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February 24, 2000

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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Twelfth Street, Lobby, TW-A325
Washington, D.C. 20554

Re: Notification of *Ex Parte* Contact in IB Docket No. 98-172

Dear Ms. Salas:

On behalf of our client, Winstar Communications, Inc. ("Winstar"), this is in response to an *ex parte* submission by Mark A. Grannis, on behalf of Teledesic, on February 11, 2000. In the *ex parte*, Mr. Grannis claims that a journal article written by three economists demonstrates that the "Emerging Technologies rules fostered attempts by some incumbents to obtain overcompensation for relocated links."

To the contrary, the article attached to the Teledesic *ex parte* supports comments filed by Winstar in this proceeding to the effect that the *Emerging Technologies* rules worked extremely well as a relocation model and should be adopted by the Commission in the instant proceeding. (See Winstar *ex parte* filed on February 17, 2000). The following are actual excerpts from the article (pp.668-669, copy attached) cited in the Teledesic *ex parte*:

- "Good-faith negotiations appear to have been the norm . . ."
- "Voluntary negotiations with the majority of microwave incumbents in critical sections in each of the newly licensed markets, notably the urban areas where potential subscriber population is the greatest, have been or are being conducted in good faith by all parties." (Quoting CTIA President Thomas Wheeler)

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- "While providing incumbents with a limited right to stay may have increased transaction costs in some cases, in many cases there was little or no efficiency loss."

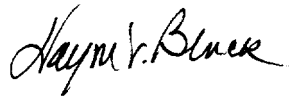
- "The right to move with compensation is especially desirable under these circumstances." (emphasis added)

Clearly, the relocation rules established in the *Emerging Technologies* and *Cost Sharing* proceedings worked well for PCS relocation. Attempts by Teledesic and other satellite companies to upset the Commission's long-established policy to balance the rights and duties of incumbents and new entrants during the relocation process are unsupported and unwise.

In particular, the Commission should reject suggestions by certain satellite companies that relocation payments be based on depreciated equipment costs plus 2% of hard costs for engineering and installation. **Commission precedent and the principle of fair treatment for incumbents requires that nothing less than full replacement cost, based on the well-established "comparable facilities" standard, should be the basis for compensation.** In addition, the sunset period for relocation should not begin to run until unencumbered relocation spectrum is identified, and an equitable cost reimbursement scheme is developed.

Pursuant to section 1.1206 of the Commission's rules, two copies of this letter have been filed with your office. Copies are also being provided to each of the Commission officials listed below. Please feel free to contact me with any questions.

Sincerely,



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required to reimburse the holder of the reimbursement rights for a pro rata share of the actual cost of relocating microwave facilities, excluding any premium that the PCS licensee might pay to the incumbent as an incentive to move during the voluntary negotiation period. The formula provides for straight-line depreciation of the reimbursement rights over a 10-year period so later entering PCS licensees, who benefit less from the microwave relocation, pay less of the relocation costs. The Commission established a cap of $250,000 reimbursement for each microwave link plus an additional $150,000 where a new tower is required. Moreover, this cost-sharing plan would apply to co-channel interference only. In August 1996,[45] the Commission designated the Personal Communications Industry Association (PCIA) and the Industrial Telecommunications Association (ITA) as the clearinghouses to administer the Commission's cost-sharing plan for microwave relocation. In February 1997,[46] the Commission decided to allow incumbents who voluntarily relocate themselves to collect reimbursement under the same cost-sharing formula applied to PCS licensees.

C. *Experience*

The spectrum currently allocated to PCS contained approximately 4,500 microwave links before the reallocation.[47] The licensees were mostly petroleum companies, utilities, railroads, and local governments. By January 1998 over half of these links had been moved out of the band.[48] About 90 percent of the moved links relocated to alternative microwave bands, and 10 percent shifted to fiber or copper wire, or ceased operation.[49]

The experience with microwave relocation in PCS seems roughly consistent with the above theory. While there are no public records of payments made for relocation, it appears that the microwave incumbents have been able to extract some premiums, but that the premiums have been limited. Good-faith negotiations appear to have been the norm, although there are numerous reports of large demands for rapid settlement. According to

[45] Memorandum Opinion and Order Re: Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, 11 F.C.C.R. 9394 (1996).

[46] Second Report and Order re: Amendment to the Commission's Rules, *supra* note 33.

[47] Letter from Mark Golden, Vice President, PCIA, to Reed Hundt, Chairman of the FCC, September 22, 1995.

[48] Two thousand one hundred eighty-five relocated links have been registered with the PCIA microwave relocation clearinghouse. PCIA Microwave Clearinghouse Semi-annual Report to the Commission, WT Docket No. 95-157, February 2, 1998. Three hundred seventy relocated links have been registered with the clearinghouse operated by the ITA. Third Semi-annual Report to the Commission of the ITA Microwave Relocation Clearinghouse, WT Docket No. 95-157, February 2, 1998.

[49] Estimate by Mark Crosby, President, ITA, meeting November 24, 1997.

Thomas Wheeler, president of the Cellular Telecommunications Industry Association (CTIA), "[V]oluntary relocation negotiations with the majority of microwave incumbents in critical sections in each of the newly licensed markets, notably the urban areas where potential subscriber population is the greatest, have been or are being conducted in good faith by all parties."[50] But there have been reports of incumbents demanding premiums of several times actual relocation costs to relocate before the involuntary relocation period, as illustrated by the following specific case.

> The PCS licensee surveyed the incumbent's 1.9 GHz system and an equipment manufacturer quoted a relocation price of $225,000 per link, inducing an upgrade of equipment. The incumbent demanded $400,000 in cash for each relocated link. . . . The PCS licensee's negotiator took the incumbent's demand back to the licensee for consideration. During the interim, the incumbent attended a seminar on the "value" of these frequencies to PCS licensees. The incumbent then rescinded its $400,000 offer and stated that it would not take less than $1,200,000 per link.[51]

While providing incumbents with a limited right to stay may have increased transaction costs in some cases, in many cases there was little or no efficiency loss. Before the PCS entrant is ready to begin service, accommodation is efficient. Even after service is up, many links can be worked around. For example, NextWave, the largest winner in the C-block auction, estimated that of the approximately 500 microwave links in its markets, 40 percent will not require immediate relocation.[52] Relocation is expensive and often unnecessary.

The right to move with compensation is especially desirable under these circumstances. There is no bias toward relocation. The sole bias is for accommodation over termination. Since termination is least likely to be desirable, this rule is apt to minimize transaction costs. Giving the incumbent the right to stay for a limited period of time increases transaction costs, but the increase is bounded. However, such a concession to the incumbent may be just what is needed to get the incumbents to agree to the reallocation.

VI. Application to Digital Television

The approach used to relocate microwave incumbents in PCS spectrum may prove useful in thinking about how to shift other occupied spec-

[50] Thomas E. Wheeler, *Electro-magnetic Spectrum Policy: Hearing before the U.S. Senate Committee on Commerce, Science, and Transportation*, 104th Cong., 2d Sess. (March 27, 1996).

[51] Letter from Mark Golden, Vice President, PCIA, to Reed Hundt, Chairman of the FCC, September 22, 1995, attachment E, p. 1.

[52] PCS Wk., June 19, 1996, at 2.