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May 31, 2000

Commissioner Susan Ness
Office of Commissioner Ness
Room 8-B115H
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *IB Docket 98-172*

Dear Commissioner Ness:

In a May 10 *ex parte* presentation, Winstar Communications attempts to justify the financial windfalls that result from the Commission's *Emerging Technologies* rules for relocation of incumbent users[1]. The attempt fails, however, because the task is impossible. Despite the overall soundness of the *Emerging Technologies* framework, the monetary obligation of the new entrant in an involuntary relocation is measured according to a "comparable facilities" standard that is without basis in law, policy, or logic. Several points from the May 10 *ex parte* cry out for rebuttal.

First, **the "comparable facilities" standard requires payment of windfall "premiums" to holdouts**. As Teledesic has previously noted, section 101.73(b) of the Commission's rules specifically authorizes an incumbent who is asked to relocate before the expiration of the mandatory negotiation period to demand "premiums" far in excess of what it would cost to provide "comparable facilities." Winstar argues that premiums are not required because all the negotiations are voluntary, but this rationalization is not persuasive. The outcome of the negotiation is bounded by what the outcome would be if negotiations failed,

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[1] Winstar's May 10 *ex parte* was submitted in response to several *ex parte* letters filed by Teledesic with all of the Commissioners' offices and various Commission officials. Because the Winstar letter was copied to a number of people who may not have seen those original letters, illustrative copies are attached.

and under the Commission's "comparable facilities" standard, the incumbent has all the leverage. An incumbent whose equipment cannot be retuned knows that by holding out he cannot possibly do worse than to receive equipment that is "at least equivalent to" the old equipment in terms of throughput, reliability, and operating cost – plus, it is very likely to be new. There is therefore no incentive for the incumbent to be at all reasonable about the actual market value of the old equipment. The incentive rather is to demand a premium for a voluntary relocation anytime prior to the point at which involuntary relocations are permitted. That is what economic theory predicts; that is what experience with the PCS relocation confirms; that is what the rules themselves expressly authorize. The rules give satellite operators no choice but to pay a "premium" for voluntary relocation, conferring a windfall on terrestrial operators.[2]

Second, **band segmentation is fundamentally different from a PCS-type relocation, and calls for a different apportionment of relocation costs**. As Teledesic has repeatedly pointed out, this is not a situation in which a new service comes along and ejects a service that previously enjoyed exclusive access to the band. It is instead a case in which the Commission has at least tentatively decided that two co-primary services can each use the spectrum more efficiently if each gets exclusive access to a portion of the band instead of shared access to the whole band. The segmentation proposed by the Commission is therefore an action that will *benefit* terrestrial operators. Simple justice requires this situation to be treated differently from a situation in which one business is essentially discontinued in order to make way for another.

Indeed, Winstar and other terrestrial licensees have agreed that segmentation benefits terrestrial as well as satellite operators. According to Winstar's November 19, 1998 comments in this proceeding, co-frequency sharing between satellite and terrestrial services in the 18 GHz band "would mean either satellite earth stations would not work in certain areas, or more likely, satellite operations would force the relocation of virtually all incumbent terrestrial services from the 18 GHz band. Frequency separation serves to resolve interference issues and improve overall spectrum efficiency" (p. 7). "Even a limited number of fixed satellite users within a given geographic area would create insurmountable coordination problems. The *only way* for the Commission to ensure the efficient use of spectrum in such a situation is to provide for band segmentation" (pp. 9-10, emphasis added). Similarly, the Fixed Point-to-Point Communications Section of TIA recognized in its November 19, 1998 comments that the exclusion zones necessarily created when the FSS and FS attempt to share spectrum are "not acceptable either to the FS or satellite interests." (p.11). Additional support came from SBC

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[2] Some may find the unfairness of the current rules easier to recognize if we imagine a scenario in which the tables are turned so as to favor satellite interests instead of terrestrial ones. If the *Emerging Technologies* rules provided that in the absence of a voluntary relocation agreement the incumbent would automatically become secondary after six months, with no compensation, we suspect that terrestrial interests would take little comfort from the opportunity to negotiate voluntary agreements prior to that time.

Communications and BellSouth, both heavy users of fixed microwave links in the 18 GHz band. With nearly unanimous recognition throughout the industry and within the Commission that this band segmentation benefits all parties, one may well ask why the relocation costs are not shared evenly between the two services, but Teledesic has not gone that far. Teledesic merely asks why it must pay an *unfairly inflated* amount for taking part in a segmentation that actually benefits the very same parties who are authorized to hold out for "premiums."

Third, **this rulemaking is about ubiquitous deployment, not "cherry-picking."** Winstar seems to believe that FSS systems should pursue "selective relocation of FS incumbents . . . , by cherry-picking those areas that provide the greatest business opportunity." That suggestion could not be more at odds with the animating principles in the NPRM. As the Commission made clear in the first paragraph of the NPRM, it proposed segmentation because it was concerned "about the feasibility of sharing between terrestrial fixed services and ubiquitously deployed FSS earth stations." Since Winstar's solution would undermine ubiquitous deployment, it is directly contrary to the whole point of the rulemaking. As the Commission recognized, "non-government FSS licensees [are] planning to deploy potentially millions of small antenna earth stations" (at ¶ 1). They are not planning on (and the economics of the service could not support) cherry picking, and the Commission must not assume otherwise in adopting suitable relocation rules.

In addition, the commercial reality is that any FSS network offering the promise of ubiquitous access must be prepared to offer that access on day one. If, for example, a multinational corporation wishes to contract with Teledesic for a virtual private network that provides connectivity for locations all around the world, Teledesic must be prepared to meet that customer's bandwidth needs at each and every location. If an 18 GHz link prevents Teledesic from serving the St. Louis office, then Teledesic may be precluded from competing effectively for that customer's business in New York, Chicago, Los Angeles, Tokyo, and Sydney. Needless to say, it will not do for Teledesic to ask the customer to wait around for six months or a year while a deal is cut with the incumbent operator in St. Louis. So although there is indeed a conceptual difference between MSS and FSS networks, the Commission should reject Winstar's invitation to adopt relocation rules that encourage "cherry-picking" by Teledesic and other FSS operators.

Finally, it bears repeating that **the FCC's decision in this matter will have global repercussions**. If the FCC applies an essentially "local" relocation policy to quintessentially global systems, the misguided approach will, without fail, propagate itself around the world. Foreign governments are certain to conclude that their terrestrial operators deserve every bit as much as terrestrial operators in the U.S. deserve, and the result will be to require the payment of unjustified and unjustifiable windfalls to incumbents in every country around the globe. The inability of any government or company to front-end the payment of above-market relocation payments to all existing operators in the world in a given band will signal the end of the development of new technology intended for global application. The Commission must take account of these global realities; it simply does not have the luxury of following a "squeaky wheel" relocation policy on a "U.S. only" basis as it did with the PCS relocation.

Teledesic, like Winstar, has been very supportive of the policy goals the Commission has sought to achieve in the segmentation of the 18 GHz band. Indeed, Teledesic is encouraged by the considerable degree to which the benefits of band segmentation in frequencies above 17 GHz appear to be gaining acceptance by both satellite and terrestrial interests. The task remaining is to find transitional measures that allow users of both types of services to experience the benefits of the 18 GHz segmentation as quickly and as inexpensively as possible. The "comparable facilities" standard does not achieve that goal.

Thank you very much for your consideration of our views in this matter.

Sincerely,

/s/

Mark A. Grannis
Counsel to Teledesic

cc: Ari Fitzgerald
Adam Krinsky
Mark Schneider
Peter Tenhula
Bryan Tramont
Donald S. Abelson
Richard B. Engleman
Julie Garcia
Jennifer Gilsenan
Edward R. Jacobs
Karl A. Kensinger
F. Ronald Netro
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ATTORNEYS AT LAW

April 25, 2000

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APR 25 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Letter

Ms. Magalie Roman Salas
Federal Communications Commission
445 Twelfth Street, S.W.
Twelfth Street Lobby, TW-A325
Washington, D.C. 20554

Re: ***IB Docket No. 98-172***

Dear Ms. Salas:

Yesterday, on behalf of Teledesic Corporation, I spoke by telephone with Mark Schneider of Commissioner Ness's office regarding the above-captioned proceeding. During the conversation, I expressed Teledesic's alarm at the possibility that the Commission might improve upon its previous relocation orders for the 2 GHz band but apply the old rules to the 18 GHz band without substantial change. I drew Mr. Schneider's attention to three important reasons why it would be illogical for the Commission to make relocation compensation more generous to the fixed service at 18 GHz than at 2 GHz.

First, while the 2 GHz relocation is required in order to introduce a new service into the band, the 18 GHz relocation is taking place between two services that are already co-primary throughout the entire band. This is not a situation in which a new service comes along and ejects a service that previously enjoyed exclusive access to the band. In the 18 GHz band, both satellite and terrestrial services have been co-primary for years, and both will remain in the band. But instead of giving each service shared access to the whole band, the Commission's band plan gives each service exclusive access to a portion of the band. The Commission has concluded that this redesignation benefits both services, and the compensation rules should reflect this fact. And indeed, virtually all commenters agree that this segmentation benefits both services, much as painting a yellow line down the middle of a road benefits both northbound and southbound drivers without either increasing or decreasing the size of the road. With virtually unanimous agreement that both terrestrial and satellite interests will benefit from segmentation of the 18 GHz band, there is no logical reason to require the satellite industry alone to shoulder the cost burden -- let alone to shoulder the burden of paying for the upgrade that is inherent when older equipment is replaced by newer, more advanced equipment.

Second, while the *Emerging Technologies* rules already cover some of the bands involved in the 2 GHz MSS rulemaking, there are currently no relocation rules in the 18 GHz band. Terrestrial incumbents in the 18 GHz band cannot possibly have had any expectation that the *Emerging Technologies* rules would be applied to them, so it is difficult to imagine why the Commission would apply those rules to a new class of incumbents in the 18 GHz band at the same time it modifies them at 2 GHz.

Finally, it is noteworthy that FSS interests sought segmentation of the 18 GHz band as early as 1984, before either satellite or terrestrial services were deployed there. Fixed Service interests resisted, and the Commission adopted the co-primary allocations that the Commission now finds it in the public interest to alter. *Establishment of Spectrum Utilization Policy and Amendment to Commission Rules Regarding Digital Termination Systems,* 49 Fed. Reg. 37760, ¶¶ 37-41 (Sept. 26, 1984). The relocation costs that are necessary now are therefore costs the satellite industry tried to prevent. It would be inequitable to apportion those costs to the satellite industry, especially when the costs thus apportioned are demonstrably overly generous toward the FS incumbents who insisted on the inefficient sharing arrangement back in 1984.

In accordance with section 1.1206(b) of the Commission's rules, I am submitting an original and 1 copy of this letter. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely

Mark A. Grannis

cc: Mark Schneider (by fax)

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ATTORNEYS AT LAW

April 26, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Letter

Ms. Magalie Roman Salas
Federal Communications Commission
445 Twelfth Street, S.W.
Twelfth Street Lobby, TW-A325
Washington, D.C. 20554

Re: ***IB Docket No. 98-172***

Dear Ms. Salas:

On April 24, on behalf of Teledesic Corporation, I spoke by telephone with Bryan Tramont of Commissioner Furchtgott-Roth's office regarding the above-captioned proceeding. During the conversation, I expressed Teledesic's alarm at the possibility that the Commission might improve upon its previous relocation orders for the 2 GHz band but apply the old rules to the 18 GHz band without substantial change. I drew Mr. Tramont's attention to three important reasons why it would be illogical for the Commission to make relocation compensation more generous to the fixed service at 18 GHz than at 2 GHz.

First, while the 2 GHz relocation is required in order to introduce a new service into the band, the 18 GHz relocation is taking place between two services that are already co-primary throughout the entire band. This is not a situation in which a new service comes along and ejects a service that previously enjoyed exclusive access to the band. In the 18 GHz band, both satellite and terrestrial services have been co-primary for years, and both will remain in the band. But instead of giving each service shared access to the whole band, the Commission's band plan gives each service exclusive access to a portion of the band. The Commission has concluded that this redesignation benefits both services, and the compensation rules should reflect this fact. And indeed, virtually all commenters agree that this segmentation benefits both services, much as painting a yellow line down the middle of a road benefits both northbound and southbound drivers without either increasing or decreasing the size of the road. With virtually unanimous agreement that both terrestrial and satellite interests will benefit from segmentation of the 18 GHz band, there is no logical reason to require the satellite industry alone to shoulder the cost burden -- let alone to shoulder the burden of paying for the upgrade that is inherent when older equipment is replaced by newer, more advanced equipment.

Second, while the *Emerging Technologies* rules already cover some of the bands involved in the 2 GHz MSS rulemaking, there are currently no relocation rules in the 18 GHz band. Terrestrial incumbents in the 18 GHz band cannot possibly have had any expectation that the *Emerging Technologies* rules would be applied to them, so it is difficult to imagine why the Commission would apply those rules to a new class of incumbents in the 18 GHz band at the same time it modifies them at 2 GHz.

Finally, it is noteworthy that FSS interests sought segmentation of the 18 GHz band as early as 1984, before either satellite or terrestrial services were deployed there. Fixed Service interests resisted, and the Commission adopted the co-primary allocations that the Commission now finds it in the public interest to alter. *Establishment of Spectrum Utilization Policy and Amendment to Commission Rules Regarding Digital Termination Systems,* 49 Fed. Reg. 37760, ¶¶ 37-41 (Sept. 26, 1984). The relocation costs that are necessary now are therefore costs the satellite industry tried to prevent. It would be inequitable to apportion those costs to the satellite industry, especially when the costs thus apportioned are demonstrably overly generous toward the FS incumbents who insisted on the inefficient sharing arrangement back in 1984.

In accordance with section 1.1206(b) of the Commission's rules, I am submitting an original and 1 copy of this letter. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely

Mark A. Grannis

cc: Bryan Tramont (by fax)

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ATTORNEYS AT LAW

April 27, 2000

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OFFICE OF THE SECRETARY

By Telecopier

Mr. Ari Fitzgerald
Office of the Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Room 8-B201N
Washington, D.C. 20554

Re: ***IB Docket No. 98-172***

Dear Mr. Fitzgerald:

As you know, Teledesic has attempted throughout this proceeding to make the Commission's approach to relocation issues more efficient for all parties and less costly for satellite service providers and the public at large. Since the Commission is writing on a clean slate at 18 GHz, it has a tremendous opportunity to retain the best of its *Emerging Technologies* rules while improving on the less efficient elements of the ET rules. Teledesic is alarmed, however, at the possibility that the Commission might improve upon its previous relocation orders for the 2 GHz band but apply the old rules to the 18 GHz band without substantial change. There are three important reasons why it would be illogical for the Commission to make relocation compensation more generous to the fixed service at 18 GHz than at 2 GHz.

First, while the 2 GHz relocation is required in order to introduce a new service into the band, the 18 GHz relocation is taking place between two services that are already co-primary throughout the entire band. This is not a situation in which a new service comes along and ejects a service that previously enjoyed exclusive access to the band. In the 18 GHz band, both satellite and terrestrial services have been co-primary for years, and both will remain in the band. But instead of giving each service shared access to the whole band, the Commission's band plan gives each service exclusive access to a portion of the band. The Commission has concluded that this redesignation benefits both services, and the compensation rules should reflect this fact. And indeed, virtually all commenters agree that this segmentation benefits both services, much as painting a yellow line down the middle of a road benefits both northbound and southbound drivers without either increasing or decreasing the size of the road. With virtually unanimous agreement that both terrestrial and satellite interests will benefit from segmentation of the 18

GHz band, there is no logical reason to require the satellite industry alone to shoulder the cost burden -- let alone to shoulder the burden of paying for the upgrade that is inherent when older equipment is replaced by newer, more advanced equipment.

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Finally, it is noteworthy that FSS interests sought segmentation of the 18 GHz band as early as 1984, before either satellite or terrestrial services were deployed there. Fixed Service interests resisted, and the Commission adopted the co-primary allocations that the Commission now finds it in the public interest to alter. *Establishment of Spectrum Utilization Policy and Amendment to Commission Rules Regarding Digital Termination Systems,* 49 Fed. Reg. 37760, ¶¶ 37-41 (Sept. 26, 1984). The relocation costs that are necessary now are therefore costs the satellite industry tried to prevent. It would be inequitable to apportion those costs to the satellite industry, especially when the costs thus apportioned are demonstrably overly generous toward the FS incumbents who insisted on the inefficient sharing arrangement back in 1984.

In accordance with section 1.1206(b) of the Commission's rules, I am submitting 2 copies of this letter for filing with the Secretary's office. If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely

Mark A. Grannis
Counsel for Teledesic Corporation

cc: Magalie Roman Salas (2 copies)

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MAY 01 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 1, 2000

Commissioner Harold Furchtgott-Roth
Office of Commissioner Furchtgott-Roth
Room 8-A302C
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *IB Docket 98-172*

Dear Commissioner Furchtgott-Roth:

As the debate over appropriate relocation compensation rules for the 18 GHz band has progressed, some have attempted to portray the *Emerging Technologies* rules as entitling terrestrial incumbents to no more than is necessary to "make them whole." Nothing could be further from the truth. The *Emerging Technologies* enable incumbents to demand large premiums and expensive upgrades before they are obliged to yield to a relocation that the public interest requires. Before the Commission extends this measure of relocation compensation into the 18 GHz band, it is essential that the Commission squarely face the fact that the *Emerging Technologies* rules lead inexorably to unjustifiable windfalls for incumbents.

The *Emerging Technologies* rules, as everyone acknowledges, allow the parties to agree to any mutually acceptable relocation scheme. Ultimately, however, what the parties might agree to is bounded on the low end by what the ET licensee[5] would be required to pay in order to effect an involuntary relocation. Pursuant to section 101.75 of the Commission's rules, involuntary relocation requires the ET licensee to provide "comparable facilities," as that phrase

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5 Neither Teledesic nor any other 18 GHz licensee is covered by the ET rules, of course, but since this is an analysis of the rules already on the books for the 2 GHz band, the phrase "ET licensee" is used throughout to signify the party requesting relocation. As Teledesic has argued on many occasions, satellite licensees in the 18 GHz band have been co-primary with terrestrial services there for over fifteen years, and there is no reason for them to shoulder the entire relocation burden that was placed on ET licensees.

is defined in the Commission's rules. The definition of "comparable facilities" includes not only "hard costs" or "actual costs," but also "engineering, equipment, site and FCC fees," as well as other types of transaction costs. Involuntary relocation is not possible until the end of the voluntary negotiation period and the mandatory negotiation period. This framework provides a windfall to incumbents in at least three ways.

First, the *Emerging Technologies* rules set up a period of years during which the ET licensee may be required to pay much more to effect relocation voluntarily. An incumbent who is asked to relocate before the expiration of the mandatory negotiation period is perfectly entitled to demand "premiums" far in excess of what it would cost to provide "comparable facilities." Indeed, section 101.73(b) specifically contemplates the payment of such premiums. The only apparent constraint on the incumbent's ability to demand a premium is that if the Commission is asked to determine whether a party is bargaining in good faith, *one of the factors* to consider is "the type of premium requested . . . and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate." 47 C.F.R. § 101.73(b)(2). There is thus no question that the *Emerging Technologies* rules call for the payment of windfall premiums to incumbents. Even if there were no windfall built into the definition of "comparable facilities," the rules expressly countenance incumbent demands for payments in excess of the cost of "comparable facilities." Unless the references to "premiums" are expunged from the rules, there can be no pretense that these rules merely "make incumbents whole."

Second, the definition of "comparable facilities" does include an inherent windfall – the windfall of receiving new equipment instead of old. The rules require the replacement facilities to "be *at least* equivalent to" the old facilities (emphasis added) in terms of throughput, reliability, and operating cost, but nowhere do the rules require any adjustment for age. Thus, an incumbent with equipment that has already been in service for fifteen years (and whose equipment cannot be retuned) is entitled to insist, *even at the involuntary relocation stage,* that the ET licensee provide brand new equipment – equipment that is "at least equivalent" in all relevant respects *and* has a much longer useful life. Clearly, this is a windfall.

Finally, nothing in the *Emerging Technologies* rules takes account of the fact that much of the cost of any commercial incumbent's equipment will already have been recovered through depreciation charges that reduce the incumbent's taxes. If an incumbent amortizes its equipment over a ten-year period using straight-line depreciation, then after five years it has deducted fully half the cost of its facilities, effectively excluding an equivalent amount of profits from taxation. By ignoring this factor, the *Emerging Technologies* rules actually require the ET licensee to pay a commercial incumbent not only for costs the incumbent had to bear, but also for costs the incumbent did *not* have to bear – or more specifically, taxes the incumbent did not have to pay. For the "comparable facilities" definition to be adapted to elementary financial realities, the incumbent would have to rebate to the ET licensee the full amount that it had previously deducted from its taxes. Without such a rebate, it is impossible to deny that the rules provide for windfall recoveries.

Teledesic is aware that the Commission is prepared to move quickly on this item. It is important, however, for the Commission to see clearly the type of profiteering it is authorizing.

Under the *Emerging Technologies* rules, terrestrial incumbents get a windfall recovery even at the involuntary relocation phase, and at each earlier phase they are perfectly free to demand "premiums" of much more. This is a far cry from merely "making incumbents whole" or "putting them in the same position they were in."

There are a number of ways the Commission can address the windfall element in its rules. One way, which Teledesic has suggested since the very start of this proceeding, would be to permit involuntary relocation upon payment of the book value of the replaced equipment (plus 2% to cover transaction costs, as under the current ET rules). But other alternatives would also address the problem in an economically defensible manner:

- As suggested above, the Commission could require incumbents to rebate prior tax write-offs in order to avoid a double recovery, and eliminate any reference to "premiums" from the rules.
- The Commission could shorten the sunset date to five years from the date of the Report and Order, in order to give satellite service providers a realistic chance to avoid a major "holdout" problem.
- The Commission could make some rough estimate of per-link relocation costs and establish a "sliding scale" for involuntary relocation payments, with the relocation payment falling over time to reflect the fact that the value of the replaced equipment diminishes over time.[6] For example, the following scale could be used for all 18 GHz equipment that cannot be retuned:

Time of Involuntary Relocation:	**Before January 1, 2002**	**During 2002**	**During 2003**	**During 2004**	**January 1, 2005 until "sunset"**
Required Payment to Incumbent:	Subject to Negotiation	$80,000	$60,000	$40,000	$20,000

(Of course, the values in this sliding scale do not perfectly reflect the fair market value of the used equipment at any point in time as well as the "unamortized value" or "remaining useful life" approach, but they do create the proper incentives for voluntary negotiations, and they better reflect the economic reality that fixed microwave equipment does not, like antique collectibles or rare coins, generally hold its value or appreciate over time.)

To date, terrestrial interests have shown no interest in discussing these or any other options on reasonable economic terms, but it would be arbitrary and capricious for the FCC to proceed with the ET rules in the 18 GHz band without a clear-eyed economic analysis of what

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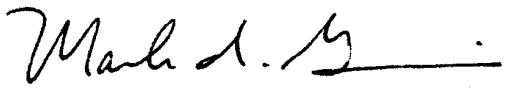
6 Naturally, if the Commission were to establish a schedule of relocation fees, it would have to be based on actual equipment values in the 18 GHz band. Microwave equipment in the 18 GHz band is considerably less expensive than in some other bands. Teledesic estimates that brand new 18 GHz radios currently cost between $50,000 and $60,000.

these rules actually yield in the real world. Teledesic remains ready to sit down with terrestrial interests and discuss any approach to relocation that is rooted in the principle of *just* compensation for equipment that must be replaced.

Sincerely,



Mark A. Grannis
Counsel to Teledesic

cc: Bryan Tramont
Magalie Roman Salas (2 copies)