfathered ITFS licensees would not be offset by alternative spectrum resources. Thus, the Commission should not deprive grandfathered ITFS licensees and their communities of the protection they need to continue to provide this important educational service.

In sum, it is clear both that the original cable-competition purpose for granting co-channel MDS licenses in 1983 has not been fulfilled, and that the

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broadband access. *See* Stephen Lawson, *Philadelphia Wi-Fi Plans Move Forward*, PCWORLD, December 2, 2004.

Substantial new spectrum is also being made available for wireless broadband services. For example, the Commission allocated 90 MHz of spectrum in the 1710-1755 and 2110-2155 MHz bands that can be used to offer advanced wireless services, including 3G. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 04-111, *Ninth Report,* 19 FCC Rcd 20597 ¶ 99 (2004). This spectrum is in addition to the abundance of spectrum already allocated by the Commission for CMRS and PCS services, which offer the potential for advanced wireless services as well. *Id.* at ¶ 82-90, 99 ("U.S. mobile carriers have the flexibility to deploy technologies, including those commonly called Third Generation or "3G," that allow them to offer high-speed mobile data services using their existing CMRS spectrum.") The Commission also expects "that many of the new technologies to be developed and deployed in [the 78 MHz to be reclaimed from broadcast services in connection with the analog to digital transition] will support advanced wireless services." *Id.* at ¶ 94-95. The Commission will soon auction 242 additional broadband PCS licenses. Broadband PCS Spectrum Auction Scheduled for January 12, 2005, *Public Notice*, DA-1639, Report No. AUC-03-58-A (Auction No. 58) (rel. June 18, 2004). And the Commission has recently noted that CMRS carriers generally have available to them "the spectrum they need to offer next-generation services now." Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 19 FCC Rcd 21522 ¶ 139 (2004).

current purpose for restructuring the EBS/BRS spectrum, when properly viewed in the context of emerging competition of all sorts in the broadband marketplace, does not entirely depend for its success on granting superior rights to those same co-channel MDS licensees. There is no adequate policy justification for taking away or limiting the spectrum long used by grandfathered ITFS licensees such as TVC in order to promote MDS wireless broadband systems.

V. THE COMMISSION SHOULD ADOPT TRANSITION RULES THAT ASSURE GSA PROTECTION FOR GRANDFATHERED ITFS LICENSEES AND THEIR EDUCATIONAL COMMUNITIES.

The Commission must fulfill its commitment to grandfathered ITFS stations to maintain their operational integrity even as they transition to the new EBS regulatory regime. Specifically, the Commission must maintain their right to operate free of interference from co-channel MDS licensees in the same geographic area. Grandfathered ITFS licensees should also have the same rights as other ITFS stations to evolve their facilities into the EBS, now that the Commission has completely changed the operating paradigm for *all* ITFS and MDS stations.[24]

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[24] Freezing grandfathered ITFS stations in their current service configurations rather than allowing them to transition to new frequencies is not practical under the new band plan. Because grandfathered ITFS stations operate as stand-alone four-channel high power stations, it would be difficult for new cellularized, low-power BRS/EBS stations to protect them from interference. Requiring grandfathered ITFS stations to remain in their current configurations would thus hinder the roll-out of broadband services in those markets. Freezing grandfathered ITFS stations would also ignore the Commission's 1998 decision to award *all* ITFS licensees a protected service area. ITFS licensees such as TVC have leased excess

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It would be inequitable to impose a rule under which grandfathered ITFS licensees would lose spectrum rights in the transition process. These licensees have used the spectrum over the years to distribute instructional programming. MDS licensees, whose rights have always been subject to protecting pre-existing ITFS services, would be handed an unwarranted windfall by obtaining spectrum rights to which they would not otherwise have had access. It is difficult to see how such an action could be consistent with the public interest.

Rather, grandfathered ITFS operators should obtain spectrum rights within a GSA under the new band plan and rules. E- and F-Channel MDS licensees will neither gain nor lose from such a policy, because they would not have been able to operate in the grandfathered ITFS station's GSA in any event.

In the case of substantial overlap, the Commission should provide a defined period of time for co-channel MDS and ITFS stations with GSA overlaps to resolve the transition to the new band plan through settlement. The Commission should adopt a set of transition procedures for substantially overlapping PSAs only when such settlement is not possible.

(…continued)

capacity based on the availability to their lessee of the protection of the PSA, and this protection has been confirmed in the rulings described above. Restricting interference protection just to grandfathered ITFS receive sites would thus deprive grandfathered ITFS stations of important current spectrum rights, which was expressly disavowed by the Commission in commencing this proceeding.

If voluntary settlement is not possible, TVC believes it would be reasonable even in the Commission's "scenario 1"[25] (substantial overlap) to use a geographic division of GSAs ("splitting the football"), and allow both ITFS and MDS to transition to the new regime. Such an approach would be the most equitable and least violative of the grandfathered ITFS licensee's longstanding spectrum rights. In the New York market, where TVC operates F-Channel stations KNZ-70 and KVS-31 and where there is substantial overlap with the co-channel MDS licensee, the "split the football" approach would be workable. The Joint Comments of the Catholic Television Network and the National ITFS Association, being filed separately, provide an engineering analysis demonstrating that the approach would result in exclusive service areas encompassing roughly 51% and 49%, respectively, of the total population within the areas covered by the combined GSAs. As the Joint Comments explain, this approach would thus produce "rough justice."

In any event, the Commission should respect the rights that were granted to the grandfathered ITFS licensee "in perpetuity."[26] If the "split the football" approach is not adopted as the default transition rule in lieu of agreement between the affected parties, the ITFS licensee should be given a GSA that represents all of its 35-mile radius PSA. The ITFS licensee should be allowed to operate on a primary basis throughout that PSA on the transition channels. The MDS station would have the right to operate on a secondary basis within that area.

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[25] *See id.* at 14290 ¶ 338.

[26] *E & F Group Reallocation Order*, 94 FCC 2d at 1247 ¶ 110.

VI. CONCLUSION

For the reasons set forth above, the Commission should allow grandfathered ITFS stations to transition to EBS on a par with other ITFS stations, and it should preserve their interference protection rights from co-channel MDS stations in the EBS station's GSA.

Respectfully submitted,

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