

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	
Promoting Efficient Use of Spectrum Through	)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

**PETITION FOR FURTHER RECONSIDERATION
AND REQUEST FOR CLARIFICATION OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

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SUMMARY

HITN hereby submits its Petition for Further Reconsideration and Request for Clarification of the Commission's recent Broadband Services Reconsideration Order in WT Docket 03-66. First, HITN seeks reconsideration of the dismissal of six of its new station applications, which the Commission deemed mutually exclusive with other pending new station applications. While HITN had previously requested reconsideration of those dismissals, the Commission's complete failure to provide a reasoned decision in its Broadband Services Reconsideration Order responding to HITN's numerous and specific arguments, coupled with certain inconsistent statements made elsewhere in that Order and the Commission's decision to postpone white space auctions for at least four years, requires the FCC to reexamine its decision dismissing HITN's applications.

Second, HITN seeks clarification of the Commission's decision regarding the term limits of so-called grandfathered EBS leases and requests that the Commission affirmatively close certain loopholes by which operators have warehoused EBS spectrum without benefit to the licensee or the public in what are now substantially unusable video based leases.

Third, HITN seeks reconsideration of the Commission's decision regarding how it will handle the creation of geographic service areas for new or modified station applications that were pending as of January 10, 2005. Specifically, HITN asks that the Commission remove an inconsistency in how it proposes to treat new station applications as compared with modification applications.

Fourth, HITN requests that the Commission modify its EBS eligibility rule 27.1201 with regard to non profit entities that propose to serve local educational

institutions to bring its language regarding currently permitted uses into line with other changes made in this proceeding.

Fifth, in light of recent experiences with deficient and incomplete opt-out waiver requests from parties seeking exemption from the upcoming band-plan transition, HITN requests that the Commission amend and clarify the minimal requirements for a sufficient MVPD opt-out waiver request. Further, HITN requests that the Commission clarify what service areas and interference protection rights will apply where neighboring GSAs overlap due to an opt-out waiver.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	

To: The Commission

**PETITION FOR FURTHER RECONSIDERATION
AND REQUEST FOR CLARIFICATION OF
HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK**

Pursuant to Section 1.429 of the Commission's rules, Hispanic Information and Telecommunications Network ("HITN"), by its attorneys, hereby submits its Petition for Further Reconsideration and Request for Clarification ("Petition") of the Commission's Order on Reconsideration in the above referenced matter.¹

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, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order*

I. Introduction

HITN, founded in 1981, is a 501(c)(3) non-profit private foundation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV, the first and only 24-hour a day Spanish language public interest television channel in the United States, is presently carried by DirecTv, Dish Network, Comcast Cable, Time Warner Cable and the Charter Communications. HITNet, a satellite-based broadband service delivered via HITN's state of the art satellite platform at the Brooklyn Navy Yard, New York, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico. HITN also holds over 60 station authorizations in the Educational Broadband Service ("EBS") for facilities throughout the United States and Puerto Rico. HITN's EBS facilities are presently used to provide educational programming and services, and through a partnership with Clearwire Corporation and other operators, advanced wireless broadband services in several markets. HITN, one of the largest holders of EBS authorizations in the United States, has a significant stake in the outcome of this proceeding, and therefore has participated in all earlier facets of this Rulemaking.²

and Second Report and Order, FCC 06-46, released April 27, 2006 ("*Broadband Services Reconsideration Order*"). A summary of the *Broadband Services Reconsideration Order* was published in the Federal Register on June 19, 2006, 71 Fed. Reg. 35,178 (2006) See Also underlying Report and Order ("*Broadband Services Order*") and Further Notice of Proposed Rulemaking ("*FNPRM*"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004). A summary of the *Broadband Services Order* was published in the Federal Register on December 10, 2004, 69 Fed. Reg. 72,020.

² See Comments and Reply Comments of HITN filed in response to Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003), 18 FCC Rcd 6722, 6734 (2003) ("*NPRM*").

II. Mutually Exclusive Applications

In the *Broadband Services Reconsideration Order*, the Commission upheld its erroneous dismissal without processing of six HITN applications which sought new EBS stations.³ Despite HITN's timely submission of a twenty-two page Consolidated Request for Reconsideration, the Commission gave no detailed consideration to the numerous substantive arguments raised by HITN. The Commission in two sentences and without reasoned explanation, completely ignored all of HITN's arguments, cited to the same cases with which HITN took issue, and simply reiterated its earlier conclusion. The Commission essentially concluded that it had precedent for dismissing pending mutually exclusive applications when converting to geographic licensing, and that dismissal of such applications in some unspecified way furthers an efficient transition and therefore serves the public interest. HITN respectfully requests that the Commission reconsider its unreasoned and erroneous decision regarding HITN's applications and reinstate and process such applications in furtherance of the public interest convenience and necessity in accordance with its obligations under its Rules and the Communications Act.⁴

While the Commission concludes without reasoned analysis that dismissal of HITN's timely filed, but MXed applications will support the public interest by somehow allowing for a more efficient transition, it concedes elsewhere in the *Broadband Services Reconsideration Order* that "it may be possible to make new licenses available in a way that does not interfere

³ *Broadband Services Reconsideration Order* at ¶¶ 233-239. The Commission originally dismissed the applications in the *Broadband Services Order* at ¶ 263 and Appendix E thereto. HITN applications dismissed included: Alamosa, Colorado (G-Group) (File No. BPLIF-19951020WP); Billings, Montana (G-Group) (File No. BPLIF-19951020GG); Bloomingdale, Georgia (B-Group) (File No. BPLIF-19951016AV); Boise, Idaho (B-Group) (File No. BPLIF-19951020ET); Salinas, California (B-Group) (File No. BPLIF-19951020GI); and Santa Rosa California (C-Group) (File No. BPLIF-19951016BJ).

⁴ Because the Commission failed to evaluate and address the various arguments raised by HITN on reconsideration, HITN is incorporating all of those arguments into this reconsideration request by reference. Accordingly, HITN is attaching its Consolidated Petition for Reconsideration, dated August 30, 2004 as Exhibit 1 hereto.

with potential transitions to the new band plan.”⁵ While the Commission presumably would subsume the frequencies and the reasonably definable limited service areas proposed in the dismissed applications into EBS white space areas that are to be auctioned off, the Commission has now stated in its in the *Broadband Services Reconsideration Order* that it will further delay the availability of such service areas for at least four more years. The Commission elected to delay all white space auctions until after the transition period is completed in July of 2010. Therefore it is evident that an auction of such discrete and definable areas solely among the Mxed parties would in no way have interfered with or detracted from a smooth and efficient transition of this spectrum band or the later auction of remaining white space areas. Further, given this announced auction delay and because HITN stands ready and willing to construct and transition such stations for the launch of new Broadband services in conjunction with Clearwire, or one of its other wireless broadband service operator partners, the Commission’s action dismissing HITN’s six Mxed applications, will cause a delay in the delivery of advanced broadband services to various areas of the country – a result in direct opposition to the Commission’s stated goals in this proceeding.

As HITN has noted, the decision must be reversed, as it is contrary to the Commission’s statutory mandate with respect to the processing of pending applications under the Communications Act, and with the specific instructions of Congress regarding the handling of Mxed applications, as previously acknowledged by the Commission itself.⁶ Additionally, such

⁵ *Broadband Services Reconsideration Order* at ¶ 236, but see *Id.* at ¶ 321.

⁶ 47 USC § 309 (see also *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S.Ct. 148 (1945)); *Balanced Budget Act of 1997*, *Pub. Law No. 105-33*, 111 Stat. 251 (1997) (“1997 Budget Act”); *First Report and Order in MM Docket 97-234* 13 FCC Rcd 15920 (1998) at ¶¶ 108, 204-205 (in which the Commission stated that such Mxed applications must be resolved by competitive bidding pursuant to Section 309(j)(1) and that because such Mxed applicants had complied with existing procedures to file long-form applications they had a reasonable expectation that they would be competing only against those who had similarly filed timely applications).

decision must be reversed as arbitrary and capricious because the Commission failed to supply a reasoned explanation of: (1) how such dismissals would further its stated goals, especially in a context that differs dramatically from a previous referenced situation in which the Commission dismissed Mxed applications;⁷ (2) why it was deviating from a stated policy, determined to be in the public interest⁸; and (3) how the goals achieved by such dismissals would justify the trampling of the legitimate processing rights of the applicants, especially following an unreasonable ten year delay in processing these properly filed applications.⁹

⁷ For example while noting that several parties on reconsideration raised the educational nature of the spectrum, the Commission's decision completely failed to address this issue. See *Broadband Services Reconsideration Order*, at ¶¶ 235-236. In particular, the Commission failed to consider: 1) the fact that the dismissed applications were for a restricted eligibility noncommercial educational service and that applications filed for such stations may have used public or scarce federal educational funds; 2) that in most cases such applications were specifically targeted at individual communities, often associated with specific school districts or municipalities; 3) that given such facts the applicants would not be able to target the limited service areas of interest or have access to the kinds of funds necessary to participate in a future wide area geographic white space auction, and thus the dismissal of their applications are tantamount to a dismissal with prejudice. Further the Commission failed to address the fact that this service transition, unlike the nascent Maritime Service case, deals with the conversion of thousands of existing stations already entitled to 35 mile PSAs to a geographic licensing scheme substantially based on those existing service areas, and the fact that the few remaining substantially well defined and predictable service areas covered by the dismissed applications would have little impact on such a transition.

⁸ See *Broadband Services Reconsideration Order* at ¶ 236, upholding *Broadband Services Order* at ¶ 263; but see *First Report and Order in MM Docket 97-234* 13 FCC Rcd 15920 (1998) at ¶¶ 108, 204-205. The Courts have held that an agency is not free to simply ignore its own rules or stated policies, but instead when departing from such policies, must set forth and articulate a reasoned explanation for its actions. See *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (DC Cir 1986); see also *Acherner Broadcasting Co. v. FCC*, 62 F. 3d 1441 (DC Cir 1995), *American Trucking Associations, Inc. v. ICC*, 697 F. 2d 1146, 1150 (DC Cir 1983); *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (DC Cir 1970) cert. denied, 403 US 923 (1971); *Illinois Public Telecommunications Association v. FCC* 8 CR 339 (DC Cir 1997). The Courts have also held that failure to provide such a reasoned explanation renders the Commission's decision arbitrary and capricious. See *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (DC Cir. 1993). See also, *National Citizens Commission for Broadcasting v. FCC*, 39 RR 2d 1463 (DC Cir. 1977) (A commission decision is arbitrary and capricious under 5 USC § 706(2)(A) if not supported by the record in the proceeding). The Administrative Procedures Act in turn provides that where an agency action is found to be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" it must be set aside. 5 USC § 706(2)(a).

⁹ Quizzically, in its most recent decision the Commission faults the parties for having failed to resolve "these long-standing issues" by settlement. *Broadband Services Reconsideration Order* at ¶ 236. However, in making such a statement, the Commission overlooks the fact that no rule or Commission policy required the parties to resolve these applications through settlement. Additionally, the Commission makes no mention of the fact that the Communications Act and the Commission's Rules specifically made it the responsibility of the Commission itself to resolve such so called "long-standing issues" by processing the applications in accordance with its Rules. The Commission offers no explanation for why its staff failed to exercise the Commission's primary responsibility under Section 309(j) of the Communications Act to process the Mxed applications for a period approaching ten years. The Commission also offers no reasoned explanation of why its sudden decision to transition this spectrum to

Accordingly, in light of the additional issues raised herein and because the Commission's *Broadband Services Reconsideration Order* failed to address the issues previously raised by HITN in its August 30, 2004 Consolidated Petition for Reconsideration, HITN respectfully requests that the Commission reconsider its unreasoned and erroneous decision regarding HITN's applications and reinstate and process such applications in furtherance of the public interest convenience and necessity in accordance with its obligations under its Rules and the Communications Act.

III. Limitation on Length of EBS Leases

In the *Broadband Services Reconsideration Order*, the Commission adopted a thirty year limitation on new EBS leases, but reiterated that "leases entered into before the effective date of the new EBS Rules would be grandfathered under the then existing EBS leasing framework, thus such leases would be subject to the existing 15 year lease limitation."¹⁰ However, in its discussion of such grandfathered leases, the Commission neglected to specifically address and close a loophole in grandfathered legacy one-way video only leases that has allowed operators to argue that vague language within their leases allows them to simply extend their lease term each time the FCC extends the limit on allowable lease terms.¹¹ The FCC must clarify that such provisions allowing for extensions of the permissible length of EBS lease terms may not be used to extend the lease terms of outmoded grandfathered leases entered into under prior rules.

In order to demonstrate to the Commission the serious nature of this problem, HITN submitted with its April 5, 2006, Follow up to Written Ex Parte Submission, several examples of

geographic licensing trumps the legitimate rights of these licensees and excuses its ten year breach of its licensing obligations under the Communications Act.

¹⁰ *Broadband Services Reconsideration Order* at ¶¶ 268 and 266 citing *Broadband Services Order* at ¶ 180. It should be noted that many grandfathered leases had lease terms of only ten years. The Commission should also clarify that its statement on grandfathered lease term limits may not be inferred as a right to necessarily extend the terms of such outmoded legacy one-way video only leases.

¹¹ See Written Ex Parte Submissions of HITN dated April 4, 2006 and April 5, 2006 (attached hereto as Exhibit 2). HITN first raised this issue with the Commission in Comments filed on October 23, 2003.

suspect clauses from existing grandfathered EBS leases, that could be construed impermissibly by a legacy operator to extend its hold on the spectrum for *decades* without having to renew the lease for two-way uses, and thereby allowing the operator to warehouse the spectrum, effectively preventing the licensee from making the spectrum available to a new entrant that intends to immediately construct a new wireless broadband system on the channels.¹² The Commission must clarify this aspect of its *Services Reconsideration Order* in order to close this loophole once and for all.

IV. Geographic Service Areas

In the *Broadband Services Reconsideration Order*, the Commission stated that it was adopting certain recommendations of the WCA on how it should handle GSAs regarding applications for new or modified stations pending before the Commission as of January 10, 2005, in various situations.¹³ HITN respectfully requests that the Commission reconsider and clarify its decision to adopt those recommendations as discussed below.

With regard to the treatment adopted in the first scenario discussed regarding new station applications, HITN requests that the Commission reverse its decision because such treatment is

¹² Note that many of these leases also contain an unknown term start date because the initiation of the term is triggered by commencement of wireless cable video services, construction of the wireless cable video system, or service provision of the first wireless cable video subscriber – none of which events in the vast majority of cases ever occurred and which now cannot occur. Under this loophole, operators have in many cases effectively warehoused spectrum for more than ten years without providing services to the public or lease payments to the licensees. Therefore, these licensees have double trouble with the legacy operator, which can claim not only that the lease is extended for many, many, more years based on FCC rules, but that the initial term has not yet even begun, thus trapping the licensee and its spectrum license in a valueless lease. In a recent decision of the New Jersey Superior Court, the Court stated that one such lease agreement could not be read to allow for an unlimited delay in the satisfaction of conditions precedent and that the operator and its predecessors in interest were obligated to commence the Agreement's start date within a reasonable time period, and that failure to do so would bar their claim to a lease by the doctrine of laches. See Order of Superior Court of New Jersey, Mercer County, Chancery Division – General Equity, Docket C-53-06, released June 16, 2006 at pp. 9-12. (decision attached hereto as Exhibit 3). Given the present inability of operators to launch and operate new wireless cable video systems on the majority of this spectrum band, the Commission should close this loophole once and for all by declaring void, all legacy video only leases entered into under pre-1998 rules, the terms of which have never commenced.

¹³ *Broadband Services Reconsideration Order*, at ¶¶ 205-208.

internally inconsistent with the approach being taken within the second scenario regarding station modification applications and therefore without a reasoned explanation for the difference in treatment would be deemed arbitrary and capricious. Specifically, scenario one stated:

Where there is pending as of January 10, 2005 an application for a new incumbent station with a PSA that overlaps that of a licensed incumbent station, the GSA of the incumbent station is created by “splitting the football” and, if the pending application is ultimately dismissed or denied, the territory covered by the GSA of the applied for station reverts to the BRS BTA holder (if a BRS application) or to EBS white space (if an EBS application).¹⁴

In this scenario, the Commission is essentially modifying the service area of an existing incumbent station based on a division of a PSA football overlap with a pending ungranted request for a new service authorization, and then deciding to re-auction such removed portion of the incumbent station’s service area if the application for a new station is never granted. The Commission in this first scenario has adopted a very different approach from that contained in scenario two. In scenario two a modification application pending as of January 10, 2005, that would in effect result in the modification and diminution of another incumbent station’s service area would not be considered and thus would not effect such other stations GSA unless ultimately granted by the Commission. Thus, based on identical PSA rights flowing from the timing of the filing of two applications, the Commission has stated that, in one case it would effectively divest an incumbent licensee of a portion of its service area prior to the grant of the other application, while in another case it would not divest the same incumbent of a portion of its service area unless the other application were granted.¹⁵ Such disparate treatment would be

¹⁴ *Broadband Services Reconsideration Order*, at ¶¶ 206.

¹⁵ While the GSA was defined based on old PSA boundaries, PSAs and GSAs are fundamentally different things. While a PSA defined the area in which a licensee was entitled to service protection, GSA defines an area in which a licensee is authorized to operate. To this end the new rules require a licensee with a geographic service area to reduce its signal to a prescribed level at its service area boundaries. Thus, while the Commission conferred GSA’s on existing stations as of January 10, 2005 based on a division of PSA overlaps, the right of an applicant to a PSA, based on the timing of the filing of its application, should not attach, and no rights of any other incumbent station

arbitrary and capricious and contrary to the requirement that the Commission provide consistent treatment to similarly situated parties.¹⁶

While the approach in scenario one might be appropriate where an existing service area becomes vacant, here the service area in question does not yet exist. An applicant's expectation of the service area to which it would be entitled is not the same as a vacant and existing service area. In the special cases being discussed here, part of the service area for the new or modified station is being stripped from another licensee and would be available solely to the particular applicant by virtue of the timing of its filing of its new station or modification application. Thus, where such application is never granted the taking of a portion of an incumbent licensee's service area simply to give it to a BTA licensee or to place it in a white space auction would not be justifiable under the Act or the Commission's rules and policies.

Thus, the Commission should conclude that where a service area application is prospective in nature and would, if granted, curtail the service rights of others, such impact should not be deemed effective unless and until such impacting service authorization is granted, as the Commission properly stated in scenario two.

V. EBS Eligibility

On September 1, 2005, in a separate proceeding, Possible Revision or Elimination of Rules Under the Regulatory Flexibility Act, 5 U.S.C. 610 in response to Public Notice DA-05-1524, HITN submitted comments seeking a practical revision to the EBS eligibility requirements

should be affected in the creation of a GSA for such station, unless and until such new station application is granted. Thus the approach taken by the Commission in scenario two would be the correct approach to take with regard to scenario one.

¹⁶ See *Green County Mobilephone, Inc. v. FCC*, 765 F. 2d 235, 237 (DC Cir 1985); *Melody Music, Inc. v. FCC*, 345 F.2d 730 (DC Cir 1965).

of Section 27.1201(a)(3). While such request remains pending in that proceeding, it is directly related to changes recently made by the Commission in this Docket and perhaps should be dealt with by the Commission as part of this proceeding. Section 27.1201(a)(3) sets forth the eligibility requirements for accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, or nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited educational institutions or governmental organizations. In the case of nonprofit organizations which must establish eligibility through the provision of services to the enrolled students of another accredited educational institution or governmental entity,¹⁷ the rule requires applicants to provide documentation from proposed receive sites demonstrating they will receive and use the applicants' educational usage.

While HITN believes that the rule remains valuable and should be retained, in light of recent fundamental changes to other rules governing the EBS service, which are geared primarily toward increasing the nature and types of services that may be offered over EBS stations, certain amendments to the rule are appropriate. The rule, as originally crafted, anticipated the provision of letters from accredited schools regarding their intent to receive and use educational video programming. It is now anticipated that many entities qualifying to operate EBS stations will be contemplating the provision of educational content or education facilitating services that may not include instructional video programming created by, or packaged for delivery by, the EBS licensee. For example, in the case of broadband services, an educational institution may be interested in receiving and using any of the following types of services at fixed, temporary fixed or mobile sites: voice over IP; one or two-way streamed video content; teleconferencing and

¹⁷ See 47 CFR § 27.1201(a) and (a)(3). In the case of a non-profit entity, that would include all situations. However, subsection (a)(3) would only affect accredited educational institutions or governmental entities that were proposing to establish eligibility based on service to enrolled students other than their own.

remote classroom hookups; high speed Internet or data services; and wireless local or wide area networks.

Accordingly, the rule should be updated in a manner that recognizes that a receive site of an accredited institution providing formal educational services to enrolled students, may be interested in receiving an array of education enhancing broadband services, which it intends to use in furtherance of its educational mission.¹⁸ Such a letter would recognize the reality that educational content available over the World Wide Web and downloaded at any specific site is essentially user-directed. Therefore, while neither the service provider nor the site's school administrator can preview or make specific advance statements regarding the content that will be accessed, the most that can be said is that the services will be used in the furtherance of the receiving institution's educational mission and will be made available to enrolled students, faculty and staff in a manner and in a setting conducive to such usage. Additionally, in light of the transition of the EBS service from a site-based to a geographic licensing structure, restrictive language regarding the absolute distance from the transmit site for qualified schools supplying letters must be revised. While the distance may be retained, it should be based on distance from the proposed center reference point, and should be further qualified to ensure that such school will be within the proposed geographic service area.¹⁹

¹⁸ Naturally, where an EBS applicant is proposing to provide only traditional video based educational programming, the current form of the receive site statement would suffice.

¹⁹ Suggested wording for the revised rule, modified to be consistent with other recent changes is as follows:

§ 27.1201 EBS eligibility.

(a)

(3) Those applicant organizations whose eligibility is established by service to accredited institutional or governmental organizations must submit documentation from proposed receive sites demonstrating that they will receive and use the applicant's educational usage. In place of this documentation, a state educational television (ETV) commission

VI. MVPD Opt-Out

In the Broadband Services Reconsideration Order, the Commission upheld its decision to consider transition opt-out requests on a case by case basis. While HITN had not previously commented on this issue in its reconsideration pleadings, since the close of the reconsideration pleading cycle, HITN has found itself opposing one of the first opt-out requests to be filed under the Commission's new Rules. HITN's experience in that proceeding has led it to conclude that the Commission needs to provide MVPDs with more clarity as to the minimum requirements for an adequate opt-out waiver request. HITN believes that it is unfair to potentially affected parties, many of which who will be non-profit educational licensees, to have to expend large sums of money on legal and engineering counsel to defend themselves against poorly conceived opt-out waiver requests that fail to properly analyze the impact of the requested opt-outs on the operations of neighboring GSA stations, or provide sufficient discussions of mitigation

*may demonstrate that the public schools it proposes to serve are required to use its proposed educational usage. Documentation from proposed receive sites which are to establish the eligibility of an entity not serving its own enrolled students for credit should be in letter form, written and signed by an administrator or authority who is responsible for the receive site's curriculum planning. No receive site more than 35 miles from the ~~transmitter site,~~ **proposed station's central reference point, or outside the applicants' proposed GSA,** shall be used to establish basic eligibility. **Where broadband or data services are proposed, the letter should indicate that such data services will be used in furtherance of such institution's educational mission and will be provided to enrolled students, faculty and staff in a manner and in a setting conducive to such usage. The administrator must indicate—** **Where traditional educational or instructional video services are proposed, the letter should indicate that the applicant's program offerings have been viewed and that such programming will be incorporated in the site's curriculum. Where traditional educational or instructional video services are proposed, the letter should also discuss the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming. If other levels of authority must be obtained before a firm commitment to utilize the service can be made, the nature and extent of such additional authorization(s) must be provided.***

techniques that might be employed to allow for the opt-out while not impairing the ability of neighbors to transition their channels to the new bandplan. Additionally, HITN has uncovered a previously unconsidered implication of such opt-out requests that will require the Commission to provide clarification on the interference protection rights that opt-out licensees will enjoy vis-a-vis their transitioned GSA neighbors.

Specifically, HITN urges the Commission to make clear that any MVPD seeking an opt-out waiver from the mandatory bandplan transition must at a minimum: 1) serve neighboring EBS and BRS stations and other potentially affected licensees with a copy of the waiver request, including engineering analysis of the predicted impact of the opt-out request on such stations; 2) if interference is predicted, explain why it cannot provide its services while meeting the interference protection requirements contained within the new rules; 3) detail specific techniques and efforts the MVPD will undertake at its sole expense to mitigate any interference its special operating parameters would cause to affected parties; 4) provide sufficient information about its current operations in order to allow for an objective case-specific determination of its eligibility and need for a waiver; and 5) provide signed statements from all licensees that are proposed to participate in the opt-out making clear that such licensees wish to have their stations excluded from the bandplan transition.

Additionally, HITN has noted that existing channels opting out of the new band-plan would no longer line up exactly with their respective co-channel counterparts within neighboring transitioned GSAs, and would instead find themselves co-channel with channels and portions of channels of various other neighboring transitioned stations. As the rules now stand, while the stations granted an opt-out waiver would not have to transition to the new band-plan, they would still be geographically licensed under the FCC's new rules. In this regard, their GSAs would have

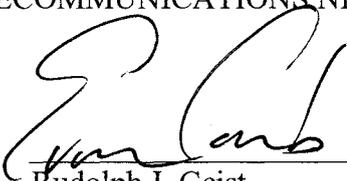
been fixed on the effective date of the new rules based on a bifurcation of PSA overlaps with neighboring co-channel stations. Accordingly, an A-Group station's GSA was defined by its overlaps with neighboring pre-transition co-channel stations. Similarly, a B-Group station's GSA was defined by its overlaps with neighboring pre-transition co-channel stations. If in a market where licensees are seeking an opt-out waiver the B-Group station had a neighboring co-channel station to its East with a PSA reference point some 20 miles away, while the A-Group station in the same market had no such co-channel neighbor to its East, then the GSA of the B-Group would be truncated to the East to allow for the GSA of its neighbor, while the A-Group's GSA would extend out to the East 35 miles from its reference point. Thus, in this common scenario, it is clear that the GSA boundaries between the opt-out market and the market to its East would differ depending on the channel group. In our example above, an untransitioned high-power high-site A3 channel in the opt-out market would ultimately find itself co-channel with a post-transition B2 channel in the market to its East. Because the GSAs of these two stations differ, and each would have a right under Section 27.55 of the Commission's new EBS rules to serve some of the same geographic area, the Commission must clarify: 1) whether an opt-out is possible; 2) whether one station's opt-out would preclude its co-channel neighbor from transitioning; and 3) if it would not, what interference protection and service rights each station would have in such a situation with respect to the area within the overlap of their GSAs.

VII Conclusion

HITN respectfully requests that the Commission reconsider and clarify its Broadband Services Reconsideration Order and the Rules adopted thereby in accordance with the discussion set forth herein.

Respectfully submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK

By: 

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Its Attorneys

July 19, 2006

EXHIBIT 1

RJGLAW LLC STAMP & RETURN

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August 30, 2004

VIA COURIER

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

RECEIVED

AUG 30 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

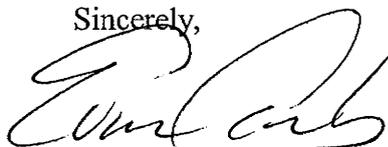
Re: Hispanic Information and Telecommunications Network, Inc.
FRN: 0006-6203-48
ITFS New Station Applications
FCC File Nos. BPLIF-19951020WP (Alamosa, CO)
BPLIF-19951020GG (Billings, MT)
BPLIF-19951016AV (Bloomington, GA)
BPLIF-19951020ET (Boise, ID)
BPLIF-19951020GI (Salinas, CA)
BPLIF-19951016BJ (Santa Rosa, CA)
Consolidated Petition For Reconsideration

Dear Ms. Dortch:

On behalf of Hispanic Information and Telecommunications Network, Inc. there are enclosed herewith an original and fourteen copies of a Consolidated Petition For Reconsideration regarding the above-referenced matters. This filing is being made pursuant to and in accordance with the requirements of 47 CFR §§ 1.429, 1.106 and 1.4.

Please return a date stamped copy to the courier delivering this filing. Please direct all questions regarding this matter to the undersigned counsel.

Sincerely,



Evan D. Carb

Enclosures

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of the Applications of:)		
)		
HISPANIC INFORMATION AND)		
TELECOMMUNICATIONS NETWORK, INC.)		
)		
Application for New ITFS Station at:)		
)		
Alamosa, Colorado	(G-Group)	)	File Nos. BPLIF-19951020WP
Billings, Montana	(G-Group)	)	BPLIF-19951020GG
Bloomington, Georgia	(B-Group)	)	BPLIF-19951016AV
Boise, Idaho	(B-Group)	)	BPLIF-19951020ET
Salinas, California	(B-Group)	)	BPLIF-19951020GI
Santa Rosa California	(C-Group)	)	BPLIF-19951016BJ
)		

To: The Commission

CONSOLIDATED PETITION FOR RECONSIDERATION

**HISPANIC INFORMATION AND
TELECOMMUNICATIONS
NETWORK, INC.**

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Its Attorneys

August 30, 2004

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Summary and Introduction

This Consolidated Petition for Reconsideration comes before the Commission on review of a July 29, 2004, Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 03-66 (“Broadband Services Order”). Therein, the Commission, as part of an announced transition from a site based to geographic based licensing framework, dismissed certain mutually exclusive long-form applications for new Instructional Television Fixed Service, including seven filed by the Hispanic Information and Telecommunications Network (“HITN”), which had been pending before the Commission since 1994 and 1995.

That decision must be reversed, as it is contrary to the Commission’s statutory mandate with respect to the processing of pending applications under Section 309 of the Communications Act, as interpreted, and with the instructions of Congress regarding the handling of MXed applications in the 1997 Balanced Budget Act.

Additionally, such decision must be reversed as arbitrary and capricious because the Commission failed to offer any explanation, much less a reasoned explanation, why it was necessary to dismiss MXed applications in conjunction with its rule changes or how such dismissals would further its stated goals, especially in a context, involving educational licensees and already heavily licensed spectrum, that differs dramatically from a previous referenced situation in which the Commission dismissed MXed applications.

The decision must also be reversed as arbitrary and capricious because the Commission failed to provide a reasoned explanation concerning its deviation from previously stated policy, determined to be in the public interests, concerning the HITN

expressed alternative of resolving such pending Mxed applications by limited participation auctions.

Further, the decision must be reversed because the Commission failed to provide a reasoned explanation of how any goals achieved by such dismissals would justify the trampling of the legitimate processing rights of the applicants, especially following an unreasonable nine year Staff delay in processing these properly filed applications.

Accordingly, HITN respectfully requests that the Commission reverse the erroneous dismissals of the Mxed HITN applications and conduct an auction between the Mxed applicants to award these licenses.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of:)	
)	
HISPANIC INFORMATION AND)	
TELECOMMUNICATIONS NETWORK, INC.)	
)	
Application for New ITFS Stations at)	
Alamosa, Colorado (G-Group)	)	File Nos. BPLIF-19951020WP
Billings, Montana (G-Group)	)	BPLIF-19951020GG
Bloomington, Georgia (B-Group)	)	BPLIF-19951016AV
Boise, Idaho (B-Group)	)	BPLIF-19951020ET
Salinas, California (B-Group)	)	BPLIF-19951020GI
Santa Rosa California (C-Group)	)	BPLIF-19951016BJ

To: The Commission

CONSOLIDATED PETITION FOR RECONSIDERATION

Hispanic Information and Telecommunications Network, Inc. ("HITN"), by its attorneys, and pursuant to 47 C.F.R § 1.429, hereby timely submits its Consolidated Petition for Reconsideration of the Commission action dismissing HITN's above-referenced pending applications for new Instructional Television Fixed Service ("ITFS") stations on various channels in the above referenced markets ("the HITN Applications").¹

¹ The Commission acted to dismiss these applications as part of its decision in *Re Report and Order and Further Notice of Proposed Rulemaking, regarding Fixed and Mobile Broadband Access, Educational and Other Advanced Services, in WT Docket No. 03-66, FCC 04-135, Released July 29, 2004 ("Broadband Services Order")* at ¶ 263 and Appendix E thereto. Notwithstanding the *Broadband Services Order* is not yet effective, the Commission staff has taken the position these dismissals were effective on July 29, 2004. See also follow up dismissal from the Broadband Division of the Wireless Telecommunications Bureau, reported in its ULS Database as August 12, 2004 letter action (however, to date no such letter has been received by HITN or its counsel). To the extent that this dismissal, contained in the *Broadband Services Order* is deemed to be not a part of that notice and comment rule making, then such reconsideration is requested pursuant to 47 CFR § 1.106. While, as discussed in detail infra, HITN takes issue with the claimed effective date of such action, to err on the side of caution HITN is submitting its Reconsideration request within 30 days of July 29,

That decision must be reversed, as it is contrary to the Commission's statutory mandate with respect to the processing of pending applications under the Communications Act, and with the instructions of Congress regarding the handling of MXed applications.

Additionally, such decision must be reversed as arbitrary and capricious because the Commission failed to supply a reasoned explanation of: (1) how such dismissals would further its stated goals, especially in a context that differs dramatically from a previous referenced situation in which the Commission dismissed MXed applications; (2) why it was deviating from a stated policy, determined to be in the public interest; and (3) how the goals achieved by such dismissals would justify the trampling of the legitimate processing rights of the applicants, especially following an unreasonable nine year delay in processing these properly filed applications.

I BACKGROUND

A. Station Applications

The filing background for each of the applications at issue under this reconsideration request are as follows:

1. Alamosa, Colorado HITN filed its above-referenced application for a new ITFS G-Group on October 20, 1995. HITN further amended that application on September 19, 1996. Pursuant to MM Public Notice Report No. 23990B released May, 21, 1997 that application was determined to be MXed with an application (BPLIF-

2004, the release date of the *Broadband Services Order*. Also, note that as of the ultimate effective date of the *Broadband Services Order*, the Commission will be changing the name of this service to the Educational Broadband Service ("EBS").

19951020LD) filed for the same channels at Alamosa by North American Catholic Educational Programming Foundation, Inc. (“NACEPF”). On February 3, 2003, pursuant to an October 18, 2002 WTB Public Notice (DA 02-2751)(the “WTB Data Collection Notice”), HITN expressed continued interest in the processing of its application and resubmitted date stamped copies of the application and its amendment.

2. Billings, Montana HITN filed its above-referenced application for a new ITFS G-Group station on October 20, 1995. HITN further amended that application on May 24, 1996. Pursuant to MM Public Notice Report No. 24212A released April 3, 1998 that application was determined to be MXed with an application (BPLIF-19951020ZR) filed for the same channels at Billings by Yellowstone Education Center (“YEC”). On February 3, 2003, pursuant to the WTB Data Collection Notice, HITN expressed continued interest in the processing of its application and resubmitted date stamped copies of the application and its amendment.

3. Bloomington, Georgia HITN filed its above-referenced application for a new ITFS B-Group station on May 12, 1994, pursuant to an exception to a filing freeze then in effect.² Pursuant to MM Public Notice Report No. 24239A released May 12, 1998 that application was determined to be MXed with applications filed by Richmond Hill Christian Academy (“RHCA”)(BPIF- 19951020PH) and the Board of Public Education for

² See *Amendment of Part 74 of the Commission’s Rules With Regard to the Instructional Television Fixed Service, MM Docket No. 93-24, Notice of Proposed Rulemaking*, 8 FCC Rcd 1275, 1277 ¶ 9 (1993)(“1993 NPRM”). As an exception to the filing freeze on the acceptance of new and major change ITFS applications imposed by the Commission on February 25, 1993, the Commission stated it would continue to accept applications relying on construction funds being provided by the National Telecommunications and Information Administration (NTIA), because NTIA required filing of the application before it would accept and consider funding requests.

Savannah (“BPES”) (BPLIF-951020XT). On February 3, 2003, pursuant to the WTB Data Collection Notice, HITN expressed continued interest in the processing of its application and resubmitted date stamped copies of the application. On June 20, 2003 by WTB Public Notice DA 03-2057 the application of RHCA was dismissed for failure to prosecute.

4. Boise, Idaho HITN filed its above-referenced application for a new ITFS B3, B4, D1 & D2 Channel station on October 20, 1995. HITN further amended that application on May 24, 1996. Pursuant to MM Public Notice Report No. 24159A released January 16, 1998 that application was determined to be MXed with an application (BPLIF-19951018AD) filed for the same B3&B4 channels at Boise by Canyon County School (“CCS”). However through staff error a CCS application for the Boise D1 & D2 channels (BPLIF-19951018AH) was granted by the FCC on May 2, 1996, without regard to HITN’s pending application. On February 24, 1998 CCS filed a petition to deny HITN’s application based on its inclusion of the D1 & D2 channels. On February 3, 2003, pursuant to the WTB Data Collection Notice, HITN expressed continued interest in the processing of its application with regard to the B3 & B4 channels and resubmitted date stamped copies of the application and its amendment.

5. Salinas, California HITN filed its above-referenced application for a new ITFS B-Group station on October 20, 1995. HITN further amended that application on May 24, 1996. While the BLS and ULS databases listed the application as “tendered,” Appendix E of the *Broadband Services Order* lists an application filed for the same channels in Salinas by Hartnell Community College (BPLIF-19951020QT). HITN has

been able to find no acceptance notice that listed the two applications as mutually exclusive. On February 3, 2003, pursuant to the WTB Data Collection Notice, HITN expressed continued interest in the processing of its application and resubmitted date stamped copies of the application and its amendment.

6. Santa Rosa, California HITN filed its above-referenced application for a new ITFS C-Group station on May 12, 1994, pursuant to the 1993 NPRM freeze exception. HITN further supplemented that application on September 15, 1995 and October 31, 1996.

Pursuant to MM Public Notice Report No. 23829B, released September 19, 1996 that application was determined to be MXed with applications filed by Roman Catholic Communications Corp. ("CTN")(BMPLIF-19950913EX & BPLIF-19951020A9), Mendocino Lake Community College District ("MLCC")(BPLIF-19951019AJ), the Regents of the University of California ("UCA")(BPLIF-19951020CV), Santa Rosa Junior College ("SRJC")(BPLIF-19951020FM) and Clarendon Foundation ("Clarendon")(BPLIF-19951020LM). Somehow the CTN application BMPLIF-19950913EX was granted on November 14, 1996 per Broadcast Actions Public Notice 43881, dated December 5, 1996 and the MLCC application was granted on July 18, 1997 per MM Broadcast Actions Public Notice 44041, dated July 25, 1997. On June 20, 2003 by WTB Public Notice DA 03-2057 the CTN application of BPLIF-19951020A9 was dismissed for failure to prosecute. On December 23, 1996 (per MM Broadcast Actions PN 43921, dated February 3, 1997) the UCA application was replaced with a major modification (BMPIF-19961223BO), which was subsequently dismissed as of October 29, 1997 (per MM Broadcast Actions PN 44110, dated November 3, 1997). On February 3, 2003, pursuant to the WTB Data Collection

Notice, HITN expressed continued interest in the processing of its application and resubmitted date stamped copies of the application.³

B. FCC Actions

As discussed above, following receipt of ITFS modifications and new station Applications, either pursuant to an exception to the freeze in 1994 and 1995 or during the ITFS filing window in October 1995, the Commission would review applications for general acceptability and either place them on an acceptance notice either as MXed or as recommended for grant. Mxed applications were then slated for decision by comparative analysis pursuant to various criteria set out within the Commission's Rules.

Following the enactment of the 1997 Balanced Budget Act, the Commission released a Report and Order in 1998, in which it concluded that absent an affirmative clarification to the contrary by Congress, it would be compelled to resolve the pending MXed ITFS applications by auction, but that such auctions would be limited in the public interest only to the MXed parties themselves. Having sought and received no ITFS exception to the auction requirement from Congress, in June of 2000, the Commission released a Public Notice providing a brief sixty day window for settlements, and stated that it would soon schedule auctions. Two and one half years later, in October of 2002, the

³ Appendix E also listed HITN's application for a new ITFS D4 Channel Station at Casa Grande, Arizona (PLIF-19951016AQ) as MXed with an application filed of Verde Valley School (BMPLIF-19950914LC) that had previously been withdrawn and then dismissed by the Commission in conjunction with a cancellation of the underlying station and call sign. By separate pleading filed simultaneously herewith HITN argues that its application was erroneously listed on Appendix E, and that the Staff's attempt to rescind its dismissal of VVS' withdrawn modification on August 11, 2004, without reinstating the underlying station and call sign, and then dismiss such application as MXed was arbitrary and capricious and flawed because the VVS modification, without an underlying station authorization would be fatally defective and unacceptable. To the extent that the Commission concludes otherwise, HITN respectfully requests that the arguments advanced

ITFS and MDS industry requested changes to the rules, which formed the basis of the April 2003 Notice of Proposed Rulemaking in the instant Proceeding.

In its NPRM, the Commission stated that it would freeze action on certain pending applications during the rulemaking and requested comment on a tentative conclusion that it would dismiss them upon adoption of new rules. In comments, HITN restated the Commission's earlier conclusion that pending MXed applications should be resolved, in furtherance of the public interest, by auction between the MXed parties. In its *Broadband Services Order*, the Commission, without discussion or reasoned explanation, disagreed with HITN's position and stated that it would simply dismiss certain pending MXed applications in conjunction with its adoption of a geographic licensing scheme. Accordingly the *Broadband Services Order* dismissed certain MXed applications and any associated pleadings. The Commission's ULS database system also reflects an August 12, 2004 letter dismissal of each of the HITN Applications, referencing the July 29, 2004 action of the Commission in its *Broadband Services Order*. However, to date no such letters have been received by the licensee.

II DISCUSSION

A. The Commission Decision Dismissing MXed Applications Without Consideration is Contrary to the Commission's Specific Mandate Under the Communications Act and the Directives of Congress, and is Contrary to The Public Interest, Convenience and Necessity.

The Commission's Action dismissing certain MXed applications is contrary to its mandate contained within the Communications Act to consider and grant applications in

herein, be equally applied to the dismissal of its Casa Grande application.

the public interest. Section 309 of the Act specifically states:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.⁴

The HITN applications were submitted in accordance with the Commission's Rules and are therefore entitled to consideration.⁵ Here, presumably for administrative convenience, the Commission is wrongfully seeking to simply dismiss rather than consider applications as required by its mandate. In fact, the Commission attempts to sidestep its Statutory obligations by claiming that its handling of these applications is a procedural rather than substantive matter. This is simply incorrect. A decision not to consider, rather than how to consider applications properly filed in accordance with the requirements of the Communications Act, as well as the Commission's own Rules and Policies in place at the time of filing, is not a procedural issue but a substantive one.

In the Balanced Budget Act of 1997, Congress increased the Commission's authority to decide amongst competing applicants through the use of auctions.⁶ In 1998, the Commission concluded that Congress, not having specifically exempted ITFS from competitive bidding, had compelled the FCC to use this device to resolve pending MXed

4 47 USC § 309.

5 *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S.Ct. 148 (1945).

6 *Balanced Budget Act of 1997, Pub. Law No. 105-33*, 111 Stat. 251 (1997) ("1997 Budget Act").

Applications.⁷ The Commission stated that “pending mutually exclusive ITFS applications, although pending since at least the last ITFS filing window in October 1995, must be resolved by competitive bidding pursuant to Section 309(j)(1).”⁸ The Commission also stated “we believe it would not serve the public interest to accept additional competing applications ... and we will therefore limit the eligible bidders in any auction of the pending ITFS Applications to those with applications already on file.”⁹ Therefore, failure to resolve these applications through competitive bidding between only the pending applicants would be contrary to the Commission’s specific mandate, as well as the directives of Congress in the 1997 Budget Act and the public interest as previously determined by the Commission itself. Dismissal of the HITN Applications must therefore be reversed and the MXed applications awarded by an auction among the specifically MXed applicants.

B. The Commission Decision to Dismiss MXed Applications Without a Reasoned Explanation of its Deviation from a Previously Stated Policy Determined to be in the Public Interest is Arbitrary and Capricious and Must be Reversed.

As discussed above, in implementing provisions of the 1997 Budget Act, the Commission concluded that the Public Interest would best be served by restricting eligible bidders for any auction of the pending MXed ITFS applications to the MXed parties

⁷ *First Report and Order in MM Docket 97-234* 13 FCC Rcd 15920 (1998) at ¶¶ 204-205.

⁸ *Id.* at ¶ 205 (emphasis added).

⁹ *Id.*

themselves.¹⁰ In reaching its decision, the Commission stated that these applicants had complied with existing procedures to file long-form applications and had a reasonable expectation that they would be competing only against those who had similarly filed timely applications.¹¹ In response to the Notice of Proposed Rulemaking in the instant proceeding,¹² HITN advanced the Commission's previously stated policy.¹³ However, in the *Broadband Services Order*, without reasoned explanation the Commission simply dismisses HITN's argument and reverses its policy with regard to restricting auction participation for spectrum covered by the pending Mxed applications.¹⁴ The only reason offered by the Commission in dismissing certain Mxed applications is that such treatment would be consistent with its actions in one earlier case where it transitioned to geographic licensing from site based licensing. Notwithstanding such conclusion, the Commission offers no reason why such harsh and unwarranted treatment of pending applications, properly filed under Commission Rules and Policies, would in any way facilitate a more smooth or rapid transition to such a licensing scheme or its stated goals, and more importantly, the Commission proffers no evidence that continued processing of such Mxed applications, along with the other pending new station applications, would in any way impede the transition to geographic licensing.

10 *First Report and Order in MM Docket 97-234* 13 FCC Rcd at ¶ 205

11 *Id.* at ¶ 108

12 *Notice of Proposed Rulemaking and Memorandum Opinion and Order, in WT Docket No. 03-66*, FCC 03-56, released April 2, 2003 ("Broadband Services NPRM").

13 September 8, 2003 Comments of HITN at p. 10.

The Courts have held that an agency is not free to simply ignore its own rules or stated policies, but instead when departing from such policies, must set forth and articulate a reasoned explanation for its actions.¹⁵ While the Commission references one other case in which it acted in a similar fashion, it fails to explain why the policy articulated in 1998 on this very subject and with regard to these very applications will no longer best serve the public interest. Such an unreasoned departure from stated policy with regard to specific applications, which rests solely on grounds that do not justify the result, is arbitrary and capricious.¹⁶ The Administrative Procedures Act provides that where an agency action is found to be “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law” it must be set aside.¹⁷ Accordingly, the Commission’s action in this case dismissing certain Mxed applications, including the HITN Applications, must be reversed.

C. The Fact That the Commission has Previously Dismissed Mxed Applications In Other Services When Transitioning from Site Based to Geographic Licensing Does not Make it Appropriate in This Instance.

As support for the dismissal of certain Mxed Applications, the Commission simply cites to the Broadband Services NPRM regarding its stated intention to do so and to a

¹⁴ *Broadband Services Order* at ¶ 263.

¹⁵ See *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (DC Cir 1986); see also *Acherner Broadcasting Co. v. FCC*, 62 F. 3d 1441 (DC Cir 1995), *American Trucking Associations, Inc. v. ICC*, 697 F. 2d 1146, 1150 (DC Cir 1983); *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (DC Cir 1970) cert. denied, 403 US 923 (1971); *Illinois Public Telecommunications Association v. FCC* 8 CR 339 (DC Cir 1997).

¹⁶ See *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (DC Cir. 1993). See also, *National Citizens Commission for Broadcasting v. FCC*, 39 RR 2d 1463 (DC Cir. 1977) (A commission decision is arbitrary and capricious under 5 USC § 706(2)(A) if not supported by the record in the proceeding).

¹⁷ 5 USC § 706(2)(a).

Maritime Services order regarding VHF public coast stations as evidence that it has previously dismissed pending MXed applications in other services when switching from a site-based licensing system to geographic licensing.¹⁸ In its Comments submitted in this proceeding, HITN advocated the policy position previously enunciated by the Commission in 1998. Nonetheless, the Commission, with short shrift to HITN's argument, ordered the dismissal of a number of pending MXed ITFS applications. For several reasons, the Commission's reliance on specific actions taken in commercial services like the maritime service, whether or not they were legal under the Communications Act and the Administrative Procedures Act, are inappropriate for use in the context of addressing the special circumstances of applications in a service reserved for non-commercial and educational licensees.

1. In relying on Precedent From a Commercial Context, the Commission Fails to Consider the Special Treatment Traditionally Afforded to Non Commercial Applicants.

The Commission, in reaching its decision to facilitate a transition to geographic licensing, presumably in part by dismissing certain MXed applications, has failed to consider the fact that it is dealing with restricted eligibility educational spectrum.

Although the Commission specifically retains the limited eligibility requirement for

¹⁸ *Broadband Services Order* at ¶ 263 and n 578 & 574 citing *Amendment of the Commission's Rules Regarding Maritime Communications, PR Docket No. 92-257, Second Report and Order and Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 16949, 17015-17016 (1997) ("Second Maritime Order").

licensing on the ITFS frequencies as they transition to the EBS service,¹⁹ and recognizes the traditional special needs of such ITFS licensees by facilitating the continuation of high powered instructional video operations within a specified reserved spectrum segment,²⁰ it inexplicably fails to consider the specific educational concerns associated with the handling of such pending MXed applications.

Many of the MXed applications, including the HITN Applications, were filed using public or scarce educational funds and were specifically targeted at individual communities, often associated with specific school districts or municipalities that the applicant had a specific intention to serve. Consistent with such highly targeted filings, many of the applications included required statements from area schools and entities that would be receiving service from the applicant's proposed station. Accordingly, the Commission's conclusion that certain MXed applications would be dismissed without prejudice, presumably for administrative convenience, and an apparent presumption that such applicants would then be free to participate in future auctions to gain access to such locations, fails to consider the unique characteristics of educational applicants.

¹⁹ *Broadband Services Order* at ¶ 152. Therein the Commission specifically states:

After considerable deliberation, we conclude that it is in the public interest to retain EBS eligibility and content restrictions. We believe that the public interest favors preserving this spectrum for licensing to ITFS eligible entities and that doing so will further the educational objectives that led to the establishment of ITFS. The record demonstrates that the EBS service provides critical educational services such as web-based and streaming video for instruction in adult literacy and basic skills, emergency medical and fire services, law enforcement, and corrections. These services are often provided by community colleges at a variety of locations across the state where such instruction would generally be unavailable.
Id.

²⁰ Id. at ¶¶ 36 & 44.

While a commercial entity might wish to participate in a wide area geographic auction, an educational or non profit entity might find such participation a prohibitively expensive method to obtain access to the limited communities and schools that it originally proposed to serve.²¹ Additionally scarce public funding may prove unavailable for such participation in a larger more costly open eligibility geographic auction, as opposed to a limited auction among already MXed parties. Thus the net effect of the Commission's action would be the same as a dismissal with prejudice, and such applicant would be forever barred from obtaining authority to provide service to the limited area and schools originally applied for. As the Commission properly noted in 1998, the MXed educational applicants, such as HITN, "had a reasonable expectation that they would be competing only against those who had similarly filed timely applications."²²

2. The facts in this Case do not Warrant the Same result as the Commission Reached in Its Second Maritime Order

In the Second Maritime Order, the Commission was faced with a transition of VHF Public Coast Stations to geographic licensing at a time when there were only 300 licensed stations, each of which operated on one or two channels and covered only a twenty to thirty mile service area along coastal and inland waterways.²³ The nationwide services created following the shift to a geographic licensing scheme for that spectrum therefore would be

21 Additionally, the Commission's application of such a harsh result to non-profit and educational entities wrongfully presumes that such entities are as able as commercial licensees to absorb the financial losses associated with the filing and ten year prosecution of these properly filed applications.

22 *First Report and Order in MM Docket 97-234* 13 FCC Rcd at ¶ 108.

23 See Second Maritime Order at ¶¶ 74, 75 and 80.

largely composed of facilities licensed following the transition. Unlike the situation faced by the Commission in the Maritime services, as of 2001 there were some 2,400 licensed ITFS stations composed of 8,000 Six MHz channels, each with a 35 mile service area.²⁴ Therefore, the service that will be created following a shift to geographic licensing will be based more on cooperative agreements with some 1,275 individual ITFS licensees, than on any auction of remaining unlicensed ITFS spectrum.

Thus, the shift to geographic licensing most applicable to this proceeding is that to be experienced by already existing individual stations, which comprise the bulk of the available spectrum on these frequency bands. However, unlike the maritime context such a shift will have very little practical effect on the area presently being served by such licensees. Currently each ITFS licensee has a 35 mile protected service area,²⁵ which is being adjusted in this proceeding only by bisecting the areas of overlap between neighboring licensees operating on the same channels, a practice already widely implemented by private agreement within the industry.²⁶ In the case of the limited number of pending MXed applications, the geographic areas affected are equally well defined, predictable and are most often in conflict either with applicants proposing almost identical facilities or with the modifications of neighboring stations. Therefore the impact on the transition to geographic licensing would be limited and predictable.

24 See Comments of The National ITFS Association in ET Docket 00-258, February 22, 2001, at P.3.

25 See *Two-Way Order in MM Docket 97-217*, 13 FCC Rcd 19112 at ¶ 114 (1998) & 47 CFR § 74.903(d).

26 *Broadband Services Order* at ¶ 59.

Because the Commission failed to explain why the continued processing of certain MXed educational service applications would be any more disruptive to the orderly transition to a geographic licensing scheme than would the processing of other pending new station applications, which the Commission will continue to process, and because the nature of the transition is different, the number of MXed applications small, the affected areas easily defined, and a resolution mechanism already mandated and determined to be in the public interest, the application of the procedure questionably employed by the Commission in a commercial context to dismiss certain pending mutually exclusive applications is not warranted or appropriate in this instance.

D. The Commission's Unconscionable Failure to Process these MXed Applications for Almost Ten Years From the Date of Their Filing Renders Any Argument Today Favoring Administrative Convenience Over the Legitimate Expectations of the Applicants and the Processing Obligations of the Staff Less Compelling.

The Commission's attempt, presumably for administrative convenience, to shirk its statutory obligations and its prior public interest finding, by dismissing without consideration or a reasoned justification certain properly filed and pending MXed applications is rendered even more egregious when considered in the context of the Commission's prior conduct with regard to the processing of these applications.

At the time the HITN Applications were filed in 1994 and 1995, the FCC's Rules provided that MXed applications would be resolved by a comparative analysis based on

specific criteria.²⁷ Despite the timely and proper submission of these authorization requests, as detailed above, most of the HITN Applications were not even placed on Public Notice as mutually exclusive for two or more years following their submission to the Commission. When Congress adopted its Balanced Budget Act in 1997, mandating the use of auctions in the case of mutually exclusive applications, the Commission was quick to implement the provisions of the Act and to modify its Rules accordingly.²⁸ However, while the Commission specifically noted HITN's support for such auctions at that time, it stated that it would not commence ITFS auctions immediately, so that it could intercede with Congress regarding a possible exemption for MXed ITFS applications.²⁹

On March 20, 2000, the FCC released a Public Notice stating that Congress had not afforded clarification or an exemption of ITFS from the auction requirement. Accordingly, the Commission stated: "in anticipation of soon scheduling an auction for the pending mutually exclusive applications" it would open a 60 day period for settlements ending June 30, 2000 to allow a final opportunity for settlement.³⁰ However, in the almost two and one half years following the close of that settlement period and prior to the submission of the so called industry white paper, which ultimately prompted the Broadband Services NPRM, the Commission did not schedule the promised auctions for the pending MXed

27 See 47 CFR § 74.913 (1995).

28 See generally, *First Report and Order in MM Docket 97-234*, 13 FCC Rcd 15920 (1998).

29 *Id.* at ¶ 204 and n.257, citing HITN's support for auctions.

30 *FCC Public Notice, ITFS Mutually Exclusive Applications – Settlement Period, FCC 00-98*, released March 20, 2000. The FCC had also released a prior Public Notice encouraging such settlements, *DA-98-2070*, released October 15 1998.

Applications.³¹ Most recently, in 2002, the Commission required the Mxed applicants, under the penalty of dismissal for failure to prosecute, to expend additional time and money to help correct its automated database and physical files by; supplying detailed data correction sheets, resubmitting date stamped copies of applications, amendments and pleadings already on file, and submitting signed expressions of continued interest regarding their pending applications.³²

During this nine year period, the educational or not for profit Mxed applicants have expended their scarce and valuable resources for the preparation of engineering studies, long form applications, amendments, legal petitions and pleadings regarding their Mxed applications and those of competing parties, comments in rulemaking proceedings that might affect the processing of their applications, settlement discussions, and database corrections. Not once during this nine year period did the Commission ever hint that it would dismiss these properly filed instructional service applications without consideration.

Given the fact that these applications have been pending before the Commission for nine years and given the Commission's failure during such time to process them either under its original comparative processing scheme or its subsequent auction processing scheme, the Commission would be hard pressed to justify its present attempt to dismiss

31 See *A Proposal for Revising the MDS and ITFS Regulatory Regime*, submitted by the Wireless Communications Association International, The National ITFS Association and the Catholic Television Network on October 7, 2002 ("White Paper"). Nor did the Commission take any action to schedule such auctions between the submission of the White Paper and April 2, 2003, the date of its release of the Broadband Services NPRM.

32 See *Public Notice – Wireless Telecommunications Bureau Seeks to Verify ITFS, MDS and MMDS License Status and Pending Applications*, DA 02-2751, released October 18, 2002.

such applications without consideration for administrative convenience.³³ Certainly a blank statement that such actions have been taken before does not justify: (1) the Staff's decision, following years of inaction, simply to not fulfill its statutory processing obligations; (2) the denial of the MXed applicants' processing rights; or (3) the Commission's reversal of its previously stated policy that processing such applications by a restricted auction would best serve the public interest - especially where the affected service is educational and the dismissals are not necessary for the Commission to achieve its stated goals.

E. The Commission Decision To Dismiss Certain New Station Applications MXed With Modifications of Existing Stations would be Unlawful and Fundamentally Unfair as it Would Constitute a de facto Grant of the Modification over the New Service Proposal without Due Consideration of the Pending Applications.

In several cases, applications for new stations filed in 1995 became MXed with modification applications filed by existing ITFS licensees. Under the *Broadband Services Order*, the Commission purports to dismiss both MXed new applications and pending MXed amendments of existing licensees. However, in dismissing pending modifications generally, the Commission notes that in most cases under the new rules such changes may

33 In fact such an unreasonable and unexplained delay could be considered a violation of law under the APA. See e.g. *Telecommunications Research and Action Committee, et al. v. FCC*, 750 F2d 70, 242 U.S. App. D.C. 222 (1984), and cases cited therein, holding that 5 U.S.C. §§ 555(b) & 706(1) require an agency to conclude matters presented to it "within a reasonable time," and that a reviewing court may compel agency action unlawfully withheld or unreasonably delayed. While the FCC enjoys express statutory authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice (47 U.S.C. Sec. 154(j) (1982)), unreasonable delays and significant prejudice to parties, such as that experienced here, could be found to be an abuse of discretion.

be made without further application to the Commission.³⁴ Therefore, the practical effect of the Commission's dismissal of certain MXed new station applications is to issue a de facto grant to the licensees with whom they were MXed without the benefit of consideration as required by law. Even if the Commission could somehow justify the general dismissal of certain MXed applications, it is well settled that the Commission would not be able to simply grant the application of one MXed party without regard to the processing rights of another.³⁵ Yet that is exactly the practical effect of the Commission's actions in this case. Therefore, the Commission dismissal of certain MXed ITFS applications is arbitrary and capricious, contrary to law, and an abuse of its discretion. And must be reversed.³⁶

F. Inclusion of the HITN Applications on Appendix E was Unsupported by the Commission's Stated Action or the Ordering Clauses Contained in the Broadband Services Order and Therefore the Dismissal of Such Applications Must be Reversed.

In the *Broadband Services Order*, the Commission does not state that it is dismissing all categories of MXed ITFS applications and therefore the inclusion of the HITN Applications on Appendix E was inconsistent with the actions taken by the Commission within the text of the Order. In Section 263 of the Order, the Commission in referencing Appendix E states:

Thus we dismiss all applications for ITFS Stations that were filed prior to the adoption of the NPRM where: the applications are mutually exclusive, and the applicants filed settlement agreements subsequent to the release of the NPRM,

³⁴ *Broadband Services Order* at ¶¶ 53 & 58.

³⁵ See *Ashbacker* 326 U.S. 327 (1945).

³⁶ See *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (DC Cir. 1993) and 5 USC § 706(2)(a).

and/or applicants filed settlement agreements prior to the release of the NPRM, but the settlement agreement did not comply with our rules.

By this language the Commission did not require the dismissal of all MXed ITFS applications, but rather only those MXed applications where a settlement had been filed either subsequent to the release of the NPRM or prior to the release of the NPRM, but was defective. However, the Order does not require the dismissal of MXed applications generally, where no settlement has been filed. HITN entered into no settlements with regard to the HITN Applications. Therefore, their inclusion on Appendix E was unsupported by the actions contained in the Order and constituted error. Accordingly, such dismissals must be reversed.

G. The Staff's Claimed Effective Date for Commission Action Dismissing MXed Applications Would Render Such Action Not in Accordance With the Commission's Rules.

Section 1.103 of the Commission's Rules provides that, "the effective date of any Commission Action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules."³⁷ In this case, the Commission appears to be treating the effective date for the Commission Action on MXed applications as the date of release of the *Broadband Services Order*. While a note to 47 CFR § 1.4(b)(1) allows for licensing decisions within a rulemaking Order to have an effective date as of the release date pursuant to Section 1.4(b)(2), such a result would be premature in this case. Because the *Broadband Services Order* will not be effective until publication in the Federal Register, the geographical licensing scheme, and related rules and policies on which the dismissals

³⁷ 47 CFR § 1.103(a)

are based will not become effective until that date. Therefore, holding that the dismissals were effective as of the release date would be inconsistent with existing Commission Rules and would give premature effect to rule and policy changes without adequate notice to the public. Such a conclusion would also be inconsistent with the Commission's obligation to act in accordance with existing rules and policies until such time as those rules are properly and finally changed.³⁸ Accordingly, as of the date the Staff asserts the dismissals became effective, they were premature and based on no existing Commission rule or policy and thus would be considered contrary to law under the APA as of that date.

³⁸ See *Reuters Ltd. v. FCC*, 781 F. 2d 946, 947 & 950 (DC Cir. 1986); *Shering Corp. v. Shalala*, 995 F. 2d 1103, 1105 (DC Cir 1993); 5 USC 553 (B) & (C); *Chrysler Corp. v. Brown*, 441 US 281, 313 (1979); *Lindz v. Heckler*, 800 F. 2d 871, 878 (9th Cir. 1986); *JEM Broadcasting Co., Inc. v. FCC*, 22 F 2d 320, 327 (DC Cir 1994).

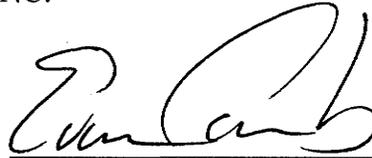
III CONCLUSION

WHEREFORE, for the foregoing reasons, The Commission's dismissal of the HITN Applications in Appendix E of its *Broadband Services Order* must be reversed and the HITN Applications for further processing and grant by limited participation auction.

Respectfully submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK<
INC.

By:



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Its Attorneys

August 30, 2004

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing Consolidated Petition for Reconsideration of Hispanic Information and Telecommunications Network, Inc. were served this 30th day of August, 2004 on the following parties via first class mail of the United States Postal Service, postage prepaid, to the following addresses:

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John F. O'Sullivan Jr.
The Board of Public Education for Savannah
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A handwritten signature in black ink, appearing to be 'J.F. O'Sullivan Jr.', written over a horizontal line.

EXHIBIT 2



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April 5, 2006

Via Electronic Filing

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

Re: Follow-Up to Written Ex Parte Submission -WT Docket No. 03-66

Dear Ms. Dortch:

This follow-up written presentation is being filed on behalf of Hispanic Information and Telecommunications Network, Inc. (“HITN”), the largest holder of Educational Broadband Service (“EBS”) spectrum in the United States, and is a supplement to the letter filed by HITN yesterday, April 4, 2006, in the above-referenced docket (attached hereto as Exhibit A). That letter concerned closing a loophole related to the Commission’s change in policy to extend allowable EBS lease durations.

It is important to note that HITN first raised this important issue in its October 23, 2003 reply comments in response to the Commission’s 1997 Notice of Proposed Rulemaking in re Amendment of Parts 1, 21 and 74 of the Commission’s Rules regarding ITFS and MMDS Spectrum, 12 FCC Rcd.22174 (1997) (“First Two-Way Order NPRM”). Since HITN put the Commission on notice of this problem in 2003 and this loophole has not yet been closed, the problem has been severely exacerbated by legacy operators abusing the Commission’s policies intended to allow for longer new two-way leases, by claiming extension of many legacy one-way video leases beyond ten years. With a further extension of the maximum allowable EBS lease term beyond 15 years, legacy operators will have the green light to continue warehousing spectrum using the same extension claims. In its 2003 reply comments, HITN wrote:

As a corollary, however, HITN proffers that the Commission does have the jurisdiction and authority to void any term(s) that are found to be unlawful or contrary to Commission rules or policy in ITFS lease agreements, over which the Commission initially took jurisdiction in 1983. In this respect,

HITN believes the Commission should not permit a commercial lessee of ITFS spectrum to, for example, extend a 10 year analog video programming based excess capacity lease entered into under the former rules that limited lease terms to a maximum 10 years, for an additional 5 year term, pursuant to a claim the Commission authorized 15 year leases in the Two-Way Order, notwithstanding that the lessee has never fulfilled the terms of the agreement to construct an analog wireless cable system. This type of activity by an ITFS lessee typically serves only to hold the ITFS licensee's channels hostage under an outdated video-only lease until the ITFS licensee enters into a new two-way data lease with the commercial lessee on its terms, preventing the ITFS licensee from entering into a new two-way data lease with a third party. The Commission can and should declare that this practice is unlawful and not permissible under its rules. The public interest requires in this instance that the Commission confirm that commercial lessees of ITFS spectrum capacity may not prevent an ITFS license holder from developing its spectrum under the current rules by a threat of enforcement of tenuous lease provisions granting an additional 5 year period to hold the spectrum hostage.

In its comments, Spectrum Market, LLC ("SM") proposes that the Commission either terminate all leases in existence at the time the new rules in this proceeding are adopted, or declare that such leases may not be extended beyond 15 years. While HITN disagrees that the Commission should terminate all leases entered into under the current rules and further disagrees that the Commission has the jurisdiction to do so, we believe SM's proposal regarding limiting lease extensions well founded but misses the mark. The lease gamesmanship being played by commercial ITFS lessees is not with respect to attempting to extend analog or one-way legacy leases beyond 15 year terms as SM suggests, but rather, as proffered by HITN, to extend those leases beyond ten year terms, in violation of the rules and policies that were in effect at the time these leases were executed. Either way one looks at this issue, the end result to the educator is the same – a lessee that has no intention of ever fulfilling the terms of its original analog video-only wireless cable contract, whatever the term, is holding the ITFS spectrum hostage and continuing to deprive the public of the development of this valuable educational resource. The Commission should declare that no ITFS lessee may extend a lease entered into prior to the release of the Two-Way Order beyond its original 10 year term or for any additional term beyond 10 years (whatever provision that may be construed to permit such extension in the lease), unless that lessee intends to promptly fulfill all of its obligations under the lease as to construction and operation of the analog video wireless cable facility contemplated thereby. Any lessee that cannot make these affirmative representations should have no right to extend such a lease under any circumstances.

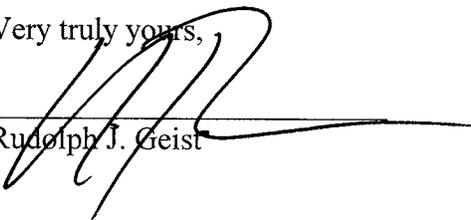
HITN Reply Comments at Section V, filed October 23, 2003 in re Docket 03-66.

In order to make the case that the Commission should close the legacy one-way video lease extension loophole discussed in more detail in HITN's April 4, 2006 letter as part of its order on reconsideration in this proceeding, HITN thought it would be useful to demonstrate to the Commission the serious nature of this problem with numerous EBS existing leases by illustrating just a few examples of the type of lease provisions that are void as against the law and public policy, and pursuant to which legacy operators have an opportunity to abuse the Commission's forward-looking extension of lease term policies for new two-way leases. As such, please find attached at Exhibit B hereto a summary of several such EBS leases entered into prior to the First Two Way Order NPRM. These leases (of which complete copies are also attached) contain terms that could be construed by a legacy operator to extend its hold on the spectrum for *decades* without having to renew the lease for two-way uses and that serve to allow that operator to prevent the licensee from making the spectrum available to a new entrant that intends to immediately construct a new wireless broadband system on the channels.¹

¹ Note that many of these leases also contain an unknown term start date because the initiation of the term is triggered by commencement of wireless cable services, construction of the wireless cable system, or service provision of the first wireless cable subscriber – none of which events in the vast majority of cases ever occurred. Therefore, these licensees have double trouble with the legacy operator, which can claim not only the lease is extended for many, many, more years based on FCC rules, but that the initial term has not yet even begun.

Please contact the undersigned counsel with any questions about this submission.

Very truly yours,



Rudolph J. Geist

Enclosures

cc: (VIA Hand Delivery w/ enclosures and via e-mail)
Fred Campbell
John Giusti
Barry Ohlson
Aaron Goldberger
Catherine Seidel
Peter Corea
Walter Strack
Joel Taubenblatt
John Schauble

EXHIBIT

A



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April 4, 2006

Via Electronic Filing

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

Re: Written Ex Parte Submission -WT Docket No. 03-66

Dear Ms. Dortch:

This letter is on behalf of Hispanic Information and Telecommunications Network, Inc. (“HITN”), the largest holder of Educational Broadband Service (“EBS”) spectrum in the United States.

In crafting final rules in the above-referenced proceeding pertaining to the maximum length of EBS leases, the Commission should make very clear in the order on reconsideration that any further extension of the allowable maximum lease term is not intended to continue allowing legacy operators a loophole not closed by the Commission when it first extended maximum allowable EBS (then ITFS) lease terms from 10 to 15 years.

When the Commission extended the maximum allowable lease term from 10 to 15 years to give operators further flexibility respecting plans to use EBS spectrum for new two-way uses under seemingly future two-way EBS leases, the Commission failed to address the issue whether a legacy operator could use the new 15 year lease term maximum to extend a legacy one-way video only use lease entered into

prior to 1997 when the First Two-Way Order NPRM¹ was issued, from a 10 year maximum lease term allowed under the old rules to a 15 year maximum term for new uses contemplated in the First Two Way-Order. As a result, legacy operators have taken the position, including with HITN and many other EBS licensees over the past 7-8 years, that legacy leases that contemplated any potential for a greater than 10 year term, were automatically extended to a 15 year term.

This has been a major problem for two important reasons. First, this has enabled operators to continue enforcing leases entered into under the old rules that contemplated one-way video uses only for a maximum term of 10 years for significantly longer terms, notwithstanding the spectrum has not been used for that purpose by most operators for at least the past 10 years. This has enabled legacy operators to warehouse and hold EBS spectrum hostage under the pretense that the FCC blessed their ability to enforce longer legacy lease terms under the guise of the new two-way rules contemplating these operators to enter into new 15-year lease terms. Second, this has prevented many EBS licensees from having full flexibility and freedom on a level playing field to negotiate new two-way lease terms with an existing operator leasing the channels or a new operator of their choice because of the threat of litigation pertaining to legacy operator claims of automatically extended over ten year one-way video lease terms purportedly condoned by the Commission.

As an example of how this could be a major problem for an EBS licensee, the Commission should consider the following potential case.² A licensee entered into an excess capacity lease with Legacy Operator X on November 1, 1995 that allowed the Operator to use Licensee's EBS channels for one-way video use for a term of 10 years, or until November 1, 2005. The lease also contemplates two additional 10-year renewal terms if FCC rules ever allow for lease terms longer than 10 years. Licensee has been receiving \$2,000 a month in lease payments throughout the term. On November 1, 2005, Licensee notifies Legacy Operator X that it is prepared to negotiate a new lease with Legacy Operator X for new two-way uses on Licensee's EBS channels, to the benefit of Legacy Operator X and Licensee, and Licensee makes a proposal for a new lease. However, Legacy Operator X does not intend to provide any two-way services on the spectrum into the foreseeable future (if ever), and responds to Licensee that pursuant to the FCC's extension in 1998 of the maximum allowable lease term to 15 years, Legacy Operator X is electing to extend the legacy lease until November 1, 2010. Around the same time, Licensee has received a proposal from New Operator Y for the lease of its EBS channels to be

¹ In re Amendment of Parts 1, 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions, Notice of Proposed Rulemaking, 12 FCC Rcd.22174 (1997) ("First Two-Way Order").

² At the request of the Commission, HITN can provide numerous and voluminous examples of leases containing this type of language that a legacy operator can rely on to extend a legacy analog one way video lease for a significantly longer term for the purpose of warehousing spectrum, as well as specific cases where this is actually occurring.

immediately developed as part of a new two-way wireless broadband system, with lease payments of \$10,000 a month.

In this example, Licensee is faced with the Hobson's Choice of having its Channels warehoused by Legacy Operator X for an additional 5 years or more (if the Commission extends allowable lease terms of longer than 15 years) because Legacy Operator X does not intend to deploy a new wireless broadband system on Licensee's Channels or Legacy Operator X desires to prevent New Operator Y from entering the market and immediately deploying a wireless broadband system. Either way, Licensee and the public lose. Licensee loses because, among other reasons, its spectrum is being warehoused indefinitely and may not be put to new uses for a long time, if ever. The public (and the Commission) loses because the spectrum is not being put to the new uses for which it is intended to serve the public interest.

To close this loophole, the Commission must specify in the order on reconsideration that for any leases contemplating one-way video only use entered into prior to the release of the 1997 First Two Way Order NPRM when the public was on notice of potentially longer lease terms for leases allowing new two way or other uses, any later Commission rules permitting longer than 10 year lease terms may not be relied on by legacy operators to cause the extension of those leases beyond then current rules in effect allowing 10 year maximum lease terms. This will serve the public interest and facilitate more immediate use of EBS spectrum for new two-way uses, and prohibit legacy operators from warehousing spectrum under legacy one-way video only leases under the pretense of a purported Commission blessing through its intent to allow longer term new two-way leases.

Very truly yours,

/s/ Rudolph J. Geist

cc: (VIA E-Mail)
Fred Campbell
John Giusti
Barry Ohlson
Aaron Goldberger
Catherine Seidel
Peter Corea
Walter Strack

Joel Taubenblatt
John Schauble

EXHIBIT

B

HITN Ex Parte Supplemental Submission – SUMMARY OF ATTACHED LEASE AGREEMENTS

WNC235 (Counterpoint Communications)

Operator: Ascutney Associates, Inc.
Date of execution: 12/11/1991
Lease term start date: 3/21/1994 – “the date Lessor is issued a license by the FCC”
Ten-year termination date: 3/21/2004
Loophole termination date: 3/21/2024 – *improper 20-year extension*.
Loophole Language: Section 1(b): “If FCC rules are modified to permit at the time of expiration of the Initial Term, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee [OPERATOR] shall have served written notice on Lessor [EDUCATOR] at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term.”

WNC236 (Santa Rosa County Schools)

Operator: Wireless Cable of Florida, Inc.
Date of execution: 2/18/1993
Lease term start date: 3/18/1994 – “date on which the FCC issues a license for the Channels for the Market”
Ten-year termination date: 3/18/2004
Loophole termination date: 3/18/2014 – *improper 10-year extension*.
Loophole Language: Section 2: “Lessee [OPERATOR] shall have the option to renew this agreement for three (3) additional sixty (60) month terms (each being hereinafter referred to individually as "Extended Term") under the same terms and conditions as contained herein, provided, however that ... with respect to the second and third Extended Terms, each of said extensions are conditioned upon (a) Lessee [OPERATOR] delivering to Licensee a written notice of its [OPERATOR'S] intention to renew no later than six (6) months prior to the end of the then current term, (b) Lessee [OPERATOR] not being in default under this Agreement at the end of the then current term, and (c) such extension of term shall be in compliance with FCC regulations and policies then in effect, and (d) Licensee's consenting to such extended Terms, such consent which shall not be unreasonably withheld. The parties recognize that lease terms exceeding ten years are currently prohibited by FCC rules.”

WNC240 (Texas State Technical Institute)

Operator: United States Wireless Cable, Inc.
Date of execution: 11/27/1990
Lease term start date: **INDEFINITE: “upon the date commercial broadcasting on the channels commences”**
Ten-year termination date: 11/27/2000? – *even a proper ten-year termination can be postponed indefinitely.*
Loophole termination date: 11/27/2020? – *improper 20-year extension, even after indefinite start of term.*
Loophole Language: Section 1(b): “If FCC rules permit at the time this Agreement expires, this Agreement shall be automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee [OPERATOR] shall have served written notice on Lessor [EDUCATOR] at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term (hereinafter referred to as the "Expiration Date"), that it [OPERATOR] elects not to renew this Agreement for a Renewal Term.”

WNC503 (The Kearney State College Foundation)

Operator: Wireless Entertainment Network
Date of execution: 1/22/1992
Lease term start date: **INDEFINITE: “upon the initiation of Lessee's [OPERATOR'S] Wireless Cable Service on the Channels”**
Ten-year termination date: 1/22/2002? – *even a proper ten-year termination can be postponed indefinitely.*
Loophole termination date: 1/22/2022? – *improper 20-year extension, even after indefinite start of term.*
Loophole Language: Section 1(b): “If FCC rules permit at the time that this Agreement expires, this Agreement shall automatically and without further notice be extended for up to two successive additional terms (each additional term is referred to as a "Renewal Term") of ten years each unless and until Lessee [OPERATOR] shall have served written notice on Lessor [EDUCATOR] at least ninety days prior to the expiration date of the Initial Term or Renewal Term (the "Expiration Date"), that it [OPERATOR] elects not to renew this Agreement for a Renewal Term.”

WNC647 (Lake City Community College)

Operator: Heartland Wireless Communications, Inc.
Date of execution: 7/20/1994
Lease term start date: 7/20/1994
Ten-year termination date: 7/20/2004
Loophole termination date: 7/20/2024 – *improper 20-year extension.*
Loophole Language: Section 1(b): “If FCC rules permit at the time this Agreement expires, this Agreement shall be automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee [OPERATOR] shall have served written notice on Lessor [EDUCATOR] at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term (herinafter referred to as the “Expiration Date”), that it [OPERATOR] elects not to renew this Agreement for a Renewal Term.”

WNC786 (Sacred Hearts Academy)

Operator: Hawaiian Broadcasting Investors 1, Limited Partnership
Date of execution: May 1994
Lease term start date: **INDEFINITE: “the date on which Hawaiian Broadcasting [OPERATOR] uses the transmission capacity on the Channels for the provision of its [OPERATOR’S] Wireless Cable Service.”**
Ten-year termination date: May 2004? – *even a proper ten-year termination can be postponed indefinitely.*
Loophole termination date: May 2034? – *improper 30-year extension, even after indefinite start of term.*
Loophole Language: Section 2.2: “Lessor [EDUCATOR] shall negotiate in good faith exclusively with Hawaiian Broadcasting [OPERATOR] and Hawaiian Broadcasting [OPERATOR] shall negotiate in good faith with Lessor [EDUCATOR] the terms and conditions on which the Term or any Renewal Term, as the case may be, shall be renewed; provided, however, that in the event the FCC rules and regulations are amended to permit the automatic renewal or extension of agreements for the utilization of transmission capacity on ITFS channels, which the parties hereby acknowledge and agree is an express condition to this proviso, then upon the expiration of the Initial Term the term shall automatically renew without any further action of the parties for an additional term which shall be of the longest duration permitted under the applicable FCC rules and regulations in force and effect at such time; and provided, further, that if a subsequent automatic renewal term also is permitted under the FCC rules and regulations in force and effect as of the date on which a second automatic Renewal Term would commence, which the parties hereby acknowledge and agree is an express condition to this further proviso, then, upon the expiration of the initial automatic Renewal Term, the term shall renew for a second Renewal Term of the same duration upon the giving of notice to Lessor [EDUCATOR] by Hawaiian Broadcasting [OPERATOR] no later than one hundred eighty (180) days prior to the expiration of the first automatic Renewal Term.”

WNC992 (Counterpoint Communications)

Operator: Onondaga Wireless, Inc.
Date of execution: 8/3/1993
Lease term start date: 3/30/1998 – “the date Lessor is issued a license by the FCC”
Ten-year termination date: 3/30/2008
Loophole termination date: 3/30/2028– *improper 20-year extension.*
Loophole Language: Section 1(b): “If FCC rules are modified to permit at the time of expiration of the Initial Term, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee [OPERATOR] shall have served written notice on Lessor [EDUCATOR] at least ninety (90) days prior to the expiration date of the Initial Term or Renewal term.”

WND220 (Sweeny Independent School District)

Operator: Wireless One, Inc.
Date of execution: 10/18/1995
Lease term start date: **INDEFINITE: “For the purposes of this Agreement, the Start Date shall be the date indicated in writing by Lessee [OPERATOR] to Lessor [EDUCATOR] that commercial broadcasting by Lessee [OPERATOR] has commenced.”**
Ten-year termination date: 10/18/2005? – *even a proper ten-year termination can be postponed indefinitely.*
Loophole termination date: 10/18/2015? – *improper 10-year extension, even after indefinite start of term.*
Loophole Language: Section 1(b): “If then allowed by FCC policy and Rules, the Initial Term shall automatically be extended for an additional ten year period upon all terms and conditions hereof.”

COUNTERPOINT COMMUNICATIONS, INC.

"C" CHANNEL GROUP

AIR TIME LEASE AGREEMENT

BURLINGTON, VERMONT

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

This Agreement which was made and entered into on the 11th day of December, 1991, by Ascutney Associates, Inc., having its mailing address as P.O. Box 186, Rexford, New York 12148, as Lessee, and Counterpoint Communications, Inc., 785 Asylum Avenue, Hartford, Connecticut 06105, as Lessor, is hereby rescinded and replaced with the following agreement between the parties.

This Agreement (hereinafter referred to as "Agreement") is made and entered into by and between Ascutney Associates, Inc., having its mailing address as P.O. Box 186, Rexford, New York 12148, as Lessee, and Counterpoint Communications, Inc., 785 Asylum Avenue, Hartford, Connecticut 06105, as Lessor.

WHEREAS, The Federal Communications Commission ("FCC") authorizes licenses for Instructional Television Fixed Service ("ITFS") channels to lease excess capacity for non-ITFS uses, 47 C.F.R. §74.391(e), Instructional Television Fixed Service (MDS Reallocation), 94 FCC 2d 1203 (1983), Reconsideration, 98 FCC 2d 129; and Instructional Television Fixed Service, 101 FCC 2d 49 (1985), Reconsideration, 59 Rad. Reg. 2d (P&F) 2d 1355 (1986), and

WHEREAS, Lessor intends to be the licensee of four (4) ITFS channels in the Burlington, Vermont, area and its environs and has determined that excess capacity exists after the fulfillment of its ITFS requirements, and

WHEREAS, Lessee is in the business of providing channels for the distribution of television programming via microwave transmission known as Multichannel Multipoint Distribution Service ("MMDS") and is desirous of leasing excess ITFS capacity, and

WHEREAS, Lessee and Lessor believe that the combination of education programming and entertainment programming will be mutually advantageous and provide a significant benefit to the general public.

NOW, THEREFORE, in consideration of the premises and of their mutual promises, undertakings, covenants, and conditions set forth herein, the parties hereto do hereby agree as follows:

1. Term of Agreement. (a) The term of this Agreement shall commence upon the date of its execution and shall extend for a period of ten (10) years from the date Lessor is issued a license by the FCC (hereinafter referred to as "Initial Term"), unless voluntarily terminated by written consent of both parties or involuntarily terminated as provided in Paragraph 11 below.

3/21/94 -
3/21/04

(b) The Commission's policies currently limit the term of the excess capacity air time lease agreements to the term of the License. If FCC rules are modified to permit at the time of expiration of the Initial Term, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee shall have served written notice on Lessor at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term. It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement, notwithstanding any provision hereof to the contrary. The expiration date of the second renewal term shall be referred to as the "Final Expiration Date." Unless Lessee provides Lessor with written consent to do so or unless Lessee has been adjudged to be in bankruptcy and is no longer a going concern, Lessor shall not negotiate or enter into a lease agreement for excess channel capacity on the ITFS channels with any individual or entity other than Lessee during this lease, except as provided for in this paragraph or Paragraph 10. In the event, after the Final Expiration Date, Lessor decides to utilize channel capacity for itself for non-

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ITFS purposes, or in the event that Lessor decides not to lease channel capacity to any individual or entity, including Lessee, or in the event that Lessor decides to lease channel capacity to any individual or entity other than Lessee, Lessor shall compensate Lessee for the fair market value of the Leased Equipment, as hereinafter defined, after which title of such equipment shall pass to Lessor.

(c) Three hundred sixty (360) days before the expiration of this Agreement and any renewal thereof, if any, Lessor and Lessee shall meet to determine if additional renewals are in the best interest of each party. If, within sixty (60) days after such meeting, Lessor and Lessee are unable to reach an agreement to renew this Agreement on appropriate terms and conditions, this Agreement shall terminate at the end of the term.

(d) In the event, subsequent to the commencement of operations, it is determined that Lessor can no longer remain an ITFS licensee, both parties agree to cooperate in identifying, selecting and licensing a properly constituted organization which will replace the Lessor as both a party to this Agreement and as the FCC licensee of the ITFS channels contemplated by this Agreement. Lessee agrees that upon completion of the licensing of a replacement organization by the FCC and the execution of a channel lease agreement between Lessee and the replacement organization, Lessor will have no further obligation to the terms and conditions of this Agreement, will not incur any penalties as a result of this change and will not be responsible for any of the expenses associated with this change. Lessor and Lessee agree to act in good faith and to use their best efforts to secure an agreement with a replacement organization. Lessor and Lessee further agree that the terms and conditions of such an agreement will be reasonable and that the parties will not unreasonably withhold approval and execution of an agreement with a replacement organization.

(e) Lessee and Lessor shall use their best efforts to negotiate either reasonable terms and conditions for an Additional Renewal or the compensation due Lessee pursuant to Paragraph 1(b). If, after six (6) months, the parties have not reached an agreement on reasonable terms and conditions for the Additional Renewal or the compensation due Lessee pursuant to

Paragraph 1(b), each party shall agree to submit the matters in dispute to the conflict resolution procedures employed by the American Arbitration Association. Subject to the State of Connecticut Civil Practice Law and Rules, the arbitrator's decision shall be binding and non-appealable, judicially or otherwise, and both parties shall share evenly in the costs of the arbitrator's services.

(f) It is understood by both parties that the Additional Renewal is conditioned on Lessor receiving a renewal of Lessor's ITFS license from the FCC. In the event Lessor's license is not renewed, the parties have no further liability to the other, unless non-renewal has occurred due to a negligent or willful act or omission on the part of Lessor, in which case Lessor shall be obligated to compensate Lessee as if Lessor chose not to lease channel capacity pursuant to Paragraph 1(b).

(g) Lessor shall file and diligently pursue all necessary and appropriate applications with the FCC and with any and all local, state and federal governmental agencies to renew its ITFS license, at Lessee's expense. Lessor shall keep Lessee informed of the status of all such applications and renewals and shall use reasonable efforts promptly to give Lessee copies of all notices and renewals. In the event Lessor and Lessee do not renew this Agreement, Lessor shall reimburse Lessee for any and all costs incurred by Lessee associated with Lessor having its ITFS license renewed, and Lessor shall compensate Lessee for the fair market value of the Leased Equipment, after which title of such equipment shall pass to Lessor.

(h) In the event that this Agreement is not renewed after the Final Expiration Date, Lessor grants to Lessee, for a period of thirty-six (36) months commencing on the Final Expiration Date, a right of first refusal to enter into a new agreement for the leasing of the air time on Lessor's ITFS channels pursuant to the following terms. If Lessor receives a bona fide written offer from a third party to lease the air time on Lessor's ITFS channels within this thirty-six (36) month period, Lessor shall give written notice to Lessee describing the entity to whom the proposed use is to be made, the fees, charges, rental or other consideration to be received for the use, the terms thereof and generally the relevant other terms and conditions. Lessee shall have a period of thirty (30) days after its receipt of such notice from Lessor in which to elect, by giving

written notice to Lessor, to use the channels for the same fees, charges, rental or other consideration for which Lessor proposed to allow usage of the channel or channels to the third person. If the fees, charges, rental or consideration to be paid by the third person was to be in whole or in part in form other than cash, or on terms other than those provided for in this Agreement in Paragraph 6, the consideration payable by the third person shall be so stated by Lessee as a sum certain in its notice of election. If Lessor does not believe Lessee's stated offer is in an amount fairly equivalent to the fair value of the consideration payable by the third person and so notifies Lessee in writing within seven (7) days after Lessor's receipt of Lessee's notice of election to so use or purchase, Lessee may elect within five (5) days after its receipt of such notice from Lessor to refer such question for determination by an impartial arbitrator and the right of first refusal of Lessee shall then be held open until five (5) days after Lessee is notified of such determination. Said arbitrator shall be chosen either by agreement of Lessee and Lessor at the time such question arises, or, at the option of either party, by referring the question to the American Arbitration Association with instructions that the American Arbitration Association select a single arbitrator under a request from the parties for expedited and accelerated determination. The determination of the arbitrator chosen under either option contained in this subparagraph shall be final and binding upon Lessee and Lessor. The parties shall share equally in the costs and fees of the arbitration. In the event Lessee shall elect to exercise its said right of first refusal, the Royalty Agreement shall be consummated within fifteen (15) days following the day on which Lessor received notice of Lessee's election to exercise the right of first refusal or the day upon which any question required to be determined, or at such other time as may be mutually agreed. The right of first refusal is terminated either by the election to use the ITFS channels by Lessee as provided herein or by notice to Lessee of Lessor's proposal to offer for use the channels or any part to a third party and Lessee's unwillingness or failure to meet and accept such a bona fide offer pursuant to the terms and procedures as set forth above, provided that such proposed use is consummated at the same fees, charges, rental or other consideration and upon the same terms as to which said

right of first refusal applied, within thirty (30) days after Lessee's right of first refusal had expired or has been specifically waived by written notice given to Lessor by Lessee.

2. Excess Capacity. Lessor has determined that there will be excess capacity available on the four (4) proposed ITFS channels to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment or other commercial programming. Lessor has further determined that, by combining its educational programming with Lessee's entertainment programming, a significant increase may be achieved in the number of persons who will have access to Lessor's educational programming at little or no additional cost.

3. Lease of Excess Capacity. Lessor agrees to lease to Lessee the "excess" capacity available on four (4) of its ITFS channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity," as that term is defined by the rules and regulations of the FCC, and available to Lessee for entertainment programming (hereinafter referred to as "Lessee Time"). Lessee Time shall initially include all but twenty (20) hours per week per channel. Not less than sixty (60) days prior to the initiation of program service, Lessor shall notify Lessee in writing of the twenty (20) specific air time hours for the forthcoming three (3) months which it intends to utilize. Thereafter, in the event Lessor subsequently wishes to exclude additional hours from Lessee Time for the provision of qualified ITFS programming up to a maximum of forty (40) hours per week per channel, Lessor shall give Lessee one (1) year's advance written notice of its intentions. The parties shall negotiate in good faith the revised schedule for the twenty-one (21) to forty (40) specific air time hours Lessor intends to utilize. Lessee or its designee will schedule the ITFS programming and use automatic switching equipment to facilitate the use of the channel capacity.

4. Integration of Lessor's Programming. Lessee agrees to integrate Lessor's programming into the overall communications service offered to subscribers, without cost charged to Lessor. Such programming shall be in a format consistent with the standards commonly accepted within the industry.

5. Transmission Facilities. (a) Upon execution of this Agreement, Lessee shall, in consultation with Lessor, select a location for the transmission point that Lessee may deem to be a suitable location for provision of the services contemplated by this Agreement. Such location will be selected to ensure the adequacy of the transmissions of the Lessor's ITFS programming to Lessor's proposed receive sites as specified in Lessor's most recent ITFS application with the FCC. Lessor, at Lessee's expense, shall file the necessary and appropriate applications with the FCC to secure a construction permit and license to operate at least four (4) ITFS channels from the location selected by the Lessee. Upon approval, Lessee, or its designee, shall, within a reasonable period of time, commence to construct the ITFS channel transmission facilities in accordance with said FCC authorization. Lessee, or its designee, shall purchase and install such transmitters, transmission line, antennas, towers, and receivers as are required to operate Lessor's ITFS channels in accordance with the provisions of such authorization. Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 8 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment.") Lessee shall supervise and be responsible for the installation of the Leased Equipment and shall retain title to the leased equipment. Unless specifically provided herein, Lessee shall retain title to the Leased Equipment which may be removed by Lessee, or its designee, upon termination of this Agreement.

(b) In addition, Lessee shall provide recording equipment and other incidental equipment ordinarily and reasonably employed in the operation of an ITFS station. Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 8 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment.") Lessee shall supervise and be responsible for the installation of the Leased Equipment, and Lessee shall retain title to the Leased Equipment.

(c) Subject to the technical direction, supervision and control of the Lessor (which direction and supervision shall be at Lessor's expense), Lessee shall be responsible, at its own cost and expense, for the technical performance as well as for emergency and preventative maintenance of all equipment at the station as well as parts and labor in connection therewith to the

level required by the FCC. Lessee shall notify Lessor of any apparent malfunction and of any corrective action taken.

(d) All personnel performing adjustments, maintenance, repairs, replacements or measurements on all station equipment shall be approved in writing by Lessor and shall hold an unexpired Radio-Telephone Operator's License, first or second class, issued by the FCC or shall be working under the supervision of a person holding such a license, or shall be otherwise qualified, in accordance with industry standards, to perform such work as may be required.

(e) Lessee shall provide Lessor with a detailed contingency plan before commencement of initial service to be implemented at such time as there is any failure of the transmission equipment. The contingency plan must meet with the Lessor's approval, which approval shall not be unreasonably withheld.

(f) Lessee is required to assist Lessor in obtaining all applicable permits, licenses, releases, rights-of-way and/or such other documents as may be reasonably required by Lessor.

(g) Lessee shall install, at no expense to Lessor, equipment specified in Attachment A.

6. Rent. (a) Commencing one hundred eighty (180) days following the initiation of service to subscribers, Lessee shall pay Lessor, on a monthly basis, fifty percent (50%) of that number which is the product of the number of channels provided by Lessor, divided by the total number of channels employed by Lessee in the provision of entertainment programming, times the net revenues derived by Lessee from the provision of ITFS, MDS and/or MMDS channels to its user(s) in the Burlington market, or the minimum monthly fee specified in Paragraph 6(b) below, whichever is higher. For purposes of this paragraph, "net revenue" shall include gross revenues derived by Lessee from the provision of ITFS, MDS and/or MMDS channels to end user(s) in the Burlington market, less all reasonable and ordinary administrative and operating expenses.

(b) The minimum monthly fee specified in Paragraph 6(a) shall be as follows: Fifty Dollars (\$50.00) per month for the successive months seven (7) through twelve (12)

following the initiation of service to subscribers, One Hundred Fifty Dollars (\$150.00) per month for the successive months thirteen (13) through eighteen (18), Three Hundred Dollars (\$300.00) per month for the successive months nineteen (19) through twenty-four (24), Four Hundred Fifty Dollars (\$450.00) per month for the successive months twenty-five (25) through thirty-six (36) and Five Hundred Dollars (\$500.00) per month for each month thereafter.

7. Right to Audit. Upon written notice to Lessee at least ten (10) business days in advance, Lessor shall have the right to inspect or audit all records and accounts covered by this and other Agreements upon which the amount of rent to which Lessor is entitled pursuant to Paragraph 8(a) is determined. Lessee shall keep, maintain and preserve complete and accurate records and accounts, including all invoices, ledgers, financial and other such records pertaining to subscribers, equipment and affiliations. Said inspection or audit may be conducted by Lessor or any other persons designated by Lessor. Lessor agrees to maintain the confidentiality of all information so obtained, unless to maintain confidentiality would seriously jeopardize a cause of action either being brought by or being defended by Lessor, in which case Lessor shall be permitted to disclose, to the minimum extent necessary, the information necessary to support or defend the cause of action.

8. ITFS Channel Equipment Lease. Lessor shall lease from Lessee all equipment purchased and installed by Lessee pursuant to Paragraph 5 of this Agreement. The terms of the lease agreement, to be entered into within sixty (60) days hereof, shall include the following:

(a) Rent. Lessor shall pay to Lessee the total amount of One Dollar (\$1.00) per year for any use of the Leased Equipment, it being understood that Lessor's provision of the air time at the rates provided in this Agreement is full consideration for Lessee's lease of equipment to Lessor.

(b) Taxes. Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, and Lessee shall be entitled to claim depreciation and investment tax credits thereunder for income tax purposes.

(c) Maintenance and Operating Costs. Lessee shall be required to bear all costs associated with maintaining and operating the Leased Equipment.

(d) Term. The term of the lease shall commence upon the date the transmission equipment is operable and available for use and shall end upon the termination of this Agreement.

9. Control Over Programming. Lessee intends that only programming of a sort which would not serve to place Lessor's reputation in the community in jeopardy will be transmitted by Lessee on the leased channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, The Movie Channel, ESPN, WTBS, WGN, Cable Network, etc. The parties recognize the difficulties inherent in specifying exact standards in this paragraph, but believe that good faith efforts on both sides can overcome whatever differences which may arise. Prior to the initiation of service by Lessee, Lessee shall provide Lessor with a list which reflects the program services which shall be used by Lessee in its service offering to its subscribers. Unless otherwise restricted by program contract, Lessor shall select from the list provided by Lessee those services which shall be transmitted on Lessor's leased channels. Lessor shall have the absolute right to deny Lessee the right to transmit on said leased channels any program which is obscene as defined by the laws of the United States or which would violate the rules and regulations of the FCC.

10. Lessor's Control in Event of Default. In the event that Lessee violates any material portion of the Communications Act of 1934, as amended, any material rule or regulation of the FCC or any material provision of the law of Connecticut or any material provision of this Agreement, or in the event that Lessee becomes insolvent, is adjudged bankrupt, files any petition for bankruptcy or reorganization or makes an assignment for benefit of creditors, then, upon expiration of thirty (30) days' prior written notice sent to Lessee by certified mail, return receipt, Lessor, at its election, may enter the premises of the transmission site and suspend or temporarily deny service until the default is fully cured. Lessee shall remain fully liable for all charges during any period in which service is suspended or temporarily denied. Lessee may negate Lessor's

election to suspend or temporarily deny service by fully curing such default prior the effective date of such suspension or denial.

11. Termination. (a) This Agreement may be terminated by Lessee upon one hundred eighty (180) days' written notice to Lessor in the event that the FCC determines that Lessor and/or Lessee is not authorized to operate said channels as contemplated by this Agreement. Should such termination occur, each party shall be entitled to retain all equipment and materials purchased or furnished by such party, except that in the event Lessee is found not authorized to operate said channels, Lessor will have the option to purchase the Leased Equipment at fair market value. There shall be a final accounting of monies due under this Agreement, and when completed, there shall be no further liability of either party to the other.

(b) Should either party be in material breach of this Agreement for the nonperformance of the obligations contained in this Agreement, this Agreement may be terminated if such breach shall continue for a period of thirty (30) days following the receipt of written notice from the non-defaulting party. The failure of Lessee to make any payment required by this Agreement shall constitute a material breach.

(c) If Lessee, subsequent to the commencement of operations, makes the determination that its business can no longer remain economically viable, then Lessee shall have the right to terminate this Agreement without any further liability on the part of either party. If such termination occurs, Lessor will have the option to purchase the Leased Equipment at fair market value and shall have the option to enter into an air time lease agreement with a third party.

12. Notice. Any notice to be given by Lessor to Lessee under any provision of this Agreement shall be by hand delivery or by certified mail to Ascutney Associates, Inc., P.O. Box 186, Rexford, New York 12148. Any notice to be given by Lessee to Lessor under any provision of this Agreement shall be by hand delivery or by certified mail to Counterpoint Communications, Inc., 785 Asylum Avenue, Hartford, Connecticut 06105.

13. Severability. Should any court or agency determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement article which is not invalid.

14. Venue and Interpretation. Venue for any cause of action by or between Lessor and Lessee shall be the City of Hartford, Connecticut, and all provisions of this Agreement shall be construed under the laws of the State of Connecticut.

15. Entire Agreement. This Agreement constitutes the entire Agreement between the parties and supersedes all prior oral or written provisions of any kind. The parties further agree that this Agreement may only be modified by written agreement signed by both parties. Neither Lessor nor Lessee may assign or transfer its rights or obligations under this Agreement without prior written consent of the other, which consent shall not be unreasonably withheld. It is expressly understood that should either party assign or transfer its rights or obligations under this Agreement, it shall be a condition of such assignment or transfer that the assignee or transferee assume the rights or obligations of the assignor or transferor under this Agreement, unless the non-assigning or non-transferring party shall waive its rights under this paragraph in writing.

16. Indemnification. Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend the Lessor from all claims, demands, causes of action, loss, investigations, proceedings, damages, penalties, fines, expenses and judgments, including attorneys' fees (herein collectively "claims") arising out of this Agreement, unless such claim arose out of a negligent act or omission of Lessor, and shall identify Lessor in insurance policies maintained by Lessee as a beneficiary of the provisions which insure Lessee against the damages arising from such causes of action. Such insurance policies shall be maintained in effect by Lessee in such types and amounts ordinarily and reasonably maintained by owners and operators of such communications systems. Lessee shall indemnify and hold harmless Lessor against any claims of libel, slander, infringement of copyright or unauthorized use of any trademark, trade name or service mark arising from the transmission of program material over the

communications channels and against all other claims by third parties arising out of Lessee's conduct in using the communications channels.

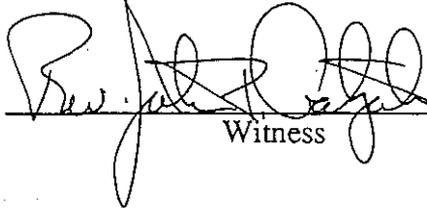
17. Compliance with Applicable Laws. Nothing in this Agreement shall require either party not to comply with applicable laws, rules, regulations, or ordinances.

18. Specific Performance. The parties hereto acknowledge and agree that a breach by either party of any of the provisions hereof will cause the other party irreparable injury and damage for which there is no adequate remedy at law. Accordingly, the terms of this Agreement shall be specifically enforced. Neither this provision nor any exercise by any party of rights to equitable relief or specific performance herein granted shall constitute a waiver of any other rights which it may have to damages or otherwise.

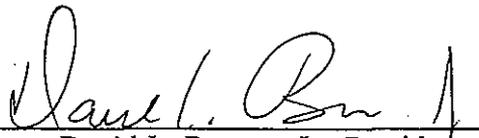
IN WITNESS WHEREOF, the parties hereto have executed this Agreement at

Hartford this 16th day of Apr. /, 1993.

ATTEST:



Witness

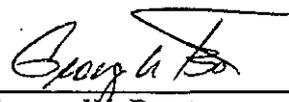
By: 

David L. Brewer, Jr., President
Counterpoint Communications, Inc.
"Lessor"

ATTEST:



Witness

By: 

George W. Bott
Ascutney Associates, Inc.
"Lessee"

3/11/93

COUNTERPOINT

AIR TIME LEASE AGREEMENT

Attachment A

The parties agree that within thirty (30) days following the receipt of a construction permit from the FCC for the four channels contemplated by this Agreement, Lessor will provide Lessee a list of twenty-five (25) locations at which Lessee will install, at no expense to Lessor, such equipment as may be necessary to receive Lessor's educational programming. Such installations shall be performed in accordance with conventional industry standards and practices and shall be completed within six (6) months from the date the construction of transmission facilities is completed by Lessee.

**ITFS CHANNEL LEASE AGREEMENT
FOR FACILITIES AND EXCESS CHANNEL CAPACITY**

This **ITFS CHANNEL LEASE AGREEMENT** (the "Agreement") executed as of February 18, 1993 by **SANTA ROSA COUNTY SCHOOLS**, a Florida body corporate located at 603 Canal Street, Milton, FL 32570 ("Licensee"), and **WIRELESS CABLE OF FLORIDA, INC.**, a Florida corporation whose principal offices are located at 1950 Landings Blvd., Sarasota, FL 34231-3310 ("Lessee"):

RECITALS

A. WHEREAS, Licensee anticipates receiving the authorizations from the Federal Communications Commission, an agency of the United States government ("FCC"), for the operation of (4) four Instructional Television Fixed Service ("ITFS") channels Group C1 - C4 in the Pensacola, Florida Service Area (the "Market"); and

B. WHEREAS, Licensee anticipates constructing and operating said ITFS channels ("Channels"); and,

C. WHEREAS, Licensee has determined that it will have excess unused channel capacity on its ITFS channels after the fulfillment of Licensee's educational requirements, Lessee desires to use said excess unused channel capacity in connection with its efforts to develop a wireless cable business in the Market, and Licensee is willing to lease such channel capacity to Lessee for all lawful purposes consistent with FCC rules and policies, as same may be amended from time to time.

NOW, THEREFORE, in consideration of the recitals and the mutual promises set forth below, the Parties agree as follows:

1. Definitions: As used in the Agreement, the following terms shall have the meanings indicated:

1.1 "Business" or "Service" means the wireless cable service, provided by Licensee, and shall include the associated subcarriers, vertical blanking intervals, OFS, ITFS, MMDS and MDS channels as defined in the rules and regulations of the FCC, used or useful in a wireless cable business.

1.2 "License Date" means the date on which the FCC issues a license for the Channels for the Market;

1.3 "Transmission Facilities" means the equipment and facilities to be owned by Lessee and used by Lessee in its Business.

1.4 "Commenced Construction" means the date that Lessee delivers to Licensee verification that sufficient equipment has been ordered with confirmed delivery dates of not more than ninety days from date of order, to complete all construction of the Transmission Facilities.

1.5 "Subscriber" means a separate household that, at the time of determination, (a) is connected to a receiving antenna or to other equipment capable of receiving directly or indirectly MMDS and ITFS transmissions, or is then entitled to possession of a Receiving Unit or such other equipment and (b) the account of which is not more than sixty days past due. Each separate user residing in or located at a nursing home, hotel, hospital, apartment building, condominium, planned unit development or similar multi-unit building, complex, facility, develop-

ment or structure shall, if such user is contractually obligated to pay for service for at least a one month period, be considered as a separate household even if billed as a part of a single account. If Lessee provides service to any user at a rate less than the rate such user would have paid if such user were located in a single family house, such user shall be counted as a fractional Subscriber, the fraction to be determined by dividing the rate paid by such user by the rate such user would have paid if such user were the only user in a single family house.

1.6 "Receiving Unit" means the antenna, down-converter, set top converter, decoder, cable and any other equipment required to receive and view MMDS or ITFS signals on a television set.

1.7 Start Date. For the purposes of this Agreement the Start Date shall be the first day of the first calendar month commencing after the first Subscriber begins receiving basic commercial service from Lessee's system over the Channels.

1.8 "Proposal" means the Response to Request for Proposal to Lease ITFS Channels dated January 22, 1993 submitted to the Santa Rosa County School Board by Lessee, the terms of which are hereby expressly incorporated herein by reference and made a part of this Agreement, unless otherwise noted herein.

1.9 "Receive Site" means a particular site which shall be equipped with Receive Equipment pursuant to the terms of this Agreement. The Receive Sites are identified on Exhibit "B" attached to this Agreement and incorporated herein by reference.

1.10 "Receive Equipment" means the particular equipment to be installed by Lessee at each Receive Site in accordance with the Proposal and the terms of this Agreement.

1.11 "Studio to Transmitter Link" means a Transmission Facility at a Licensee site with sufficient power to link ITFS programming to the Transmission Facilities defined in Section 1.3.

2. Term. ~~The term of this Agreement shall begin on the date of execution of the Agreement and shall continue for a period of sixty (60) months following the license Date. Said period shall hereinafter be referred to as the "Initial Term." Lessee shall also have the option to renew this Agreement for three (3) additional sixty (60) month terms (each being hereinafter referred to individually as "Extended Term") under the same terms and conditions as contained herein, provided, however that with respect to the first sixty (60) month Extended Term, said Extended Term is conditioned upon (a) Lessee delivering to Licensee a written notice of its intention to renew for the first Extended Term by no later than six (6) months prior to the end of the Initial Term and (b) Lessee not being in default under this Agreement at the end of the Initial Term, and further provided that with respect to the second and third Extended Terms, each of said extensions are conditioned upon (a) Lessee delivering to Licensee a written notice of its intention to renew no later than six (6) months prior to the end of the then current term, (b) Lessee not being in default under this Agreement at the end of the then current term, and (c) such extension of term shall be in compliance with FCC regulations and policies then in effect, and (d) Licensee's consenting to such extended Terms, such consent which shall not unreasonably be withheld. The parties recognize that lease terms exceeding ten years are currently prohibited by FCC rules.~~

3. Lease of Channels. Commencing on the first day of the term of this Agreement, Licensee hereby leases to Lessee all of the channel capacity for the Channels Licensee does not use for the provision of ITFS Programming on the terms and conditions set forth in this Agreement. For this purpose, channel capacity shall include all rights to transmit both video programming and data over Licensee's entire frequency spectrum. Licensee will give Lessee thirty days' advance written notice of excess channel hours available and shall make any such additional hours available exclusively to Lessee.

3.1 Licensee Use of Channels. From the date on which Licensee begins transmitting on the Channels until two (2) years after the License Date, Licensee shall transmit ITFS programming on each of the Channels for a minimum of twenty (20) hours per week, including at least three (3) hours per weekday, excluding holidays and vacation days, scheduled between 8:00 a.m. and 10:00 p.m. These minimums shall decrease or increase if the FCC changes its rules or policies concerning minimum hours of ITFS programming on ITFS channels. Parties acknowledge that Licensee will operate twenty (20) hours weekly as stated in the FCC application.

3.2 Right of Recapture. Licensee may, to the extent allowed to do so by the FCC, notify Lessee that Licensee's needs require it to transmit ITFS programming on each of the Channels for up to forty (40) hours per week, including at least six (6) hours per weekday, excluding vacations and holidays.

4. Control of Facilities. Notwithstanding anything in this Agreement to the contrary, Licensee, as the FCC licensee of the Channels, shall be responsible for the compliance with all applicable FCC rules and policies. Licensee will have control, in accordance with FCC rules and policies, of the construction, operation, management and maintenance of the Transmission Facilities to the extent necessary to comply with such rules and policies.

5. Payments. In consideration of the Licensee's agreement to lease the Channels to Lessee, Lessee agrees to make the following payments to Licensee:

5.1 Commitment. ~~Lessee shall make a non-refundable payment to Licensee of \$5,000.00 upon signing of this Agreement.~~

5.2 Recurring Monthly Fee. In consideration of the service to be provided hereunder by Licensee, and commencing on the Start Date, and continuing thereafter, the Lessee agrees to pay to Licensee a Recurring Monthly Fee in: ~~Year 1 = \$500, Year 2 = \$750, Year 3 = \$1,000, Year 4 = \$1,250, and Year 5 = \$1,500. Lessee shall pay Licensee the greater of the above amount or \$.05 per subscriber per month per set of (4) four channels.~~

5.3 Number of Subscribers Determination. The number of Subscribers in any calendar month shall be deemed to be the number of Subscribers as of the last day of the prior month plus the number of Subscribers as of the last day of the current month divided by two.

5.4 Interest. Monthly recurring fees are due and payable on the 30th of the following month. If not received by the first of the next month, a 1.0 percent per month finance charge from the due date will be assessed.

5.5 Taxes. The monthly service charge set out in this Agreement is the net charge to Lessee. If Federal, State, or local taxes (other than taxes on the income of the Licensee) are applicable, or become applicable to this service charge, it will be the responsibility of the Lessee to pay these taxes.

5.6 Audit. Lessee shall provide to Licensee a subscriber report prepared within sixty days following the end of each business quarter. The report would include a calculation of the fees owed on the subscriber count under this Agreement and compared with actual payments made. Any adjustment would then be paid within thirty days of the report.

5.7 Filing of Tariff. If required by FCC rules and regulations, the payments to be made under this Agreement shall be reflected in and subject to a Tariff filed with the FCC. If this Agreement is or becomes inconsistent in any respect with FCC regulations of Tariff provisions, such regulations or Tariff provisions, as the case may be, shall govern upon becoming effective.

5.8 Increase in Monthly Fee. If Lessee executes an Agreement with any other entity holding ITFS authorizations in the Market for a purpose and pursuant to terms similar to those established herein (the "Alternate Agreement"), and such Alternate Agreement provides for a larger monthly fee than provided in Section 5.2 hereof, then the monthly fee in Section 5.2 hereof shall be automatically increased to the same amount as the monthly fee in the Alternate Agreement, effective on the date Lessee makes its first monthly payment under the Alternate Agreement.

5.9 Services To Be Provided By Lessee. Lessee shall provide those additional services which are more particularly described and itemized on Exhibit "A" attached hereto and by this reference incorporated herein (hereinafter "Additional Services").

5.10 Installation And Maintenance Of Receiving Equipment At Receive Sites. Lessee shall, at Lessee's sole cost and expense, install and maintain Receive Equipment (as specified in the Proposal), including any maintenance necessary as a result of lightning strikes, at each Receive Site within the performance time frames hereinafter specified. Prior to Lessee's installation of Receive Equipment at any Receive Site, Lessee shall notify Licensee in writing of the specific equipment and specifications therefore which are to be installed by Lessee. Licensee, or Licensee's designated representative, shall have three (3) business days from its receipt of the notice within which to review the proposed equipment specifications. If Licensee objects to the specified equipment, Licensee shall so notify Lessee in writing of its objections within said three (3) business day time period, specifying the nature of the objection. If objection is timely made, Lessee shall take all necessary steps to satisfy Licensee's objection, provided, however, Lessee shall not be required to deviate from the Proposal in meeting such objections. If Licensee fails to notify Lessee of any objections within the objection period, it shall be conclusively presume that Licensee does not object to the proposed Receive Equipment, in which case Lessee shall be authorized to proceed with the Receive Equipment installation as proposed. ~~Receive Equipment shall be installed at all Receive Sites within two (2) months after the License Date.~~ Lessee shall be notified in writing of any alleged default in performance, and upon such notification, Lessee shall have thirty (30) days within which to cure the alleged default. If after the thirty (30) day cure period the default has not been cured, the Licensee may elect to terminate this Agreement.

5.11 Installation of Studio to Transmitter Link. Lessee shall prepare and provide to Licensee an application for filing at the FCC in Licensee's name for a microwave studio-to-transmitter link ("STL") suitable for the simultaneous transmission by Licensee of one (1) channel from Licensee's tower site to the ITFS Transmission Facilities at 1687 Quintet Road, Pace, FL. Upon the latter of the FCC's approval of the STL or the License Date as specified in Section 1.2 of the Agreement, WCF will construct the STL at its sole cost and expense, such construction to be completed within the time provided in the Agreement for the construction of the ITFS Transmission Facilities. Upon completion, the STL shall be regarded for all purposes under the Agreement as part of the Transmission Facilities as defined in Section 1.3 of the Agreement.

6. Liability Insurance. It is agreed that Licensee shall be insured as a third party named insured under any liability insurance obtained by Lessee.

7. Construction. The Parties have determined the Transmission Facilities will be located at 1687 Quintet Road, Pace, FL, and may later specify relocation of such Transmission Facilities as may be appropriate. Lessee shall bear all costs, including but not limited to consultant, design and legal fees, associated with the construction, relocation, engineering and any licenses, permits, authorizations, or approval necessary to acquire transmitter sites or obtain the use of such sites. Upon the FCC's grant of a construction permit to Licensee for the Transmission Facilities described and specified in this Section 7 and the satisfaction of all other applicable regulatory requirements, Lessee shall, at its sole cost and expense, complete construction of the Transmission Facilities prior to the point in time when five months remain before the construction permit to construct the Channels expires.

7.1 Lease of Transmission Facilities to Licensee. As consideration for Licensee entering into this Agreement, Lessee shall lease the Transmission Facilities to Licensee for a term equal to the duration of this Agreement, including renewal terms thereof for a cost of \$1.00 per year. In the event Lessee finances the Transmission Facilities, it is agreed that such financing agency shall agree to give third party notification of default and sale of financed equipment unto Licensee hereunder.

7.2 Operation and Maintenance. Subject to the provision of Section 4, Lessee shall, at its sole cost and expense, operate and maintain the Transmission Facilities in good operating condition and repair with Licensee being notified of all such repairs. All persons performing maintenance, repairs, or any other duties at the Transmission Facilities shall be technically qualified and properly licensed to perform such duties and shall work under Lessee's direct and continuing supervision and in accordance with good engineering practices consistent with industry standards. In the event transmission service is interrupted for any reason, Lessee shall notify Licensee immediately.

7.3 Signal Quality. For the purpose of arbitrating disputes regarding signal quality, Licensee agrees to designate a specific representative who shall have the authority on behalf of the Licensee to notify Lessee of any matters relating to signal quality. In the event a dispute arises as to the signal quality, the parties agree that they shall mutually select an independent consultant with technical expertise in the area so as to arbitrate the dispute. Lessee agrees that it shall be solely responsible for the cost of said independent consultant, if required.

7.4 Signal Strength. The parties recognize that the currently pending Licensee request for license is for a 10 watt system. Licensee will cooperate with Lessee in seeking to increase system wide broadcast capabilities, provided, however, that such cooperation shall be at no cost to Licensee.

8. Governmental and Third Party Authorizations. Licensee shall use its best efforts, and Lessee shall cooperate with Licensee, to obtain any and all FCC licenses, permits, authorizations or approvals required to carry out the transactions contemplated by this Agreement. Provided, however, that the Licensee shall not be required to pay for the reallocation, reconstruction, or similar costs related to the waiver of the interference protection rights of co-channel or adjacent ITFS channel facilities, as authorized under Part 74, Subpart I, of the FCC's rules. Lessee shall use its best efforts and its good offices to assist Licensee in obtaining necessary clearances from co-channel and adjacent channel ITFS operators as necessary. Licensee shall use its best efforts to acquire and maintain licenses for the Channel license, Licensee shall use its best efforts to cause such license to be renewed.

9. Programming. Lessee will initially acquire the rights to transmit programming provided by programming suppliers of the type customarily provided on cable television systems. The programming of Lessee shall be of a quality and variety that Lessee reasonably believes will be comparable to and competitive with the programming offered by the cable television services in the Service Area. Lessee recognizes that Licensee, as license holder for the ITFS channels on which excess channel capacity is made available pursuant to this Agreement, has a legitimate and significant interest in the programming which Lessee transmits. Lessee will not transmit programming rated "X" or "NC17" by the Motion Picture Association of America or any programming Licensee believes is contrary to its obligations as an FCC licensee. Lessee will give thirty days' advance written notice to Licensee of any significant changes in programming content, will consider any comments made by Licensee concerning such changes, and will provide Licensee with an opportunity for reasonable consultation concerning any such changes in advance of their implementation.

10. ITFS Receive Sites. All of the receive sites installed by Lessee shall be capable of receiving Licensee's ITFS programming, if so directed by Licensee. Unless otherwise advised in writing by Licensee, such sites shall be installed and operated by Lessee so as to receive all of Licensee's programming.

11. Lessee's Right of First Refusal. If, at any time after the date of the execution of this Agreement, Licensee shall determine to sell, convey, assign or otherwise dispose of the licenses and authorizations for the Channels, Licensee shall notify Lessee of said intent at least sixty (60) days before Licensee notifies any other party. If, at the time of such notification, Lessee is eligible to be licensed to operate such Channels, Lessee may, at its sole option, submit to Licensee a proposal to purchase the Channels and Licensee agrees to review and give due consideration to said proposal. In the event Licensee shall accept this proposal, and in the further event the transfer of such licenses and authorizations shall require FCC consent or approval, Licensee shall use its best efforts to assist Lessee in all reasonable ways in securing of such consent or approval, and the consummation of and payment of the purchase price with respect to the sale of assets subject to Lessee's exercised option hereunder shall be conditioned upon the receipt of FCC consent or approval.

12. Representations and Warranties of Lessee. Lessee represents and warrants as follows:

12.1 Organization. Lessee warrants that it is duly organized, validly existing and in good standing under the laws of the State of Florida. Lessee is qualified or otherwise entitled to do business in all jurisdictions in which such qualification or entitlement is required by reason of its business, activities, or ownership or property. Lessee has all requisite power and authority to own its properties and to carry on its business. Lessee has all requisite power to execute, deliver, and subject to the regulatory authority of the FCC, perform this Agreement.

12.2 Authorization. All necessary actions on the part of Lessee to authorize the execution and delivery of this Agreement, and the performance of the obligations of Lessee herein, have been taken. This Agreement is valid and legally binding upon Lessee and enforceable in accordance with its terms except to the extent that enforceability thereof may be limited by bankruptcy, insolvency or the laws relating to the enforcement of creditors' rights or by the application of equitable principles.

12.3 No Violation. The execution, delivery and performance of this Agreement and all actions and transactions contemplated hereby: (i) will not violate any provision of law or of the Articles of Incorporation or Bylaws of Lessee, any order of any court or other agency of government to which Lessee is party or by which it or any of its properties is bound, and (ii) will not violate, be in conflict with, result in a breach of or constitute (with notice or lapse of time or both) a default under any applicable law, order or regulation, indenture, agreement or other instrument to which Lessee is a party or by which it or any of its properties is bound and which has not been waived or consented to, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of its property or assets.

12.4 Reliance. Licensee would not enter into this Agreement but for its reliance upon the foregoing representations and warranties of the Lessee.

13. Defaults. For purposes of this Agreement, it shall be an "Event of Default" hereunder if:

13.1 Payment. Lessee fails to make any payment due and payable under this Agreement within thirty days after the date upon which a payment is due hereunder; or

13.2 Representations or Warranties. If any of the material "Representations or Warranties" of the Lessee prove at any time to be incorrect; or

13.3 Breach of Covenant. Lessee materially breaches any covenant or agreement herein or fails to comply with any material provision of this Agreement, and such breach of failure continues for thirty days after notice thereof shall have been sent by Licensee to Lessee.

13.4 Licensee's Rights in Event of Default. In the Event of Default by Lessee, Licensee shall be entitled to terminate this Agreement, at its sole and exclusive election, upon written notice to Lessee, and Lessee's right to use the channel capacity of the channels shall immediately cease. In such event, Licensee shall retain the Commitment

Fee paid under Section 5.1 and any Monthly Fees paid under Section 5.2 as its sole remedy except as provided in Section 13.5.

13.5 Purchase of Equipment under Default. In the event of the Default by Lessee or termination of this Agreement, the Licensee shall have the right to purchase Lessee's transmitting equipment for the greater of (i) fair market value or (ii) a depreciated value based on a straight line five-year depreciation schedule calculated monthly. Fair market value shall be determined by an independent appraiser selected by each party (who in turn select a third independent appraiser) and the arithmetic average of the three appraisals will constitute the fair market value.

14. Indemnification. Each party shall indemnify, defend and hold the other party harmless from any and all claims, damages, causes of action, penalties, statutory damages, interest, attorney's fees and costs and expenses, including attorney's fees arising out of any transmission over the Transmission Facilities that is obscene or defamatory, that violates applicable federal or state lottery laws, the Communications Act of 1934, as amended, or the rules and policies of the FCC, or that infringes in any respect the copyright, trademark, property or other rights of any person. For purposes of this provision, Licensee's programming consists of any material transmitted to satisfy its programming obligations to the FCC and any material transmitted for its own purposes; Lessee's programming consists of all other transmissions. Lessee shall maintain liability, property damage and errors and omissions insurance, in amounts judged adequate by industry standards, to cover its obligations under this section. Upon request, Lessee shall furnish Licensee with insurance certificates evidencing such current insurance policies. This indemnification shall include the providing of defense on behalf of Licensee, including Licensee's right to select counsel, and to have all reasonable attorney's fees and reasonable costs, taxable and nontaxable to be paid by Lessee.

15. Representations, Warranties and Covenants of Licensee. Licensee represents and warrants as follows:

15.1 Authorization. Licensee has all requisite power and authority to enter into this Agreement and to perform the obligations to be performed by it under this Agreement including but not limited to the FCC authorization referred to in the Recitals. This Agreement constitutes a valid, binding and enforceable obligation of Licensee.

15.2 No Violation. The execution and delivery of this Agreement by Licensee and the performance of Licensee's obligations hereunder are not in violation or breach of, do not conflict with or constitute a default under, and will not accelerate or permit the acceleration of the performance required by, any of the terms or provisions of any note, debt instrument, security agreement or mortgage or any other contract or agreement, written or oral to which Licensee is a party or by which any of its assets or properties are bound and will not be an event which, after notice or lapse of time or both, will result in any such violation, breach, conflict, default, or acceleration or under any law, judgment, decree, order, rule or regulation of any governmental authority or applicable to Licensee and will not result in the creation or imposition of any lien (whether or not perfected), encumbrance, equity or restriction in favor of any third person upon any of the properties of Licensee; provided, however, that the Licensee shall not be in default of this provision if the FCC determines that any provision of this Agreement, or the Agreement as a whole, violates FCC rules or policies or the

Communications Act of 1934, as amended. In such event, the Parties shall negotiate in good faith such changes to the Agreement so as to effect compliance with FCC requirements.

15.3 **Reliance.** Lessee would not enter into this Agreement but for its reliance upon the foregoing representations and warranties of the Licensee.

16. **Licensee Access to Records.** From time to time and upon reasonable notice to Lessee, Licensee or its accountants or attorneys shall have the right to request information or be permitted at all reasonable times to inspect and copy any and all records of the Lessee which Licensee or its accountants or attorneys reasonably consider necessary to verify Lessee's compliance with the terms and provisions of this Agreement. It is understood by Licensee that such information is, to the extent permitted by Florida law, to be held in confidence and not disclosed to any third parties without prior consent of Lessee.

17. **Notices.** All notices, requests, consents and other communications hereunder shall be in writing and shall be effective upon receipt, in each case addressed:

If to Licensee, to:

Mr. Bennett C. Russell
Santa Rosa County Schools
603 Canal Street
Milton, FL 32570-6706

If to Lessee, to:

Mr. Rod Warner
Wireless Cable of Florida, Inc.
1950 Landings Boulevard, Suite 110
Sarasota, FL 34231-3310

provided, however, that if any party shall have designated a different address by notice to the others, then to the last address so designated.

18. **Waivers.** Any waiver by any Party of any breach of or failure to comply with any provision of this Agreement by the other Party shall not be construed as, or constitute, a continuing waiver of such provision, or a waiver of any other provision of this Agreement.

19. **Complete Agreement.** This Agreement (which for purposes hereof includes the Proposal) sets forth the entire understanding of the Parties hereto and supersedes all prior agreements, covenants, arrangements, communications, representations or warranties, whether oral or written, by any Party (or any officer, employee or representative of any Party). To the extent any provisions of this Agreement shall be inconsistent with the provisions set forth within the Proposal, the terms and provisions of this Agreement shall supersede and control.

20. **Governing Law; Construction.** This Agreement shall be construed and enforced in accordance with and governed by the internal substantive laws of the State of Florida and of the United States of America. The heading of the Sections of this Agreement are inserted for convenience of reference only and shall not be deemed to constitute a part hereof. Unless otherwise stated, references in this Agreement to sections refer to the Sections of this Agreement.

21. **Force Majeure.** If by reason of force majeure either Party is unable, in whole or in part, to carry out its obligations hereunder, said party shall not be deemed in violation or default, during the continuance of such inability. The term "Force Majeure", as used herein, shall mean the following: acts of God, acts of public enemies; orders of any kind of the government of the United States of America or the State of Florida or any of their departments, agencies, political subdivision, or officials, or any civil or military authority; insurrections; riots; epidemics; landslides; lightning; earthquakes; fires; hurricanes; volcanic activity; storms of extraordinary force; floods; washouts; droughts; civil disturbances; explosions; or any other cause or event not reasonably within the control of the adversely affected party.

22. **Amendment, Termination.** This Agreement may be amended or terminated only by an instrument in writing duly executed by the Parties.

23. **Counterparts.** More than one counterpart of this Agreement may be executed by the Parties hereto, and each fully executed counterpart shall be deemed an original.

24. **Dealings with Third Parties.** Neither Party is, nor shall either Party hold itself out to be, vested with any power or right to contractually bind, act on behalf of the other as its contracting broker, agent or otherwise for committing, selling, conveying or transferring any of the other Party's assets or property, contracting for or in the name of the other Party, or making any contractually binding representations as to the other Party which shall be deemed representations contractually binding such Party.

25. **Severability.** If any provision of this Agreement is declared void by any court of competent jurisdiction, the validity of any other provision of this Agreement shall not be affected.

26. **Survival.** This Agreement shall be binding upon and inure to the benefit of the Parties hereto, and their respective assigns, heirs, successors and legal representatives.

27. **Assignment.** This Agreement may be assigned by Licensee or Lessee provided that that Party obtains the prior written consent of the other Party, which consent shall not be unreasonably withheld. It shall not be unreasonable for Licensee to withhold consent to an assignment by Lessee if Licensee, after review of the intended Assignee's principals and the intended Assignee's financial resources and capitalization reasonably determines that the intended Assignee is less able to fully perform the Agreement than the Lessee.

28. **Attorney's Fees.** If it shall be necessary for either the Licensee or Lessee to employ an attorney to enforce their respective rights pursuant to this Agreement because of the Default of the other Party, the defaulting Party shall reimburse the prevailing Party for reasonable attorney's fees.

29. **No Third Party Beneficiaries.** It is not the intent of either Licensee or Lessee that there be any third party beneficiary to this contract, and this contract in exclusively for the benefit of Lessee or Licensee or their respective assigns.

30. **Independent Relationships.** Nothing in this contract shall be construed as creating an employer-employee relationship by and between Licensee and Lessee, and Licensee shall not be held or responsible for the acts or omissions of the Lessee.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized officers as of the day and year first above written.

Licensee

Santa Rosa County Schools

Lessee

Wireless Cable of Florida, Inc.

By: Bennett C Russell
Its: Superintendent

By: Rod Warner
Its: PRESIDENT

2/16/93

EXHIBIT "A"**ADDITIONAL SERVICES**

1. Homebound Students. Lessee will provide free installation of Receiving Units at the residences of all homebound students as directed by the School Board, or their designee. The equipment shall be maintained at said site by Lessee, free of charge, for the duration of the student's disability which prevents that student from attending school. Homebound students will receive the Basic service at no charge.

2. Internship Position. Lessee will, for each school year during which this Agreement shall remain in full force and effect, provide a paid student internship position (at minimum wage), which internship shall be awarded by the Licensee, at the Licensee's discretion. The specific hours of employment shall be determined by Licensee, after consultation with Lessee.

3. Consultation. Lessee agrees, during the term of this Agreement, to provide reasonable consultation services to the Licensee with respect to ITFS related equipment and service, provided that such assistance shall not involve any out of pocket expenses to be incurred on behalf of the Lessee.

EXHIBIT A

TS Tech.

UNITED STATES WIRELESS CABLE, INC.

*Group A
McAllen*

ITFS AIRTIME LEASE AGREEMENT
WITH APPLICATION FOR LICENSE PROVISIONS

This Airtime Lease Agreement (hereinafter referred to as the "Agreement"), made and entered on this 27 day of November, 1990 by Texas State Technical Institute, having its principal place of business at Harlingen, Texas ("Lessor") and UNITED STATES WIRELESS CABLE, INC., having its principal place business at 1012 Mopac Circle, Suite 100, Austin, Texas 78746 ("Lessee").

WHEREAS, Lessor is a qualified educational entity under FCC Rules;

WHEREAS, Lessor wishes to secure the appropriate authorizations from the Federal Communications Commission ("FCC") to construct and operate an Instructional Television Fixed Service ("ITFS") facility in the McAllen greater metropolitan area (the "Area") on four (4) channels (the "Channels") in order to distribute educational programs to the public;

WHEREAS, Lessor contemplates that some excess air time will be available on said facility;

WHEREAS, the FCC has authorized ITFS licensees to so lease excess channel capacity to non-ITFS users;

WHEREAS, Lessee is in the business of providing channels for the distribution of television programming via microwave transmissions known as the Multi-Channel Multi-Point Distribution Service ("MMDS") and is desirous of leasing such excess ITFS capacity from Lessor; and

WHEREAS, Lessor and Lessee believe that the combination of educational programming and entertainment programming will be mutually advantageous and provide a significant benefit to the general public in the area.

NOW, THEREFORE, in consideration of the premises and of their mutual promises, undertakings, covenants, and conditions set forth herein, Lessor and Lessee do hereby agree as follows:

1. Term of Agreement.

(a) Initial Term. Subject to the provisions for earlier termination contained in Paragraph 11 hereof, the initial term of this Agreement shall commence upon the date commercial broadcasting on the channels commences and shall continue in full force and effect through the date of expiration of the FCC term of Lessor's ITFS license (said period of effect is hereinafter referred to as the "Initial Term".)

(b) Renewal Term. If FCC rules permit at the time this Agreement expires, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee shall have served written notice on Lessor at least ninety (90)

days prior to the expiration date of the Initial Term or Renewal Term (hereinafter referred to as the "Expiration Date"), that it elects not to renew this Agreement for a Renewal Term. It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement, notwithstanding any provision hereof to the contrary.

(c) Additional Renewals. One hundred eighty (180) days before the expiration of this Agreement and any renewal thereof, if any, Lessor and Lessee shall meet to determine if Additional Renewals are in the best interest of each party. If, within one hundred eighty (180) days after such meeting, Lessor and Lessee are unable to reach an agreement to renew this Agreement on appropriate terms and conditions, this Agreement shall terminate.

(d) Right of First Refusal to Lease. In the event that this Agreement is not renewed, Lessor hereby grants to Lessee, for a period of one (1) year commencing on the last day of the Term hereof, a right of first refusal to enter into a new agreement for the leasing of the airtime on Lessor's Channels pursuant to the following terms. If Lessor receives a bona fide written offer from a third party to lease the airtime on Lessor's Channels within said one (1) year period, Lessor shall transmit the same in writing to Lessee as Lessor's offer and Lessee shall then have the right for sixty (60) days after its receipt of said offer to accept said offer. If, during said sixty (60) day period, Lessee shall fail to accept such offer, its option hereunder as to such offer shall terminate and, then and only then, may Lessor so agree to lease

such airtime to a party other than Lessee. Thereupon, Lessor shall have the right to lease the airtime on its Channels to, and only to, the aforesaid bona fide prospective lessee at the identical price, terms and conditions as were offered to Lessee. Lessor may not accept said offer with any modification to its price, terms and/or conditions in any respect without first again providing Lessee with written notice of and the right to accept the modified offer.

(e) At Lessee's expense, Lessor shall file all necessary and appropriate applications with the FCC and, as required by law, with any and all other local, state, and federal governmental agencies to maintain and renew its ITFS license and any associated authorization.

(f) Operation During Extended Term. If Lessor and Lessee are unable to reach agreement for Additional Renewals, Lessee shall continue to lease the Channels for a period of six (6) months after the Expiration Date of this Agreement on the same terms and conditions as are provided for in this Agreement, in order to afford each party an opportunity to prudently avail itself of alternative distribution facilities. On the last day of this six (6) month period (the "Extended Expiration Date"), Lessee may cease to lease the Channels and this Agreement will terminate.

2. Excess Capacity. Lessor has determined that there will be excess capacity available on the four (4) ITFS Channels to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment or other commercial

programming. Lessor has further determined that, by combining its educational programming with Lessee's entertainment programming, a significant increase may be achieved in the number of persons who will have access to Lessor's educational programming at no transmission cost.

3. Lease of Excess Capacity.

(a) Lessor agrees to lease to Lessee the "excess" capacity available on all four (4) of its ITFS Channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity," as that term is defined by the Rules of the FCC, specifically Section 74.931 thereto, and shall be available to Lessee for entertainment programming (hereinafter referred to as "Lessee Time"). Unless otherwise prohibited by the Rules of the FCC, Lessee Time shall include all capacity made available on all channels made available through the use of Comband or other similar technologies which allow the division of an ITFS channel into two or more discrete video channels, each of which shall hereinafter be referred to as "Sub-ITFS Channels." Lessor also agrees to permit Lessee to channel map all channels subject to FCC rules and regulations. Lessor reserves for itself a minimum of twenty (20) hours per week per ITFS channel between the hours of 8:00 a.m. and 4:00 p.m. Monday through Saturday, to be used for ITFS scheduled programming, including a minimum of three (3) hours per day per channel per Weekday (Monday through Friday, excluding weekends and holidays). (Such time is referred to herein as "Lessor

Reserved Time.") In addition, Lessor preserves for itself for any expanded ITFS programming, an additional twenty (20) hours per week per channel, between the hours of 8:00 a.m. and 4:00 p.m. Monday through Friday. (Such time is referred to herein as "Lessor's Preserved Time.") Not less than thirty (30) days prior to the initiation of program service, Lessor shall provide Lessee in writing with a schedule containing the specific Lessor's Reserved Time and Lessor's Preserved Time airtime hours which it intends to utilize. Thereafter, in the event Lessor subsequently wishes to modify the schedule to recapture additional hours from Lessee Time for the provision of qualified ITFS programming, up to a maximum total of forty (40) hours per week per ITFS channel between the hours of 8:00 a.m. and 4:00 p.m. Monday through Friday, Lessor shall provide Lessee with three (3) months' advance notice of any revision to its schedule of the specific air time hours Lessor intends to utilize. In the event that Lessor notifies Lessee it intends to utilize more than forty (40) hours per week per ITFS channel, Lessee shall have the option of terminating this Agreement pursuant to Subparagraph 11(d) hereof.

(b) Termination Due To Insufficient Capacity. If Lessor exercises its rights to use air time in excess of forty hours per channel per week pursuant to paragraph 3(a), Lessee shall have the right to terminate this Agreement following sixty (60) days prior written notice to Lessor. In the event of such termination, Lessor shall fairly compensate Lessee for its loss, including damage to its business, provided that Lessee reasonably demonstrates that

such excess use is so significant that it makes Lessee's use of the ITFS station economically nonviable. If the parties are unable to agree on the appropriateness or the amount of such compensation, the matter shall be submitted to arbitration whereby each party selects one arbitrator, which arbitrators, in turn, select a third arbitrator and that third arbitrator will make the final determination, which shall be binding on both parties. Each party will pay the cost of its selected arbitrator and equally share the cost of the third arbitrator.

(c) Notwithstanding the foregoing, Lessor shall retain control of the subcarriers and vertical blanking intervals (hereinafter referred to as "VBI's") of one channel with Lessee having use of all subcarriers and vertical blanking intervals on all other channels.

4. Technical Changes in Channel Operation and Equipment for Lessor's Use.

(a) Lessor recognizes the mutual benefits and technological advantages of the use of encoding methods for program security, equipment signaling and individual addressability control over unauthorized equipment use. Lessor agrees that its program services and/or airtime use will not cause harm or interfere with Lessee's current or future signal or other such technical needs utilized for the operation and services provided by the system. Furthermore Lessor will not, by its own action or through a third party, utilize any part of its licensed frequency spectrum to

create or operate a service that is in competition with Lessor's current, planned or future service over the system.

5. Integration of Lessor's Programming. At Lessor's request, Lessee agrees to endeavor to integrate certain of Lessor's programming into the overall communications service offered to Lessee's Subscribers. This integration shall include, but shall not be limited to, at the sole discretion of Lessee, listing Lessor's material in program guides produced for subscribers; and full attribution to Lessor as the source of such material of Lessor.

6. Technical Facilities.

(a) Upon execution of this Agreement, Lessee shall, in consultation with Lessor, co-locate the Transmission Point for provision of the services contemplated by this Agreement with the MMDS and/or other facilities Lessee operates under lease agreement in Lessor's designated market. At Lessee's expense, Lessor shall prepare and file with the FCC any appropriate applications or amendments to previously filed applications, to secure a license to operate the four (4) Channels from said location. Lessee shall provide all legal and/or engineering personnel for this purpose or will have the right to approve any expenses incurred by Lessor in advance of Lessor incurring such expenses. If, upon reviewing Lessor's application, the FCC directs Lessor to amend, revise or modify its application, and/or the terms of this Agreement to comply with FCC rules or policies, Lessor and Lessee shall cooperate to mutually agree upon such changes and Lessor will

expeditiously so amend its application. Upon FCC grant of the application, by Final Order, Lessee, or its designee, shall, within a reasonable period of time, commence and, not later than eighteen (18) months after the date of a grant of the construction permit, complete construction of the ITFS channel transmission facilities in accordance with said FCC authorization(s). At its expense, Lessee, or its designee, shall design, engineer, purchase, and install such transmitters, transmission line, antennas, and receivers as are required to operate the ITFS channels in accordance with the provisions of such authorization(s). Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 9 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment.") Lessee shall supervise and shall be responsible for the installation of the Leased Equipment and shall retain title to the Leased Equipment. Lessee shall maintain adequate casualty and liability insurance to cover all Leased Equipment installed pursuant to this Agreement. For purposes of this Agreement, a "Final Order" means a written action or order of public notice issued by the FCC granting the application and issuing the conditional license for the Channels to Lessor: (a) which has not been reversed, stayed, enjoined, set aside, annulled or suspended, and (b) with respect to which (i) no requests have been filed for administrative or judicial review, reconsideration, appeal or stay and the time for filing any such requests, and the time for the FCC to set aside the action on its own motion, has expired, or (ii) in the event of review,

reconsideration or appeal, the grant of the application and issuance of the conditional license has been affirmed and the time for further review, reconsideration or appeal has expired.

(b) Modification of Transmission Point. Lessor agrees to change the Transmission Point specified in its application or FCC authorization to any previous location requested by Lessee, and, in such event, to file with the FCC any necessary and permissible amendment to the application for the Channels or any necessary and permissible modification application or notification consistent with the FCC's Rules. Lessee shall pay for Lessor's actual costs and expenses, including legal and engineering fees, actually incurred by Lessor to prepare, file and prosecute such amendment, application or notification, provided that Lessee has approved the amount of such expenses in writing prior to their having been incurred by Lessor and Lessor has provided Lessee with satisfactory documentation of such expenses.

(c) Receive Facilities. At Lessee's expense not to exceed \$400.00 per location, Lessee shall construct receive facilities at up to twenty (20) locations in the Area to be selected by Lessor and capable of receiving the signal transmitted over the ITFS channels, including one (1) location to be selected as Lessor's studio or Area headquarters capable of simultaneously receiving and monitoring all of Lessor's signals transmitted over the ITFS channels. In the event that Lessor requests construction of a receive location that includes the wiring of a master antenna system or similar multi-receiver configuration, Lessee shall

install the extra wiring required only if reimbursed by Lessor for its actual costs. Any equipment so used in the construction of the aforesaid twenty (20) locations shall, upon the initiation of operation of the system, become the property of the Lessor. In addition, all equipment installed at Lessor's expense shall remain the Lessor's property. All other receive equipment will remain the property of Lessee.

(d) Lessee shall provide, at its sole cost and expense, suitable space at the Transmission Point for the ITFS channel antenna(s) and transmitters, and TVRO satellite antenna. Lessor shall, where possible, co-locate its production facility with Lessee's production facilities. In the event that Lessee's production facility cannot be co-located with the Transmission Point, Lessee and Lessor shall mutually arrange for the availability of telephone transmission lines necessary to carry the Lessor's programs from its facility to the Transmission Point. However, if requested by Lessee, Lessor will apply for and obtain any FCC authorizations necessary for a sufficient number of microwave point-to-point studio-to-transmitter links ("STLs") for such purpose. Upon receipt of such authorizations, Lessee, at Lessee's expense, will design, obtain and install the equipment necessary for such STLs. Such equipment will become part of the Leased Equipment. Such STLs will be available for use by Lessee for any purpose, including, but not limited to, the transmission of data.

(e) Power Increase. If Lessee so requests, Lessor will file an amendment to its application for the Channels or a modification application with the FCC seeking authority to increase the output power of the ITFS Channels to a higher level requested by Lessee, provided that such higher level will not be reasonably anticipated to cause harmful electrical interference to any other radio transmission facility for which an application has previously been accepted by the FCC or authorization granted by the FCC, and which is entitled to protection from such interference under FCC rules. In the event that said authorization for power increase is obtained, Lessee, at its sole expense, shall provide and install appropriate amplifiers and related equipment in order to effect said power increase and such amplifiers and equipment shall thereupon become part of the Leased Equipment. Lessee shall arrange for and pay for all costs, including legal and engineering fees associated with said application and power increase.

7. Fees.

(a) Commencing on the start up of commercial broadcasting and continuing thereafter throughout the Initial Term and any Renewal Term of the Agreement, Lessee shall pay to Lessor as consideration for the Channels provided to Lessee hereunder the greater of \$.08 (8 cents) per subscriber per month for the four (4) channels or the following minimum monthly royalty payments: For the first twelve (12) months: \$300.00 per month. Beginning on the 13th month and ending on the 36th month: \$400.00 per month. For each month after the 36th month until termination of this

Agreement: \$500.00 per month. Lessor agrees to cooperate with Lessee to comband Lessor's receiver sites to gain additional required time for educational programming if feasible under FCC rules and regulations to minimize Lessee's requirements for comband equipment at its receive sites.

(b) Right to Audit. Lessee and Lessor shall, while this Agreement is in force, keep, maintain and preserve complete and accurate records and accounts, including all invoices, correspondence, ledgers, financial and other records pertaining to Lessee's and Lessor's charges hereunder, and such records and accounts shall be available for inspection and audit at the respective offices of Lessee and Lessor at any time or times during the time service is being provided to Lessee hereunder or within ninety (90) days thereafter, during reasonable business hours, by Lessee or Lessor or their respective nominees. Notwithstanding the foregoing, Lessee and Lessor shall be entitled to only one audit of each other's records and accounts during any six-month interval. Lessee and Lessor shall provide each other with five (5) business days' advance written notice to their intent to inspect said records and accounts prior to being allowed to do so. Lessee and Lessor shall not interfere with each other in the exercise of their respective rights of inspection and audit set forth herein. The exercise in whole or in part at any time or times of the right to audit records or accounts or of any rights herein granted or the acceptance by Lessee or Lessor of any statement or remittance tendered by or on behalf of either Lessee or Lessor shall be

without prejudice to any rights or remedies of either of them and shall not preclude Lessee or Lessor thereafter from disputing the accuracy of any such statement or payment.

(c) Lessee shall arrange for and pay Lessor's legal, engineering and related expenses actually incurred in prosecuting its application for the authorizations and documents by Lessor.

8. Arbitration of Dispute. In the event that Lessee or Lessor cannot resolve any dispute arising under this Agreement, such dispute may be resolved pursuant to arbitration pursuant to the procedures of the American Arbitration Association, and the decision of the Arbitrator as provided for therein shall be final and shall bind both Lessor and Lessee. Such dispute shall not in any way result in a default hereunder unless the award of the Arbitrator is not complied with. All information obtained by Lessee or Lessor during such disputes shall be maintained on a confidential basis.

The Lessee and Lessor shall each pick their own arbitrator. These two shall then pick a third arbitrator. Each shall pay for their own selected arbitrator and shall share the cost of the third arbitrator equally.

9. ITFS Channel Equipment Lease. Lessor shall lease from Lessee all Leased Equipment. The terms of the lease agreement, to be entered into prior to commencing construction shall include the following:

(a) Rent. Lessor shall pay to Lessee the total amount of One dollar (\$1.00) per year for any use of the Leased Equipment,

it being understood that Lessor's provision of the air time at the rates provided in this Agreement is the major consideration for Lessee's lease of the equipment to Lessor.

(b) Taxes. Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, and Lessee shall be entitled to claim depreciation and investment tax credits thereunder for income tax purposes.

(c) Maintenance and Operating Costs. Lessee shall be required to bear all costs associated with maintaining, upgrading and operating the Leased Equipment.

(d) Term. The term of the lease shall commence upon the date actual construction begins and shall end upon the termination of this Agreement.

10. Control Over Programming. Lessee intends that only programming of a sort which will not serve to place Lessor's reputation in the community in jeopardy will be transmitted by Lessee on Lessor's channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, the Movie Channel, ESPN, WTBS, Cable News Network, etc. The parties recognize the difficulties inherent in specifying exact standards in this Paragraph, but believe that good faith efforts on both sides can overcome whatever differences which may arise. Lessor shall have the absolute right to deny Lessee the right to transmit on its leased channels any program which is obscene as defined by the laws

of the United States or which would violate the rules and regulations of the FCC or which in the sole opinion of Lessor is not acceptable to Lessor.

11. Termination.

(a) This Agreement may be terminated at the option of Lessee upon thirty (30) days' written notice to Lessor in the event that the FCC has not granted an ITFS authorization for the Channels to Lessor within eighteen (18) months from the date this Agreement is signed.

(b) If Lessor's FCC authorization is ever terminated or revoked, this Agreement will terminate. Should such termination occur, each party shall be entitled to retain all equipment and materials purchased or furnished by such party. There shall be a final accounting of monies due under this Agreement, and when completed, there shall be no further liability of one party to the other.

(c) Termination by Reason of Default and Nonperformance.
At the option of the non-defaulting party, this Agreement may be terminated upon the material breach or default by the other party of its duties and obligations hereunder if such breach or default shall continue for a period of thirty (30) consecutive days after such party's receipt of notice thereof from the non-defaulting party. Failure to make any payment required under Paragraph 7 hereof shall, if such failure continues for a period of thirty (30) days after written notice thereof to Lessee, constitute a material breach of this Agreement by Lessee and, in such event, Lessor may

elect to cancel and terminate this Agreement. In the event of termination pursuant to this Subparagraph, such termination shall not affect or diminish the rights of claims or remedies available in equity or at law to the non-defaulting party arising by reason of such breach or default. Lessor's failure to maintain its license authorization with the FCC shall constitute a default by Lessor. In such event, Lessor may become liable in damages under Section 3(b) to Lessee.

(d) Termination by failure of Lessee's business plans.

Prior to starting actual construction of the channels, Lessee shall have the option to terminate this agreement by notifying Lessor, in writing, that circumstances exist with reference to the transaction contemplated by this Agreement which would interfere with Lessee's business plan. In the event of such termination, neither party shall have any further obligation to the other, except that Lessee shall reimburse Lessor for any out-of-pocket expenses previously approved by Lessee incurred by Lessor.

(e) Early termination by Lessee. Lessee may terminate this Agreement at any time for any reason by providing Lessor with six (6) months prior written notice. In such event, Lessor shall have rights to purchase leased equipment as defined in Section 3.

12. Notice. Any notice to be given by Lessor to Lessee under any provision of this Agreement shall be by hand delivery or by prepaid overnight express courier to President. Any notice to be given by either Lessee or Lessor under any provision of this

Agreement shall be at such location as may be designated by each to the other.

13. Severability. Should any court or agency, including the FCC, determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement provision which is valid.

14. Venue and Interpretation. This Agreement shall be governed by, and construed and enforced in accordance with the Communications Act of 1934, as amended, the rules and policies of the FCC and the laws of the State of Texas.

15. Entire Agreement. This Agreement constitutes the entire Agreement between the parties and supersedes all prior oral or written provisions of any kind. The parties further agree that this Agreement may only be modified by written agreement signed by both parties.

16. Assignment. Lessor or Lessee may not assign, transfer, sell, dispose of or otherwise alienate or encumber their rights or obligations under this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld.

17. Right of First Refusal. If, at any time after the date of the execution of this Agreement, Lessor shall determine to sell, convey, assign or otherwise dispose of the licenses and authorizations for the ITFS Channels, Lessee, or its designee then eligible to be licensed to operate such Channels, shall have the

first right and option to acquire or assign such licenses and authorizations, subject to the following procedures and to FCC rules and regulations:

(i) Within ten (10) days after receiving an offer to acquire the authorization(s), Lessor will serve Lessee with written notice containing a copy of such offer, identifying the offeror and stating Lessor's intent to accept the offer in the event that Lessee does not elect to match the offer on substantially the same terms as those contained in the notice and original offer.

(ii) Within sixty (60) days of its receipt of such notice, Lessee will notify Lessor in writing of its intention to match the offer to obtain the authorization(s) on substantially the same terms contained in the original offer, in which event

Lessor will reject the original offeror's offer and accept that of Lessee. Lessee's failure to so timely notify Lessor of its intention to substantially match the original offer shall be construed as notification that Lessee or its designee does not wish to so exercise its right of first refusal with regard to the original offer and, only in such event may Lessor accept the original offer.

- (iii) In the event that any term of the original offer is changed in any respect or a new offer is presented, before accepting such offer, Lessor must first follow the procedures specified in the foregoing subparagraphs (i) and (ii), providing Lessee notice with regard to the revised offer and giving it or its designee the opportunity to exercise its right of first refusal thereto.
- (iv) At the commencement of any negotiations with any party for the acquisition by that party of the authorizations, Lessor will provide such party, in writing, with full disclosure of Lessee's rights provided for in this Paragraph 17 and of Lessor's intention to honor those rights.

18. Indemnification.

(a) Lessee. Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend Lessor for all claims, demands, causes of action, loss, investigations, proceedings, damages, penalties, fines, expenses, and judgments, including attorneys' fees (herein collectively "claims") arising out of this Agreement, unless such claim arose out of a negligent act or omission of Lessor.

(b) Lessor. Lessor shall pay any and all costs and expenses, including attorney's fees, resulting from Lessor's breach of this Agreement or from any negligence, omission or wrongful act by Lessor, its agents or employees.

19. Cooperation. Lessor and Lessee each warrant to each other that it will take no action that will unreasonably interfere, threaten or frustrate the other's purposes or business activities; Lessor and Lessee agree to keep the other informed and to coordinate with the other any of its activities that may have such an effect on the other.

20. Purchase Option. Upon termination of this Agreement, Lessor shall have the right to purchase the Leased Equipment used exclusively for Lessor's ITFS operation. That equipment shall consist of: those transmitters, down-converter, power supply, STL equipment, cable, connectors, fittings and hardware, and any other equipment used through this lease for the sole and exclusive use for Lessor's signal transmission, transport, delivery and reception. Any equipment which is used in a shared fashion (such as transmit antenna, decoders, combiners) in providing signals other than Lessor's signals is excluded from this option to purchase. The intent of this purchase option is to provide Lessor with the capability to continue to perform on Lessor's ITFS license.

21. Obligation to Transmit. Nothing in this Agreement shall be construed to obligate or create a duty on the part of Lessee to actually transmit any minimum number of hours of programming during the Lessee's Time.

22. Leased Equipment. Lessee shall supply, at its sole cost and expense, sufficient personnel to operate and maintain the Leased Equipment. Such personnel shall, at all times, be under the

supervision of Lessee but subject to control of Lessor. Said personnel shall insure that the Leased Equipment shall, at all times, meet the technical operating requirements of the Rules of the FCC. Such operations and maintenance activities shall be undertaken at such times as are consistent with the operating requirements of Lessee's business. Lessor shall have overall responsibility for access to transmission facilities during normal business hours and at other times upon twenty-four (24) hours' prior notice.

23. Start Date. For purposes of this Agreement, the Start Date shall be that date indicated in writing by Lessee to Lessor that commercial broadcasting by Lessee has commenced.

24. Conditions Precedent. All of the rights and obligations hereunder shall be subject to the following conditions precedent, which conditions may be waived in writing by the non-defaulting party.

(a) Material Documents. Lessor will have made available to Lessee for inspection all of the material documents and contracts to which Lessor is a party which in any way affects the Channels.

(b) FCC Application. Lessor, to the extent required by the FCC with the assistance of Lessee as herein set forth, shall have applied to the FCC for a license to operate the ITFS Channel facilities as described herein.

(c) Final Order. The FCC shall have issued a Final Order granting Lessor the license to operate the Channels in accordance with the terms of this Agreement.

(d) Construction. The Channels shall have been constructed and licensed in accordance with the terms of this Agreement.

25. Agreement to Defend. Lessee agrees to defend any suit or proceeding brought against Lessor based on a claim that any device made by Lessor designed and furnished hereunder constitutes an infringement of any existing United States patent, provided Lessee is notified promptly in writing and is given complete authority and information required for the defense of same; and Lessee shall pay all damages and costs awarded therein against Lessor, but shall not be responsible for any cost, expense incurred or settlement made by Lessor without Lessee's prior written consent. In the event any device furnished hereunder is, in Lessee's or Lessor's opinion, likely to or does become the subject of a claim for patent infringement, Lessee shall at its own expense procure for Lessor the right to continue using said device or modify it to become non-infringing; but in the event use of such device is prevented by injunction and Lessee fails to modify or otherwise procure for Lessor the right to continue using it, Lessee will remove such device and shall substitute thereof other non-infringing, FCC approved equipment.

26. Lessor Elects to Terminate Tele-Communication Activities. Lessor reserves the right to terminate any further activity by

Lessor in the tele-communications activities covered by this agreement. Such termination may be for any reason and shall only require that Lessor provide Lessee a sixty (60) day written notice of such termination. Upon such termination Lessor shall be obligated to execute an assignment of all of its rights to any ITFS Licenses or license applications covered by this agreement or other FCC authorizations directly related to such ITFS licenses to any FCC qualified entity designated by Lessee. Upon completion of such assignment all of Lessor's obligations under this agreement shall terminate and Lessor shall have no liability whatsoever to Lessee. Should Lessor have incurred any out-of-pocket expenses directly related to this Agreement which have not been paid to Lessor by Lessee, Lessee shall be obligated to pay such expenses prior to Lessor executing an assignment of its rights to FCC applications or authorizations.

27. Special Conditions.

A. Notwithstanding any other provisions of this contract, Lessee agrees to provide such support to Lessor as is reasonably necessary to assist Lessor in providing a minimum of 80 hours per week of qualified educational programming on Lessor's channels.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this 29 day of November, 1990.

LESSOR:

By: [Signature]

President
Title

LESSEE:

UNITED STATES WIRELESS CABLE, INC.

By: Robert J. Davis

President
Title

RECV'D & INSPECTED

JAN 09 2004

FCC-GBG MAILROOM

THE FOLLOWING AMENDMENTS ARE MADE TO THAT CONTRACT ENTITLED
"ITFS AIRTIME AGREEMENT WITH APPLICATION FOR LICENSE PROVISIONS"
BETWEEN UNITED STATES WIRELESS CABLE, INC. OF AUSTIN, TEXAS AND
TEXAS STATE TECHNICAL INSTITUTE OF
McALLEN, TX DATED NOVEMBER 27, 1990

File # 010122DF

1. PARAGRAPH 1(f) on page 4 is deleted entirely from the contract.
2. PARAGRAPH 6 (b) on page 10 is amended by changing the first two sentences therein as follows:

Modification of Transmission Point. Lessor agrees to change the Transmission Point specified in its application or FCC authorization to any location requested by Lessee, provided such new location will still serve Lessors receive sites. In such event, Lessor agrees to file with the FCC any necessary and permissible amendment to the application for the Channels or any necessary and permissible modification application or notification consistent with FCC Rules.

The remaining sentences of Paragraph 6 (b) remain as in the original contract.

3. PARAGRAPH 11 (d) on page 17 is deleted entirely.

THESE AMENDMENTS ARE AGREED TO AND ACCEPTED ON THE DATE SHOWN BY EACH SIGNATURE BELOW AND THEREBY MADE A PART OF THE CONTRACT AS PROVIDED FOR IN THE ORIGINAL CONTRACT.

Robert T. Davis

April 24, 1991
DATE

UNITED STATES WIRELESS CABLE, INC.
LESSEE BY ROBERT T. DAVIS,

Texas State Technical Institute

May 28, 1991
DATE

LESSOR

BY: [Signature]

TITLE: President

REC'D & INSPECTED

JAN 09 2004

FCC-GBG MAILROOM

Form FCC 330-R

Exhibit No. 2

The programming for this station originally consisted of multi-channel audio-video programming including requisite instructional and cultural materials. The programming continues to consist of audio-video programming of instructional and cultural materials; however, the quantity of signals using excess capacity available on the multi-channel system has been reduced

WNC503

*Grand
Island*

ITFS AIRTIME LEASE AGREEMENT

This Airtime Lease Agreement is made on January 22, 1992, between The Kearney State College Foundation ("Lessor") and Wireless Entertainment Network, a Partnership ("Lessee").

RECITALS:

A. Lessor is a qualified educational entity under FCC Rules, and the Federal Communications Commission ("FCC") has authorized licensees in the Instructional Television Fixed Service ("ITFS") to lease excess capacity on their channels to non-ITFS users; and

B. Lessor wishes to secure the appropriate authorizations from the Federal Communications Commission ("FCC") to construct and operate an Instructional Television Fixed Service ("ITFS") facility in the Grand Island, Nebraska greater metropolitan area (the "Area") on four (4) channels (the "Channels") in order to distribute educational programs to the public; and

C. Lessor contemplates that some excess air time will be available on the facility; and

D. Lessee is in the business of providing channels for the distribution of television programming for a fee to subscribers ("Wireless Cable Service"), and desires to lease Lessor's excess ITFS capacity; and

E. Lessor and Lessee believe that the combination of educational programming and entertainment programming will be mutually advantageous and provide a significant benefit to the general public in the area.

AGREEMENT:

1. Term of Agreement.

a. Initial Term. Subject to the provisions for earlier termination contained in Paragraph 11, the initial term of this Agreement shall commence upon the initiation of Lessee's Wireless Cable Service on the Channels and shall continue in full force and effect for the shorter of ten years or the FCC term of Lessor's ITFS license (the "Initial Term".)

b. Renewal Term. If FCC rules permit at the time that this Agreement expires, this Agreement shall automatically and without further notice be extended for up to two successive additional terms (each additional term is referred to as a "Renewal Term") of ten years each unless and until Lessee shall have served written notice on Lessor at least ninety days prior to the expiration date of the Initial Term or Renewal Term (the "Expiration Date"), that it elects not to renew this Agreement for a Renewal Term. The expiration date of the second renewal

term shall be referred to as the "Final Expiration Date." It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement, notwithstanding any provision in this Agreement to the contrary.

Should FCC rules not permit automatic renewal of the Agreement, upon notice by Lessee to Lessor at least 180 days before the Expiration Date, Lessor and Lessee agree to meet to negotiate in good faith towards the renewal of the Agreement. These negotiations shall be exclusive for a 180 day period following Lessee's notice to Lessor.

c. Additional Renewals. One hundred eighty days before the Final Expiration date, Lessor and Lessee shall meet to determine if Additional Renewals are in the best interest of each party. If, within one hundred eighty days after this meeting, Lessor and Lessee are unable to reach an agreement to renew this Agreement on appropriate terms and conditions, this Agreement shall terminate.

d. Right of First Refusal to Lease. In the event that this Agreement is not renewed after the final expiration date, Lessor grants to Lessee, for a period of one year commencing on the Final Expiration Date, a right of first refusal to enter into a new agreement for the leasing of the airtime on Lessor's Channels pursuant to the following terms. If Lessor receives a bona fide written offer from a third party to lease the airtime on Lessor's Channels within this one year period, Lessor shall transmit the same in writing to Lessee as Lessor's offer and Lessee shall then have the right for sixty days after its receipt of the offer to accept it. If, during this sixty day period, Lessee shall fail to accept the offer, its option shall terminate and, then and only then, may Lessor agree to lease the airtime to a party other than Lessee. Lessor shall then have the right to lease the airtime on its Channels to, and only to, the bona fide prospective lessee at the identical price, terms and conditions as were offered to Lessee. Lessor may not accept the offer with any modification to its price, terms, and/or conditions in any respect without first again providing Lessee with written notice of and the right to accept the modified offer.

e. License Application. At Lessee's expense, Lessor shall file all necessary and appropriate applications with the FCC and, as required by law, with any and all other local, state, and federal governmental agencies to acquire, maintain and renew its ITFS license and any associated authorization.

f. Operation During Extended Term. If Lessor and Lessee are unable to reach agreement for Additional Renewals, Lessee shall

continue to lease the Channels for a period of six months after the Expiration Date of this Agreement on the same terms and conditions as are provided for in this Agreement, in order to afford each party an opportunity to prudently avail itself of alternative distribution facilities. On the last day of this six month period (the "Extended Expiration Date"), Lessee may cease to lease the Channels and this Agreement will terminate.

2. Excess Capacity.

Lessor has determined that there will be excess capacity available on all four of its ITFS Channels to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment or other commercial programming. Lessor has further determined that, by combining its educational programming with Lessee's entertainment programming, a significant increase may be achieved in the number of persons who will have access to Lessor's educational programming.

3. Lease of Excess Capacity.

a. Amount of Excess Capacity Available. Lessor agrees to lease to Lessee the "excess capacity" available on all four of its ITFS Channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity", as that term is defined by the Rules of the FCC, specifically Section 74.931, and shall be available to Lessee for entertainment programming ("Lessee Time"), subject to the following:

i. Unless otherwise prohibited by the Rules of the FCC, Lessee Time shall include all capacity made available on all channels made available through the use of Comband or other similar technologies which allow the division of an ITFS channel into two or more discrete video channels, each of which is referred to as "Sub-ITFS Channels". Lessor also agrees to permit Lessee to channel map all channels subject to FCC rules and regulations.

ii. Except for during the first two years after the operation of Wireless Cable Service begins on Lessor's Channels, Lessor reserves for itself a minimum of twenty hours per week per ITFS Channel between the hours of 8:00 A. M. and 4:00 P. M. Monday through Saturday, to be used for ITFS scheduled programming, including a minimum of three hours per day, per channel per weekday (Monday through Friday, excluding holidays). (This time is referred to as "Lessor Reserved Time").

iii. During the first two years after the operation of Wireless Cable Service begins on Lessor's Channels, the minimum Lessor Reserved Time shall be twelve hours per week per ITFS Channel during the times specified above.

iv. Lessor also preserves for itself for any expanded ITFS programming, an additional twenty hours per week per channel, between the hours of 8:00 A.M. and 4:00 P.M. Monday through Friday. ("Lessor's Preserved Time").

v. Not less than thirty days prior to the initiation of program service, Lessor shall provide Lessee in writing with a schedule containing the specific Lessor's Reserved Time and Lessor's Preserved Time airtime hours which it intends to utilize. If Lessor wishes to modify the schedule to recapture additional hours from Lessee Time for the provision of qualified ITFS programming, up to a maximum total of forty hours per week per ITFS channel between the hours of 8:00 A.M. and 4:00 P.M. Monday through Friday, Lessor shall provide Lessee with three months' advance notice of any revision to its schedule of the specific air time hours Lessor intends to utilize.

vi. Unless otherwise required by the FCC, the maximum time recapturable by Lessor shall be 40 hours per Channel per week in the daily time periods specified in the preceding sentence. In the event that the FCC requires Lessor to recapture more than forty hours per week per ITFS channel, Lessee shall have the option of terminating this Agreement pursuant to Subparagraph 3(b).

b. Termination Due to Insufficient Capacity. In the event that the FCC rules require Lessor to use air time in excess of forty hours per channel per week, Lessee shall have the right to terminate this Agreement following sixty (60) days prior written notice to Lessor.

c. Subcarriers. Lessee shall have the use of all subcarriers and vertical blanking intervals on the Channels.

d. Programming Schedule. Lessor agrees at all times to maintain an ITFS programming schedule which is sufficient to comply with all pertinent FCC rules and regulations concerning the use of the Channels.

4. Technical Changes in Channel Operation and Equipment for Lessor's Use.

Lessor recognizes the mutual benefits and technological advantages of the use of encoding methods for program security, equipment signalling and individual addressability control over unauthorized equipment use. Lessor agrees that its program services and/or airtime use will not cause harm or interfere with Lessee's current or future signal or other such technical needs utilized for the operation and services provided by the system. Furthermore, Lessor will not, by its own action or through a third party, utilize any part of its licensed frequency spectrum to create or operate a service that is in competition with Lessee's current, planned or future service over the system.

5. Integration of Lessor's Programming.

At Lessor's request, Lessee agrees to endeavor to integrate certain of Lessor's programming into the overall communications service offered to Lessee's Subscribers. This integration shall include, but shall not be limited to, at the sole discretion of Lessee, listing Lessor's material in program guides produced for subscribers, and full attribution to Lessor as the source of this material.

6. Technical Facilities.

a. Transmission Point. Upon execution of this Agreement, Lessee shall, in consultation with Lessor, co-locate the Transmission Point for provision of the services contemplated by this Agreement with any MMDS and/or other facilities Lessee operates in the Area.

b. FCC License Application. At Lessee's expense, Lessor shall prepare and file with the FCC any appropriate applications, or amendments to previously filed applications, to secure a license to operate the four Channels from the Transmission Point. Lessee shall provide all legal and/or engineering personnel for this purpose or will have the right to approve any expenses incurred by Lessor in advance of Lessor incurring such expenses. If, upon reviewing Lessor's application, the FCC directs Lessor to amend, revise or modify its application, and/or the terms of this Agreement to comply with FCC rules or policies, Lessor and Lessee shall cooperate to mutually agree upon such changes and Lessor will expeditiously so amend its application, at Lessee's expense. Upon FCC grant of the application by Final Order, Lessee, or its designee, shall, within a reasonable period of time, commence and, not later than eighteen months after the date of a grant of the

construction permit, complete construction of the ITFS channel transmission facilities accordance to the FCC authorization(s).

c. Leased Equipment. At its expense, Lessee, or its designee, shall design, engineer, purchase and install all transmitters, transmission line, antennas, and receivers as are required to operate the ITFS channels in accordance with the authorization(s). Any equipment so used in the construction shall be leased to Lessor pursuant to Paragraph 9 of this Agreement. (referred to as the "Leased Equipment"). Lessee shall supervise and shall be responsible for the installation of the Leased Equipment and shall retain title to the Leased Equipment. Lessee shall maintain adequate casualty and liability insurance to cover all Leased Equipment installed pursuant to this Agreement.

d. Final Order. For purposes of this Agreement, a "Final Order" means a written action or order of public notice issued by the FCC granting the application and issuing the conditional license for the Channels to Lessor: (a) which has not been reversed, stayed, enjoined, set aside, annulled or suspended, and (b) with respect to which (i) no requests have been filed for administrative or judicial review, reconsideration, appeal or stay and the time for filing any such requests, and the time for the FCC to set aside the action on its own motion, has expired, or (ii) in the event of review, reconsideration or appeal, the grant of the application and issuance of the conditional license has been affirmed and the time for further review, reconsideration or appeal has expired.

e. Further Amendments. Lessor shall use its best efforts to cause the FCC to modify Lessor's construction permit and/or license for the Channels as may be reasonably requested from time to time by Lessee, to the extent that it is not inconsistent with the rules and regulations of the FCC nor with the policies, procedures and best interests of Lessor, including by way of example the filing of any modifications with the FCC that are necessary or desirable to relocate the transmission point of any of the Channels and any application for authority to increase the output power on the Channels to the extent permitted by the FCC's rules and regulations, as those rules and regulations may be amended from time to time.

f. Receive Facilities. At Lessee's expense (not to exceed \$400.00 per location), Lessee shall construct receive facilities at up to 3 locations in the Area to be selected by Lessor and capable of receiving the signal transmitted over the ITFS Channels, including one location to be selected as Lessor's studio or Area headquarters capable of simultaneously receiving and monitoring all of Lessor's signals transmitted over the

ITFS Channels. In the event that Lessor requests construction of a receive location that includes the wiring of a master antenna system or similar multi-receiver configuration, Lessee shall install the extra wiring required only if reimbursed by Lessor for its actual costs. Any equipment so used in the construction of the above locations shall, upon the initiation of operation of the system, become the property of the Lessor. In addition, all equipment installed at Lessor's expense shall remain the Lessor's property. All other receive equipment will remain the property of Lessee. Lessee shall be under no obligation to provide reception equipment prior to the time that this equipment becomes available to it from its suppliers. At Lessor's expense, Lessee shall construct facilities beyond the locations selected by Lessor; provided, however, that Lessor shall only be obligated to pay Lessee for Lessee's actual costs in constructing these additional facilities.

g. Location of Production Facilities. Lessee shall provide, at its sole cost and expense, suitable space at the Transmission Point for the ITFS channel antenna(s) and transmitters, and TVRO satellite antenna. Lessor shall, where possible, co-locate its production facility with Lessee's production facilities. In the event that Lessee's production facility cannot be co-located with the Transmission Point, Lessee and Lessor shall mutually arrange for the availability of telephone transmission lines necessary to carry the Lessor's programs from its facility to the Transmission Point. However, if requested by Lessee, Lessor will apply for and obtain any FCC authorizations necessary for a sufficient number of microwave point-to-point studio-to-transmitter links ("STLs") for this purpose, at lessee's expense. Upon receipt of the authorizations, Lessee, at Lessee's expense, will design, obtain, and install the equipment necessary for the STLs. The STL equipment will become part of the Leased Equipment. The STLs will be available for use by Lessee for any purpose, including, but not limited to, the transmission of data.

h. Best Efforts. Both parties shall use their best efforts to diligently prepare, file and prosecute before the FCC all petitions, waivers, construction applications, amendments and other related documents necessary to secure FCC approval of all aspects of this Agreement. Lessee shall assist in the preparation and prosecution of these applications. Notwithstanding anything in this Agreement to the contrary, it is understood that no filing shall be made with the FCC with respect to this Agreement unless both parties have reviewed the filing and consented to its submission. Consent shall not be unreasonably withheld.

i. Application Costs. The reasonable costs of the preparation of the applications referred to in this Section 6, including all legal and engineering costs and filing fees, shall be paid by Lessee.

7. Airtime Lease Fees.

a. Initial Term. Starting with the commencement of Lessee's Wireless Cable Service ("Commencement Date") and continuing throughout the Initial Term, Lessee shall pay to Lessor \$10,000.00 per year as airtime lease fees as the total consideration for all channels being leased pursuant to this Agreement. This amount shall be payable on or before the last day of each year of the initial term.

b. Renewal Terms. The annual airtime lease fee shall be adjusted at the beginning of the first renewal term by any increase in the Consumer Price Index ("CPI"), as follows:

i. The CPI shall mean the average for "all items" shown on the "United States city average for urban wage earners and clerical workers, all items, groups, sub-groups and special groups of items as promulgated by the Bureau of Labor Statistics of the United States Department of Labor", using the year 1990-1991 as a base of 100.

ii. During the first renewal term, the initial term annual lease fee shall be increased by the percentage of increase in the CPI from the month containing the first day of the initial term to the month containing the first day of the first renewal term. If the CPI decreases or does not change during this time, then the annual lease fee shall remain at \$10,000.00.

iii. During the second renewal term, the first renewal term annual lease fee shall be increased by the percentage of increase in the CPI from the month containing the first day of the first renewal term to the month containing the first day of the second renewal term. If the CPI decreases or does not change during this time, then the annual lease fee shall remain the same as the first renewal term.

iv. If the CPI ceases to incorporate a significant number of items, or if a substantial change is made in the method of establishing the CPI, the CPI shall be adjusted to the figure that would have resulted had no change occurred in the manner of computing the CPI. If the CPI (or a

successor or substitute index) is not available, a reliable governmental or nonpartisan publication, evaluating the same or similar information as is now used in determining the CPI, shall be used in lieu of the CPI.

- c. Expenses. Lessee shall arrange for and pay Lessor's legal, engineering and related expenses actually incurred by Lessor in prosecuting its application (including any amendments) for the authorizations.

8. Arbitration of Dispute.

In the event that Lessee or Lessor cannot resolve any dispute arising under this Agreement, the dispute may be resolved pursuant to arbitration pursuant to the procedures of the American Arbitration Association, and the decision of the Arbitrator shall be final and shall bind both Lessor and Lessee. No dispute shall in any way result in a default unless the award of the Arbitrator is not complied with. All information obtained by Lessee or Lessor during a dispute shall be maintained on a confidential basis. The Lessee and Lessor shall each pick their own arbitrator. These two shall then pick a third arbitrator. Each shall pay for their own selected arbitrator and shall share the cost of the third arbitrator equally.

9. ITFS Channel Equipment Lease.

Lessor shall lease from Lessee all Leased Equipment. The terms of the lease agreement, to be entered into prior to commencing construction, shall include the following:

- a. Rent. Lessor shall pay to Lessee the total amount of One Dollar (\$1.00) per year for any use of the Leased Equipment, it being understood that Lessor's provision of the air time at the rates provided in this Agreement is the major consideration for Lessee's lease of the equipment to Lessor.

- b. Taxes. Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, and Lessee shall be entitled to claim all depreciation and investment tax credits for income tax purposes.

- c. Maintenance and Operating Costs. Lessee shall be required to bear all costs associated with maintaining, upgrading and operating the Leased Equipment.

- d. Term. The term of the lease shall commence on the date Lessee completes installation of transmission facilities capable of transmitting programming, and shall end on the earliest of:

i. the expiration of the Initial Term, or if the term is renewed, on the expiration of the Renewal Term, or

ii. in the event of:

(1) the creation or attempted creation by Lessor of any security interest in the Leased Equipment or in the Lessor's FCC construction permit, FCC license or such other operating authority as may be required by a governmental authority,

(2) any breach by Lessor of any of the provisions of this Agreement which is not cured within thirty days after notice from Lessee, or

(3) the Lessor's loss of its FCC construction permit, FCC license or such other operating authority as may be requested by any governmental authority.

e. Repossession of Equipment. Except as otherwise provided in Section 11.4, upon the termination of this Agreement (either at the scheduled termination date or otherwise), Lessee shall be entitled to remove the Leased Equipment and, if necessary, to enter into Lessor's premises during normal business hours for the purpose of doing so. Provided, in those cases where Lessee shall be permitted to remove the equipment, Lessor shall have the right, exercisable after receiving notice that Lessee will terminate this Agreement, to purchase the Leased Equipment from Lessee at a cash price equal to its Fair Market Value at the time of Lessor's purchase. "Fair Market Value" shall be determined as follows:

i. By the mutual agreement of Lessee and Lessor.

ii. If the parties are unable to agree on the fair market value, then the fair market value shall be determined by an appraiser selected by Lessor and Lessee.

iii. If Lessor and Lessee are unable to agree on an appraiser, each shall select its own appraiser with experience in appraising businesses and equipment of like nature. The average of the amounts calculated by the two appraisers shall be the fair market value. However, if the differential between the two amounts exceeds 10 percent (based on the lower amount), the two appraisers shall choose a third competent appraiser, with experience in appraising businesses and equipment of like nature, who shall determine which of the two appraisers' determinations as to value is the nearest to the fair market value. The Fair Market Value shall then be the average of nearest

value and the value calculated by the third appraiser to be the fair market value.

iv. Lessor and Lessee shall split the costs of any mutually agreed upon appraiser if one appraiser is used. Lessor and Lessee shall each bear the costs of their own appraisers if two appraisers are used. If a third appraisal is necessary, the costs of any third appraisal shall be divided equally between the parties.

f. Risk of Loss. Lessor shall have no responsibility for the loss or damage of the Leased Equipment, except for loss or damage caused by any intentional or negligent act or omission of Lessor, its agents, affiliates, representatives or invitees. In the event Lessor is liable for loss or damage of any equipment, it shall pay Lessee for the time and materials required to restore the equipment to its previous condition or to replace the equipment at then current prices.

10. Control Over Programming.

Lessee intends that only programming of a sort which will not serve to place Lessor's reputation in the community in jeopardy will be transmitted by Lessee on Lessor's channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, the Movie Channel, ESPN, WTBS, CNN, etc. The parties recognize the difficulties inherent in specifying exact standards in this Paragraph, but believe that good faith efforts on both sides can overcome whatever differences may arise. Lessor shall have the absolute right to deny Lessee the right to transmit on its leased channels any program which is obscene as defined by the laws of the United States or which would violate the rules and regulations of the FCC.

11. Termination.

Termination of this Agreement shall be governed by the following provisions:

a. Termination of FCC Authorization. Lessee may terminate this Agreement without further liability upon thirty days' prior written notice to Lessor if the FCC or Lessee determine that Lessor and/or Lessee is not authorized to operate the Channels as contemplated by this Agreement. If termination shall occur pursuant to this section, the termination shall extinguish and cancel this Agreement without further liability on the part of either party to the other, except that each party shall be entitled to retain all equipment and materials purchased or furnished by it, and there shall be a final accounting of monies due but unpaid under this Agreement.

b. Termination for Default and Nonperformance. Should either party be in breach of this Agreement for the nonperformance of a material obligation, this Agreement may be terminated by the non-defaulting party if the breach continues for a period of thirty days following the receipt of written notice from the non-defaulting party.

c. Termination by FCC Action. At the option of Lessee, this Agreement may be terminated in the event the FCC, at any time, limits Lessee's Time to less than seventy-five percent of the transmission time on the Channels or limits Lessee's ability to program air time during the hours of 4:00 P.M. to 8:00 A.M. The election to terminate shall be made in writing to Lessor by Lessee, setting forth the effective date of such termination. In the event of termination pursuant to this section, this Agreement shall be extinguished and cancelled without further liability on the part of either party to the other; provided, however, that the termination shall not affect any amounts owed to Lessor to the date of said termination.

d. Option to Terminate. At any time on or before the third anniversary of this Agreement, Lessee shall have the right to terminate this Agreement without further liability to Lessor.

12. Right of First Refusal.

a. Restriction on Sale or Assignment. If at any time after the date of the execution of this Agreement, Lessor decides to sell, convey, assign or otherwise dispose of its interest in the licenses and authorizations for the Channels, Lessee, if it is then eligible to be licensed to operate those channels, shall have the right and option to acquire the interest as set out in Section 12.c.

b. Restriction on Lease of Excess Capacity. Lessor shall not at any time lease, convey or otherwise dispose of any of its interest in the excess transmission capacity on the Channels unless there is full compliance with Section 12.c.

c. Procedure. Upon receipt by Lessor of any bona fide written offer to assign, sell or otherwise dispose of any or all of its interest in the licenses and authorizations for the Channels or for the lease of any of the excess transmission capacity of the Channels which Lessor is willing to accept, Lessor shall proceed as follows:

i. Lessor shall transmit the offer to Lessee in the same form as received by Lessor. Lessee shall then have the

right for thirty days after its receipt of the offer to accept the offer.

ii. If after the 30-day period, Lessee shall fail to accept the offer, its right and option to accept the offer shall terminate. Lessor shall then have the right for a period ending on the 60th day after the expiration of the 30-day period to assign, sell or otherwise dispose of its interests in the licenses and authorizations, or lease excess transmission capacity, to, and only to, the bona fide prospective offeror at the same price and upon the same terms as were offered to Lessee.

iii. Any prospective assignee or purchaser, as a condition of the assignment or purchase, shall accept, assume, and agree to be bound by all of the terms and conditions of this Agreement applicable to Lessor as if the purchaser were the original Lessor.

iv. Upon the expiration of the above 60-day period, if Lessor shall not have entered into a binding contract for the sale of its interests in the licenses and authorizations or for the lease of its excess transmission capacity, as the case may be, on the same terms as proposed with the prospective purchaser or lessee, all of the restrictions and options imposed in Sections 12.a., 12.b., and 12.c. shall again apply.

v. The right of first refusal provided to Lessee pursuant to Section 12.a. shall not apply with respect to any proposed sale, conveyance, assignment or other disposition of assets, equipment and property to any nonprofit organization similar to Lessor provided that the organization is wholly owned by or under common control with Lessor.

vi. The right of first refusal provided to Lessee pursuant to Section 12.a. shall not apply with respect to any transfer of Lessor's assets to or merger of Lessor with the University of Nebraska Foundation as long as the merged entity agrees to assume the obligations of Lessor under this Agreement. In the event that this takes place, all payments to Lessor shall have the restricted use of being used only for athletic scholarships for students attending the University of Nebraska at Kearney campus, even though the payments may be administered through the office of the University of Nebraska Foundation.

d. FCC Authorization. In the event that Lessee shall elect to exercise the rights specified in Section 12.a., and in the

further event that the transfer of the licenses and authorizations shall require FCC consent or approval, Lessor shall use its best efforts to assist Lessee in the securing of consent or approval, and the consummation and payment of the purchase price with respect to the sale of Lessor's interests shall be conditioned upon receipt of a Final Order of the FCC granting the required consent or approval.

e. Setoff. In the event that Lessee shall elect to exercise the rights specified in Section 12.a., there shall first be set off and deducted from the purchase price to be paid by Lessee all payments pursuant to Section 7 accruing after the date that Lessee accepts Lessor's offer.

f. Survival. Notwithstanding the earlier termination of this Agreement, the provisions of this Section 12 shall remain in full force and effect until the first anniversary of the date of the termination. However, if this Agreement is terminated pursuant to Section 11.b., the provisions of this Section 12 shall cease to have any force or effect on the termination.

13. Indemnification.

a. Lessee. Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend Lessor for all claims, demands, causes of action, loss, investigations, proceedings, damages, penalties, fines, expenses, and judgments, including attorneys fees (herein collectively "claims") arising out of this Agreement, unless such claim arose out of a negligent act or omission of Lessor.

b. Lessor. Lessor shall pay any and all costs and expenses of Lessee, including attorney's fees, resulting from Lessor's breach of this Agreement or from any negligence, omission or wrongful act by Lessor, its agents or employees.

14. Cooperation.

Lessor and Lessee each warrant to each other that it will take no action that will unreasonably interfere, threaten, or frustrate the other's purposes or business activities; Lessor and Lessee agree to keep the other informed and to coordinate with the other any of its activities that may have such an effect on the other.

15. Purchase Option.

Upon termination of this Agreement, Lessor shall have the right to purchase the Leased Equipment used exclusively for Lessor's ITFS

operation. That equipment shall consist of: those transmitters, down-converter, power supply, STL equipment, cable, connectors, fittings and hardware, and any other equipment used through this lease for the sole and exclusive use for Lessor's signal transmission, transport, delivery and reception. Any equipment which is used in a shared fashion (such as transmit antenna, decoders, combiners) in providing signals other than Lessor's signals is excluded from this option to purchase. The intent of this purchase option is to provide Lessor with the capability to continue to perform on Lessor's ITFS license.

16. Obligation to Transmit.

Nothing in this Agreement shall be construed to obligate or create a duty on the part of Lessee to actually transmit any minimum number of hours of programming during the Lessee's Time.

17. Leased Equipment.

Lessee shall supply, at its sole cost and expense, sufficient personnel to operate and maintain the Leased Equipment. Lessee's personnel shall, at all times, be under the supervision of Lessee but subject to control of Lessor. Lessee's personnel shall insure that the Leased Equipment shall, at all times, meet the technical operating requirements of the Rules of the FCC. These operations and maintenance activities shall be undertaken at times as are consistent with the operating requirements of Lessee's business. Lessor shall have overall responsibility for access to transmission facilities during normal business hours and at other times upon reasonable prior notice.

18. Start Date.

For purposes of this Agreement, the Start Date shall be that date indicated in writing by Lessee to Lessor that the provision of Wireless Cable Service by Lessee has commenced.

19. Conditions Precedent. All of the rights and obligations of the parties shall be subject to the following conditions precedent, which conditions may be waived in writing by the non-defaulting party.

a. Material Documents. Lessor will have made available to Lessee for inspection all of the material documents and contracts to which Lessor is a party which in any way affects the Channels.

b. FCC Application. Lessor, to the extent required by the FCC, with the assistance of Lessee as provided for in this

Agreement, shall have applied to the FCC for a license to operate the ITFS Channel facilities.

c. Final Order. The FCC shall have issued a Final Order granting Lessor the license to operate the Channels in accordance with the terms of this Agreement.

d. Construction. The Channels shall have been constructed and licensed in accordance with the terms of this Agreement.

e. Minimum Channels. Lessee shall have contracted to acquire or lease at least 11 wireless cable channels in the Area for the Wireless Cable Service, including the Channels leased from Lessor.

20. Agreement to Defend.

Lessee agrees to defend any suit or proceeding brought against Lessor based on a claim that any device made by Lessor designed and furnished pursuant to this Agreement constitutes an infringement of any existing United States patent, provided Lessee is notified promptly in writing and is given complete authority and information required for the defense of same. Lessee shall pay all damages and costs awarded against Lessor, but shall not be responsible for any cost, expense incurred or settlement made by Lessor without Lessee's prior written consent. In the event any device furnished is, in Lessee's or Lessor's opinion, likely to or does become the subject of a claim for patent infringement, Lessee shall at its own expense procure for Lessor the right to continue using the device or modify it to become non-infringing; but in the event use of the device is prevented by injunction and Lessee fails to modify or otherwise procure for Lessor the right to continue using it, Lessee will remove the device and shall substitute other noninfringing, FCC approved equipment.

21. Lessor's Representations and Warranties.

Lessor represents and warrants to Lessee as follows:

a. Organization. Lessor is a corporation duly organized, validly existing and in good standing under the laws of the State of Nebraska and has full power and authority to own its property, licenses and permits, and to carry out all of the transactions contemplated.

b. Compliance with Law. Lessor has complied with and is now complying with all laws, rules and regulations governing the business, ownership and operations of the ITFS Channels. Except as otherwise provided in this Agreement, no consent, approval or authorization by or filing with any governmental

authorities on the part of Lessor is required in connection with the transactions contemplated. All attendant contracts and undertakings, as well as the carrying out of this Agreement, will not result in any violation of or be in conflict with Lessor's Articles of Incorporation and By-Laws, or any judgment, decree, order, statute, law, rule or regulation of any governmental authority applicable to Lessor.

c. Corporate Authority. All requisite corporate resolutions and other authorizations necessary for the execution, delivery, performance and satisfaction of this Agreement by Lessor have been duly adopted and complied with.

d. Misrepresentation of Material Fact. No document or contract disclosed to Lessee pursuant to this Agreement and which in any way affects any of the properties, assets or proposed business of Lessor as relates to this Agreement, and no certificate or statement furnished by Lessor or on behalf of it in connection with the transactions contemplated contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements not misleading.

e. Licenses in Good Standing. At the Start Date, Lessor's licenses and permits for the Channels shall be in full force and effect and unimpaired by any acts or omissions of Lessor, its employees or agents; and there shall be no complaint, condition, event, defect or occurrence existing or, to the knowledge of Lessor, threatened against the licenses which would materially threaten their retention or renewability by Lessor.

22. Lessee's Representations and Warranties.

Lessee represents and warrants to Lessor as follows:

a. Organization. Lessee is a partnership duly organized, validly existing and in good standing under the laws of the State of Nebraska and has full power and authority to own its property and to carry out all of the transactions contemplated by this Agreement. On the Start Date, Lessee will be qualified to do business in the State of Nebraska.

b. Corporate Authority. All requisite partnership resolutions and other authorizations necessary for the execution, delivery, performance and satisfaction of this Agreement by Lessee have been duly adopted and complied with.

c. Misrepresentation of Material Fact. No document or contract disclosed to Lessor pursuant to this Agreement and which

in any way affects any of the properties, assets or proposed business of Lessor as relates to this Agreement, and no certificate or statement furnished by Lessee or on behalf of it in connection with the transactions contemplated contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements not misleading.

23. Survival.

All representations, warranties, covenants and agreements made by the parties or in any certificate to be delivered or made in writing in connection with the transactions contemplated shall survive the execution and delivery of this Agreement.

24. Confidentiality.

Lessor acknowledges that pursuant to this Agreement it may receive proprietary information relating to the encoding and/or decoding system associated with the ITFS channel equipment and patented processes including, but not limited to, improvements, innovations, adaptations, inventions, results of experimentation, processes and methods whether or not deemed patentable and certain business and marketing techniques (collectively referred to as "Confidential Information"). Lessor acknowledges that this Confidential Information has been developed by Lessee at considerable effort and expense and represents special, unique and valuable property assets of Lessee, the value of which may be destroyed by unauthorized dissemination. Accordingly, Lessor covenants and agrees that, except as may be required for the performance of this Agreement, Lessor shall not use or disclose this Confidential Information to any third person, firm, corporation, or other entity for any reason. This undertaking shall be enforceable by injunctive or other equitable relief to prevent any violation or threatened violation.

25. Miscellaneous.

a. Notice. All notices, requests, demands and other communications which are required or may be given pursuant to the terms of this Agreement shall be in writing and shall be deemed given when delivered by hand or sent by facsimile transmission or on the third day after mailing if mailed by registered mail, postage prepaid, return receipt requested, as follows:

i. If to Lessee:

Wireless Entertainment Network
1722 First Avenue
P.O. Box 2299
Scottsbluff, NE 69361
Att: Chris Hilliard

with a copy to:

Rick L. Ediger, Attorney
Simmons, Olsen, Ediger & Selzer, P.C.
1502 Second Avenue
P.O. Box 1949
Scottsbluff, NE 69361

ii. If to Lessor:

Kearney State College Foundation
University of Nebraska at Kearney
P.O. Box 113
Kearney, NE 68849
Att: President

with a copy to:

Jeffrey L. Orr, Attorney
Jacobsen, Orr, Nelson, Wright,
Harder & Lindstrom, P.C.
P.O. Box 1060
Kearney, NE 68848

or to other address as any part shall have designated by notice in writing to the other parties.

b. Severability. Should any court or agency, including the FCC, determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement provision which is valid, legal and enforceable.

c. Venue and Interpretation. This Agreement shall be governed by, and construed and enforced in accordance with the Communications Act of 1934, as amended, the rules and policies of the FCC, and the laws of the State of Nebraska.

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all prior oral or

written provisions with respect to its subject matter. The parties further agree that this Agreement may only be modified by written agreement signed by both parties. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

e. Assignment. Lessor or Lessee may not assign, transfer, sell, dispose of or otherwise alienate or encumber their rights or obligations under this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld.

f. Further Assurance. From time to time after the date of execution, the parties shall take further action and execute further documents, assurances and certificates as either party reasonably may request of the other to effectuate the purposes of this Agreement.

g. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, and shall become effective when each of the parties shall have delivered to it this Agreement duly executed by the other party.

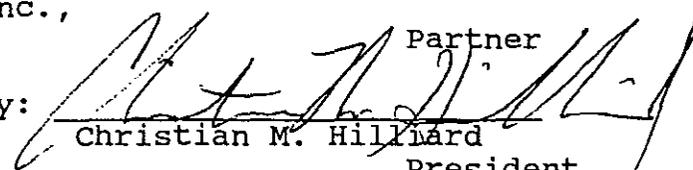
h. Headings. The headings in this Agreement are for the sole purpose of convenience of reference and shall not in any way limit or affect the meaning or interpretation of any of the terms or provisions of this Agreement.

LESSOR: Kearney State College
Foundation

By: 
President

LESSEE: Wireless Entertainment Network,
a Partnership

BY: Wireless Entertainment Network
Inc.,

By: 
Partner
Christian M. Hilliard
President

**FIRST AMENDMENT TO
ITFS AIRTIME AGREEMENT**

This First Amendment to ITFS Airtime Agreement by and between The Kearney State College Foundation ("Lessor") and Wireless Entertainment Network, Inc. ("Lessee") for operations in the Grand Island, Nebraska area is made this _____ day of April 1992.

The ITFS Airtime Lease Agreement is amended as follows:

1. Paragraphs 1(a), 1(b), 1(c), 1(d) and 1(f) are hereby deleted. Paragraphs 1(a) and 1(b) are replaced with the following and Paragraph 1(e) is re-numbered Paragraph 1(c):
 - a. **Initial Term.** This Agreement shall be effective upon execution but the term of this Agreement shall commence upon the grant of the ITFS construction authorization and shall extend for an initial term of five (5) years. Said period is hereinafter referred to as the "Initial Term."
 - b. **Renewal Term.** Provided Lessee's rights have not been terminated pursuant to Paragraph 11, this Agreement shall automatically and without further notice be extended for one (1) successive additional term (such additional term is hereinafter referred to as the "Renewal Term") of five (5) years unless and until Lessee shall have served written notice on Lessor at least sixty (60) days prior to the expiration date of the Initial Term that it elects not to renew this Agreement for the Renewal Term. It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement notwithstanding any provision hereof to the contrary.
2. Paragraph 7(b) is hereby deleted and replaced with the following:
 - b. **Renewal Term.** The annual airtime lease fee shall be adjusted at the beginning of the renewal term by any increase in the Consumer Price Index ("CPI"), as follows:
 - i. The CPI shall mean the average for "all items" shown on the "United States city average for urban wage earners and clerical workers, all items, groups, sub-groups and special groups of items as promulgated by the Bureau of Labor Statistics of the United States Department of Labor", using the year 1990-1991 as a base of 100.

ii. During the renewal term, the initial term annual lease fee shall be increased by the percentage of increase in the CPI from the month containing the first day of the initial term to the month containing the first day of the renewal term. If the CPI decreased or does not change during this time, then the annual lease fee shall remain at \$10,000.

iii. If the CPI ceases to incorporate a significant number of items, or if a substantial change is made in the method of establishing the CPI, the CPI shall be adjusted to the figure that would have resulted had no change occurred in the manner of computing the CPI. If the CPI (or a successor or substitute index) is not available, a reliable governmental or nonpartisan publication, evaluating the same or similar information as is now used in determining the CPI, shall be used in lieu of the CPI.

3. Paragraphs 3(a) and 3(b) are hereby deleted and replaced with the following:

3. Lease of Excess Capacity.

a. **Amount of Excess Capacity Available.** Lessor agrees to lease to Lessee the "excess capacity" available on all four of its ITFS Channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity", as that term is defined by the Rules of the FCC, specifically Section 74.931, and shall be available to Lessee for entertainment programming ("Lessee Time"), subject to the following.

i. Unless otherwise prohibited by the Rules of the FCC, Lessee Time shall include all capacity made available on all channels made available through the use of Comband or other similar technologies which allow the division of an ITFS channel into two or more discrete video channels, each of which is referred to as "Sub-ITFS Channels". Lessor also agrees to permit Lessee to channel map all channels subject to FCC rules and regulations.

ii. Lessor reserves for the group of four channels licensed, a total of 168 hours of Air-Time each week. This Air-Time shall include twenty (20) hours of Air-time for each channel each week to be used by Lessor for its ITFS scheduled programs. Furthermore, Lessor reserves for any

expanded ITFS program schedule needs, an additional twenty (22) hours of weekly airtime per licensed channel.

iii. No less than thirty days prior to the initiation of program service, Lessor shall provide Lessee in writing with a schedule containing the specific airtime hours which it intends to utilize. Lessor shall provide Lessee with three months' advance notice of any revision to its schedule of the specific air time hours.

iv. In the event that the FCC requires Lessor to recapture more than forty two hours per week per ITFS channel, Lessee shall have the option of terminating this Agreement pursuant to Subparagraph 3(b).

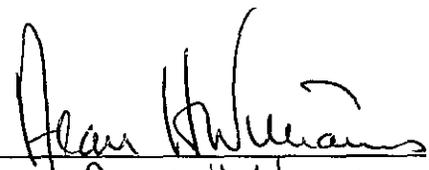
b. Termination Due to Insufficient Capacity. In the event that the FCC rules require Lessor to use air time in excess of forty two hours per channel per week, Lessee shall have the right to terminate this Agreement following sixty (60) days prior written notice to Lessor.

4. This First Amendment to ITFS Airtime Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument and shall become effective when each of the parties shall have delivered to it this Agreement duly executed by the other party.

LESSOR: THE KEARNEY STATE
COLLEGE FOUNDATION

LESSEE: WIRELESS ENTERTAINMENT, INC.

BY: 
Name: JOSEPH E. COLLINS
Title: President
Date: 4/22/92

BY: 
Name: Alan H. Williams
Title: V. Pres.
Date: 4-22-92

WNC 647

- OLD TOWN, FL

HEARTLAND WIRELESS COMMUNICATIONS, INC.

ITFS AIRTIME LEASE AGREEMENT
WITH APPLICATION FOR LICENSE PROVISIONS

THIS AIRTIME LEASE AGREEMENT (hereinafter referred to as the "Agreement"), made and entered on this 20th day of July, 1994 by LAKE CITY COMMUNITY COLLEGE, having its principal place of business at U.S. Highway 90 East, Lake City, Florida 32025 ("Lessor") and HEARTLAND WIRELESS COMMUNICATIONS, INC., having its principal place of business at 224 West Evergreen, Durant, Oklahoma 74701 ("Lessee").

WHEREAS, Lessor is an accredited educational entity or is otherwise eligible under Federal Communications Commission ("FCC") Rules for an Instructional Television Fixed Service ("ITFS") license;

WHEREAS, Lessor has applied for and received the appropriate authorization permits and license for the B-2 in Cross City, Florida and Lessor wishes to secure the appropriate authorizations from the FCC to construct and operate an ITFS facility in the Cross City/Fanning Springs, Florida greater metropolitan area (the "Area") on the remaining B1, B3 and B4 Channels (the "Channels") in order to distribute educational programs to the public;

WHEREAS, Lessor has determined that some excess channel capacity will be available on said facility;

WHEREAS, the FCC has authorized ITFS licensees to so lease excess channel capacity to non-ITFS users;

WHEREAS, Lessee is in the business of providing channels for the distribution of video programming via microwave transmissions known as the Multichannel Multipoint Distribution Service ("MMDS") and is desirous of leasing excess ITFS transmission capacity from Lessor; and

WHEREAS, Lessor and Lessee believe that the combination of educational programming and entertainment programming will be mutually advantageous and provide a significant benefit to the general public in the area.

NOW, THEREFORE, in consideration of the premises and of the mutual promises, undertakings covenants, and conditions set forth herein, Lessor and Lessee do hereby agree as follows:

1. **TERM OF AGREEMENT.**

(a) **Initial Term.** This Agreement shall become effective upon the date of its execution. Subject to the provisions of termination contained in Paragraph 11 hereof, the initial term of this Agreement shall commence upon the date both parties execute this Agreement and shall continue in full force and effect through the date of expiration of the initial FCC term of Lessor's ITFS license (said period is hereinafter referred to as the "Initial Term").

(b) **Renewal Term.** If FCC rules permit at the time this Agreement expires, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until

Lessee shall have served written notice on Lessor at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term (hereinafter referred to as the "Expiration Date"), that it elects not to renew this Agreement for a Renewal Term. It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement, notwithstanding any provision hereof to the contrary.

(c) **Additional Renewals.** One hundred eighty (180) days before the expiration of this Agreement and any renewal thereof, if any, Lessor and Lessee shall meet to determine if Additional Renewals are in the best interest of each party. If, within one hundred eighty (180) days after such meeting, Lessor and Lessee are unable to reach an agreement to renew this Agreement on appropriate terms and conditions, this Agreement shall terminate.

(d) **Right of First Refusal to Lease.** In the event that this Agreement is not renewed, Lessor hereby grants to Lessee, for a period of one (1) year commencing on the Expiration Date hereof, a right of first refusal to enter into a new agreement for the leasing of the airtime on Lessor's Channels pursuant to the following terms. If Lessor receives a bona fide written offer from a third party to lease the airtime on Lessor's Channels within said one (1) year period, Lessor shall transmit the same in writing to Lessee as Lessor's offer and Lessee shall then have the right for sixty (60) days after its receipt of said offer to accept said offer. If, during said sixty (60) day period, Lessee shall fail to accept such offer, its option hereunder as to such offer shall terminate and, then and only then, may Lessor so

agree to lease such airtime to a party other than Lessee. Thereupon, Lessor shall have the right to lease the airtime on its Channels to, and only to, the aforesaid bona fide prospective lessee at the identical price, terms and conditions as were offered to Lessee. Lessor may not accept said offer with any modification to its price, terms and/or conditions in any respect without first again providing Lessee with written notice of and the right to accept the modified offer.

(e) **License Maintenance and Renewal.** At Lessee's expense, Lessor shall file all necessary and appropriate applications with the FCC and, as required by law, with any and all other local, state, and federal governmental agencies to maintain and renew its ITFS license and any associated authorization.

2. **EXCESS CAPACITY.** Lessor has determined that there will be excess capacity available on the ITFS Channels to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment or other commercial programming. Lessor has further determined that, by combining its educational programming with Lessee's entertainment programming, a significant increase may be achieved in the number of persons who will have access to Lessor's educational programming at no additional transmission cost.

3. **LEASE OF EXCESS CAPACITY.**

(a) **Excess Capacity Available to Lessee.** Lessor agrees to lease to Lessee the "excess" capacity available on all of its ITFS channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity," as that term

is defined by the Rules of the FCC, specifically Section 74.931 thereto, and shall be available to Lessee for entertainment programming (hereinafter referred to as "Lessee Time"). Unless otherwise prohibited by the Rules of the FCC, Lessee Time shall include all capacity on all channels made available through the use of Comband or other similar technologies which allow the division of an ITFS channel into two or more discrete video channels, each of which shall hereinafter be referred to as "Sub-ITFS Channels." Lessor agrees to permit Lessee to channel map all channels subject to FCC rules and regulations. Lessor agrees to permit Lessee to channel load its programming, if permitted by the FCC's rules and regulations. Lessor reserves for itself a minimum of forty (40) hours per week per ITFS channel.

(b) **Termination Due To Insufficient Capacity.** If Lessor exercises its rights to use air time in excess of forty hours per channel per week pursuant to paragraph 3(a), Lessee shall have the right to terminate this Agreement following sixty (60) days prior written notice to Lessor.

(c) **Use of Subcarriers and Vertical Blanking Intervals.** Lessor shall retain control of the subcarrier and vertical blanking intervals and may reserve to itself the use of subcarrier and vertical blanking intervals on one channel, with Lessee having use of all subcarrier and vertical blanking intervals on all other channels.

4. **TECHNICAL CHANGES IN CHANNEL OPERATION AND EQUIPMENT FOR LESSOR'S USE.** Lessor recognizes the mutual benefits and technological

advantages of the use of encoding methods for program security, equipment signaling and individual addressability control over unauthorized equipment use. Lessor agrees that its program services and/or airtime use will not cause harm or interfere with Lessee's current or future signal or other such technical needs utilized for the operation and services provided by the system. Furthermore, Lessor will not, by its own action or through a third party, utilize any part of its licensed frequency spectrum to create or operate a service that is in competition with Lessor's current, planned or future service over the system.

5. **INTEGRATION OF LESSOR'S PROGRAMMING.** At Lessor's request, Lessee agrees to endeavor to integrate certain of Lessor's programming into the overall communications service offered to Lessee's Subscribers. This integration shall include, but shall not be limited to, at the sole discretion of Lessee, listing Lessor's material in program guides produced for subscribers and full attribution to Lessor as the source of such material.

6. **TECHNICAL FACILITIES.**

(a) **Transmission Point Location.** Upon execution of this Agreement, Lessee shall, in consultation with Lessor, co-locate the Transmission Point for provision of the services contemplated by this Agreement with the MMDS and/or other facilities Lessee operates under lease agreement in Lessor's designated market. At Lessee's expense, Lessor shall prepare and file with the FCC any appropriate applications or amendments to previously filed applications, to secure a license to operate the one (1) channel from said location. Lessee shall provide all legal and/or engineering personnel for the purpose or will have the right to approve any expenses

incurred by Lessor in advance of Lessor incurring such expenses. If, upon review of Lessor's application, the FCC directs Lessor to amend, revise or modify the application or the terms of this Agreement to comply with FCC rules or policies, Lessor and Lessee shall cooperate to mutually agree upon such changes and Lessor will expeditiously so amend its application. Upon FCC grant of the application or modification by Final Order, Lessee, or its designee, shall construct or modify the ITFS channel transmission facilities in accordance with said FCC authorization. Lessee or its designee shall commence construction of the facilities within a reasonable period of time following grant by Final Order of the requisite authorization. Lessee or its designee shall timely complete construction in accordance with the terms of Lessor's authorization. Lessee and Lessor acknowledge that current FCC rules require completion of construction within eighteen (18) months after the date of a Final Grant of a conditional license or within such additional period(s) of time the FCC may authorize following formal request by the Lessor for additional time to construct. Lessor agrees to cooperate with Lessee in the review, execution and filing of formal requests for extension of the construction period as may be necessary. At its expense, Lessee or its designee, shall design, engineer, purchase, and install such transmitters, transmission line, antennas, and receivers as are required to operate the ITFS channels in accordance with the provision of such authorization(s). Any existing equipment previously purchased by the Lessor such as transmitters, transmission line, antennas and receivers will be

upgraded to the equivalent or better of purchased equipment by Lessee, at Lessee's expense. Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 9 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment"). Lessee shall supervise and shall be responsible for the installation of the Leased Equipment and shall retain title to the Leased Equipment pursuant to Paragraph 20 hereof. Lessee shall maintain adequate casualty and liability insurance to cover all Leased Equipment installed pursuant to this Agreement. For purposes of this Agreement, a "Final Order" means a written action or order for which public notice is provided by the FCC granting the application and issuing the conditional license for the Channels to Lessor: (a) which has not been reversed, stayed, enjoined, set aside, annulled or suspended, and (b) with respect to which (i) no requests have been filed for administrative or judicial review, reconsideration, appeal or stay and the time for filing any such requests, and the time for the FCC to set aside the action on its own motion, has expired, or (ii) in the event of review, reconsideration or appeal, the grant of the application and issuance of the conditional license has been affirmed and the time for further review, reconsideration or appeal has expired.

(b) **Modification of Transmission Point.** Lessor agrees to change the Transmission Point specified in its application or FCC authorization to any location requested by Lessee from which Lessor's specified and protected ITFS receive sites will be served and, in such event, to file with the FCC any necessary and permissible

amendment to the application for the Channels or any necessary and permissible modification application or notification consistent with the FCC's Rules. Lessee shall pay for Lessor's actual costs and expenses, including legal and engineering fees, actually incurred by Lessor to prepared, file and prosecute such amendment, application or notification, provided that Lessee has approved the amount of such expenses in writing prior to their having been incurred by Lessor and Lessor has provided Lessee with satisfactory documentation of such expenses.

(c) **Receive Facilities.** At Lessee's expense not to exceed \$400 per location, Lessee shall construct receive facilities at up to eight (8) locations in the Area to be selected by Lessor and capable of receiving the signal transmitted over the ITFS channels, including one (1) location to be selected as Lessor's studio or Area headquarters capable of simultaneously receiving and monitoring all of Lessor's signals transmitted over the ITFS channels. In the event that Lessor requests construction of a receive location that include the wiring of a master antenna system or similar multi-receiver configuration, Lessee shall install the extra wiring required only if reimbursed by Lessor for its actual costs. Any equipment so used in the construction of the aforesaid eight (8) locations shall, upon the initiation of operation of the system, become the property of the Lessor. In addition, all equipment installed at Lessor's expense shall remain the Lessor's property. All other receive equipment will remain the property of Lessee.

(d) **Transmission Point Facilities.** Lessee shall provide, at its sole cost and expense, suitable space at the Transmission Point for the ITFS channel antenna(s) and transmitters, and TVRO satellite antenna. Lessor shall, where possible, co-locate its production facility with Lessee's production facilities. In the event that Lessee's production facility cannot be co-located with the Transmission Point, Lessee shall arrange for the transmission of programs from its facility to the antennas. However, if requested by Lessee, Lessor will apply for and obtain any FCC authorizations necessary for a sufficient number of microwave point-to-point studio-to-transmitter links ("STLs") for such purpose. Upon receipt of such authorizations, Lessee, at Lessor's expense will design, obtain and install, at cost, the equipment necessary for such STLs. Such equipment will become part of the Leased Equipment. Such STLs will be available for use by Lessee for any purpose, including, but not limited to, the transmission of data.

(e) **Power Increase.** If Lessee so requests, Lessor will file an amendment to its application for the Channels or a modification application with the FCC seeking authority to increase the output power of the ITFS Channels to a higher level requested by Lessee, provided that such higher level will not be reasonably anticipated to cause harmful electrical interference to any other radio transmission facility for which an application has previously been accepted by the FCC or authorization granted by the FCC, and which is entitled to protection from such interference under FCC rules. In the event that said authorization for power increase

is obtained, Lessee, at its sole expense, shall provide and install appropriate amplifiers and related equipment in order to effect said power increase and such amplifiers and equipment shall thereupon become part of the Leased Equipment. Lessee shall arrange for and pay for all costs, including legal and engineering fees associated with said application and power increase.

7. **FEES.**

(a) **Fee Schedule.** Commencing on the date of execution of the Agreement and continuing until commercial broadcasting begins, Lessee shall pay to Lessor a monthly fee of One Dollar (\$1). Upon the start of commercial broadcasting and continuing thereafter throughout the Initial Term and any Renewal Term of the Agreement, Lessee shall pay to Lessor as consideration for the Channels provided to Lessee hereunder \$0.015 cents per subscriber per month for each granted channel in the ITFS Channel Group. Lessor agrees to cooperate with Lessee to combine Lessor's receiver sites to gain additional required time for educational programming if feasible under FCC rules and regulations to minimize Lessee's requirements for comband equipment at its receive sites.

(b) **Right to Audit.** Lessee and Lessor shall, while this Agreement is in force, keep, maintain and preserve complete and accurate records and accounts, including all invoices, correspondence, ledgers, financial and other records pertaining to Lessee's and Lessor's charges hereunder, and such records and accounts shall be available for inspection and audit at the respective offices of Lessee and

Lessor at any time or times during the time service is being provided to Lessee hereunder or within ninety (90) days thereafter, during reasonable business hours, by Lessee or Lessor or their respective nominees. Notwithstanding the foregoing, Lessee and Lessor shall be entitled to only one audit of each other's records and accounts during any six-month interval. Lessee and Lessor shall provide each other with five (5) business days' advance written notice to their intent to inspect said records and accounts prior to being allowed to do so. Lessee and Lessor shall not interfere with each other in the exercise of their respective rights of inspection and audit set forth herein. The exercise in whole or in part at any time or times of the right to audit records or accounts or of any rights herein granted or the acceptance by Lessee or Lessor of any statement or remittance tendered by or on behalf of either Lessee or Lessor shall be without prejudice to any rights or remedies of either of them and shall not preclude Lessee or Lessor thereafter from disputing the accuracy of any such statement or payment.

(c) **Payment of Fees.** Lessee shall arrange for and pay Lessor's legal, engineering and related expenses actually incurred in prosecuting its application for the authorizations and related documents.

8. **ARBITRATION OF DISPUTE.** In the event that Lessee and Lessor cannot resolve any dispute arising under this Agreement, such dispute may be resolved pursuant to arbitration pursuant to the procedures of the American Arbitration Association, and the decision of the Arbitrator as provided for therein shall not in any way result in a default hereunder unless the

award of the Arbitrator is not complied with. All information obtained by Lessee or Lessor during such disputes shall be maintained on a confidential basis.

The Lessee and Lessor shall each pick their own arbitrator. These two shall then pick a third arbitrator. Each shall pay for their own selected arbitrator and shall share the cost of the third arbitrator equally.

9. **ITFS CHANNEL EQUIPMENT LEASE.** Lessor shall lease from Lessee all Leased Equipment. The terms of the lease agreement, to be entered into prior to commencing construction shall include the following:

(a) **Rent.** Lessor shall pay to Lessee the total amount of One dollar (\$1) per year for any use of the Leased Equipment, it being understood that Lessor's provision of the air time at the rates provided in this Agreement is the major consideration for Lessee's lease of the equipment to Lessor.

(b) **Taxes.** Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, the Lessee shall be entitled to claim depreciation and investment tax credits thereunder for income tax purposes.

(c) **Maintenance and Operating Costs.** Lessee shall be required to bear all costs associated with maintaining, upgrading and operating the Leased Equipment.

(d) **Term.** The term of the lease shall commence upon the date actual construction begins and shall end upon the termination of this Agreement.

10. **CONTROL OVER PROGRAMMING.** Lessee intends that only programming of a sort which will not serve to place Lessor's reputation in the community in jeopardy will be transmitted by Lessee on Lessor's channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, the Movie Channel, ESPN, WTBS, Cable News Network, etc. The parties recognize that difficulties inherent in specifying exact standards in this Paragraph, but believe that good faith efforts on both sides can overcome whatever differences which may arise. Lessor shall have the absolute right to deny Lessee the right to transmit on its leased channels any program which is obscene as defined by the laws of the United States or which would violate the rules and regulations of the FCC or which in the sole opinion of Lessor is not acceptable to Lessor.

11. **TERMINATION.**

(a) **Termination by Reason of No ITFS Channels within Twenty-Four Months.** This Agreement may be terminated at the option of Lessee upon thirty (30) days written notice to Lessor in the event that the FCC has not granted an ITFS authorization for the Channels to Lessor within twenty-four (24) months from the date this Agreement is signed.

(b) **Termination by Reason of Revocation of FCC Authorization.** If Lessor's FCC authorization is ever terminated or revoked, this Agreement will terminate. Should such termination occur, each party shall be entitled to retain all equipment and materials purchased or furnished by such party. There shall be a final

accounting of monies due under this Agreement, and when completed, there shall be no further liability of one party to the other.

(c) **Termination by Reason of Default and Nonperformance.** At the option of the non-defaulting party, this Agreement may be terminated upon the material breach or default by the other party of its duties and obligations hereunder if such breach or default shall continue without being cured for a period of thirty (30) consecutive days after such party's receipt of notice thereof from the non-defaulting party. Failure to make any payment required under Paragraph 7 hereof shall, if such failure continues for a period of thirty (30) days after written notice thereof to Lessee, constitute a material breach of this Agreement by Lessee and, in such event, Lessor may elect to cancel and terminate this Agreement. In the event of termination pursuant to this Subparagraph, such termination shall not affect or diminish the rights of claims or remedies available in equity or at law to the non-defaulting party arising by reason of such breach or default. Lessor shall use its best efforts to maintain its license authorizations with the FCC. Lessee shall assist in maintaining the license and filing appropriate licenses.

(d) **Termination by Failure of Lessee's Business Plans.** Prior to starting actual construction of the Channels, Lessee shall have the option to terminate this Agreement by notifying Lessor, in writing, that circumstances exist with reference to the transaction contemplated by this Agreement which would interfere with Lessee's business plan. In the event of such termination, neither party

shall have any further obligation to the other, except that Lessee shall reimburse Lessor for any out-of-pocket expenses previously approved by Lessee and incurred by Lessor.

(e) **Early Termination by Lessee.** Lessee may terminate this Agreement at any time for any reason by providing Lessor with six (6) months prior written notice. In such event, Lessor shall have rights to purchase leased equipment as defined in Section 20. Lessor may terminate if FCC has not given approval within 2 years from date or if Lessee has not begun operations within 18 months after FCC approves the Channels.

12. **NOTICE.** Any notice to be given by either party to the other party under any provision of this Agreement shall be by hand delivery or by prepaid overnight express courier to the respective party's signatory to this Agreement at the address of that party as provided in the first paragraph of page 1 of this Agreement. Lessor or Lessee may change the address for notice by sending such notice to the other party in accord with this paragraph.

13. **SEVERABILITY.** Should any court or agency, including the FCC, determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement provision which is valid.

14. **VENUE AND INTERPRETATION.** This Agreement shall be governed by, and construed and enforced in accordance with the Communications Act of 1934, as amended, the rules and regulations of the FCC and the laws of the State of Florida.

15. **ENTIRE AGREEMENT.** This Agreement constitutes the entire Agreement between the parties and supersedes all prior oral or written provisions of any kind. The parties further agree that this Agreement may only be modified by written agreement signed by both parties.

16. **ASSIGNMENT.** Lessor or Lessee may not assign, transfer, sell, dispose of or otherwise alienate or encumber their rights or obligations under this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld.

17. **INDEMNIFICATION.**

(a) **Lessee.** Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend Lessor for all claims, demands, causes of action, loss, and judgments, including attorneys' fees (herein collectively "claims") arising out of this Agreement, unless such claim arose out of a negligent act or omission of Lessor.

(b) **Lessor.** Lessor shall pay any and all costs and expenses, including attorneys fees, resulting from Lessor's breach of this Agreement or from any negligence, omission or wrongful act by Lessor, its agents or employees.

18. **COOPERATION.** Lessor and Lessee each warrant to each other that it will take no action that will unreasonably interfere, threaten or frustrate the other's purposes or business activities; Lessor and Lessee agree to keep the other informed and to coordinate with the other any of its activities that may have such effect on the other.

19. **PURCHASE OPTION.** At the end of the Initial Term or upon early termination of this Agreement by Lessee, Lessor shall have the right to purchase the Leased

Equipment used exclusively for Lessor's ITFS operation for the sum of One Dollar (\$1). Upon payment of said sum, title to such of the Leased Equipment owned by Lessee shall, at Lessor's option, transfer to Lessor and the Leased Equipment shall become the property of Lessor. Lessee shall also use its best efforts and execute such leases or assignments as reasonably necessary to provide for Lessor's continued use of the transmitter site. In order to facilitate Lessor's rights under this Section, Lessee agrees to keep the Leased Equipment free and clear of all liens and encumbrances and shall promptly give Lessor notice of the creation or assertion by any person or entity of such lien or encumbrance. Lessee also hereby grants to Lessor a security interest in and lien upon the Leased Equipment.

Upon early termination of this Agreement by Lessor, Lessor shall have the right to purchase the Leased Equipment used exclusively for Lessor's ITFS operation, at its depreciated value at the time of such termination. That equipment shall consist of: those transmitters, down-converters, power supply, STL equipment, cable, connectors, fittings and hardware, and any other equipment used through this lease for the sole and exclusive use for Lessor's signal transmission, transport, delivery and reception. Any equipment which is used in a shared fashion (such as transmit antenna, decoders, combiners) in providing signals other than Lessor's signals is excluded from this option to purchase. The intent of this purchase option is to provide Lessor with the capability to continue to perform on Lessor's ITFS license.

20. OBLIGATION TO TRANSMIT. Nothing in this Agreement shall be construed to obligate or create a duty on the part of Lessee to actually transmit any minimum number of hours of programming during the Lessee's Time.

21. **LEASED EQUIPMENT.** Lessee shall supply, at its sole cost and expense, sufficient personnel to operate and maintain the Leased Equipment. Such personnel shall, at all times, be under the supervision of Lessee but subject to control of Lessor. Said personnel shall insure that the Leased Equipment shall, at all times, meet the technical operating requirements of the Rules of the FCC. Such operations and maintenance activities shall be undertaken at such times as are consistent with the operating requirements of Lessee's business. Lessor shall have overall responsibility for access to transmission facilities during normal business hours and at other times upon twenty-four (24) hours prior notice.

22. **START DATE.** For purposes of this Agreement, the Start Date shall be the date which authorization from the FCC for the ITFS Channels is granted.

23. **CONDITIONS PRECEDENT.** All of the rights and obligations hereunder shall be subject to the following conditions which conditions may be waived in writing by the non-defaulting party.

(a) **Material Documents.** Lessor will have made available to Lessee for inspection all of the material documents and contracts to which Lessor is a party which in any way affects the Channels.

(b) **FCC Application.** Lessor, to the extent required by the FCC with the assistance of Lessee as herein set forth, shall have applied to the FCC for a license to operate the ITFS Channel facilities as described herein.

(c) **Final Order.** The FCC shall have issued a Final Order granting Lessor the license to operate the Channels in accordance with the terms of this Agreement.

(d) **Construction.** The Channels shall have been constructed and licensed in accordance with the term of this Agreement.

24. **AGREEMENT TO DEFEND.** Lessee agrees to defend any suit or proceeding brought against Lessor based on a claim that any device made by Lessor, designed and furnished hereunder constitutes an infringement of any existing United States patent, provided Lessee is notified promptly in writing and is give complete authority and information required for the defense of same; and Lessee shall pay all damages and costs awarded therein against Lessor, but shall not be responsible for any cost, expense incurred or settlement made by Lessor without Lessee's prior written consent. In the event any devise furnished hereunder is, in Lessee's or Lessor's opinion, likely to or does become the subject of a claim for patent infringement, Lessee shall at its own expense procure for Lessor the right to continue using said device or modify it to become non-infringing; but in the event use of such device is prevented by injunction and Lessee fails to modify or otherwise procure for Lessor the right to continue using it, Lessee will remove such device and shall substitute thereof other non-infringing, FCC approved equipment.

25. **USE OF COMPRESSION TECHNOLOGY.** In the event Lessee seeks to utilize bandwidth compression or other technologies to make possible the simultaneous transmission of more than one video program on any of the ITFS Channels, Lessee shall provide notice to Lessor describing in detail the technical changes to be made to the Transmission Facilities and receive sites

and proposing an amendment to this Agreement to authorize the use of such technologies. Lessor shall consent to the use of such technologies and execute an appropriate amendment to this Agreement if Lessor is reasonably satisfied that: (a) the proposal is consistent with FCC Rules and Policies and the Lessor's authorization for the station; (b) the changes to the Transmission Facilities will be made in a manner that will not disrupt Lessor's ITFS programming operations and will not result in noticeable degradation in transmission quality or in other technical problems; (c) additions or changes to the Transmission Facilities, including all digital encoding equipment necessary for Lessor's ITFS transmissions, will be provided or made at Lessee's expense; (d) any new or modified receive site equipment necessary to permit all of Lessor's receive sites to continue to receive Lessor's ITFS programming will be provided by Lessee at no cost to Lessor or to such receive sites, and future receive sites will be able to acquire such equipment at reasonable cost; (e) Lessor will have the choice to use up to 25% of the expanded capacity of the ITFS Channels for ITFS use, such choice to be subject to modification on one (1) year's notice to Lessee.

26. **SPECIAL CONDITIONS.** Notwithstanding any other provisions of this Agreement to the contrary, Lessee agrees to provide such support to Lessor as is reasonably necessary to assist Lessor in providing a minimum number of hours per week of qualified educational programming as required by the FCC on Lessor's channels.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this

20th day of July, 1994.

LESSOR:

LAKE CITY COMMUNITY COLLEGE

LESSEE:

HEARTLAND WIRELESS
COMMUNICATIONS, INC.

By:

Muriel Kay Heimer
Muriel Kay Heimer
President

By:

David E. Webb
David Webb
President

EXHIBIT I

ITFS LEASE AGREEMENT

BY AND BETWEEN

SACRED HEARTS ACADEMY

AND

**HAWAIIAN BROADCASTING INVESTORS 1,
LIMITED PARTNERSHIP**

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ITFS LEASE AGREEMENT

-- THIS ITFS LEASE AGREEMENT (the "Agreement"), is made as of this ___ day of May, 1994, by and between Sacred Hearts Academy, a Hawaii non-profit corporation ("Lessor"), and Hawaiian Broadcasting Investors 1, Limited Partnership, a Hawaii limited partnership ("Hawaiian Broadcasting").

W I T N E S S E T H:

WHEREAS, Lessor has a substantial continuing education mission to serve students off campus and desires to distribute instructional, public service and research programming to classrooms, industrial sites, other educational institutions and remote sites of Lessor located throughout the Honolulu metropolitan area; and

WHEREAS, Lessor desires to file with the Federal Communications Commission ("FCC") an application for the authorization to operate Instructional Television Fixed Service channels A-1, A-2, A-3 and A-4 at Palehua Ridge, Honolulu, Hawaii and desires to lease the excess transmission capacity thereon; and

WHEREAS, pursuant to the terms and subject to the conditions hereof, Hawaiian Broadcasting desires to assist Lessor in filing the necessary applications and filings in order that Lessor might obtain the Authorization (as hereinafter defined) for the Channels (as hereinafter defined) and thereafter make available to Hawaiian Broadcasting the excess transmission

capacity thereon, subject to Lessor's rights under the Recapture Rules (as hereinafter defined);

NOW, THEREFORE, in consideration of the premises and of the mutual promises, undertakings, covenants and agreements set forth herein, the parties hereto do hereby agree as follows:

ARTICLE 1 - DEFINITIONS

1.1 Definitions. Whenever used in this Agreement or the Recitals above or any Exhibit hereto, unless something in the subject or context is inconsistent therewith, the following words and terms shall have the respective meanings ascribed to them, as follows:

(a) "Application" shall have the meaning ascribed thereto in Section 3.1(a).

(b) "Authorization" means the authorization, permit and license issued by the FCC for the operation of an ITFS, MMDS or MDS channel, as the case may be.

(c) "Channels" means the ITFS channels A-1 (2500-2506 MHz), A-2 (2512-2518 MHz), A-3 (2524-2530 MHz) and A-4 (2536-2542 MHz) to be operated in the Metropolitan Area.

(d) "Commencement Date" means the date on which Hawaiian Broadcasting uses the transmission capacity on the Channels for the provision of its Wireless Cable Service.

(e) "Confidential Information" shall mean any confidential or secret information or data that is of value to the party disclosing such information, including, but not limited to, confidential or secret (i) scientific or technical informa-

tion; (ii) information relative to the current or proposed business, sales and marketing plans of the party disclosing such information and financial information related thereto; (iii) drawings, designs, computer programs and software devices; (iv) costs and pricing information; and (v) identification of personnel or other possible resources for possible use in the business of the party disclosing such information; provided, however, that the term "Confidential Information" shall not include any information that (A) is now or subsequently enters the public domain through means other than direct or indirect disclosure by any party hereto in violation of the terms of this Agreement, (B) is already in the possession of the party receiving such information free of any obligation of confidence to any other party, or (C) is lawfully communicated to the party receiving the information by a third Person, free of any confidential obligation, subsequent to the time of communication thereof by, through or on behalf of the other party hereto.

(f) "Damages" means all claims, demands, causes of action, losses, investigations, proceedings, damages, penalties, fines, expenses and judgements, including, but not limited to, reasonable attorneys' fees and disbursements.

(g) "Effective Date" shall mean the date of this Agreement.

(h) "Fair Market Value" shall mean, in each case, such fair market value as is determined by the mutual agreement of Hawaiian Broadcasting and Lessor; provided, however, that if the

parties are unable to agree on the fair market value, then the fair market value shall be determined by arbitration pursuant to the terms of Section 13.2 hereof.

(i) "Final Order" means an action by the FCC or other regulatory authority having jurisdiction (i) which action cannot be reversed, stayed, enjoined, set aside, annulled or suspended, and (ii) with respect to which action no timely request for stay, motion or petition for reconsideration or rehearing, application or request for review, or notice of appeal or other judicial petition for review is pending, and (iii) as to which the time for filing any such request, motion, petition, application, appeal or notice, and for the entry of orders staying, reconsidering, or reviewing on the FCC's or such other regulatory authority's own motion has expired.

(j) "Initial Term" has the meaning set forth in Section 2.1.

(k) "Instructional Programming" means instructional and public programming which qualifies as ITFS programming as prescribed in Section 4.9316(a), (b) and (c) or the FCC rules and regulations (47 C.F.R. § 74.931 (a), (b) and (c) (1991)).

(l) "ITFS" means Instructional Television Fixed Service as designated by Subpart I of Part 74 of the FCC's rules.

(m) "Joint Equipment" shall mean the transmission equipment installed at the Tower Site to be jointly used by those certain ITFS, MMDS and MDS licensees from whom Hawaiian

Broadcasting leases transmission capacity for use in connection with its Wireless Telecommunications Service.

(n) "Leased Capacity" has the meaning set forth in Section 6.2.

(o) "Leased Equipment" has the meaning set forth in Section 4.3.

(p) "Lessor Equipment" shall mean the equipment listed on Exhibit 1 which is to be used in connection with the Channels at the Tower Site.

(q) "Lien" means, with respect to any asset, any mortgage, lien, pledge, charge, security interest, restriction or encumbrance of any kind, whether statutory or otherwise, in respect of such asset.

(r) "MDS" means the Multipoint Distribution Service as designated by Subpart K of Part 21 of the FCC's rules.

(s) "MMDS" means the Multichannel Multipoint Distribution Services as designated by Subpart K of Part 21 of the FCC's rules.

(t) "Metropolitan Area" means the Honolulu, Hawaii area to which Hawaiian Broadcasting may provide Wireless Telecommunications Services from the Tower Site.

(u) "Permitted Lender" means any commercial bank or trust company or any other Person having a net worth of not less than

(v) "Permitted Liens" means any Lien for current taxes not yet due.

(w) "Primary Time" has the meaning set forth in Section 6.1.

(x) "Ready Recapture Time" has the meaning set forth in Section 6.1.

(y) "Recapture Rules" means the FCC's rules governing the Primary Time and Ready Recapture Time and the rights and obligations of the parties hereunder with respect thereto (117 C.F.R. § 74.931(e)(2) (1991)).

(z) "Renewal Term" shall have the meaning ascribed thereto in Section 2.2.

(aa) "Rent" shall have the meaning ascribed thereto in Section 8.1.

(ab) "Term" means the Initial Term together with any subsequent Renewal Term or Renewal Terms, as provided herein.

(ac) "Tower Site" shall mean the tower site located on the Palehua Ridge or such other location designated by Hawaiian Broadcasting at which the ITFS, MMDS and MDS channels made available to Hawaiian Broadcasting for use with respect to the Wireless Telecommunications Services are co-located.

(ad) "Wireless Cable Service" means the provision of subscription video and/or entertainment and additional programming services and services ancillary thereto in the Metropolitan Area through the use of, among others, ITFS, MMDS and MDS channels.

(ae) "Wireless Telecommunications Service" means any telecommunications service that is permitted under FCC rules and

regulations to be provided on or by means of the transmission capacity on an ITFS, MMDS or MDS channel, including, but not limited to, Wireless Cable Services.

1.2 Additional Terms. The definitions in Section 1.1 shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include," "includes" and "including" shall be deemed to be followed by the phrase "without limitation." All references to "party" and "parties" shall be deemed references to the parties to this Agreement unless the context shall otherwise require. All references to Sections and Paragraphs shall be deemed references to Sections and Paragraphs of this Agreement, unless the context shall otherwise require. All references herein to Exhibits shall be deemed to be references to the Exhibit(s) attached to this Agreement.

ARTICLE 2 - TERM

2.1 Initial Term. Subject to the provisions for early termination contained herein, the term of this Agreement shall commence upon the date of execution of this Agreement and shall expire on the earlier of (i) the expiration of the Authorization for the Channels or (ii) the tenth anniversary of the Commencement Date (the "Initial Term".)

2.2 Renewal Term. If Hawaiian Broadcasting wishes to extend the term of this Agreement beyond the Initial Term or any subsequent term (any such renewal of the Initial Term or any term

subsequent thereto a "Renewal Term"), Hawaiian Broadcasting shall so notify Lessor in writing no later than one hundred twenty (120) days prior to the expiration of the Initial Term or any Renewal Term. Thereafter, for a period of 90 days, Lessor shall negotiate in good faith exclusively with Hawaiian Broadcasting and Hawaiian Broadcasting shall negotiate in good faith with Lessor the terms and conditions on which the Term or any Renewal Term, as the case may be, shall be renewed; provided, however, that in the event the FCC rules and regulations are amended to permit the automatic renewal or extension of agreements for the utilization of transmission capacity on ITFS channels, which the parties hereby acknowledge and agree is an express condition to this proviso, then upon the expiration of the Initial Term the term shall automatically renew without any further action of the parties for an additional term which shall be of the longest duration permitted under the applicable FCC rules and regulations in force and effect at such time; and provided, further, that if a subsequent automatic renewal term also is permitted under the FCC rules and regulations in force and effect as of the date on which a second automatic Renewal Term would commence, which the parties hereby acknowledge and agree is an express condition to this further proviso, then, upon the expiration of the initial automatic Renewal Term, the term shall renew for a second Renewal Term of the same duration upon the giving of notice to Lessor by Hawaiian Broadcasting no later than one hundred eighty (180) days prior to the expiration of the first automatic Renewal Term.

ARTICLE 3 - FCC APPLICATIONS

3.1 Application for Authorization.

(a) Promptly following the Effective Date, Hawaiian Broadcasting shall prepare, subject to the review and approval of Lessor, which review shall be promptly undertaken and which approval shall not be unreasonably withheld, the necessary applications and filings in order to apply for the Authorization for the Channels (any such applications and filings and any supplements thereto, collectively, the "Application") and promptly thereafter Lessor shall file and diligently prosecute the Application with the FCC.

(b) Each of Hawaiian Broadcasting and Lessor shall use its best efforts to obtain the timely grant of the Authorization for the Channels by the FCC for Lessor. Lessor shall not take any action with respect to the Application without the prior consent thereto by Hawaiian Broadcasting, which consent shall not be unreasonably withheld. Lessor shall take any and all actions with respect to the Application as Hawaiian Broadcasting may reasonably request and shall file and diligently prosecute any additional pleadings, motions, filing or applications with respect thereto as Hawaiian Broadcasting may prepare subject to the review and approval of Lessor, which review shall be promptly undertaken and which approval shall not be unreasonably withheld.

(c) Nothing contained herein shall obligate Hawaiian Broadcasting to take any action with respect to the Application in order to obtain the grant thereof for Lessor, including, but

not limited to, the making of any payments to the FCC or to any third Person in order to acquire the Authorization for the Channels or to settle any competing applications for the Authorization for the Channels filed by a third Person, if Hawaiian Broadcasting determines in its good faith reasonable business judgment that any such payments would result in, or is reasonably likely to result in, an adverse effect on the development or provision of, or its ability to develop or provide, Wireless Telecommunications Services in the Metropolitan Area.

3.2 Point-to-Point Link. If at any time during the Term Lessor determines with the approval of Hawaiian Broadcasting, which approval shall not be unreasonably delayed or withheld, that it is necessary to construct point-to-point studio-to-transmitter links in order to permit Lessor to deliver Instructional Programming from Lessor's studio to the Tower Site, Hawaiian Broadcasting shall prepare, subject to the review and approval of Lessor, which review shall not be unreasonably delayed and which approval shall not be unreasonably withheld, the necessary applications therefore, and thereafter Lessor shall file and diligently pursue such applications with the FCC.

3.3 Amendments and Additional Filings and Consents.

(a) Lessor shall use its best efforts to cause the FCC to modify the Authorization for the Channels as may be reasonably requested from time to time by Hawaiian Broadcasting, to the extent that it is not inconsistent with the rules and regulations

of the FCC or with the policies, procedures and best interests of Lessor, including, by way of example and not of limitation, filing any applications or filings with the FCC that are necessary or desirable to re-locate the transmission point of any of the Channels, to increase the output power on the Channels to the extent permitted by the FCC's rules and regulations, as those rules and regulations may be amended from time to time, and to otherwise modify the Authorization for the Channels in a manner that would assist Hawaiian Broadcasting in the provision of its Wireless Telecommunications Services.

(b) Hawaiian Broadcasting shall prepare, subject to the review and approval of Lessor, which review shall not be unreasonably delayed and which approval shall not be unreasonably withheld, and Lessor shall file, and thereafter diligently prosecute, such pleadings, motions and other filings as may be requested by Hawaiian Broadcasting with such federal and/or state regulatory agencies or courts in order to implement the transactions contemplated by this Agreement and to otherwise assist Hawaiian Broadcasting in developing its Wireless Telecommunications Services in the Metropolitan Area, including, but not limited to, the development and operation of a telecommunications system that provides such services through the use of digital transmission or compression technology.

3.4 Receive Sites. Following the grant of the Authorization for the Channels, Lessor shall maintain, and Hawaiian Broadcasting shall assist Lessor in maintaining, with

the FCC, ~~current~~ and complete listing of all of its authorized receive-sites for the Channels.

3.5 Further Action. Throughout the Term, Lessor shall use its best efforts to obtain and maintain in force all licenses, permits and authorizations required or desired in connection with Hawaiian Broadcasting's use of the Channels. Subject to the prior approval of Lessor, which approval shall not be unreasonably withheld or delayed, Lessor shall file such protests or petitions to deny other applications for licenses as may be reasonably requested by Hawaiian Broadcasting, and, if requested by Hawaiian Broadcasting, and to the extent so requested, Lessor shall use its best efforts to prevent any unauthorized individual or entity from receiving the signals transmitted on the Channels.

3.6 Engineering Plans. All engineering plans required to be submitted with any application or filing contemplated hereby, including, but not limited to, the Application, shall be prepared by Hawaiian Broadcasting with the consent of Lessor, which consent shall not be unreasonably withheld or delayed.

3.7 Best Efforts. Both parties hereto shall use their best efforts to diligently prepare, file and prosecute before the FCC all petitions, waivers, construction applications, amendments and other related documents necessary to secure FCC approval of all aspects of this Agreement. Hawaiian Broadcasting shall assist in the preparation and prosecution of such applications. Notwithstanding anything in this Agreement to the contrary, it is understood that no applications, requests or filings required by this

Agreement shall be filed unless both parties hereto have reviewed said filing and consented to its submission, such consent not to be unreasonably withheld or delayed.

3.8 Application Costs. The reasonable costs of the preparation of the applications and amendments referred to in this Article 3, including, but not limited to, (a) all legal and engineering costs and filing fees therefor and (b) with respect to the review thereof by Lessor's outside counsel, shall be paid by Hawaiian Broadcasting.

ARTICLE 4 - FACILITIES

4.1 Construction of Transmission Facilities. Following the grant of the Authorization for the Channels, Hawaiian Broadcasting shall commence the construction of the transmission facilities for the Channels and the installation of the Leased Equipment and shall complete the construction and installation thereof no later than thirty (30) days prior to the construction deadline set forth in the Authorization or any extension thereof.

4.2 Construction of STL Facilities. Promptly following the grant of all necessary FCC and other federal and state consents and approvals to construct the studio-to-transmitter facilities for which Lessor has filed an application pursuant to Section 3.1 hereof, Hawaiian Broadcasting shall acquire and install, or cause to be installed, the necessary equipment therefor.

4.3 Ownership of Facilities. Hawaiian Broadcasting shall own all the transmission and reception facilities and equipment described in Sections 4.1 and 4.2, all improvements thereto,

including, but not limited to the Lessor Equipment and the Joint Equipment. Any equipment so installed in said construction, which equipment shall consist of both Lessor Equipment and Joint Equipment, shall be leased to Lessor pursuant to Article 5 hereof (the Lessor Equipment and the Joint Equipment hereinafter referred to as the "Leased Equipment"). Lessor shall supervise the installation of the Leased Equipment. Subject to the provisions of Sections 5.6, 12.3 and 12.4, Hawaiian Broadcasting shall retain title to the Leased Equipment.

ARTICLE 5 - EQUIPMENT LEASE

5.1 Channel Transmission Equipment Lease. Following the construction of the transmission facilities for the Channels and during the remainder of the Term, Lessor shall lease from Hawaiian Broadcasting, and Hawaiian Broadcasting shall lease to Lessor, the Leased Equipment pursuant to the terms and subject to the conditions set forth in this Article 5.

5.2 Rent. The Lessor shall pay to Hawaiian Broadcasting per year for the use of the Leased Equipment, it being understood that Lessor's provision of the excess transmission capacity at the rates provided in this Agreement is full consideration for Hawaiian Broadcasting's lease of equipment to Lessor.

5.3 Taxes. Hawaiian Broadcasting shall be required to pay all taxes and other charges assessed against the Leased Equipment, and shall be entitled to claim depreciation and all tax credits hereunder for income tax purposes.

5.4 Maintenance and Operating Costs. Hawaiian Broadcasting shall be required to bear all costs associated with maintaining and operating the Leased Equipment and shall replace the Leased Equipment during the Term, if necessary, to keep it in working order.

5.5 Lease Term. The term of the lease shall commence when Hawaiian Broadcasting completes installation of transmission facilities for the Channels at the Tower Site, and shall end upon the earlier (a) the expiration or termination of the Term or (b) the creation or attempted creation by Lessor of any Lien on the Leased Equipment or the Authorization for the Channels.

5.6 Repossession of Equipment. Except as otherwise provided in Sections 12.3 and 12.4 hereof, upon the expiration or termination of this Agreement (either at the scheduled termination date or otherwise), Hawaiian Broadcasting shall be entitled to remove the Leased Equipment and, if necessary, to enter into Lessor's premises during normal business hours for the purpose of doing same; provided, however, that in those cases where Hawaiian Broadcasting shall be permitted to remove the Leased Equipment, Lessor shall have the right, exercisable after receiving notice that Hawaiian Broadcasting will terminate this Agreement, to purchase the Leased Equipment from Hawaiian Broadcasting at a cash price equal to its Fair Market Value at the time of Lessor's purchase.

5.7 Risk of Loss. Lessor shall have no responsibility for the loss or damage of the Leased Equipment, provided, however,

that Lessor shall be liable for the time and materials required to restore the Leased Equipment to its previous condition or to replace any of the Leased Equipment if such loss or damage is caused by any intentional or negligent act or omission of Lessor, its agents, affiliates, representatives or invitees.

5.8 Digital Transmission and Reception Equipment. If at any time Hawaiian Broadcasting begins using digital transmission or compression equipment to provide its Wireless Cable Services on the Channels or any other transmission technology which permits Hawaiian Broadcasting to maximize the transmission capacity on the Channels, Hawaiian Broadcasting shall make available to Lessor the necessary encoding equipment at the Tower Site at no additional cost to Lessor either as part of the Lessor Equipment or the Joint Equipment. At such time Hawaiian Broadcasting shall also make available and install, at no cost to Lessor, one decoder for each bona fide Lessor receive site being served by the Channels at the time Hawaiian Broadcasting implements the use of the digital compression or transmission technology on the Channels. Thereafter, Hawaiian Broadcasting shall make available to Lessor, at cost, one signal decoder for each bona fide Lessor receive site that is subsequently added by Lessor. Lessor shall install and use any decoders made available by Hawaiian Broadcasting, or permit such decoders to be installed and used, only at Lessor's receive sites.

ARTICLE 6 - USE OF THE ITFS CHANNELS

6.1 Lessor's Reserved Time. During the first twenty-four (24) month period beginning on the Commencement Date, Lessor hereby reserves twelve (12) hours per week of transmission time per Channel, and, during the remainder of the Term, Lessor reserves twenty (20) hours per week of transmission time per Channel (such initial twelve (12) hours per Channel per week and the subsequent twenty (20) hours per Channel per week the "Primary Time"). The Primary Time shall be used by Lessor for the sole purpose of transmitting Instructional Programming. Subject to the terms of Section 6.1(b), Lessor also reserves the right, in accordance with the FCC rules, to recapture an additional twenty (20) hours per week of transmission time on each of the Channels ("Ready Recapture Time") for the purpose of transmitting additional Instructional Programming. To the greatest extent permitted under the rules and regulations of the FCC at the time, Hawaiian Broadcasting shall be permitted to consolidate the transmission of the Lessor's Instructional Programming on as few channels as the state-of-the-art technology may permit (e.g., by channel mapping or channel loading).

(a) Subject to the right of Lessor to amend its programming schedule under Section 6.3, at least thirty (30) days before commencement by Hawaiian Broadcasting of its Wireless Cable Service on the Channels, Hawaiian Broadcasting and Lessor shall agree in writing on the scheduling of Primary Time so as to satisfy Lessor's programming needs for its Instructional

Programming. Hawaiian Broadcasting and Lessor agree that, subject to the FCC's rules and regulations, the Primary Time shall be scheduled in order to minimize any adverse effect on Hawaiian Broadcasting's use of the transmission capacity on the Channels. Lessor agrees that it shall commence its Primary Time programming on or before the Commencement Date.

(b) Lessor shall have the right to exercise its rights with respect to the Ready Recapture Time by delivering written notice to Hawaiian Broadcasting thereof no later than twelve (12) months prior to the date on which Lessor desires to begin transmitting Instructional Programming during the Ready Recapture Time. Promptly following the delivery of such notice, but in any event no later than forty-five (45) days prior to the date on which Lessor is to begin transmitting Instructional Programming during the Ready Recapture Time and subject to the right of Lessor to amend its programming under Section 6.3, Hawaiian Broadcasting and Lessor shall agree in writing on the scheduling of the Instructional Programming during the Ready Recapture Time. Hawaiian Broadcasting and Lessor agree that, subject to the FCC's rules and regulations, the Ready Acceptance Time shall be allocated on the available transmission capacity for the Channels in order to minimize any adverse effect on Hawaiian Broadcasting's use of the transmission capacity on the Channels.

(c) Lessor and Hawaiian Broadcasting shall work together using their best efforts to cooperate in the compatible development and growth of Lessor's Instructional Programming and

Hawaiian Broadcasting's Wireless Telecommunications Service in the Metropolitan Area.

(d) Lessor agrees to maintain at all times a schedule of Instructional Programming which is sufficient to comply with all pertinent FCC rules and regulations governing the use of the Channels.

(e) In the event the FCC amends its rules and regulations in order to require that additional programming time be allotted to the Primary Time or the Ready Recapture Time or to eliminate the requirement that Lessor retain Ready Recapture Time, Hawaiian Broadcasting and Lessor agree to negotiate in good faith the terms and conditions of an amendment to this Agreement in order to reflect the allocation of additional transmission capacity on the Channels to the Primary Time or the Ready Recapture Time or the availability of additional transmission capacity for use by Hawaiian Broadcasting in the provision of its Wireless Telecommunications Service. Any such amendment to this Agreement shall reflect and preserve the benefit of the bargains of the parties reflected herein.

6.2. ~~Leased Transmission Capacity.~~ Lessor hereby leases to Hawaiian Broadcasting all of the transmission capacity on the Channels (including the subcarriers and vertical blanking intervals of the Channels) other than the transmission capacity required for the Primary Time (the "Leased Capacity") and subject to Lessor's right to recapture such transmission capacity as is

required for the Ready Recapture Time pursuant to the terms of Section 6.1(b) hereof.

6.3 Scheduling. Lessor shall give Hawaiian Broadcasting at least ninety (90) days' prior written notice of any changes in scheduling affecting the Leased Capacity. During the ninety (90)-day period, Lessor and Hawaiian Broadcasting shall negotiate in good faith to determine a programming schedule for Lessor which shall accomplish its educational objectives while minimizing the disruption to Hawaiian Broadcasting's Wireless Cable Service. Hawaiian Broadcasting, by mutual agreement with Lessor, may incorporate certain of the Lessor's Instructional Programming into its overall Wireless Cable Services. Any of Lessor's Instructional Programming shall be offered unscrambled and without additional charge to the subscribers to the Wireless Cable Service.

6.4 Control Over Programming. Hawaiian Broadcasting shall have the responsibility for the origination and transmission of programming material transmitted on the Leased Capacity. Hawaiian Broadcasting shall not transmit on the Channels any programming that (a) is obscene as defined by the laws of the United States or the State of Hawaii, (b) would violate the rules of the FCC, (c) is rated "X", or would be so rated, by the Motion Picture Association of America, or (d) is rated "Objectionable" by the U.S. Catholic Conference. Lessor agrees that Hawaiian Broadcasting may transmit over the Channels any or all of the program services listed on Exhibit 2. In the event that Hawaiian

Broadcasting intends to transmit over the Channels any program service not listed on Exhibit 2, Hawaiian Broadcasting shall notify Lessor of such programming no later than 30 days prior to the scheduled airtime of such programming.

6.5 Non-Obligation to Transmit. Nothing in this Agreement shall be construed to obligate or create a duty on the part of Hawaiian Broadcasting to actually transmit any minimum number of hours of programming on the Leased Capacity.

6.6 Primary Time and Ready Recapture Time. The Lessor shall be solely responsible for the origination of any Instructional Programming transmitted by Lessor during the Primary Time and the Ready Recapture Time. Except as otherwise provided in Sections 4.2 and 7.1, Lessor shall also be responsible for all costs associated with originating and delivering Instructional Programming to be transmitted by Lessor to the transmission point.

6.7 Permitted Services and Transmission Technology.

(a) Subject to the FCC rules and regulations then in effect and subject to the terms and conditions provided herein, Hawaiian Broadcasting shall have the exclusive right to use the Leased Capacity and shall be permitted to use the Leased Capacity for the provision of any Wireless Telecommunications Services permitted under FCC rules and regulations then in effect; provided, however, at no time shall Hawaiian Broadcasting be permitted to use the transmission capacity on the Channels in a manner which would cause undue interference with Lessor's

transmission of Instructional Programming to Lessor's receiver sites.

(b) Lessor and Hawaiian Broadcasting agree that, subject to the satisfaction by Hawaiian Broadcasting of its obligations under Section 5.8 hereof and the applicable FCC rules and regulations then in effect, Hawaiian Broadcasting shall be permitted to implement state-of-the-art transmission technology with respect to the provision of Wireless Telecommunications Services on the Channels, including, but not limited to, digital compression or transmission technology if and when available.

6.8 Addressability. To the extent that Hawaiian Broadcasting has the ability to address Lessor's receive sites individually and for specific programs, it will make that capability available to Lessor, provided that Lessor gives Hawaiian Broadcasting at least two (2) weeks' notice of its specific addressability needs for any particular time period.

6.9 Instructional Programming Development and Marketing. Lessor shall not distribute programming to any Person other than to Lessor's receive site through the use of Hawaiian Broadcasting-supplied receive equipment without the consent of Hawaiian Broadcasting, which consent shall not be unreasonably withheld. Lessor and Hawaiian Broadcasting agree to negotiate in good faith towards an agreement contemplating the joint development and marketing of Instructional Programming as part of the Wireless Cable Service in the Metropolitan Area. Should Lessor at any time determine to grant any Person not under common

control, or ownership with Lessor the right to distribute Lessor's educational video programming in the Metropolitan Area and Hawaiian Broadcasting has the capability to provide such distribution, Lessor shall grant Hawaiian Broadcasting the option to negotiate for that or similar non-exclusive distribution rights.

6.10 FCC Compliance. Hawaiian Broadcasting shall use its reasonable efforts to cooperate with any written request by the FCC to Hawaiian Broadcasting or Lessor to inspect the facilities, equipment and records of the Channels at the Tower Site for compliance with the rules and regulations promulgated by the FCC, and Hawaiian Broadcasting further agrees to take all necessary actions to comply with the results of such inspection by the FCC.

6.11 Supplemental Information. Hawaiian Broadcasting agrees to cooperate with Lessor in promptly responding to any request by the FCC or any other state or federal regulatory agency having jurisdiction over the Channels for information concerning the operations of the Channels or the financial condition of the entity operating the Channels. If requested by any party hereto, the other party agrees to cooperate in either (a) opposing the disclosure of any information determined by disclosing party to be Confidential Information and not subject to disclosure under applicable law or (b) if the disclosure of such Confidential Information is required by law, requesting the confidential treatment thereof by the state or federal regulatory agency. The costs and expenses of such opposition or request for

confidential treatment shall be born by the party opposing such disclosure or requesting such confidential treatment.

6.12 Preservation of the Authorization for the Channels.

Lessor shall at all times have the right to take necessary actions and to make necessary filings to preserve the Authorization for the Channels. Lessor agrees to provide Hawaiian Broadcasting with written notice of any such actions or filings within a reasonable period of time prior to taking such action or making such filing. If Hawaiian Broadcasting determines in its reasonable good faith judgment that any such action or filing to be taken or made by Lessor would impair Hawaiian Broadcasting's rights under this Agreement in any way, then Hawaiian Broadcasting shall be given a reasonable opportunity to assist in the preparation or prosecution of any such action or filing, as the case may be.

6.13 Consulting Services. During the Term, at such times as Lessor may reasonably request, Hawaiian Broadcasting shall make available to Lessor, at no cost to Lessor, such of Hawaiian Broadcasting's advice, expertise and knowledge with respect to the operation and maintenance of the Channels as shall be reasonably necessary to assist Lessor in operating and maintaining the Channels, including, but not limited to, complying with all FCC rules and requirements with respect thereto.

ARTICLE 7 - OPERATION OF ITFS CHANNELS

7.1 Operating Costs. Subject to the right of early termination provided herein, promptly following the date hereof and in any event, prior to the filing of any applications for the Authorization, Hawaiian Broadcasting shall negotiate and enter into a Lease at the Tower Site for the necessary space for the transmission facilities for the Channels; during the Term shall pay all necessary site rental fees and utilities costs associated with the transmission facilities for the Channels; and, under the supervision of Lessor and any other FCC licensee with co-located facilities at the Tower Site from whom Hawaiian Broadcasting has leased transmission capacity, shall be responsible for the maintenance and operation of the transmission and reception facilities of the co-located ITFS transmission facility.

7.2 Leased Equipment.

(a) Subject to Section 7.1 above, Hawaiian Broadcasting shall employ and supply, at its sole cost and expense, including workers compensation and insurance, personnel to operate and maintain the Leased Equipment. Such personnel shall at all times be subject to the control of Lessor, but Lessor shall not be required to hire additional personnel to perform said supervision. Said personnel shall insure that the Leased Equipment shall at all times meet the technical operating requirements of the rules and regulations of the FCC. Such operations and maintenance activities shall be undertaken at such times as are consistent with the operating requirements of

Hawaiian Broadcasting's business, and Hawaiian Broadcasting shall have access to the station facilities for the Channels at all times in order to carry out its maintenance and operational activities.

(b) Hawaiian Broadcasting, at its own expense, may make alterations or install attachments to the Leased Equipment (including encoding and/or addressing equipment) as may be reasonably required by the exigencies of its business from time to time, provided that such alterations and attachments do not violate any FCC rules or regulations and provided further that FCC authorization, if required, has been obtained.

7.3 Inspection. Hawaiian Broadcasting shall provide Lessor with a designated point of contact and shall ensure that Lessor shall be informed of Hawaiian Broadcasting's maintenance and operational activities. Lessor shall have the right to inspect the facilities, equipment and records with respect to the Channels during normal business hours upon the giving of notice of its intent to inspect such matters to Hawaiian Broadcasting within a reasonable amount of time prior thereto.

7.4 Interference with Existing Operations. Hawaiian Broadcasting shall install, operate and maintain the transmission equipment in such a fashion as to insure that the operation of the Channels does not create or increase interference with existing ITFS, MMDS, or MDS licensees.

7.5 Promotional Activities. After receiving Lessor's prior written approval of any Lessor promotion materials or adver-

tising, Hawaiian Broadcasting shall use its reasonable efforts to make subscribers aware of Lessor's Instructional Programming through promotional literature and advertising which shall refer to Lessor's Instructional Programming whenever appropriate. Lessor shall provide Hawaiian Broadcasting with a program schedule on a timely basis for inclusion in Hawaiian Broadcasting's promotional literature.

7.6 Programming. Lessor shall ensure that, unless authorized to do so by Hawaiian Broadcasting, the reception equipment utilized by Lessor for its own services will not receive Hawaiian Broadcasting's services. Hawaiian Broadcasting shall use its best efforts to ensure that Lessor shall be able to utilize Hawaiian Broadcasting's encoding and scrambling system on the Channels to limit reception of any or all Lessor programming only to Lessor or Hawaiian Broadcasting receivers authorized by Lessor to receive a Lessor program. Hawaiian Broadcasting shall not use the name of Lessor in any of its promotions, advertisements or announcements without Lessor's prior written permission.

7.7 Suspension of Transmissions. Hawaiian Broadcasting shall ~~have~~ the right to suspend for a reasonable period of time all transmissions from the antennae located on its tower, on at least thirty (30) days' prior written notice to Lessor for the purpose of maintenance and on as much notice as practicable for the purpose of emergency repairs.

ARTICLE 8 - RENT

8.1 Subscriber Fees.

(a) Beginning with the month in which the Commencement Date occurs, Hawaiian Broadcasting shall pay to Lessor a monthly rent (the "Rent") in an amount equal to the greater of (a) the Minimum Monthly Rent or (b) a royalty equal to (the "Royalty Rate") multiplied by the number of subscribers to the basic program service offered as part of the Wireless Cable Services, as determined in accordance with Section 8.4 hereof.

8.2 Minimum Monthly Rent. The minimum amount payable as rent during the Term (the "Minimum Monthly Rent") shall be per month.

8.3 Adjustment.

(a) In the event that (i) the Commencement Date shall be a date other than the first day of a calendar month, or (ii) this Agreement shall be terminated on a date other than the last day of a calendar month and it is determined that such termination shall have occurred in a manner not affecting Lessor's right to payments hereunder, then the Rent shall be proportionately reduced.

(b) Beginning on the second anniversary of the Commencement Date, the Royalty Rate shall be

8.4 Computation of Subscribers.

(a) For purposes of Section 8.1, the number of subscribers shall be the sum of the number of subscribers to Hawaiian Broadcasting's Wireless Cable Service in the Metropolitan Area who contract with Hawaiian Broadcasting to receive Hawaiian Broadcasting's programming for the prior month and the number of such subscribers who have contracted for such programming as of the last day of the then current month, divided by two (2). Only subscribers which are current with respect to their payments shall be considered for this purpose; provided, however, that subscribers paying after the fact for a prior month or months shall be counted as subscribers for such month or months retroactively. The number of subscribers shall be based upon the number of subscribers to the Wireless Cable Service in the Metropolitan Area without regard to whether various tiers of such service are offered to subscribers to the Wireless Cable service or whether the Channels are used to provide service in any particular tier, except that, if Hawaiian Broadcasting should dedicate the transmission capacity on one or more of the MDS, MMDS or ITFS channels used by Hawaiian Broadcasting for the provision of pay-per-view programming, then those Persons who purchase or subscribe for only pay-per-view programming shall not be included in the number of subscribers for purposes of determining the Rent payable by Hawaiian Broadcasting under Section 8.1 hereof.

(b) (i) Where Hawaiian Broadcasting sells its basic program service in bulk to a multiple dwelling unit (e.g., apartment buildings, condominiums, hotels) at a discounted rate in return for 100% basic program service penetration, the number of subscribers receiving such bulk services shall be based upon an equivalent basic subscriber count for the unit receiving the bulk services as calculated in accordance with subparagraph (b) (ii) below.

(ii) The equivalent basic subscriber count for a multiple dwelling unit receiving bulk services at a discounted rate in return for one hundred percent (100%) penetration is a whole number which is equal to (A) the product of (1) the discounted rate for bulk services sales multiplied by (2) the number of rooms in the multiple dwelling unit subscribing for the bulk services, divided by (B) the standard basic rate billed to single family residential units subscribing to the Wireless Cable Service (e.g., the discounted rate for bulk services of multiplied by 100 rooms in the unit equals per month, divided by the standard basic rate charged to single family residential subscribers of equals equivalent subscribers, or an equivalent basic subscriber count for the multiple dwelling unit receiving bulk services of when rounded to the nearest whole number).

(c) (i) Where Hawaiian Broadcasting sells its basic program service to commercial establishments (e.g., bars, restaurants) at a monthly rate that is higher than the standard

rate charged single family residential units, the number of subscribers receiving such services will be based on an equivalent basic subscriber count as calculated in accordance with subparagraph (c)(ii) below.

(ii) The equivalent basic subscriber count for the commercial establishments receiving the Wireless Cable Services at a non-standard commercial rate is a whole number which is equal to (A) the product of (1) the non-standard rate billed to the commercial establishments multiplied by (2) the total number of commercial establishments being billed such rate divided by (B) the standard basic rate billed to single family residential units subscribing to the Wireless Cable Service (e.g., the non-standard commercial rate of _____ per month multiplied by 100 commercial establishments equals _____ per month divided by a standard basic rate of _____ equals equivalent subscribers, or an equivalent basic subscriber count for all of the commercial establishments paying the non-standard commercial rate of _____ when rounded to the nearest whole number).

8.5. Payment Dates. Within twenty (20) days of the end of each month, beginning with the month in which the Commencement Date occurs, Hawaiian Broadcasting shall deliver to Lessor (i) the Rent and (ii) a certificate, signed by an officer of Hawaiian Broadcasting, showing the average number of subscribers served during said month, together with any other information reasonably requested by Lessor.

8.6 Additional Compensation. In the event that Hawaiian Broadcasting elects at any time, and from time to time, to use the Leased Capacity to provide Wireless Telecommunications Services in addition to its Wireless Cable Services, to the extent that such services are permitted under the FCC rules and regulations then in effect, then Hawaiian Broadcasting and Lessor shall negotiate in good faith for a period of ninety (90) days from the date of delivery of notice of Hawaiian Broadcasting's election to provide such service a reasonable compensation to be paid to Lessor in lieu of or in addition to the Rent described in Section 8.1, if any. If at the end of the ninety (90)-day period the parties have been unable to reach an agreement as to the additional compensation payable to Lessor hereunder, if any, then the compensation payable by Hawaiian Broadcasting to Lessor shall be determined by arbitration in accordance with the terms of Article 13 hereof.

8.7 Right to Audit.

(a) Hawaiian Broadcasting shall keep, maintain and preserve, for a period of forty-eight (48) months after their creation, complete and accurate records and accounts, including all invoices, correspondence, ledgers, financial and other records, pertaining to the Rent payable hereunder and such records and accounts shall be available for inspection and audit during reasonable business hours, by Lessor or its nominee (who shall be a certified public accountant) once in any twelve (12) month period during the Term of this Agreement. Lessor shall

provide Hawaiian Broadcasting with five business days' prior written notice of its intent to inspect said records and accounts prior to being allowed to do so. Hawaiian Broadcasting shall do all things reasonable in order to cooperate with Lessor's right of inspection and audit.

(b) Lessor's exercise in whole or in part at any time or times of the right to audit Hawaiian Broadcasting's records or accounts or of any rights herein granted or the acceptance by Lessor of any statement or remittance tendered by Hawaiian Broadcasting or on behalf of Hawaiian Broadcasting shall be without prejudice to any rights or remedies of Lessor and shall not preclude Lessor thereafter from disputing the accuracy of any such statement or payment.

(c) All information obtained by Lessor or its nominee during or as a result of any inspection or audit hereunder shall be treated as Confidential Information and shall be subject to the provisions of Article 11 hereof.

8.8 Subscriber Contracts. Lessor shall not interfere with the right of Hawaiian Broadcasting or its designee to lawfully modify, waive, rescind, terminate, in whole or in part, or cancel any and all of Hawaiian Broadcasting's services or contracts with its own subscribers. In case any such services or contracts are rescinded, terminated or cancelled, Lessor shall not be entitled to any participation in revenues or claims whatsoever with respect to the unperformed portion of any such contract.

ARTICLE 9 - RIGHT OF FIRST REFUSAL

9.1 Right of First Refusal.

(a) If at any time following the grant of the Authorization to Lessor, Lessor shall determine to sell, convey, assign or otherwise dispose of its interest in the Authorization for the Channels, Hawaiian Broadcasting or its designee, if then eligible to be licensed to operate the Channels, shall have the right and option to acquire such interest as set forth in Section 9.2.

(b) Lessor shall not at any time lease, convey or otherwise dispose of any of its interest in the excess transmission capacity on the Channels unless the terms and conditions of Section 9.2 are fully complied with.

9.2 Procedure.

(a) Upon receipt by Lessor of any bona fide offer to assign, sell or otherwise dispose of any or all of its interest in the Authorization for the Channels or for the lease of any of the excess transmission capacity of the Channels, Lessor shall require of the offeror that said offer be in writing. If the terms offered are unacceptable to Lessor, Lessor shall have the right to reject the offer without having to disclose the terms thereof to Hawaiian Broadcasting. If the terms are acceptable to Lessor, Lessor shall transmit promptly the same to Hawaiian Broadcasting as Lessor's offer. Hawaiian Broadcasting or its designee shall then have the right for thirty (30) days after

Hawaiian Broadcasting's receipt of said offer to accept said offer.

(b) If after said thirty (30)-day period Hawaiian Broadcasting or its designee shall fail to accept such offer, Hawaiian Broadcasting or its designee's right and option hereunder as to such offer shall terminate. Thereupon, Lessor shall have the right for a period ending on the sixtieth (60th) day after the expiration of said thirty (30)-day period to assign, sell, or otherwise dispose of its interests in the Authorization for the Channels, or lease excess transmission capacity, to, and only to, the aforesaid bona fide prospective offeror at the same price and upon the same terms as were offered to Hawaiian Broadcasting or its designee; provided, however, that any prospective assignee or purchaser, as a condition of such assignment or purchase, shall accept, assume and agree to be bound by all of the terms and conditions of this Agreement applicable to Lessor as if such purchaser were the original party hereto.

(c) Upon expiration of such sixty (60)-day period, if Lessor shall not have entered into a binding contract for the sale of said interests in the Authorization for the Channel or for the lease of such excess transmission capacity, as the case may be, on the aforesaid terms with such prospective purchaser or lessee, all of the restrictions and options imposed in Sections 9.1 and 9.2 shall again apply.

(d) The right of first refusal provided to Hawaiian Broadcasting pursuant to Section 9.1(a) shall not apply with respect to any proposed sale, conveyance, assignment or other disposition of such assets, equipment and property to any nonprofit organization similar to Lessor provided that said organization is wholly owned by, or under common control, with Lessor.

9.3 FCC Authorization. In the event that Hawaiian Broadcasting or its designee shall elect to exercise the rights specified in Section 9.1, and in the further event that the transfer of Authorization for the Channels shall require FCC consent or approval, Lessor shall use its best efforts to assist Hawaiian Broadcasting or its designee in the securing of such consent or approval, and the consummation of, and payment of the purchase price with respect to, the sale, assignment or transfer of the Authorization for the Channels to Hawaiian Broadcasting or its designee shall be conditioned upon receipt of a Final Order of the FCC granting such requisite consent or approval.

9.4 Set Off. In the event that Hawaiian Broadcasting or its designee shall elect to exercise the rights specified in Section 9.1, there shall first be set off and deducted from the purchase price to be paid therefor by Hawaiian Broadcasting all payments pursuant to Section 8.1 hereof accruing after the date that Hawaiian Broadcasting or its designee accepts Lessor's offer pursuant to Section 9.1.

9.5 Survival. Notwithstanding the earlier termination of this Agreement, the provisions of this Article 9 shall remain in full force and effect until the first anniversary of the date of such termination; provided, however, that if this Agreement is terminated pursuant to Section 12.4 hereof, the provisions of this Article 9 shall cease to have any force or effect upon such termination.

ARTICLE 10 - REPRESENTATIONS AND WARRANTIES

10.1 Lessor's Representations and Warranties. Lessor represents and warrants to Hawaiian Broadcasting as follows:

(a) Lessor is a non-profit corporation, duly organized, validly existing and in good standing under the laws of the State of Hawaii.

(b) The execution, delivery and performance by Lessor of this Agreement are within the powers of Lessor, have been duly authorized by all necessary action, and do not contravene or constitute a default under any provision of the Articles of Incorporation and Bylaws of Lessor. This Agreement has been duly executed and delivered by Lessor and, upon the execution and delivery of this Agreement by the parties hereto, this Agreement constitutes the valid and binding agreement of Lessor, enforceable against it in accordance with its terms, except (i) that such enforcement may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws now or hereafter in effect relating to creditor's rights generally and (ii) that the remedy of specific performance and injunctive and other forms

Department of education or any other regional or national accrediting organization.

10.2 Hawaiian Broadcasting's Representations and Warranties. Hawaiian Broadcasting represents and warrants to Lessor as follows:

(a) Hawaiian Broadcasting is a limited partnership, duly formed, validly existing and in good standing under the laws of the State of Hawaii and has full power and authority to own its property and to carry out all of the transactions contemplated by this Agreement.

(b) The execution, delivery and performance by Hawaiian Broadcasting of this Agreement are within the powers of Hawaiian Broadcasting, have been duly authorized by all necessary action of Hawaiian Broadcasting, and do not contravene or constitute a default under any provision of the Agreement of Limited Partnership pursuant to which Hawaiian Broadcasting, is organized. This Agreement has been duly executed and delivered by Hawaiian Broadcasting and, upon the execution and delivery of the Agreement by the parties hereto, the Agreement constitutes the valid and binding agreement of Hawaiian Broadcasting, enforceable against it in accordance with its terms, except (i) that such enforcement may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar laws now or hereafter in effect relating to creditor's rights generally and (ii) that the remedy of specific performance and injunctive and other forms of equitable relief may be subject to equitable defenses and to

the discretion of the court before which any proceeding therefor may be brought.

(c) Hawaiian Broadcasting is not subject to any provision of its Agreement of Limited Partnership, mortgage, lease, indenture, agreement, instrument, order, judgment or decree that prohibits the execution or delivery of this Agreement, the consummation of the transactions contemplated hereunder, or compliance by Hawaiian Broadcasting with the terms, conditions and provisions hereof.

(d) There is no action or proceeding pending or, to the best knowledge of Hawaiian Broadcasting, threatened against Hawaiian Broadcasting that questions or challenges the validity of this Agreement or any action taken or to be taken by Hawaiian Broadcasting pursuant to this Agreement or in connection with the transactions contemplated hereby.

ARTICLE 11 - CONFIDENTIAL INFORMATION

Lessor acknowledges that pursuant to this Agreement it may receive Confidential Information and further acknowledges that this Confidential Information has been developed by Hawaiian Broadcasting at considerable effort and expense and represents special, unique and valuable property assets of Hawaiian Broadcasting, the value of which may be destroyed by unauthorized dissemination. Accordingly, Lessor covenants and agrees that, except as may be required for the performance of this Agreement, Lessor shall not use or disclose such Confidential Information to any other Person for any reason whatsoever, said undertaking to

be enforceable by injunctive or other equitable relief to prevent any violation or threatened violation thereof.

ARTICLE 12 - TERMINATION

12.1 Termination of FCC Authorization. Hawaiian

Broadcasting may terminate this Agreement without further liability upon prior written notice to Lessor in the event that (a) Lessor shall have not received the grant of the Authorization for the Channels by Final Order on or before April 1, 1997, or (b) Lessor's application for the Authorization for the Channels shall be denied by the FCC, or (c) Lessor's authority to lease the Channels in accordance with the terms of this Agreement shall terminate. If termination shall occur pursuant to this Section 12.1, such termination shall extinguish and cancel this Agreement without further liability on the part of either party to the other.

12.2 Termination for Default and Nonperformance. Should

either party be in breach of this Agreement for the nonperformance of a material obligation, this Agreement may be terminated by the non-defaulting party if such breach shall continue for a period of thirty (30) days following the receipt of written notice from the non-defaulting party. In the event of termination pursuant to this Section 12.2, such termination shall not affect or diminish the rights or claims or remedies available in equity or at law to the non-defaulting party arising by reason of such breach or default.

12.3 Termination by FCC Action. At the option of Hawaiian Broadcasting, this Agreement may be terminated in the event the FCC, at any time, limits the Leased Capacity to less than fifty percent (50%) of the total transmission capacity for the Channels or limits Hawaiian Broadcasting's ability to program air time during the hours of 3:00 p.m. to 8:00 a.m. The election to terminate shall be made in writing to Lessor by Hawaiian Broadcasting, setting forth the effective date of such termination. In the event of termination pursuant to this Section 12.3, this Agreement shall be extinguished and cancelled without further liability on the part of either party to the other; provided, however, that such termination shall not affect any amounts owed to Lessor to the date of said termination and Lessor shall have the right to purchase the Lessor Equipment at Fair Market Value and Hawaiian Broadcasting shall make available to Lessor the Joint Equipment for use by Lessor; provided, however, that Hawaiian Broadcasting shall be obligated to make available the Joint Equipment only until the earlier of the first anniversary of such termination or until such time as the transmission capacity on the Channels is no longer used solely for the transmission of Instructional Programming with the other FCC licensees with respect to the Joint Equipment.

12.4 Option to Terminate.

(a) If at any time after the eighteen (18) month anniversary of the Effective Date and on or before the third anniversary of the Effective Date Hawaiian Broadcasting has not

obtained binding agreements for programming of sufficient quality to provide a Wireless Cable Service that is competitive with other cable-like services in the Metropolitan Area, Hawaiian Broadcasting shall have the right to terminate this Agreement, without further liability to Lessor. In the event of the termination of this Agreement pursuant to this Section 12.4, Lessor's sole and exclusive remedy shall be as provided in Section 12.4(b) hereof.

(b) In the event of termination pursuant to this Section 12.4, (i) Lessor shall retain all moneys paid to it by Hawaiian Broadcasting under this Agreement; (ii) should the transmission facilities of the Channels be constructed on a Tower Site leased by Hawaiian Broadcasting, Hawaiian Broadcasting shall, at the election of Lessor, use its best efforts to assign jointly to Lessor and any other FCC licensee with co-located facilities at the Tower Site from whom Hawaiian Broadcasting has leased transmission capacity the Hawaiian Broadcasting's lease for the Tower Site, free and clear of all Liens (except Permitted Liens); (iii) Hawaiian Broadcasting shall, at the election of Lessor, use its best efforts to convey to Lessor all of Hawaiian Broadcasting's rights, title, and interest in the Lessor Equipment except for its rights, title and interest in the tower, should Hawaiian Broadcasting construct and own such tower (which shall be free and clear of all Liens, except Permitted Liens); and (iv) pursuant to Section 7.1, Hawaiian Broadcasting shall, at the election of Lessor, provide Lessor with equipment, personnel

and operating funds necessary to operate Lessor's transmission facilities at the Tower Site for a period of one year provided that the transmission capacity on the Channels is used solely for the purpose of transmitting Instructional Programming.

ARTICLE 13 - GOVERNING LAW; ARBITRATION

13.1 Governing Law. This Agreement shall be governed in accordance with the laws of the State of Hawaii without regard to the conflict of laws provisions thereof.

13.2 Arbitration.

(a) Except as otherwise specifically provided, any controversy, dispute or claim arising out of or relating to this Agreement shall be submitted for, and shall be resolved by, final and binding arbitration before a panel of three (3) arbitrators (selected as provided in (b) below) in a proceeding conducted in accordance with the Arbitration Rules of the American Arbitration Association then in effect.

(b) Any arbitration proceeding hereunder shall be initiated by delivery of a notice of arbitration to the other party to, or affected by, the matter or matters subject to arbitration. Such notice shall set forth in reasonable detail the grounds for, and the material facts relevant to, the matter or matters subject to arbitration. Within fifteen (15) calendar days after the date of such notice, the claiming party and the responding party shall each select an arbitrator and the two (2) arbitrators so selected shall mutually select a third arbitrator. In the event that the two (2) arbitrators selected by such

parties are unable to select a third arbitrator within thirty (30) calendar days after the date of such notice, the third arbitrator shall be selected by the American Arbitration Association.

(c) The arbitrators shall have the authority to grant any remedy or relief which they deem just and equitable and within the scope of the Agreement of the parties hereto, including, without limitation, specific performance and injunctive relief. In furtherance of the foregoing, each party acknowledges and agrees that irreparable damage would occur in the event that the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached, and the arbitrators shall be instructed to grant injunctive relief and/or specific performance to prevent or cure breaches of the provisions of this Agreement and to enforce specifically the terms and provisions hereof, this being in addition to any other remedy to which the arbitrators determine the parties may be entitled at law or in equity; provided, however, that the arbitrators shall not have the power or authority to amend, supplement or reform in a regard any of the rights and obligations of the parties hereunder.

(d) The parties further agree that they shall not be permitted or have the right to terminate or suspend performance of any provision of this Agreement, it being agreed that all provisions of this Agreement shall continue and be specifically enforceable in all events and under all circumstances regardless

of any events, occurrences, actions or omissions before or after the date hereof. In furtherance of the foregoing, the parties agree that they shall not be permitted to, and shall not, bring any action, claim or proceeding seeking to terminate or suspend performance of any provision of this Agreement or seeking any determination that any provision of this Agreement is invalid, inapplicable or unenforceable.

(e) Judgment upon any award rendered by the arbitrators, including specific performance or injunctive relief, may be entered and a confirmation order sought in any court having competent jurisdiction, and each party irrevocably and unconditionally submits to the jurisdiction of the courts of the State of Hawaii for this purpose and waives any right to assert, and agrees not to assert, that it is not personally subject to the jurisdiction of such courts, that such proceeding is brought in an inconvenient forum, or that the venue is improper. Each party consents to process being served in any such proceeding by mailing a copy thereof to the address in effect for notices to it under this Agreement and agrees that such service upon receipt shall constitute good and sufficient service of process and notice thereof. Nothing in this paragraph shall affect or limit any right to serve process in any other manner permitted by law.

(f) The arbitration proceeding shall take place in the Honolulu, Hawaii and shall be conducted in the English language. The arbitrators shall apply the laws of the State of Hawaii, without reference to the conflicts of laws thereof. The costs

and expenses of any arbitration proceeding, including but not limited to the arbitrators' fees and expenses, shall be borne as may be specified in the arbitration award.

ARTICLE 14 - MISCELLANEOUS

14.1 Force Majeure. Notwithstanding anything contained in this Agreement to the contrary, neither party shall be liable to the other for failure to perform any obligation under this Agreement (nor shall any charges or payments be made in respect thereof) if prevented from doing so by reason of fires, strikes, labor unrest, embargoes, civil commotion, rationing or other orders or requirements, acts of civil or military authorities, acts of God or other contingencies, including equipment failures, beyond the reasonable control of the parties, and all requirements as to notice and other performance required hereunder within a specified period shall be automatically extended to accommodate the period of pendency of such contingency which shall interfere with such performance.

14.2 Notice. All notices, requests, demands and other communications which are required or may be given pursuant to the terms of this Agreement shall be in the English language, in written or electronic form, and shall be deemed delivered (a) on the date of delivery when delivered by hand, (b) on the date of transmission when sent by facsimile transmission during normal business hours with telephone confirmation of receipt, (c) one day after dispatch when sent by overnight courier maintaining records of receipt, or (d) three days after dispatch when sent by

registered mail, postage prepaid, return-receipt requested, all addressed as follows:

(i) If to Hawaiian Broadcasting:

Hawaiian Broadcasting Investors 1,
Limited Partnership
c/o O'ahu Wireless Cable, Inc.
Suite C
45 Hoolai Street
Kailua, Hawaii 96734
Attention: Steve Berkoff
President and Chief Executive Officer
Telephone: (808) 263-5551
Facsimile: (808) 261-7191

with a copy to:

Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
Attention: Ralph C. Voltmer, Jr.
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

(ii) If to Lessor:

Sacred Hearts Academy
3253 Waialae Avenue
Honolulu, Hawaii 96816
Telephone: (808) 734-5058
Facsimile: (808) 737-7867

with a copy to:

White & Tom
820 Milliani Street, Suite 701
Honolulu, Hawaii 96813-2972
Attention: Emmet White
Telephone: (808) 547-5151
Facsimile: (808) 599-4517

or to such other address as any party shall have designated by notice in writing to the other parties.

14.3 Press Releases. Except as may be required by law or any governmental agency, no announcement to the press or to any

third party of the transactions contemplated herein shall be made by either party unless the same shall be approved in advance in writing by both Hawaiian Broadcasting and Lessor.

14.4 Severability. If any covenant or provision hereof is determined to be void or unenforceable in whole or in part, it shall not be deemed to affect or impair the validity of any other covenant or provision, each of which is hereby declared to be separate and distinct. If any provision of this Agreement is so broad as to be unenforceable, such provision shall be interpreted to be only so broad as is enforceable. If any provision of this Agreement is declared invalid or unenforceable for any reason other than overbreadth, the offending provision will be modified so as to maintain the essential benefits of the bargain among the parties hereto to the maximum extent possible, consistent with law and public policy.

14.5 Entire Agreement. This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes all prior agreements and understandings of the parties, oral and written, with respect to its subject matter. This Agreement may be modified only by an agreement in writing executed by all of the parties hereto. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns, subject, however, to the provisions of Sections 14.11 and 14.12 hereof restricting assignment.

14.6 Survival. All representations, warranties, covenants and agreements made by the parties hereto or in any certificate to be delivered hereunder or made in writing in connection with the transactions contemplated herein shall survive the execution and delivery of this Agreement.

14.7 Payment of Expenses. Except as otherwise provided, Lessor and Hawaiian Broadcasting shall pay their own expenses incident to the preparation and carrying out of this Agreement, including all fees and expenses of their respective counsel.

14.8 Further Assurances. From time to time after the date of execution hereof, the parties shall take such further action and execute such further documents, assurances and certificates as either party reasonably may request of the other to effectuate the purposes of this Agreement.

14.9 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, and shall become effective when each of the parties hereto shall have delivered to it this Agreement duly executed by the other party hereto.

14.10 Headings. The headings in this Agreement are for the sole purpose of convenience of reference and shall not in any way limit or affect the meaning or interpretation of any of the terms or provisions of this Agreement.

14.11 Assignment.

(a) Except as provided in Section 14.12 hereof, Hawaiian Broadcasting shall not have the right to assign, transfer, sublease or subcontract its rights, benefits, duties and obligations under this Agreement, without the prior written consent of Lessor, which approval is not to be unreasonably withheld or delayed, and in no event delayed more than twenty (20) days from the date of the request.

(b) Lessor shall not assign or transfer its rights, benefits, duties or obligations under this Agreement without the prior written consent of Hawaiian Broadcasting.

14.12 Third Party Financing.

(a) Notwithstanding anything contained in Section 14.11 to the contrary, Hawaiian Broadcasting shall have the right without obtaining Lessor's consent to pledge and collaterally assign and to grant a continuing security interest in, and a Lien on, and Lessor hereby consents to the pledge and collateral assignment of, and the granting of a security interest in, and a Lien on, all of Hawaiian Broadcasting's right, title and interest in and under the Agreement to a Permitted Lender(s) in connection with obtaining financing to construct and operate a telecommunications system for the provision of Wireless Telecommunications Services in the Metropolitan Area and the satisfaction of Hawaiian Broadcasting's working capital needs in connection therewith.

(b) Lessor hereby further (i) acknowledges and recognizes that such Permitted Lender(s) shall have no obligation or liability under or arising out of the Agreement by reason of or arising out of the pledge and collateral assignment of, and the granting of a security interest in and Lien on, all right, title and interest in and under the Agreement; (ii) agrees to look exclusively to Hawaiian Broadcasting for satisfaction of all obligations under the Agreement in the event of such pledges or collateral assignment; and (iii) agrees that, in the event that Hawaiian Broadcasting shall be in default under the loan agreement or other financing documents evidencing Hawaiian Broadcasting's indebtedness to the Permitted Lender(s) and the Permitted Lender(s) subsequently accelerates the obligations of Hawaiian Broadcasting, Lessor shall not unreasonably withhold its consent to the transfer of all the rights, title and interest in, and all of the obligations under, the Agreement to any Person designated by the Permitted Lender(s).

(c) Lessor agrees that should any event or condition occur under the Agreement which would enable Lessor to terminate or suspend the Agreement and Hawaiian Broadcasting has assigned or pledged, or granted a security interest in, or a Lien on, this Agreement to a Permitted Lender(s), Lessor shall not terminate or suspend the Agreement unless it gives prior written notice thereof to the Permitted Lender(s) (or its designee) and provides the Permitted Lender(s) with a reasonable period to cure such event or condition, which period shall not be less than thirty

(30) days; provided, however, that if the breach is of such a nature that it is not curable by the Permitted Lender(s), the Permitted Lender(s) shall not be required to cure such breach but shall be entitled to exercise its rights under the loan agreement or the financing documents evidencing Hawaiian Broadcasting's indebtedness to the Permitted Lender(s). Any cure of a breach by the Permitted Lender(s) shall not be construed as an assumption by the Permitted Lender(s) of any or all obligations under the Agreement unless the Permitted Lender(s) has exercised its rights under the loan agreement or other financing documents evidencing Hawaiian Broadcasting's indebtedness to the Permitted Lender(s) and expressly assumed the obligations under the Agreement.

(d) Promptly following the pledge or collateral assignment of, or the granting of a security interest in, or a Lien on, this Agreement by Hawaiian Broadcasting to a Permitted Lender(s), Hawaiian Broadcasting shall deliver to Lessor written notice thereof, which notice shall include the name and address of such Permitted Lender(s).

14.13 Dealings with Third Parties. Neither party is nor shall hold itself out to be vested with any power or right to contractually bind or act on behalf of the other as its contracting broker, agent or otherwise for committing, selling, conveying or transferring any of the other party's assets or property, contracting for or in the name of the other party, making any contractually binding representations contractually binding such party. In particular, Hawaiian Broadcasting shall

not be identified as licensee of the Channels and Lessor shall not be held out as the programmer of the Channels programmed by Hawaiian Broadcasting.

14.14 Indemnification; Insurance.

(a) (i) Lessor shall defend, indemnify and hold Hawaiian Broadcasting, its officers, employees and agents harmless from and against any and all damages arising out of the performance of this Agreement but only in proportion to and to the extent such damages are caused by or result from the grossly negligent or intentional acts or omissions of Lessor, its officers, agents, or employees.

(ii) Hawaiian Broadcasting shall defend, indemnify and hold Lessor, its officers, employees and agents harmless from and against any and all damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorneys' fees, or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of Hawaiian Broadcasting, its officers, agents, or employees.

(b) Hawaiian Broadcasting, at its sole cost and expense, shall insure its activities in connection with this Agreement and obtain, keep in force and maintain insurance of the type and in such amounts as may be customary in the industry. Promptly following the grant of the Authorization of the Channels to Lessor, Hawaiian Broadcasting shall furnish Lessor with

IN WITNESS WHEREOF the parties hereto have executed
this Agreement as of the date first above written.

SACRED HEARTS ACADEMY

By: Sister Katherine Francis Weller,
Name: n.c.
Title: Provincial

HAWAIIAN BROADCASTING INVESTORS 1,
LIMITED PARTNERSHIP

By: O'ahu Wireless Cable, Inc.

By: [Signature]
Steve Berkoff
President

Albany
WNC992.

COUNTERPOINT COMMUNICATIONS, INC.

5/19/93 -
5/19/03

"A" CHANNEL GROUP

AIR TIME LEASE AGREEMENT

UTICA, NEW YORK

This Agreement (hereinafter referred to as "Agreement") is made and entered into by and between Onondaga Wireless, Inc., having its mailing address as P.O. Box 186, Rexford, New York 12148, as Lessee, and Counterpoint Communications, Inc., 785 Asylum Avenue, Hartford, Connecticut 06105, as Lessor.

WHEREAS, The Federal Communications Commission ("FCC") authorizes licenses for Instructional Television Fixed Service ("ITFS") channels to lease excess capacity for non-ITFS uses, 47 C.F.R. §74.391(e), Instructional Television Fixed Service (MDS Reallocation), 94 FCC 2d 1203 (1983), Reconsideration, 98 FCC 2d 129; and Instructional Television Fixed Service, 101 FCC 2d 49 (1985), Reconsideration, 59 Rad. Reg. 2d (P&F) 2d 1355 (1986), and

WHEREAS, Lessor intends to be the licensee of four (4) ITFS channels in the Utica, New York, area and its environs and has determined that excess capacity exists after the fulfillment of its ITFS requirements, and

WHEREAS, Lessee is in the business of providing channels for the distribution of television programming via microwave transmission known as Multichannel Multipoint Distribution Service ("MMDS") and is desirous of leasing excess ITFS capacity, and

WHEREAS, Lessee and Lessor believe that the combination of education programming and entertainment programming will be mutually advantageous and provide a significant benefit to the general public.

NOW, THEREFORE, in consideration of the premises and of their mutual promises, undertakings, covenants, and conditions set forth herein, the parties hereto do hereby agree as follows:

1. Term of Agreement. (a) The term of this Agreement shall commence upon the date of its execution and shall extend for a period of ten (10) years from the date Lessor is issued a license by the FCC (hereinafter referred to as "Initial Term"), unless voluntarily terminated by written consent of both parties or involuntarily terminated as provided in Paragraph 11 below.

(b) The Commission's policies currently limit the term of the excess capacity air time lease agreements to the term of the License. If FCC rules are modified to permit at the time of expiration of the Initial Term, this Agreement shall automatically and without further notice be extended for up to two (2) successive additional terms (each such additional term is hereinafter referred to as a "Renewal Term") of ten (10) years each unless and until Lessee shall have served written notice on Lessor at least ninety (90) days prior to the expiration date of the Initial Term or Renewal Term. It is acknowledged and agreed that Lessee shall have the absolute right not to renew this Agreement, notwithstanding any provision hereof to the contrary. The expiration date of the second renewal term shall be referred to as the "Final Expiration Date." Unless Lessee provides Lessor with written consent to do so or unless Lessee has been adjudged to be in bankruptcy and is no longer a going concern, Lessor shall not negotiate or enter into a lease agreement for excess channel capacity on the ITFS channels with any individual or entity other than Lessee during this lease, except as provided for in this paragraph or Paragraph 10. In the event, after the Final Expiration Date, Lessor decides to utilize channel capacity for itself for non-ITFS purposes, or in the event that Lessor decides not to lease channel capacity to any individual or entity, including Lessee, or in the event that Lessor decides to lease channel capacity to any individual or entity other than Lessee, Lessor shall compensate Lessee for the fair market value of the Leased Equipment, as hereinafter defined, after which title of such equipment shall pass to Lessor.

(c) Three hundred sixty (360) days before the expiration of this Agreement and any renewal thereof, if any, Lessor and Lessee shall meet to determine if additional renewals are in the best interest of each party. If, within sixty (60) days after such meeting, Lessor and Lessee are unable to reach an agreement to renew this Agreement on appropriate terms and conditions, this Agreement shall terminate at the end of the term.

(d) In the event, subsequent to the commencement of operations, it is determined that Lessor can no longer remain an ITFS licensee, both parties agree to cooperate in identifying, selecting and licensing a properly constituted organization which will replace the Lessor as both a party to this Agreement and as the FCC licensee of the ITFS channels contemplated by this Agreement. Lessee agrees that upon completion of the licensing of a replacement organization by the FCC and the execution of a channel lease agreement between Lessee and the replacement organization, Lessor will have no further obligation to the terms and conditions of this Agreement, will not incur any penalties as a result of this change and will not be responsible for any of the expenses associated with this change. Lessor and Lessee agree to act in good faith and to use their best efforts to secure an agreement with a replacement organization. Lessor and Lessee further agree that the terms and conditions of such an agreement will be reasonable and that the parties will not unreasonably withhold approval and execution of an agreement with a replacement organization.

(e) Lessee and Lessor shall use their best efforts to negotiate either reasonable terms and conditions for an Additional Renewal or the compensation due Lessee pursuant to Paragraph 1(b). If, after six (6) months, the parties have not reached an agreement on reasonable terms and conditions for the Additional Renewal or the compensation due Lessee pursuant to Paragraph 1(b), each party shall agree to submit the matters in dispute to the conflict resolution procedures employed by the American Arbitration Association. Subject to the State of Connecticut Civil Practice Law and Rules, the arbitrator's decision shall be binding and non-appealable, judicially or otherwise, and both parties shall share evenly in the costs of the arbitrator's services.

(f) It is understood by both parties that the Additional Renewal is conditioned on Lessor receiving a renewal of Lessor's ITFS license from the FCC. In the event Lessor's license is not renewed, the parties have no further liability to the other, unless non-renewal has occurred due to a negligent or willful act or omission on the part of Lessor, in which case Lessor shall be obligated to compensate Lessee as if Lessor chose not to lease channel capacity pursuant to Paragraph 1(b).

(g) Lessor shall file and diligently pursue all necessary and appropriate applications with the FCC and with any and all local, state and federal governmental agencies to renew its ITFS license, at Lessee's expense. Lessor shall keep Lessee informed of the status of all such applications and renewals and shall use reasonable efforts promptly to give Lessee copies of all notices and renewals. In the event Lessor and Lessee do not renew this Agreement, Lessor shall reimburse Lessee for any and all costs incurred by Lessee associated with Lessor having its ITFS license renewed, and Lessor shall compensate Lessee for the fair market value of the Leased Equipment, after which title of such equipment shall pass to Lessor.

(h) In the event that this Agreement is not renewed after the Final Expiration Date, Lessor grants to Lessee, for a period of thirty-six (36) months commencing on the Final Expiration Date, a right of first refusal to enter into a new agreement for the leasing of the air time on Lessor's ITFS channels pursuant to the following terms. If Lessor receives a bona fide written offer from a third party to lease the air time on Lessor's ITFS channels within this thirty-six (36) month period, Lessor shall ^{or} give written notice to Lessee describing the entity to whom the proposed use is to be made, the fees, charges, rental or other consideration to be received for the use, the terms thereof and generally the relevant other terms and conditions. Lessee shall have a period of thirty (30) days after its receipt of such notice from Lessor in which to elect, by giving written notice to Lessor, to use the channels for the same fees, charges, rental or other consideration for which Lessor proposed to allow usage of the channel or channels to the third person. If the fees, charges, rental or consideration to be paid by the third person was to be in whole or in part in form other than cash, or on terms other than those provided for in this

Agreement in Paragraph 6, the consideration payable by the third person shall be so stated by Lessee as a sum certain in its notice of election. If Lessor does not believe Lessee's stated offer is in an amount fairly equivalent to the fair value of the consideration payable by the third person and so notifies Lessee in writing within seven (7) days after Lessor's receipt of Lessee's notice of election to so use or purchase, Lessee may elect within five (5) days after its receipt of such notice from Lessor to refer such question for determination by an impartial arbitrator and the right of first refusal of Lessee shall then be held open until five (5) days after Lessee is notified of such determination. Said arbitrator shall be chosen either by agreement of Lessee and Lessor at the time such question arises, or, at the option of either party, by referring the question to the American Arbitration Association with instructions that the American Arbitration Association select a single arbitrator under a request from the parties for expedited and accelerated determination. The determination of the arbitrator chosen under either option contained in this subparagraph shall be final and binding upon Lessee and Lessor. The parties shall share equally in the costs and fees of the arbitration. In the event Lessee shall elect to exercise its said right of first refusal, the Royalty Agreement shall be consummated within fifteen (15) days following the day on which Lessor received notice of Lessee's election to exercise the right of first refusal or the day upon which any question required to be determined, or at such other time as may be mutually agreed. The right of first refusal is terminated either by the election to use the ITFS channels by Lessee as provided herein or by notice to Lessee of Lessor's proposal to offer for use the channels or any part to a third party and Lessee's unwillingness or failure to meet and accept such a bona fide offer pursuant to the terms and procedures as set forth above, provided that such proposed use is consummated at the same fees, charges, rental or other consideration and upon the same terms as to which said right of first refusal applied, within thirty (30) days after Lessee's right of first refusal had expired or has been specifically waived by written notice given to Lessor by Lessee.

2. Excess Capacity. Lessor has determined that there will be excess capacity available on the four (4) proposed ITFS channels to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment or other commercial programming. Lessor has

further determined that, by combining its educational programming with Lessee's entertainment programming, a significant increase may be achieved in the number of persons who will have access to Lessor's educational programming at little or no additional cost.

3. Lease of Excess Capacity. Lessor agrees to lease to Lessee the "excess" capacity available on four (4) of its ITFS channels for the term of this Agreement. The remaining time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity," as that term is defined by the rules and regulations of the FCC, and available to Lessee for entertainment programming (hereinafter referred to as "Lessee Time"). Lessee Time shall initially include all but twenty (20) hours per week per channel. Not less than sixty (60) days prior to the initiation of program service, Lessor shall notify Lessee in writing of the twenty (20) specific air time hours for the forthcoming three (3) months which it intends to utilize. Thereafter, in the event Lessor subsequently wishes to exclude additional hours from Lessee Time for the provision of qualified ITFS programming up to a maximum of forty (40) hours per week per channel, Lessor shall give Lessee one (1) year's advance written notice of its intentions. The parties shall negotiate in good faith the revised schedule for the twenty-one (21) to forty (40) specific air time hours Lessor intends to utilize. Lessee or its designee will schedule the ITFS programming and use automatic switching equipment to facilitate the use of the channel capacity.

4. Integration of Lessor's Programming. Lessee agrees to integrate Lessor's programming into the overall communications service offered to subscribers, without cost charged to Lessor. Such programming shall be in a format consistent with the standards commonly accepted within the industry.

5. Transmission Facilities. (a) Upon execution of this Agreement, Lessee shall, in consultation with Lessor, select a location for the transmission point that Lessee may deem to be a suitable location for provision of the services contemplated by this Agreement. Such location will be selected to ensure the adequacy of the transmissions of the Lessor's ITFS programming to Lessor's proposed receive sites as specified in Lessor's most recent ITFS application with the

FCC. Lessor, at Lessee's expense, shall file the necessary and appropriate applications with the FCC to secure a construction permit and license to operate at least four (4) ITFS channels from the location selected by the Lessee. Upon approval, Lessee, or its designee, shall, within a reasonable period of time, commence to construct the ITFS channel transmission facilities in accordance with said FCC authorization. Lessee, or its designee, shall purchase and install such transmitters, transmission line, antennas, towers, and receivers as are required to operate Lessor's ITFS channels in accordance with the provisions of such authorization. Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 8 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment.") Lessee shall supervise and be responsible for the installation of the Leased Equipment and shall retain title to the leased equipment. Unless specifically provided herein, Lessee shall retain title to the Leased Equipment which may be removed by Lessee, or its designee, upon termination of this Agreement.

(b) In addition, Lessee shall provide recording equipment and other incidental equipment ordinarily and reasonably employed in the operation of an ITFS station. Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 8 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment.") Lessee shall supervise and be responsible for the installation of the Leased Equipment, and Lessee shall retain title to the Leased Equipment.

(c) Subject to the technical direction, supervision and control of the Lessor (which direction and supervision shall be at Lessor's expense), Lessee shall be responsible, at its own cost and expense, for the technical performance as well as for emergency and preventative maintenance of all equipment at the station as well as parts and labor in connection therewith to the level required by the FCC. Lessee shall notify Lessor of any apparent malfunction and of any corrective action taken.

(d) All personnel performing adjustments, maintenance, repairs, replacements or measurements on all station equipment shall be approved in writing by Lessor and shall hold an unexpired Radio-Telephone Operator's License, first or second class, issued by the FCC or shall

be working under the supervision of a person holding such a license, or shall be otherwise qualified, in accordance with industry standards, to perform such work as may be required.

(e) Lessee shall provide Lessor with a detailed contingency plan before commencement of initial service to be implemented at such time as there is any failure of the transmission equipment. The contingency plan must meet with the Lessor's approval, which approval shall not be unreasonably withheld.

(f) Lessee is required to assist Lessor in obtaining all applicable permits, licenses, releases, rights-of-way and/or such other documents as may be reasonably required by Lessor.

(g) Lessee shall install, at no expense to Lessor, equipment specified in Attachment A.

6. Rent. (a) Commencing one hundred eighty (180) days following the initiation of service to subscribers, Lessee shall pay Lessor, on a monthly basis, fifty percent (50%) of that number which is the product of the number of channels provided by Lessor, divided by the total number of channels employed by Lessee in the provision of entertainment programming, times the net revenues derived by Lessee from the provision of ITFS, MDS and/or MMDS channels to its user(s) through its own organization or through an operating company in the Utica market, or the minimum monthly fee specified in Paragraph 6(b) below, whichever is higher. For purposes of this paragraph, "net revenue" shall include gross revenues derived by Lessee from the provision of ITFS, MDS and/or MMDS channels to end user(s) or operating company in the Utica market, less all reasonable and ordinary administrative and operating expenses.

(b) In any event, Lessee shall be obligated to pay Lessor a minimum fee of Fifty Dollars (\$50.00) per month for the successive months seven (7) through twelve (12) following the initiation of service to subscribers, One Hundred Fifty Dollars (\$150.00) per month for the successive months thirteen (13) through eighteen (18) and Two Hundred Fifty Dollars (\$250.00) per month for each month thereafter.

7. Right to Audit. Upon written notice to Lessee at least ten (10) business days in advance, Lessor shall have the right to inspect or audit all records and accounts covered by this and other Agreements upon which the amount of rent to which Lessor is entitled pursuant to Paragraph 8(a) is determined. Lessee shall keep, maintain and preserve complete and accurate records and accounts, including all invoices, ledgers, financial and other such records pertaining to subscribers, equipment and affiliations. Said inspection or audit may be conducted by Lessor or any other persons designated by Lessor. Lessor agrees to maintain the confidentiality of all information so obtained, unless to maintain confidentiality would seriously jeopardize a cause of action either being brought by or being defended by Lessor, in which case Lessor shall be permitted to disclose, to the minimum extent necessary, the information necessary to support or defend the cause of action.

8. ITFS Channel Equipment Lease. Lessor shall lease from Lessee all equipment purchased and installed by Lessee pursuant to Paragraph 5 of this Agreement. The terms of the lease agreement, to be entered into within sixty (60) days hereof, shall include the following:

(a) Rent. Lessor shall pay to Lessee the total amount of One Dollar (\$1.00) per year for any use of the Leased Equipment, it being understood that Lessor's provision of the air time at the rates provided in this Agreement is full consideration for Lessee's lease of equipment to Lessor.

(b) Taxes. Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, and Lessee shall be entitled to claim depreciation and investment tax credits thereunder for income tax purposes.

(c) Maintenance and Operating Costs. Lessee shall be required to bear all costs associated with maintaining and operating the Leased Equipment.

(d) Term. The term of the lease shall commence upon the date the transmission equipment is operable and available for use and shall end upon the termination of this Agreement.

9. Control Over Programming. Lessee intends that only programming of a sort which would not serve to place Lessor's reputation in the community in jeopardy will be transmitted by

Lessee on the leased channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, The Movie Channel, ESPN, WTBS, WGN, Cable Network, etc. The parties recognize the difficulties inherent in specifying exact standards in this paragraph, but believe that good faith efforts on both sides can overcome whatever differences which may arise. Prior to the initiation of service by Lessee, Lessee shall provide Lessor with a list which reflects the program services which shall be used by Lessee in its service offering to its subscribers. Unless otherwise restricted by program contract, Lessor shall select from the list provided by Lessee those services which shall be transmitted on Lessor's leased channels. Lessor shall have the absolute right to deny Lessee the right to transmit on said leased channels any program which is obscene as defined by the laws of the United States or which would violate the rules and regulations of the FCC.

10. Lessor's Control in Event of Default. In the event that Lessee violates any material portion of the Communications Act of 1934, as amended, any material rule or regulation of the FCC or any material provision of the law of Connecticut or any material provision of this Agreement, or in the event that Lessee becomes insolvent, is adjudged bankrupt, files any petition for bankruptcy or reorganization or makes an assignment for benefit of creditors, then, upon expiration of thirty (30) days' prior written notice sent to Lessee by certified mail, return receipt, Lessor, at its election, may enter the premises of the transmission site and suspend or temporarily deny service until the default is fully cured. Lessee shall remain fully liable for all charges during any period in which service is suspended or temporarily denied. Lessee may negate Lessor's election to suspend or temporarily deny service by fully curing such default prior the effective date of such suspension or denial.

11. Termination. (a) This Agreement may be terminated by Lessee upon one hundred eighty (180) days' written notice to Lessor in the event that the FCC determines that Lessor and/or Lessee is not authorized to operate said channels as contemplated by this Agreement. Should such termination occur, each party shall be entitled to retain all equipment and materials purchased or furnished by such party, except that in the event Lessee is found not authorized to operate said

channels, Lessor will have the option to purchase the Leased Equipment at fair market value. There shall be a final accounting of monies due under this Agreement, and when completed, there shall be no further liability of either party to the other.

(b) Should either party be in material breach of this Agreement for the nonperformance of the obligations contained in this Agreement, this Agreement may be terminated if such breach shall continue for a period of thirty (30) days following the receipt of written notice from the non-defaulting party. The failure of Lessee to make any payment required by this Agreement shall constitute a material breach.

(c) If Lessee, subsequent to the commencement of operations, makes the determination that its business can no longer remain economically viable, then Lessee shall have the right to terminate this Agreement without any further liability on the part of either party. If such termination occurs, Lessor will have the option to purchase the Leased Equipment at fair market value and shall have the option to enter into an air time lease agreement with a third party.

12. Notice. Any notice to be given by Lessor to Lessee under any provision of this Agreement shall be by hand delivery or by certified mail to George W. Bott, Onondaga Wireless, Inc., P.O. Box 186, Rexford, New York 12148. Any notice to be given by Lessee to Lessor under any provision of this Agreement shall be by hand delivery or by certified mail to Counterpoint Communications, Inc., 785 Asylum Avenue, Hartford, Connecticut 06105.

13. Severability. Should any court or agency determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement article which is not invalid.

14. Venue and Interpretation. Venue for any cause of action by or between Lessor and Lessee shall be the City of Hartford, Connecticut, and all provisions of this Agreement shall be construed under the laws of the State of Connecticut.

15. Entire Agreement. This Agreement constitutes the entire Agreement between the parties and supersedes all prior oral or written provisions of any kind. The parties further agree that this Agreement may only be modified by written agreement signed by both parties. Neither

Lessor nor Lessee may assign or transfer its rights or obligations under this Agreement without prior written consent of the other, which consent shall not be unreasonably withheld. It is expressly understood that should either party assign or transfer its rights or obligations under this Agreement, it shall be a condition of such assignment or transfer that the assignee or transferee assume the rights or obligations of the assignor or transferor under this Agreement, unless the non-assigning or non-transferring party shall waive its rights under this paragraph in writing.

16. Indemnification. Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend the Lessor from all claims, demands, causes of action, loss, investigations, proceedings, damages, penalties, fines, expenses and judgments, including attorneys' fees (herein collectively "claims") arising out of this Agreement, unless such claim arose out of a negligent act or omission of Lessor, and shall identify Lessor in insurance policies maintained by Lessee as a beneficiary of the provisions which insure Lessee against the damages arising from such causes of action. Such insurance policies shall be maintained in effect by Lessee in such types and amounts ordinarily and reasonably maintained by owners and operators of such communications systems. Lessee shall indemnify and hold harmless Lessor against any claims of libel, slander, infringement of copyright or unauthorized use of any trademark, trade name or service mark arising from the transmission of program material over the communications channels and against all other claims by third parties arising out of Lessee's conduct in using the communications channels.

17. Compliance with Applicable Laws. Nothing in this Agreement shall require either party not to comply with applicable laws, rules, regulations, or ordinances.

18. Specific Performance. The parties hereto acknowledge and agree that a breach by either party of any of the provisions hereof will cause the other party irreparable injury and damage for which there is no adequate remedy at law. Accordingly, the terms of this Agreement shall be specifically enforced. Neither this provision nor any exercise by any party of rights to equitable relief or specific performance herein granted shall constitute a waiver of any other rights which it may have to damages or otherwise.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement at
Newington, CT this 3rd day of August, 1993.

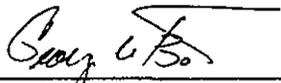
ATTEST:

Georgette J. Katin
Witness

By: 
David L. Brewer, Jr., President
Counterpoint Communications, Inc.
"Lessor"

ATTEST:

Mary Shuler
Witness

By: 
George W. Bott
Onondaga Wireless, Inc.
"Lessee"

5/19/93

COUNTERPOINT

AIR TIME LEASE AGREEMENT

Attachment A

The parties agree that within thirty (30) days following the receipt of a construction permit from the FCC for the four channels contemplated by this Agreement, Lessor will provide Lessee a list of ten (10) locations at which Lessee will install, at no expense to Lessor, such equipment as may be necessary to receive Lessor's educational programming. Such installations shall be performed in accordance with conventional industry standards and practices and shall be completed within six (6) months from the date the construction of transmission facilities is completed by Lessee.

ITFS AIRTIME LEASE AGREEMENT
WITH APPLICATION FOR LICENSE PROVISIONS

This Airtime Lease Agreement (hereinafter referred to as the "Agreement"), is made and entered into on this 18th day of October, 1995, by the Sweeny Independent School District, having its principal place of business at 1310 North Elm Street, Sweeny, Texas 77480 ("Lessor") and Wireless One, Inc. having its principal place of business at 5551 Corporate Boulevard, Baton Rouge, Louisiana ("Lessee").

WHEREAS, under Federal Communications Commission ("FCC") Rules, Lessor is a qualified educational entity; and

WHEREAS, Lessor wishes to secure the appropriate authorizations from the FCC to construct and operate an Instructional Television Fixed Service ("ITFS") facility in the Freeport, Texas, greater metropolitan area (the "Area") on up to four (4) channels (the "Channels") in order to distribute educational programs to the public; and

WHEREAS, Lessor contemplates that excess air time will be available on said facility; and

WHEREAS, the FCC has authorized ITFS licensees to lease excess channel capacity to non-ITFS users; and

WHEREAS, Lessee is in the business of providing channels for the distribution of television programming, commercial and other transmission via microwave transmissions known as the Multi-Channel Multi-Point Distribution Service ("MMDS") and is desirous of leasing such excess ITFS capacity from Lessor; and

WHEREAS, Lessor and Lessee believe that the combination of educational programming, entertainment programming, commercial and other transmission will be mutually advantageous and provide a significant benefit to the general public in the Area;

NOW, THEREFORE, in consideration of the premises and of their mutual promises, undertakings, covenants and conditions set forth herein, Lessor and Lessee do hereby agree as follows:

1. **TERM OF AGREEMENT**

(a) **Initial Term**. Subject to the provisions for earlier termination contained in Paragraph 11 hereof, the initial term of this Agreement shall commence upon the date hereof and shall continue in full force and effect through the date that is ten (10) years from the Start Date (the "Initial Term"). If then allowed by FCC policy and Rules, the Initial Term shall

automatically be extended for an additional ten (10) year period upon all the terms and conditions hereof ("Renewal Term"),

(b) Future Terms/Discretion of Either Party. Between twelve (12) and nine (9) months prior to the expiration date of the Initial Term and any Renewal Term, Lessor and Lessee shall, if necessary, negotiate new terms for this Agreement. If no new terms are agreed upon, and neither party objects in writing to the present terms of the Agreement, and neither party objects in writing to renewing the Agreement, then the Agreement shall be renewed for an additional ten (10) year period according to the terms of this Agreement. Both parties recognize the right of the other not to renew this Agreement.

(c) Right of First Refusal to Lessee. Lessor hereby grants to Lessee, for a period of twelve (12) months commencing upon termination or expiration of this Agreement, unless Lessor terminated due to Lessee's unilateral material default, a right of first refusal to enter into a new agreement for the leasing of the airtime on the Channels, pursuant to the following terms: If Lessor receives a bona fide written offer from a third party to lease the airtime on the Channels within said twelve (12) month period, Lessor shall transmit the same in writing to Lessee as Lessor's offer and Lessee shall then have the right for thirty (30) days after its receipt of said offer to accept said offer. If, during said thirty (30) day period, Lessee shall fail to accept such offer, its option hereunder as to such offer shall terminate and then, and only then, may Lessor agree to lease such airtime to a party other than Lessee. Thereupon, Lessor shall have the right to lease the airtime on the Channels to, and only to, the aforesaid bona fide prospective lessee at the identical price, terms and conditions as were offered to Lessee. Lessor may not accept said offer with any modification to its price, terms and/or conditions in any respect without first again providing Lessee with written notice of, and the right to accept, the modified offer. If the consideration to be paid to Lessor by the third party is in whole or part in a form other than cash, the cash equivalent of such other consideration shall be stated by Lessor in its offer to Lessee, and Lessee may agree to pay such cash amount in lieu of such other consideration in its acceptance of such offer; provided, however, that if Lessee does not believe that Lessor's offer states a cash amount fairly equivalent to the actual cash value of the other consideration and so notifies Lessor within seven (7) days after the receipt of the offer from Lessee, Lessor may either adopt the value set forth in Lessee's notice

or refer the matter for arbitration. If the cash value of the other consideration is referred to arbitration, Lessee's right of first refusal will extend until five (5) days after Lessee has received notice of the arbitrators' final determination. Part of any agreement shall stipulate that in the event Lessee does not exercise its right of first refusal under this section, the party acquiring the authorization(s) for the Channels shall, at the option of the Lessee, purchase the receive equipment in the possession of Subscribers and the Leased Equipment at the Transmission Point (as defined in paragraph 6(a)) for fair market value.

(d) License Maintenance and Renewal. At Lessee's expense, Lessor shall file all necessary and appropriate applications and reports with the FCC and, as required by law, with any and all other local, state, and federal governmental agencies to maintain and renew its ITFS license and any associated authorizations. Lessor shall take all other appropriate actions to obtain and maintain in force all licenses and authorizations required for use of the Channels. Lessor shall not take any action which could reasonably be expected to cause the FCC to restrict, revoke, cancel or refuse to renew Lessor's ITFS license.

2. EXCESS CAPACITY.

Lessor has determined that there will be excess capacity available on the Channels above the capacity to be utilized for Lessor's educational needs and that this excess capacity is available for entertainment programming and commercial and other transmission. Lessor has further determined that, by combining its educational programming with Lessee's entertainment programming, and commercial and other transmission, a significant increase in the number of persons who will have access to Lessor's educational programming may be achieved at no additional transmission cost to Lessor.

3.. LEASE OF EXCESS CAPACITY.

(a) Excess Capacity Available to Lessee. Lessor agrees to lease to Lessee all of the "excess" capacity available on all of the Channels, for the term of this Agreement. All time available over and above the time utilized for Lessor's educational programming shall be considered "excess capacity," as that term is defined by the rules of the FCC, specifically section 74.931 thereto, and shall be available to Lessee for reception or transmission and for entertainment programming and commercial and other transmission (hereinafter referred to as "Lessee Time").

(b) Reserved Time for Lessor. Lessor reserves for itself a minimum of 21 hours per week per channel for ITFS scheduled programming, up to four (4) hours per day between the hours of 8:00 a.m. and 10:00 p.m. Monday through Saturday (referred to herein as "Lessor's Primary Time."). Not less than thirty (30) days prior to the initiation of program service or any expansions or reductions of service, Lessor shall provide Lessee, in writing, with a schedule containing the specific Lessor's Primary Time which it intends to utilize. Lessor also reserves for itself up to an additional twenty (20) hours per week per channel for ITFS scheduled programming which it may recapture upon prior notice to Lessee, between the hours of 8:00 a.m. to 10:00 p.m. Monday through Friday (referred to herein as "Lessor's Secondary Airtime."). In the event Lessor intends to utilize Lessor's Secondary Airtime, Lessor must provide Lessee with six month's advance written notice. Upon Lessor's recapture of Lessor's Secondary Airtime, Lessee may carry Lessor's additional programming on any MMDS or ITFS channel which is available for the use of Lessee.

(c) Lessee Provided Educational Programming. If the Lessor is unable to use its reserved time, the Lessee will provide educational network programming, such as The Discovery Channel, Arts & Entertainment, C-SPAN, etc., on those Channels as a service without cost to the Lessor.

(d) Limitation on Subleasing Channel Capacity. Lessor agrees not to sublease or sell any of its time to any person or entity other than to Lessee.

(e) Sub ITFS Channels. Unless otherwise prohibited by the Rules of the FCC, Lessee Time shall include all capacity made available on all Channels made available through the use of any multiplexing techniques or other similar technologies which allow the division of an existing 6MHz ITFS channel into two or more discrete video, audio, or data, channels, each of which shall hereinafter be referred to as "Sub-ITFS Channel." In the event Sub-ITFS Channels are utilized by Lessee, these Sub-ITFS Channels shall become a part of this agreement without additional consideration therefor. Lessor also agrees to permit Lessee to channel map or channel load all Channels, subject to FCC rules and regulations and Lessor's program schedule.

(f) Licensee Control. Notwithstanding any other provision of this Agreement, Lessor shall retain ultimate control of the ITFS facilities consistent with all FCC rules and regulations.

4. TECHNICAL CHANGES IN CHANNEL OPERATION AND EQUIPMENT FOR LESSOR'S USE.

Lessor agrees that it will take no action which will degrade or interfere with the reception of Lessee's signal or other technical aspects of Lessee's operation and services. Furthermore, Lessor will not, by its own action or through a third party, utilize any part of its licensed frequency spectrum to create or operate a service that is in competition with Lessee's current, planned or future service over the system.

5. INTEGRATION OF LESSOR'S PROGRAMMING.

At Lessor's request, Lessee agrees to endeavor to integrate certain of Lessor's programming into the overall communications service offered to Lessee's Subscribers. This integration shall include, but shall not be limited to, at the sole discretion of Lessee, listing Lessor's material in program guides produced for subscribers, with full attribution to Lessor as the source of such material of Lessor.

6. TECHNICAL FACILITIES.

(a) Transmission Point Location. Upon execution of the Agreement, Lessee shall, in consultation with Lessor, co-locate the Transmission Point for provision of the services contemplated by this Agreement with the MMDS and/or other facilities Lessee operates or plans to operate under lease agreement in the Area. At Lessee's expense, Lessor shall prepare and file with the FCC, at the earliest date permitted under the FCC's rules and policies, any appropriate applications or amendments to previously filed applications, to secure a license to operate the channels from said location. Lessee shall provide all legal and/or engineering personnel for such purpose or will have the right to approve any expenses incurred by Lessor in advance of Lessor's incurring such expenses. If, upon reviewing Lessor's application, the FCC directs Lessor to amend, revise or modify its application, and/or the terms of the Agreement to comply with FCC rules or policies, Lessor and Lessee shall cooperate to mutually agree upon such changes and Lessor will expeditiously so amend its application at Lessee's expense. Upon FCC grant of the application, by Final Order, Lessee, or its designee, shall, within a reasonable period of time, commence and, not later than the construction deadline set forth in Lessee's authorization or any extension thereof, complete construction of the Channel transmission facilities in accordance with said FCC authorization(s). At its

expense, Lessee, or its designee, shall design, engineer, purchase, and install such transmitters, transmission line, antennas, and receivers as are required to operate the Channels in accordance with the provision of such authorization(s). Any equipment so used in said construction shall be leased to Lessor pursuant to Paragraph 9 hereof. (Said equipment is hereinafter referred to as the "Leased Equipment"). Lessee shall supervise and shall be responsible for the installation of the Leased Equipment and shall retain title to the Leased Equipment. Lessee shall maintain adequate casualty and liability insurance to cover all Leased Equipment installed pursuant to this Agreement. For purposes of this Agreement, a "Final Order" means a written action or order of public notice issued by the FCC granting the application and issuing the conditional license for the Channels to Lessor: (a) which has not been reversed, stayed, enjoined, set aside, annulled or suspended, and (b) with respect to which (I) no requests have been filed for administrative or judicial review, reconsideration, appeal or stay and the time for filing any such requests, and the time for the FCC to set aside the action on its own motion, has expired, or (ii) in the event of review, reconsideration or appeal, the grant of the application and issuance of the conditional license has been affirmed and the time for further review, reconsideration or appeal has expired.

(b) Modification of Transmission Point. Lessor agrees to cooperate with Lessee to change the Transmission Point specified in its application or FCC authorization to any location request by Lessee from which Lessor's specified and protected ITFS receive sites will be served, and, in such event, to file with the FCC any necessary and permissible amendment to the application for the Channels or any necessary and permissible modification application or notification consistent with the FCC's Rules. Lessee shall pay for Lessor's actual costs and expenses, including legal and engineering fees, incurred by Lessor to prepare, file and prosecute such amendment, application or notification, provided that Lessee has approved the amount of such expenses in writing prior to their having been incurred by Lessor and Lessor has provided Lessee with satisfactory documentation of such expenses, or at the request of Lessor, Lessee will prepare and provide such materials to Lessor, at Lessee's expense, for submission to the FCC by Lessor.

(c) Receive Facilities. At Lessee's expense, not to exceed \$500 per location, Lessee shall construct receive facilities at up to eight (8) locations in the Area, to be selected by

Lessor, capable of receiving the signal transmitted over the Channels, including one (1) location to be selected at Lessor's studio or area headquarters capable of simultaneously receiving and monitoring all of Lessor's signals transmitted over the Channels. In the event that Lessor requests construction of a receive location that includes the wiring of a master antenna system or similar multi-receiver configuration, Lessee shall install the extra wiring required only if reimbursed by Lessor for its actual costs. Any equipment incorporated into the aforesaid eight (8) locations shall, upon the initiation of operation of the system, remain the property of the Lessee. In addition, all equipment installed at Lessor's expense shall remain the Lessor's property. All other receive equipment will remain the property of Lessee.

(d) Transmission Point Facilities. Lessee shall provide, at its sole cost and expense, suitable space at the Transmission Point for the Channel antenna(s) and transmitters, and TVRO satellite antenna. Lessor shall, where possible, co-locate its production facility with Lessee's transmission facilities. In the event that Lessor's production facility cannot be co-located with the Transmission Point, Lessor shall arrange for the transmission of programs from its facility to the Transmission Point.

(e) Power Increase and other Modifications. If Lessee so requests, Lessor will file an amendment to its application for the Channels or a modification application with the FCC seeking authority to increase the output power of the Channels to a higher level requested by Lessee, at Lessee's expense. In the event that said authorization for power increase is obtained, Lessee, at its sole expense, shall provide and install appropriate amplifiers and related equipment in order to effect said power increase and such amplifiers and equipment shall thereupon become part of the Leased Equipment. Lessee shall arrange for and pay for all costs, including legal and engineering fees associated with said application and power increase. If Lessee so requests, Lessor will apply for FCC authorization for any other modifications or extensions to its application or license which Lessee deems necessary for its operations. This shall include, without limitation, modification to utilize multiplexing or other compression technology to expand use of the Channels bandwidth capacity to accommodate more than one video signal per channel or to engage in other types of service permitted under the FCC's rules, regulations and/or policies.

7. FEES.

(a) Commencing with Subscribers in excess of 500 in the Market, but equal to or less than 5,000 Subscribers in the Market, Lessee shall pay to Lessor, as consideration for use of the excess capacity on the four licensed Channels provided to Lessee hereunder, Six Cents (\$0.06) per subscriber per month. Above 5,000, but equal to or less than 10,000 Subscribers in the Market, the fee payable to Lessor shall increase to Seven and One-Half Cents (\$0.075) per subscriber (above 5,000 in aggregate) per month. Above 10,000 Subscribers in the Market, the fee payable to the Lessor shall increase to Ten Cents (\$0.10) per subscriber (above 10,000 in aggregate) per month. In the event the Lessor is licensed for fewer than four channels, all payments shall be reduced proportionally; e.g., for two Channels the rate shall be Three Cents (\$0.03) per subscriber per month, where it would otherwise be Six Cents (\$.06).

As used herein, "subscriber" means the number subscribers who have received and paid for Lessee's wireless cable programming over one or more of the Channels in the market area. In those situations where subscriptions for the channels are sold in bulk at a discount to multifamily dwellings or commercial establishments, a "subscriber" is defined as an "equivalent subscriber" in terms of payment due. The number of "equivalent subscribers" shall be determined by dividing the total monthly payments received for such service by the standard rate charged to individual subscribers in that system for the services provided. The resulting figure, rounded to the closest whole number, shall be used as the number of subscribers to be used to determine payment due.

(b) Right to Audit. Lessee and Lessor shall, while this Agreement is in force, keep, maintain and preserve complete and accurate records and accounts, including all invoices, correspondence, ledgers, financial and other records pertaining to Lessee's and Lessor's charges hereunder, and such records and accounts shall be available for inspection and audit at the respective offices of Lessee and Lessor at any time or times during the time service is being provided to Lessee hereunder or within ninety (90) days thereafter, during reasonable business hours, by Lessee or Lessor or their respective nominees. Notwithstanding the foregoing, Lessee and Lessor shall be entitled to only one audit of each other's records and accounts during any twelve-month interval. Lessee and Lessor shall provide each other with five (5) business days' advance written notice of their intent to inspect said records and

accounts prior to their being allowed to do so. Lessee and Lessor shall not interfere with each other in the exercise of their respective rights of inspection and audit set forth herein. The exercise, in whole or in part, at any time or times, of the right to audit records or accounts or of any rights herein granted or the acceptance by Lessee or Lessor of any statement or remittance tendered by or on behalf of either Lessee or Lessor, shall be without prejudice to any rights or remedies of either of them and shall not preclude Lessee or Lessor from thereafter disputing the accuracy of any such statement or payment.

(c) Lessee's Payment of Lessor's Fees. Lessee shall arrange for and pay Lessor's reasonable legal, engineering and related expenses actually incurred by Lessor in prosecuting its application for the authorizations and documents.

8. ARBITRATION OF DISPUTE.

In the event that Lessee and Lessor cannot resolve any dispute arising under this Agreement such dispute shall be resolved pursuant to arbitration pursuant to the procedures of the American Arbitration Association, and the decision of the Arbitrator as provided for therein shall not in any way result in a default hereunder unless the award of the Arbitrator is not complied with. All information obtained by Lessee or Lessor during such disputes shall be maintained on a confidential basis. In the event that Lessee and Lessor cannot agree upon a single arbitrator, the Lessee and Lessor shall each pick their own arbitrator. These two shall then pick a third arbitrator. A decision of two out of three of the arbitrators shall be binding upon the parties. Each shall pay for its own selected arbitrator and shall share the cost of the third arbitrator equally.

9. CHANNEL EQUIPMENT LEASE.

Lessor shall lease from Lessee all Leased Equipment. The terms of the lease agreement, to be entered into prior to commencing construction, shall include the following:

(a) Rent. Lessor shall pay to Lessee the total amount of One dollar (\$1) per year for any use of the Leased Equipment, it being understood that Lessor's provision of the airtime at the rates provided in this Agreement is the major consideration for Lessee's Lease of the equipment to Lessor.

(b) Taxes. Lessee shall be required to pay all taxes and other charges assessed against the Leased Equipment, without cost to or reimbursement by Lessor, and the Lessee

shall be entitled to claim depreciation and investment tax credits thereunto for income tax purposes.

(c) Maintenance and Operating Costs. Lessee shall be required to bear all costs associated with maintaining, upgrading and operating the Leased Equipment.

(d) Term of the Equipment Lease. The term of the lease shall commence upon the date actual construction begins and shall end upon the termination of this Agreement

(e) Purchase Option. In the event that this Agreement is terminated by Lessor by reason of the unilateral default of Lessee, or by Lessee pursuant to Section 11(e) hereof, or if this Agreement terminates by its own terms without the default of either party, Lessor shall have the right to purchase the Leased Equipment and the receive equipment installed by Lessee pursuant to Section 6(c) hereof for the then-fair market value of such Leased Equipment and reception equipment. To exercise its right to purchase the Leased Equipment and reception equipment pursuant to this Section 9(e), Lessor shall give notice of its intent to do so within ten (10) business days of such termination. In the event of a dispute about such value, the value will be determined by arbitration. Such right to purchase shall apply to Leased Equipment only to the extent that such equipment is used solely for the transmission of the Channels. Any equipment such as transmit antenna or combiners which is also used for the transmission of signals other than the Channels is excluded from this option to purchase. Such option will any event expire if full payment by Lessor to Lessee is not made within thirty (30) days of Lessor's notice to Lessee or, if the value is determined by arbitration, within thirty (30) days after Lessor receives notice of such determination.

10. CONTROL OVER PROGRAMMING

Lessee intends that only programming of a sort which will not serve to place Lessor's reputation in the community in jeopardy will be transmitted by Lessee on the Channels. At the present time, it is believed that this programming will be supplied by one or more programming networks, such as Home Box Office, Showtime, the Movie Channel, ESPN, WTBS, Cable News Network, etc. The parties recognize the difficulties inherent in specifying exact standards in this Paragraph, but believe that good faith efforts on both sides can overcome whatever differences may arise. Lessor shall have the absolute right to deny Lessee the right to transmit on the Channels any program which is obscene as defined by the

laws of the State of Louisiana and the United States or which would violate the rules and regulations of the FCC.

11. TERMINATION

(a) Termination by Reason of No Channels within Thirty-six Months. This Agreement may be terminated at Lessee's option upon thirty (30) days' written notice to the Lessor in the event that the FCC has not granted an ITFS authorization for the Channels to Lessor within thirty-six (36) months from the date this Agreement is signed.

(b) Termination by Reason of Revocation of FCC Authorization. If Lessor's FCC authorization is ever terminated or revoked by Final Order, this Agreement will terminate. Should such termination occur, each party shall be entitled to retain all equipment and materials purchased or furnished by such party. There shall be a final accounting of monies due under this Agreement, and when completed, there shall be no further liability of one party to the other. If the termination occurs during the middle of a month, payment under the Fee Schedule at Paragraph 7(a) shall be prorated. Should Lessor's application or License be the subject of a lawsuit or petition or any proceeding before the FCC or other government agency or judicial body, Lessor, at Lessee's request and expense, shall defend its application and/or license in any proceedings which could adversely impact Lessor's rights in the application or license.

(c) Termination by Reason of Default and Nonperformance. At the option of the non-defaulting party, this Agreement may be terminated upon the material breach or default by the other party of its duties and obligations hereunder if such breach or default shall continue for a period of thirty (30) consecutive days after such party's receipt of notice thereof from the non-defaulting party; provided, however, that failure to make any payment required under Paragraph 7 hereof shall, if such failure continues for a period of thirty (30) days after written notice thereof to Lessee, and then continues for an additional twenty (20) days after a second written notice thereof to Lessee, constitute a material breach of this Agreement by Lessee. In the event of termination pursuant to this Subparagraph, such termination shall not affect or diminish the rights or claims or remedies available in equity or at law to the non-defaulting party arising by reason of such breach or default. At no time under this subparagraph shall Lessee be required to pay pursuant to the Fee Schedule for any time period during which it

has no access to air time for transmission.

(d) Termination Due to Change of Business Conditions. Prior to starting actual construction of the Channels, Lessee shall have the option to terminate this Agreement by notifying Lessor, in writing, that circumstances exist with reference to the transaction contemplated by this Agreement which would interfere with Lessee's business plan. In the event of such termination, neither party shall have any further obligation to the other, except that Lessee shall reimburse Lessor for any out-of-pocket expenses previously approved by Lessee and incurred by Lessor.

(e) Early Termination by Lessee. Lessee may terminate this Agreement at any time and for any reason by providing Lessor with one (1) year's prior written notice. This right is in addition to, and not in place of, the right to terminate provided, elsewhere, in Section 11.

(f) Termination for Failure to Construct. Lessor may terminate this Agreement if Lessee has failed to construct the Channels within five (5) years of the grant of an FCC authorization for such construction. In the event of such termination, neither party shall have any further obligation to the other, except that Lessee shall reimburse Lessor for any out-of-pocket expenses previously approved by Lessee and incurred by Lessor.

(g) Lessor Elects to Cancel its Authorization(s) for Channels. Lessor reserves the right to terminate any further activity covered by this Agreement, by submitting any ITFS license(s) it might obtain to the FCC for voluntary cancellation. Such termination by cancellation of its license(s) may be for any reason and shall only require that Lessor provide Lessee a ninety (90) day written notice prior to submission of its license(s) to the FCC for voluntary cancellation; provided however, that if Lessee designates a qualified entity to Lessor within such ninety (90) day period, Lessor shall be obligated to execute an assignment of all of its rights to any ITFS Licenses or license applications covered by this Agreement or other FCC authorizations directly related to such ITFS licenses to such FCC qualified entity and maintain the validity and effectiveness of such licenses, applications and other authorizations, at Lessee's expense, until a Final Order by the FCC assigns or denies the assignment of Lessor's rights to the designated qualified entity. Upon completion of such assignment, all of Lessor's obligations under this agreement shall terminate and Lessor shall have no liability whatsoever to Lessee. Should Lessor have incurred any out-of-pocket

expenses directly related to this Agreement and owed by Lessee under the terms of this Agreement but not yet paid to Lessor by Lessee, Lessee shall be obligated to pay such expenses prior to Lessor's executing an assignment of its rights to FCC applications or authorizations.

12. NOTICE.

Any notice to be given by either Lessor or Lessee under any provision of this Agreement shall be by facsimile transmission, with original distribution by first class mail, or by prepaid overnight express courier to the President, Administrative Member, or other person designated in writing by a party to this Agreement to receive notice. Any notice to be given by either Lessee or Lessor under any provision of this Agreement shall be at such location as may be designated by each to the other, and shall be considered delivered after having been received by the other party.

13. SEVERABILITY.

Should any court or agency, including the FCC, determine that any provision of this Agreement is invalid, the remainder of the Agreement shall stay in effect and the parties agree to use their best efforts to negotiate a replacement provision which is valid.

14. VENUE AND INTERPRETATION.

This Agreement shall be governed by, and construed and enforced in accordance with the Communications Act of 1934, as amended, the rules and policies of the FCC and the laws of the State of Louisiana.

15. ENTIRE AGREEMENT.

This Agreement constitutes the entire Agreement between the parties and supersedes all prior oral or written provisions of any kind. The parties further agree that this Agreement may only be modified by written agreement signed by both parties.

16. ASSIGNMENT.

Lessor or Lessee may not assign, transfer, sell, dispose of or otherwise alienate or encumber their rights or obligations under this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld. Notwithstanding the foregoing, Lessee may assign its rights, benefits, duties and obligations hereunder to a lender in connection with the financing of its wireless cable system without securing the prior

written consent of Lessor. In addition, Lessee may assign its rights, duties, benefits and obligations hereunder to any subsidiary corporation, parent corporation or corporation under common control without the prior consent of the Lessor.

17. RIGHT OF FIRST REFUSAL

If at any time after the date of the execution of this Agreement, Lessor shall determine to sell, convey, assign or otherwise dispose of the licenses and authorizations for the Channels (except by voluntary cancellation which shall be governed under Section 11(g) of this Agreement), Lessee, or its designee then eligible to be licensed to operate such Channels, shall have the right and option to acquire such licenses and authorizations, subject to the following procedures and to FCC rules and regulations:

(a) Within thirty (30) days after receiving an offer to acquire the authorization(s), (or after an offer to convey by Lessor is accepted by a third party subject to Lessee's right of first refusal), Lessor will serve Lessee with written notice containing a copy of such offer, identifying the offeror and stating Lessor's intent to accept the offer.

(b) Within sixty (60) days of its receipt of such notice, Lessee will notify Lessor in writing of its intention to match the offer to obtain the authorization(s) on the same terms contained in the notice, in which event Lessor will reject the original offeror's offer (or conditional acceptance of the third party) and accept that of Lessee. Lessee's failure to so timely notify Lessor of its intention to match the original offer (or acceptance) shall be construed as notification that Lessee or its designee does not wish to so exercise its right of first refusal with regard to the original offer and only in such event may Lessor accept the original offer (or conditional acceptance).

(c) In the event that any term of the original offer is changed in any respect or a new offer is presented, before accepting such offer, Lessor must first follow the procedures specified in the foregoing subparagraphs (a) and (b), providing Lessee notice with regard to the revised offer and giving it or its designee the opportunity to exercise its right of first refusal thereto.

(d) At the commencement of any negotiations with any party for the acquisition by that party of the authorizations, Lessor will provide such party, in writing, with full disclosure of Lessee's rights provided for in this Paragraph 17 and of Lessor's intention to honor these

rights. In the event Lessee does not exercise its right of first refusal under this section, then the party acquiring the authorization(s) for the Channels shall, at Lessee's option, become the Lessor under this Agreement and shall assume all rights and obligations of the Lessor under this Agreement. If Lessee does not exercise its option, then part of any assigned agreement shall stipulate that the party acquiring the authorization(s) for the Channels shall, at the option of Lessee, purchase the receive equipment in the possession of Subscribers and the Leased Equipment at the Transmission Point (as defined in paragraph 6(a)) for fair market value.

18. INDEMNIFICATION.

(a) Lessee. Lessee agrees, to the fullest extent permitted by law, to hold Lessor harmless and to indemnify and defend Lessor from all claims, demands, causes of action, loss, and judgments, including attorneys' fees (herein collectively "claims") resulting from Lessee's use of the license granted by this Agreement, unless such claim arose out of a negligent or intentional act or omission of Lessor, its agents, or employees.

(b) Lessor. Lessor shall pay any and all costs and expenses, including attorneys' fees, resulting from Lessor's breach of this Agreement or from any negligence, omission or wrongful act by Lessor, its agents or employees.

19. COOPERATION.

Lessor and Lessee each warrant to each other that it will take no action that will unreasonably interfere, threaten or frustrate the other's purposes or business activities. Lessor and Lessee agree to keep the other informed and to coordinate with the other any of its activities that may have such effect on the other.

20. LEASED EQUIPMENT.

Lessee shall supply, at its sole cost and expense, sufficient personnel to operate and maintain the Leased Equipment. Such personnel shall, at all times, be under the supervision of Lessee but subject to control of Lessor. Said personnel shall insure that the Leased Equipment shall, at all times, meet the technical operating requirements of the Rules of the FCC. Such operations and maintenance activities shall be undertaken at such times as are consistent with the operating requirements of Lessee's business.

21. START DATE.

For purposes of this Agreement, the Start Date shall be that date indicated in writing

by Lessee to Lessor that commercial broadcasting by Lessee has commenced.

22. MATERIAL DOCUMENTS.

Lessor will make available to Lessee for inspection all of the material documents and contracts to which Lessor is a party which in any way affect the Channels.

23. SPECIAL CONDITIONS.

Notwithstanding any other provisions of this contract, Lessee agrees to provide such support to Lessor as is reasonably necessary to assist Lessor in providing a minimum of twenty-one (21) hours per channel per week of qualified educational programming on the Channels as necessary to meet the requirements of the FCC with respect to its ITFS license.

24. NON-DISCLOSURE.

Lessor agrees not to disclose the contents of this agreement to third parties except to the extent required in connection with an FCC application or necessary for Lessor to fulfill its public record requirement.

25. BOARD APPROVAL.

This Agreement is entered into subject to the approval of the Lessor's governing board. The officials of the Lessor will use their best efforts to obtain prompt approval by the board and will notify the Lessee as soon as approval has been received. The Lessee has the right to withdraw this offer by sending written notice to the Lessor, if a delay in obtaining board approval jeopardizes its ability to submit an ITFS license application to the FCC during the first available filing window, or its ability to develop the wireless cable system.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

LESSOR:
SWEENEY INDEPENDENT
SCHOOL DISTRICT

BY: Fred Martindale
Fred Martindale, Asst. Supt.

ITS: _____

LESSEE:
WIRELESS ONE, INC.

BY: Hans Sternberg

ITS: CHAIRMAN

Statement of Purpose and Objective

The Applicant will use the instructional television fixed service channels for expanding its current educational opportunities, as well as for establishing new programs. These channels will permit it to offer for-credit educational courses to its enrolled students as well as students attending other educational institutions in the area.

The Applicant's goals for its regional education will be especially benefited by the use of these channels, permitting expansion of the critical area of secondary education. Through its partnership with Wireless One, Inc., it will use ITFS frequencies to increase educational opportunities it currently offers.

Staff development and continuing in-service training can be enhanced by the use of these channels, permitting area-wide opportunities in these very crucial areas. These channels will also be especially valuable in supplementing classroom instruction for tutorial purposes and will allow the Applicant to be able to expand its classroom course selection.

The Applicant plans to utilize this telecommunications network to offer its students, and the surrounding community, a diverse selection of formal and non-formal educational programming.

Justification for Number of Channels Requested

The Applicant intends to transmit educational programming for several levels of education to a growing number of receiving sites. In addition, it intends to expand its adult and community educational programming to encompass a broader section of the area population.

Once royalty income justifies expansion, the Applicant intends to develop a video facility for providing classroom courses to its member schools and significant supplemental educational materials, with special emphasis on tutorial materials for assisting students who may require additional instruction. In addition, Applicant intends to provide distance learning opportunities to Homebound Students.

The Applicant needs to lease excess time on these channels to provide the financial support for the educational effort. With the growing population and increased interest in educational programming, the Applicant anticipates growing demands on these channels for course offerings and feels that it must have the use of four (4) channels.

CONSENT AGREEMENT

RCV BY:WCJC

10-17-95 1:18PM

WCJC ADMIN# 2

10/17/95 TUE 10:42 FAX 202 288 6381

GARDNER, CARTON DOUGLAS

0000

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

Re: Application of Sweeny Independent School District for Instructional Television
Fixed Service Station in Freeport, Texas

Dear Mr. Caton:

Wharton County Junior College is the licensee of WLX-857, the B group channels in Wharton, Texas. We do not object to the Sweeny Independent School District, application for new ITFS facilities and the potential theoretical interference that may exist between co-channel service areas. Wharton County Junior College believes that the stations can be operated in a coordinated manner so as not to cause any mutual interference. Therefore, we have no objection to the Sweeny Independent School District, Freeport, Texas station operation.

If objectionable levels of interference are experienced when the stations become operational, Sweeny Independent School District has committed its full cooperation to reduce interference to the extent that it is technically feasible at reasonable cost. We also will cooperate in the control of real mutual interference.

Sincerely,

Wharton County Junior College

By: Frank R. Virelo

Its: PRESIDENT

Date: 10-17-95

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EXHIBIT 3

ORDER PREPARED BY THE COURT

Nextwave Broadband, Inc.,
Plaintiff,

vs.

Saint Rose Church Schools,
Defendant.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION-GENERAL EQUITY
DOCKET NO. C-53-06

CIVIL ACTION

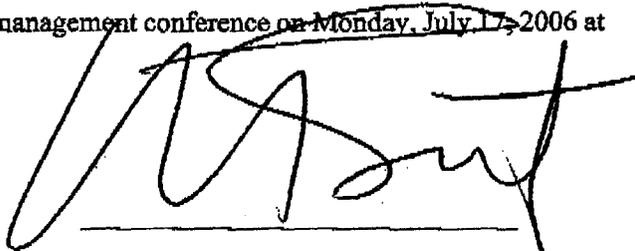
ORDER

This matter having been presented to the Court by way of a Verified Complaint and a Order to Show Cause seeking a preliminary injunction filed by Plaintiff, Nextwave Broadband, Inc., Eric S. Westenberger, Esq. appearing; and opposition having been filed by Defendant, Saint Rose Church Schools, Timothy D. Lyons, Esq. appearing; and the court having reviewed the papers submitted; and having heard oral argument on June 6, 2006; and for reasons set forth in the statement of reasons attached; and for good cause having been shown;

IT IS ON THIS 16th DAY OF JUNE 2006,

ORDERED that Plaintiffs' application for a preliminary injunction is DENIED; and it is further

ORDERED that there shall be a case management conference on Monday, July 17, 2006 at 10:00 a.m.



Neil H. Shuster, P.J.Ch.

NEXTWAVE BROADBAND, INC.

Plaintiff,

v.

SAINT ROSE CHURCH SCHOOLS

Defendant.

ORDER TO SHOW CAUSE SEEKING PRELIMINARY INJUNCTION

This matter arises from a verified complaint and order to show cause filed on April 27, 2006 by the plaintiff, NextWave Broadband, Inc. ("Plaintiff" or "NextWave"), against the defendant, Saint Rose Church Schools ("Defendant" or "Saint Rose") alleging breach of contract and breach of implied covenant of good faith and fair dealing. On May 2, 2006, the Court signed an order to show cause setting forth a briefing schedule on a preliminary injunction.¹

¹ The order to show cause was signed after an informal telephone conference whereby counsel for both parties agreed that Saint Rose would provide notice to NextWave before taking further action prior to the return date on the preliminary injunction.

Following oral arguments on the preliminary injunction, both parties submitted additional briefs and certifications on the issue of irreparable harm. While the Court has considered these submissions, they did not weigh heavily in its analysis.

Defendant is a private Catholic high school located in Belmar, New Jersey and the holder of an A-group microwave station in the Educational Broadband Service ("EBS") spectrum licensed under the Call Sign WND374 for the greater Toms River, New Jersey area (the "License").² The License permits Saint Rose to offer voice, video, data or multimedia services over its EBS spectrum in furtherance of its educational mission. In an effort to realize a financial benefit for its license, and in accordance with Federal Communication Commission ("FCC") regulations, on October 16, 1995, Defendant entered into an agreement (the "Agreement") with Magnavision Corporation ("Magnavision"), a for-profit corporation, whereby Magnavision would lease a portion of Saint Rose's excess bandwidth for an initial term of ten years so long as certain preconditions were met. According to paragraph eight of the Agreement, the "start date" would commence the ten year term when Saint Rose acquired rights to transmit program material on at least 16 channels in the market area, and Magnavision obtained an 18 month construction permit to build four EBS channels. Moreover, in the event of a breach, the Agreement could be terminated, pursuant to paragraph ten, upon 30 days notice.

² EBS was previously known as the Instructional Television Fixed Service.

Unbeknownst to Saint Rose, and without performing any of the foregoing condition precedents, on March 19, 2005, Magnavision assigned its interest in the Agreement to NextWave. Nextwave, in conjunction with a company called IP Wireless, subsequently contacted Saint Rose, but failed to take any action towards satisfying the Agreement's condition precedents. In 2004, Saint Rose was approached and solicited by Hispanic Information Television Network, Inc. ("HITN"), a for-profit company, which possessed an interest in obtaining the license. Apparently, for the first time since acquiring the license, Saint Rose believed that HITN represented a viable opportunity to realize a financial benefit. However, before entering into an agreement, Saint Rose contacted IP Wireless and NextWave to inform them of the HITN offer. Saint Rose received minimal communication from the parties, and as a result, on November 1, 2005, advised NextWave that it was terminating the Agreement for its alleged breach.

In March 2006, Saint Rose assigned its license to HITN. On April 5, 2006, NextWave learned of this assignment from reviewing a public FCC notice, and in response, filed an objection with the FCC on April 19, 2006. NextWave also filed this order to show cause seeking temporary and

preliminary injunctive relief. In its complaint, NextWave alleges that Saint Rose's assignment to HITN constituted a breach of the Agreement.³

NextWave's primary argument in support of a preliminary injunction focuses squarely on the irreparable harm that will allegedly result if Saint Rose is permitted to assign its License. According to NextWave, the excess spectrum afforded to it under the Agreement is finite and unique. For this reason, NextWave concludes, it cannot be compensated with money damages. NextWave also believes that it enjoys a reasonable probability of success on the merits because Saint Rose has breached the Agreement. By NextWave's reading of the Agreement, paragraph four requires Saint Rose to cooperate with it in finding a qualified successor and paragraph fourteen prohibits Saint Rose from assigning or transferring its License without prior written consent. In transferring its License, NextWave argues that Saint Rose breached both of these provisions.

As a threshold matter, Saint Rose points squarely to paragraph eight under the Agreement, which it contends, absolves the school of any liability.

³ Although an objection has been filed with the FCC, this Court must determine the rights and responsibilities of the parties to the Agreement because "the Commission has long held that it is not the proper forum to resolve issues of contract interpretation, as long as a licensee's compliance with Commission rules is not called into question." In re USA Broadcasting, Inc., 19 FCC Rcd 4253, 4255-56 (2004).

According to Saint Rose, paragraph eight sets forth a number of condition precedents that necessarily must be satisfied before the commencement of the Agreement's ten year term. Since these preconditions have never been satisfied as a result of NextWave and its predecessors-in-interest's alleged negligence, Saint Rose alleges that it lawfully terminated the Agreement.⁴

The issue before the Court is whether to grant Plaintiff a preliminary injunction. "[T]he power to issue injunctions is the strongest weapon at the command of a court of equity, and its use, therefore, requires the exercise of great caution, deliberation, and sound discretion." Light v. National Dyeing and Printing Co., 140 N.J. Eq. 506, 510 (Ch. 1947). In order to grant such extraordinary relief, Plaintiff must demonstrate that (1) the preliminary injunction is necessary to prevent irreparable harm; (2) the legal right underlying the Plaintiff's claim is settled; (3) the material facts are uncontroverted and demonstrate a reasonable probability of ultimate success on the merits; and (4) the relative hardship to the parties in granting or denying relief favors granting the relief. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). The Court may take a less rigid view of these factors when the relief sought is designed only to preserve the status quo. Sherman v. Sherman, 330 N.J. Super. 638, 643 n. 4 (Ch. Div. 1999).

⁴ Saint Rose makes a number of other arguments in the alternative, which

Irreparable Harm to Plaintiff:

Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages after the fact, Crowe, supra, 90 N.J. at 133, or there exists no certain pecuniary standard for the measurement of damages. Scherman v. Stern, 93 N.J. Eq. 626, 631 (E & A 1922). The irreparable harm must be imminent, concrete, non-speculative, and the harm must occur in the near, not distant future. Subcarrier Communications v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997).

NextWave can demonstrate irreparable harm. The excess spectrum leased from Saint Rose is an essential component of NextWave's plan to serve residents of the Toms River area and a finite, scarce and unique interest. Cf. Poff v. Caro, 228 N.J. Super. 370, 378-79 (Law Div. 1987) (finding of irreparable harm where leaseholder would lose interest in apartment). Therefore, if NextWave loses this interest as a result of Saint Rose's assignment, there is a reasonable argument that the harm cannot be adequately remedied with money damages.

Saint Rose argues that NextWave's harm is not irreparable because the company will not be permanently damaged by the loss of its leasehold interest. The difficulty with this argument is that it relies upon a well-settled

are subsequently addressed and considered where appropriate.

proposition in the negative. In other words, while the destruction of a person's business, custom and profits can constitute irreparable harm, see Ferraiuolo v. Manno, 1 N.J. 105, 108 (1948); Vide Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 110 (E & A 1930), the destruction of one's business is not a requirement for irreparable harm. Rather, irreparable harm can, and often occurs, in circumstances short of a business's total devastation.⁵ Therefore, the Court is satisfied for the purposes of this application that NextWave has shown irreparable harm.

Legally Settled Right:

Preliminary injunctive relief should only be granted when the issues raised present a legally settled right. Crowe, supra, 90 N.J. at 133.

NextWave presents a legally settled right because it alleges breach of contract and breach of implied covenant of good faith and fair dealing. See e.g., Sons of Thunder v. Borden, 148 N.J. 396, 421 (1997).

Reasonable Probability of Success:

⁵ The Court notes, however, that Saint Rose's alleged breach of contract and subsequent assignment of its license is not an immediate and non-speculative detriment to its business. Subcarrier Communications, supra, 299 N.J. Super. at 638. NextWave and its predecessors-in-interest have allowed the Saint Rose license to lay dormant for more than ten years and have evidenced a lack of diligence in responding to the concerns of the school. Although some measure of this dormancy is due to ambiguity and uncertainty regarding FCC regulation, it would nevertheless be speculative

Preliminary injunctive relief cannot be granted where all the material facts are controverted. Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 305-06 (E & A 1878)). Thus, to prevail on an application for a preliminary injunction, a plaintiff must demonstrate a reasonable probability of success on the merits. Ibid. (citing Ideal Laundry Co v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E & A 1930)).

Evaluating the merits of this matter requires this Court to consider and review the rights and responsibilities of the parties under the Agreement. “The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them.” Karl’s Sales & Service, Inc. v. Gimbel Bros., Inc., 249 N.J. Super. 487, 492 (App. Div.), certif. denied, 127 N.J. 548 (1991) (citing Jacobs v. Great Pacific Century Corp., 104 N.J. 580, 582 (1986); Kearny PBA Local #21 v. Kearny, 81 N.J. 208, 221-22 (1979); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953); Castiel v. King, 2 N.J. 45, 50 (1949)). To that end, where the terms of a contract are clear and unambiguous there is “no room” for further construction and a court must enforce those terms as written. City of Orange Township v. Empire Mortgage Services, 341 N.J. Super. 216, 224 (App. Div. 2001); Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960). A court

to assume that NextWave is instituting steps to realize the financial benefit

has no right “to rewrite a contract merely because one might conclude that it might well have been functionally desirable to draft it differently.” Ibid. (citing Kampf, 33 N.J. at 43; Brick Township Municipal Utility Authority v. Diversified R.B. & T., 171 N.J. Super. 397, 402 (App. Div. 1979)) (quotations omitted). “Nor may the courts remake a better contract for the parties than they themselves have seen fit to enter into, or to alter it for the benefit of one party and to the detriment of the other.” Ibid. (citing James v. Federal Ins. Co., 5 N.J. 21, 24 (1950)).

Under a plain reading of the Agreement, NextWave cannot demonstrate a reasonable probability of success on the merits because it, and its predecessors-in-interest, have failed to satisfy the Agreement’s condition precedents in a timely manner. Pursuant to paragraph eight, the Agreement states that it will not “start” until Saint Rose acquires its license and NextWave obtains an 18 month construction permit from the FCC to build four broadband channels at the transmission point. It is undisputed that NextWave and its predecessors-in-interest have failed to obtain these construction permits or take any affirmative action to revive the ten year dormancy of the License. Accordingly, when Saint Rose sought to terminate the Agreement and assign its License to HITN, it did not acquiesce on its

of its interest in the Agreement without further delay.

obligations to NextWave or breach an implied covenant of good faith and fair dealing because the ten year term of the Agreement never commenced.

NextWave relies upon paragraph two of the Agreement to contend that the Agreement commenced upon the date of its execution. To NextWave, the “start date” simply allow the parties to easily calculate the end date of the initial ten year term. Even assuming NextWave did not breach the Agreement, its argument overlooks an important equitable consideration. Namely, the Agreement cannot be read in perpetuity so as to allow unlimited delay in the satisfaction of the condition precedents. NextWave and its predecessors-in-interest were obligated to commence the Agreement’s start date within a reasonable time period. Failing to do so barred their claims under the doctrine of laches. See L.V. v. R.S., 347 N.J. Super. 33, 39 (App. Div. 2002) (“laches penalizes knowing inaction by a party with a legal right from enforcing that right after the passage of such a period of time that prejudice has resulted to the other [party] so that it would be inequitable to enforce the right”).

NextWave argues that the doctrine of laches is inapplicable to any of its self-induced delay because it brought this action immediately upon realizing that Saint Rose attempted to assign its License; in other words, “it

should not suffer for the sins of its predecessors.”⁶ In raising this argument NextWave attempts to shift the focus away from the ten years of inaction and emphasize its current sense of urgency. What NextWave fails to appreciate, however, is that it must be held to the same standard as its predecessors-in-interest. In purchasing its interest in the Agreement, NextWave bargained-for its rights and assumed the risks associated with obtaining a lease agreement, which has remained dormant for ten years. A March 7, 2005 letter from IP Wireless General Counsel J. Scott Hollyfield to Saint Rose confirms this point:

In connection with such assignment, NextWave Broadband, Inc. is agreeing in writing to assume the remaining duties and obligations under the Lease. After full execution of the Lease assignment and assumption agreement, we will provide you with a copy upon request.

In applying the doctrine of laches, the Court considers each licensor’s collective inaction rather than the seemingly timely response of NextWave.⁷

⁶ This metaphor was initially presented in a question posed by the Court, but it was later adopted by counsel and used throughout oral argument.

⁷ Even if the Court were to shorten the timeline for the purposes of a laches analysis, this too would be insufficient. NextWave failed to respond to telephonic inquiries from Saint Rose regarding its status and it ignored Saint Rose’s November 1, 2005 termination letter. Although NextWave also addresses these allegations, its responses are creative retorts rather than points of equitable significance. See Certification of Carol Zampino (“Zampino Cert.”), ¶ 7 (explaining similarity of Saint Rose’s termination

Therefore, the Court cannot find for the purpose of this application that NextWave has met this prong of the Crowe test requiring a showing of a reasonable probability of success on the merits.

Balancing Equities of Individual Defendants

Finally, preliminary relief requires a balancing of the relative hardship to the parties in granting or denying relief. Crowe, supra, 90 N.J. at 134 (citing Isolantite Inc. v. United Electrical Radio & Machine Workers of America, 130 N.J. Eq. 506, 515 (Ch. 1941), modified on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)).

The balancing of the equities favors Saint Rose. If a preliminary injunction is issued, which prevents Saint Rose from assigning its lease to HITN, then a small, private, Catholic high school will be foreclosed from realizing an immediate financial benefit for its License. Contrarily, if a preliminary injunction is not granted, NextWave will suffer minimally because, as the Court notes, the harm alleged is not imminent. See supra, at 7 n. 5 (citing Subcarrier Communications, supra, 299 N.J. Super. at 638). NextWave and its predecessors-in-interest have allowed Saint Rose's License to lay dormant for ten years, and it can, despite the apparently

letter with a letter to Sea Girt Elementary School); Zampino Cert., ¶ 12 (alleging programming issues with NextWave's phone system); see also Certification of George Alex, ¶ 3-9.

competitive nature of this industry, obtain adequate alternatives or fine-tune its business model within a reasonable period of time.

NextWave emphasizes the importance of preserving the status quo in considering the balance of the equities.⁸ According to NextWave, Saint Rose will suffer no harm because it can still assign its License if it eventually proves successful on the merits, but NextWave, by contrast, will suffer tremendous hardship through the loss of the scarce, unique spectrum. Implicit in this argument is NextWave's reliance on its own inattentiveness. While it may be true that Saint Rose has waited ten years to realize a financial gain from the license (and can therefore continue to wait for a final disposition without great prejudice), NextWave overlooks that fact that it and its predecessors-in-interest have primarily caused this delay. Therefore, to the extent NextWave raises the ten year delay in pointing to Saint Rose's lack of prejudice, estoppel may be a bar.

For the abovementioned reasons, NextWave's application for a preliminary injunction is hereby DENIED.

⁸ In fact, at oral argument NextWave appeared to advocate consideration of the status quo was paramount to a formal analysis of the factors set forth in Crowe, supra. However, NextWave did nothing to argue that the status quo should be characterized as the parties' circumstances prior to Saint Rose's assignment to HTN rather than the circumstances as they exist presently.

CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Petition for Further Reconsideration and Request for Clarification* of Hispanic Information and Telecommunications Network, Inc. were served this 19th day of July, 2006 on the following parties via electronic mail at the following addresses:

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