

OCT 10 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
 Redesignation of the 17.7-19.7 GHz Frequency) IB Docket No. 98-172
 Band, Blanket Licensing of Satellite Earth)
 Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz)
 Frequency Bands, and the Allocation of)
 Additional Spectrum in the 17.3-17.8 GHz and)
 24.75-25.25 GHz Frequency Bands for)
 Broadcast Satellite-Service Use)

To: The Commission

**PETITION FOR CLARIFICATION AND RECONSIDERATION
OF WINSTAR COMMUNICATIONS, INC.**

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Summary

This Petition seeks clarification and modification of the Commission's Order regarding redesignation of the 18 GHz band among Fixed Services, Fixed Satellite Services, Mobile Satellite Services and Broadcast Satellite Services.

Winstar seeks clarification of whether an incumbent licensee is required to relocate if comparable facilities are not offered by the incoming licensee. Although similar actions taken by the Commission in the past establish such a right, the current Order is somewhat ambiguous on this issue. Such a longstanding right should be clearly articulated by the Commission. Additionally, the Commission should clarify that license assignments and transfers of control by incumbent licensees will not result in a loss of primary status. The Order as drafted could lead to the mistaken and unintended conclusion that assignments and transfers of control involving incumbent licenses should be granted only on a secondary basis.

Winstar seeks reconsideration with regard several important aspects of the Order. First, the Order fails to account for the explosive growth within the FS market and eliminates much of the spectrum available to FS providers. The Commission attempts to compensate for this loss in spectrum by suggesting the use of "other media." However, the other media suggested by the Commission – fiber networks, 23 GHz, 14 GHz – are not reasonable or logical options in most cases. Due to the nature of the services being offered by Winstar and other FS providers, engineering incompatibility, cost prohibitions and current market demands will often render the Commission's suggested alternate media unwarranted and impractical.

Second, the Commission's Order denies the right of a relocated licensee to return to its previous frequencies in the event that the relocated facilities prove to be insufficient. In accordance with previous Commission decisions involving relocation matters, the right of 18 GHz incumbents to return to their previous facilities under these circumstances should be enforced by the Commission. Such a provision has been standard practice for years, and clearly serves the public interest. The Commission provides no sound reasoning for why the same approach has not been adopted here.

Finally, the Commission provides no logical reasoning behind its decision to do away with the Voluntary Negotiation Period. As a matter of public policy, Winstar believes that such a measure is not only reasonable, but well within the public interest, and it should be reinstated by the Commission.

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**PETITION FOR CLARIFICATION AND RECONSIDERATION
OF WINSTAR COMMUNICATIONS, INC.**

Winstar Communications, Inc. (“Winstar”), pursuant to Section 1.429(d) of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby submits this Petition for Reconsideration (“Petition”) of the Report and Order (“Order”) adopted by the Commission in the above-captioned proceeding on September 7, 2000.¹ This Petition seeks modification and clarification of the Commission’s Order regarding redesignation of the 17.7-19.7 GHz (“18 GHz”) band among Fixed Services (“FS”), Fixed Satellite Services (“FSS”), Mobile Satellite Services (“MSS”) and Broadcast Satellite Services (“BSS”).

¹ Report and Order, *Redesignation of the 18 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in Ka-Band, and the Allocation of Additional Spectrum for Broadcast Satellite Service Use*, IB Docket No. 98-172, 65 Fed. Reg. 54,155 (September 7, 2000).

Winstar seeks clarification of whether an incumbent licensee is required to relocate if comparable facilities are not offered by the incoming licensee. Winstar also seeks to clarify that assignees and transferees of incumbent licenses are entitled to maintain primary status.

Additionally, Reconsideration is required because the Order is contrary to public policy and in direct contravention of the Telecommunications Act of 1996 (“the Act”). Sufficient alternative spectrum has not been identified by the Commission to satisfy the burgeoning requirements of displaced FS licensees. As a result, the Order will greatly limit the ability of companies like Winstar to expand and provide much needed competitive local exchange services. The Order also denies the right of relocated licensees to return to their previous frequencies in the event that the relocated facilities prove to be inadequate. Last, the Commission should recognize a Voluntary Negotiation Period in this proceeding, just as it has done repeatedly in previous relocation proceedings.

I. PRELIMINARY STATEMENT

1. Winstar is a leading provider of competitive telecommunications services through its fiber optic and fixed wireless broadband network. Through its various subsidiaries, Winstar is the largest licensee of spectrum in the 38.6-40.0 GHz (“39 GHz”) band, the holder of 16 Local Multipoint Distribution Service (“LMDS”) licenses, the holder of licenses for hundreds of links in the 18 GHz band, and the licensee of additional

spectrum in other bands. Winstar utilizes its links in these bands to connect with its customers for the provision of a comprehensive set of broadband services including competitive local exchange, interexchange, high speed data transmission, video and other services. Winstar also provides critical high-capacity links to private voice and data networks typically found at university campuses, office parks, airports and other high density areas. Winstar presently provides competitive local exchange services to small to medium sized businesses in the major markets in the United States, as well as 13 international markets.²

2. Winstar's common carrier broadband network offers competitive high capacity service to urban and suburban areas through rooftop dish antennas that interface with central hub stations. The hub stations deploy point-to-point and point-to-multipoint transceivers. Many of Winstar's 18 GHz links are used to provide direct wireless connectivity between central hubs operating as points of distribution to outlying facilities at the customer's premises, typically an office building. Other 18 GHz links provide backbone connectivity to carry traffic between hub locations.

3. Winstar often uses spectrum in the 39 GHz and LMDS bands as the primary "last mile" connection to its customers, with 18 GHz links serving as the critical connection between hubs. The 39 GHz and LMDS links are typically engineered to

² In addition to the spectrum asset and networks outlined above, the company is utilizing a variety of technologies (long haul inter-city fiber, intra-city fiber, in-building digital subscriber line systems, etc.) to rapidly build one of the world's most widely available, end-to-end broadband network. Winstar makes this network useful to businesses by providing a comprehensive set of high-quality, digital-age broadband services. These services include high-speed Internet and data, Web hosting and design, phone services, Web-based applications, e-commerce, professional services and Office.com®, a Service from Winstar, the top-ranked online business service for small and medium-sized businesses.

provide 99.999% availability fiber optic quality Wireless Fiber® service. Since 39 GHz paths are usually limited to a range of less than two or three miles, use of the 18 GHz band allows Winstar to provide service to more relatively distant outlying areas (typically up to five miles) where competitive high-speed data services otherwise may not be readily available. Further, as fiber build-out increases in populated urban areas, outlying areas and smaller buildings often remain unserved and have the greatest immediate unmet need for high-speed services. In reaching many of these types of areas, the longer range 18 GHz links are suitable to provide the necessary connection.

4. Winstar also operates certain Individual Case Basis (“ICB”) links supporting private telecommunications networks that utilize the 18 GHz band. For instance, Winstar provides redundant backhaul service connecting Federal Aviation Administration (“FAA”) radar installations with MCI WorldCom points-of-presence for vital air traffic control systems. Outages for even short periods of time in these types of critical services is unacceptable as a public interest matter. Numerous other ICB customers across the country are supported by Winstar with microwave links in the 18 GHz band including banks, stock brokerage firms, newspapers and cellular telephone companies. Continued access to 18 GHz spectrum is essential for efficient business operations of these types of entities. Lack of adequate spectrum would seriously undermine the efforts of the Commission to promote both public safety and competition in the provision of telecommunications services.

5. Winstar has been successful in bringing competition to the local exchange carrier market by providing advanced, cost-effective and timely wireless access to the public switched network. Part of this success has come from the ability to build a reliable network using, in part, spectrum in the 18 GHz band to serve existing and new customers. To promote competition, the Commission should ensure that advanced communications services, such as those provided by Winstar, continue to be available at cost-effective rates and with a high degree of reliability. Competition in the local exchange market will not develop and flourish if new entrants are unable to provide at least equivalent, if not superior, service at lower costs.

II. CLARIFICATION REQUESTED.

6. Several issues raised in the Commission's Order warrant clarification. Specifically, the Commission should clarify the Order with regard to options available to incumbent licensees who are not afforded comparable facilities. Additionally, the Commission should clarify whether assignees and transferees of incumbent licenses retain the same rights as the incumbents.

A. The Commission Should Clarify That if no Comparable Facilities are Offered, the Incumbent Licensee Is Not Required to Move.

7. In previous proceedings, the Commission has established that if an incoming licensee is unable or unwilling to provide an incumbent licensee with

comparable facilities, the incumbent licensee will not be subject to mandatory relocation.³

These provisions were established by the Commission because they “are necessary to protect the operational interests of incumbent licensees.”⁴ Further, the Commission has found that such measures are “essential” so that incumbents are better able “to engage in effective business planning.”⁵ The Order, however, is not clear on this issue.

8. For example, Paragraph 82 of the Order seems to imply that certain adjustments to ensure comparability might be required *after* the incumbent licensee is relocated. The Order should be revised to clearly state that this long-standing right to receive comparable facilities prior to relocation remains intact.

B. The Commission Should Clarify That Assignments and Transfers of Control by Incumbent Licensees Do Not Result in a Loss of Primary Status.

9. The Order notes that FS licensees subject to relocation may, without losing their primary status, “perform the modifications approved in past Commission actions” involving the relocation of incumbent services.⁶ The Commission then specified that such permissible modifications include various technical changes and changes in “ownership or control,” provided that such modifications do not increase interference to satellite earth stations or result in a facility that would be more costly to relocate.⁷ The Commission

³ See First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 11 FCC Rcd 1463, at 74 (released December 15, 1995).

⁴ *Id.*

⁵ *Id.*

⁶ *In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band*, Report and Order, IB Docket No. 98-172, FCC 00-212, at ¶ 75 (June 22, 2000).

⁷ *Id.*

apparently omitted, however, to codify this aspect of its decision in its amended rules regarding the 18 GHz band. In fact, it appears that a literal reading of the Commission's Rules could lead to the mistaken and unintended conclusion that assignments and transfers of control involving incumbent 18 GHz licenses should be granted only on a secondary basis. Because such a result would be patently unfair and also inconsistent with the Commission's Order and its policies and procedures in other spectrum bands, Winstar urges the Commission to clarify its rules to confirm that such assignments and transfers of control do not result in a loss of primary status.

10. Accordingly, under Section 101.97, whether a license modification will result in a loss of primary status will typically depend upon whether the modification is considered major or minor.⁸ In the ULS proceeding (initiated in 1998), the Commission consolidated its procedural rules for the various wireless services into uniform standards set forth in Part 1 of its Rules and Regulations. With regard to the classification of filings as major or minor, the Commission adopted a new Section 1.929 that, among other things, specifies certain actions as major for all stations in all wireless radio services. Included among such major actions is “[a]ny substantial change in ownership or control.”⁹ Accordingly, a literal reading of Section 1.929(a)(2) in conjunction with Section 101.97 could lead to the conclusion that changes in the ownership or control of an incumbent FS facility should result in a loss of primary status.

⁸ See Order, at Appendix A, Section 101.97.

⁹ 47 C.F.R. § 1.929(a)(2).

11. With respect to the 1850-1990 MHz and 2.1 GHz bands, which also have been subject to relocation procedures, the Commission's practice – to the best of Winstar's knowledge – always has been to grant primary status to incumbent license assignments and transfers of control. This practice did not change when the Commission adopted Section 1.929. In fact, in adopting Section 1.929, the Commission emphasized that “[b]y creating a consolidated rule, it is not our intent to change the substance of our existing definitions of major and minor changes, or to impose new filing requirements on licensees and applicants.”¹⁰ Moreover, at no point in the ULS proceeding was there any indication that a change to the Commission's overall relocation policies was being contemplated.

12. Thus, Section 1.929 should not be employed by the Commission as a grounds for changing its policy with regard to assignments and transfers of control involving incumbent FS licenses, as such a substantive rule change clearly was never intended by the Commission. Instead, the Commission should clarify Section 101.97 to make it consistent with the Order -- *i.e.*, to state explicitly that changes of ownership or control are to be granted with primary status unless the Commission determines that relocation costs would be increased or that the transaction at issue involves an attempt to abuse the Commission's relocation policies.

¹⁰ Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Report and Order, 13 FCC Rcd 21027, at ¶ 61 (Oct. 21, 1998).

III. RECONSIDERATION REQUESTED

A. Relocated Terrestrial Service Providers Should Be Made Whole.

13. The Order specifies that FSS licensees should provide FS licensees only with enough throughput to satisfy the FS licensee's actual use *at the time of relocation*, rather than the total capacity of the FS system itself.¹¹ Winstar finds this portion of the Order particularly unsettling since it effectively deprives FS licensees of the available capacity which they have relied upon to implement their business plans. Moreover, on this point the Order completely ignores the explosive growth within this service and fails to provide adequate alternative spectrum.

14. Indeed, the Order establishes that throughput is to be determined by the utilized capacity at the time of relocation, rather than the more appropriate *total* capacity of the licensed spectrum. The Commission states that its decision closely parallels, and is based upon, the 2 GHz Microwave Relocation rules ("2 GHz Order").¹² However, rather than providing a logical nexus, the two situations are in fact, strikingly dissimilar, especially when one considers the demand for 18 GHz spectrum.

1. Explosive Growth Within the FS Market Should Be Acknowledged and Addressed.

15. The Order fails to acknowledge the explosive growth within the FS market and to provide reasonable accommodation for that growth. FS providers, such as

¹¹ See Order, at Appendix A, §101.89(d)(1).

¹² See Order at 76; See Also, First Report and Order and Further Notice of Proposed Rulemaking, *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 11 FCC Rcd 8825 (Released April 30, 1996).

Winstar, are experiencing unprecedented growth in the fixed wireless broadband network services market. Based upon this strong demand, Winstar and other FS providers have dramatically increased the number of applications filed with the FCC. Recent FCC Public Notices show that demand by FS providers for 18 GHz spectrum is now higher than ever. In the next year, Winstar expects its demand for 18 GHz spectrum to grow tenfold. The Order fails to recognize this spectacular growth, and instead, cuts back on the amount of spectrum that will be available to the FS market to provide the type of competitive local exchange services that are at the heart of the Telecommunications Act of 1996.

16. The Order freezes at current spectrum levels the ability of FS providers to accommodate the growing number of businesses that are seeking the benefits of fixed wireless broadband services. The Commission's decision requiring FSS licensees to provide relocated FS incumbents only with enough throughput to satisfy the the FS licensee's system *at the time of relocation* compounds an already difficult spectrum situation. Instead of adjusting its spectrum allocations to effectively meet the escalating needs of consumers and licensees within the FS market, the Commission does the opposite and freezes throughput capability at 1999 – 2000 levels. Although the Commission claims that it is taking a step forward to “permit the efficient use of spectrum for existing and *future* users,” it is instead taking a giant step back, by wholly ignoring the realities of current and future throughput requirements.¹³

¹³ See Order, at 1 (emphasis added).

17. Conversely, the situation addressed in the 2 GHz Order was markedly different. Licensees within that spectrum were generally private fixed microwave services (e.g., public safety, utilities and private industrial companies, etc.) whose needs were, for the most part, comparatively static. Two GHz licensees were not in the business of providing new, innovative services to an ever-growing field of customers and were not experiencing the growth presently occurring within the 18 GHz band. Two GHz licensees were generally maintaining systems that had known, fixed needs. Furthermore, at the time of the 2 GHz Order, the transition from analog systems to digital systems by private fixed microwave licensees in the 2 GHz band was increasing. Thus, 2 GHz licensees were effectively able to ‘do more with less’ as a result of the transition to newer technology. On the other hand, incumbent 18 GHz licensees already use high efficiency digital technology. No conversion benefits are apparent.

18. Further, in the 2 GHz Order, the private and common carrier fixed microwave services were “to be relocated to available frequencies in higher bands or to other media.”¹⁴ Although such options were available and feasible in the 2 GHz Order, such is not the case with regard to the 18 GHz spectrum. In fact, the situation is just the opposite: the Commission has identified *no* new spectrum for relocation. Incumbents will merely be relocated *within* spectrum that is already saturated with current services and expected to accommodate new ones. In effect, the Commission is merely rearranging furniture in a shrinking room – a room that is already too crowded – in order to make space for additional guests.

¹⁴ Id. at 3.

2. Proposed “Other Media” Contained In the Commission’s Order Often Will Not Suffice.

19. The Order also stated that FSS licensees may negotiate with FS licensees for the purpose of agreeing to terms under which the FS licensees would relocate to other media, such as fiber optics.¹⁵ In the context of services provided by Winstar, however, fiber networks and other options are not always a reasonable or logical option.

20. Although Winstar does use fiber in its network when feasible, it is questionable to assume in most cases that fiber will be a suitable alternative for relocated 18 GHz paths. First, as a general matter, if fiber were cost-effective it already would have been installed. Secondly, Winstar’s core business plan is to provide services to small to medium sized businesses where in fact fiber is unavailable.

21. In most urban areas, congestion in the 18 GHz band is already a significant problem and will only continue to worsen as current services expand and new services are introduced. As Winstar expands from urban markets to suburban areas, the ability to interconnect hub sites becomes increasingly more important. Spectrum in the 18 GHz band is ideally suited for this interconnection since it provides capacity of up to OC-3 and link distances of up to approximately 5 miles. In most cases, there are no cost-effective alternatives to the use of this spectrum.

¹⁵ See Order, at Appendix A, §101.85(a)(1) (proposing that FS Licensees can feasibly be relocated to “other media.”).

22. For example, fiber is generally much more expensive than microwave and is usually not available outside business-dense urban areas. Further, the construction time necessary for the establishment of relocation infrastructure will likely prove fatal to any proposed relocation efforts based on fiber deployment. The nature of the swift growth within the FS market requires almost instantaneous construction of infrastructure to support the ever growing need for throughput. Wireless spectrum enables rapid and non-obtrusive deployment of such networks, while fiber networks are just the opposite. Not only is fiber deployment time consuming, but it often disrupts traffic and other commercial activity. The Commission should realize that the rapid deployment of wireless networks has been figured into current FS licensee business plans and has led to FS providers' remarkable commercial success.

23. This ability to responsively meet the growing needs of various Winstar users is what has made use of FS networks so desirable. The Order effectively eliminates this ability and forces FS providers to accept predominantly non-existent fiber networks as an "alternative media." This approach is not logical and will have a chilling effect on the development of competition within the local exchange market.

24. Solutions to this dilemma through relocation to other, non-fiber forms of media are similarly problematic. Higher frequency bands such as 23 GHz require multiple relay links with 1-2 mile hops (due to propagation characteristics) in order to satisfy system availability requirements and are, therefore, more expensive, spectrally inefficient and cumbersome to use. Nor do there appear to be any lower-frequency bands

currently available with sufficient bandwidth to meet Winstar's hub interconnection capacity requirements. Frequency bands below 14 GHz are precluded on a widespread basis given that many municipal laws, zoning laws and site leases restrict antenna size even if the frequencies were available for use. Consequently, without adequate spectrum, the ability to provide competitive local exchange services, as well as competitively-priced and rapidly-deployed data and internet services, will be significantly diminished.

25. Without 18 GHz spectrum, Winstar will be faced with much higher costs (e.g., by being forced to use fiber systems or multiple shorter hops in other bands), and in some cases, may even be unable to expand (e.g., where no spectrum is available or where building restrictions prevent construction of fiber systems or use of larger antennas). The transition to fiber networks or less appropriate frequencies will effectively defeat the purpose of the wireless networks which Winstar offers: affordable alternatives to the high cost and vulnerability of non-wireless local exchange networks.

B. Any Relocation Spectrum Proposed by the Commission Should Take Into Account the Explosive Growth Within the FS Market.

26. The Commission's Order does not take into account the exceptional growth within the FS market and by doing so fails to adequately address the needs of FS licensees. While the Commission believes that its proposal will effectively meet the needs of current *and* anticipated licensees, this is simply not the case. The Order grossly overlooks the incredible growth taking place within the FS market, and instead takes what can be charitably viewed as an unrealistically optimistic view of its proposed Band Plan.

27. The Commission states that its Order, “will permit the efficient use of spectrum for existing and future users, *and* will facilitate the deployment of new services in the 17.7-20.2 GHz band.”¹⁶ This is an overly optimistic view at best, and in adopting it, the Commission appears to be ignoring the reality of the situation. As addressed throughout this Petition, and in previous filings with the Commission, FS providers such as Winstar are experiencing explosive growth in the fixed wireless broadband network services market. The ability of Winstar and others to provide a reasonable and economic alternative to local exchange services is thereby significantly diminished when the Commission takes steps that greatly reduce available spectrum for such service.

28. While Winstar generally agrees with the Commission’s analysis that the public interest is best served by separating terrestrial fixed service operations from Non-Geostationary Satellite Orbit Fixed Satellite Service (“NGSO/FSS”), the FS allocation granted by the Order is simply not enough. Winstar’s system alone has grown from 28 U.S. markets in 1998, to service in over 70 global markets less than two years later.¹⁷ Furthermore, Winstar has grown from 5,000 business customers in 1997, to more than 23,000 by 1999.¹⁸ This rapid expansion has been fueled by high demand for broadband services and the availability of adequate spectrum to serve the demand. However, future growth and expansion will only be realized if adequate spectrum continues to be available to connect hub sites. This growth, and more importantly, this valuable service provided to American consumers, will be adversely affected by the Order.

¹⁶ Order, at 1 (emphasis added).

¹⁷ See Winstar 1998 Annual Report at 2, and 1999 Annual Report at 14.

¹⁸ See 2000 Annual Report at 18.

29. For example, Winstar finds it troubling that the Commission was unable to maintain primary status for the FS in the band 19.26 – 19.3 GHz or to find a new spectrum home to compensate for this loss of spectrum. Although the Commission has exempted the incumbent systems operating in this band from the 10 year sunset limitation, it has granted them co-primary status *without* room for growth.¹⁹ The Commission’s Order fails to address the mushrooming demand for new services that is presently occurring in the paired bands 17.7 – 18.14 and 19.3 – 19.7 GHz. The effective loss of this 40 MHz between 19.26 – 19.3 GHz, negates the use of paired 40 MHz frequencies, which would normally carry traffic in a return direction. The Order effectively wipes out 80 MHz of spectrum for use by FS licensees, and fails to identify any new spectrum for displaced FS licensees.

C. The Commission Should Establish the Right of Incumbent Licensees to Return to Previous Facilities.

30. The Commission should recognize that incumbent 18 GHz licensees may return to their previous facilities if the relocation is unsuccessful. Such a provision has been standard practice by the Commission in the past, has worked well and clearly serves the public interest.

¹⁹ See Order at 69 and 75.

31. The Order claims that its decision is based upon the concepts adopted in the 2 GHz proceeding.²⁰ However, in the 2 GHz proceeding, the Commission followed sound principles of fairness and technical realities, and established the right of incumbent licensees to return to previous facilities in the event that the relocation proves to be inadequate. The Commission ignores such principles in the current Order, and denies the right of 18 GHz incumbents to return to their previous facilities. The Commission should reconsider this provision of the Order and establish a twelve-month trial period based upon the same principles and logic as in the 2 GHz relocation proceeding.²¹

32. Despite the Commission's misgivings, Winstar believes that such a provision is appropriate in the 18 GHz proceeding. The basis for such a measure would be to ensure that incumbent licensees have a full opportunity to operate new systems under 'real-world' operating conditions pursuant to agreed upon terms.²² Further, the implementation of such a provision acts as an effective "safety valve" thereby ensuring that entering licensees negotiate in good faith towards a shared goal of effective relocation. By providing incumbent licensees with such leverage, the Commission will be ensuring that all participants – incumbent licensees and incoming licensees alike – are able to negotiate on a level playing field, while providing a "safety net" in the event the new facilities prove to be unacceptable.

²⁰ Order, at 79.

²¹ 2 GHz Order at 44; See Also, 47 C.F.R. §101.75(d).

²² See 2 GHz Order at 44 (citing to similar basis for the establishment of such a clause).

33. Without such a provision, incumbent licensees will be effectively deprived of the assurance that incoming licensees will negotiate in good faith. Without a twelve-month trial period, there is simply no motivation whatsoever for incoming licensees to doggedly pursue comparable facilities. Despite the fact that the Commission has put into place a petition process for dissatisfied incumbents, this is hardly sufficient.²³ Incoming licensees may be tempted to ‘buy time’ by placing incumbent licensees on inadequate facilities. Although the Commission’s proposed petition process is a form of recourse, it is in fact, a slow, agonizing and generally unsatisfactory resolution of the problem.

D. The Commission Should Establish a Voluntary Negotiation Period.

34. The Order concluded that no voluntary negotiation period will be required in the 18 GHz relocation proceedings.²⁴ The main reason cited in reaching this conclusion appears to be that FSS licensees are expected to roll out their service rapidly on a nation-wide basis.²⁵ However, the Commission must be well aware by now that “rapidly” in satellite language means a minimum of 5 years: satellite systems must be planned, developed, contracted for and built before they literally can get off the ground. Even if incumbent licensees were to accept the Commission’s analysis that such a timeframe can realistically be referred to as “rapid,” this is no reason to completely eliminate the proven benefits of a voluntary negotiation period. Voluntary negotiation periods provide incentives for numerous incumbent licensees to coordinate effective and

²³ See Order at 82.

²⁴ See Order at 81.

²⁵ *Id.* at 80.

fair relocation provisions. Even if the satellite systems do manage to deploy sooner, the FCC can then accelerate the negotiation period at that time as appropriate. However, the Commission should not discard a proven and fair system of relocation on the false impression that satellite systems will be deployed rapidly.

35. In further support of its argument not to establish a voluntary negotiation period, the Order states that “many of the existing 18 GHz terrestrial fixed stations are likely to be able to relocated elsewhere in the 18 GHz band.”²⁶ As addressed in detail throughout this Petition, this observation by the Commission simply ignores the reality of the situation. The Commission’s Band Plan does not adequately address relocation deficiencies *within* the 18 GHz band. As a result of the Order, many incumbent 18 GHz licensees will be left with no adequate spectrum alternative.

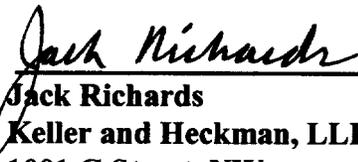
36. Even if the Commission’s proposal were true (i.e. that many 18 GHz licensees will simply relocate within the 18 GHz band) this provides no logical nexus for eliminating the voluntary period. Voluntary negotiation periods have long proven effective in enabling incumbent licensees to negotiate fair and reasonable terms for relocation with incoming licensees. The ability of any two parties to negotiate on a voluntary basis without the direct involvement of the Commission can and should be viewed as having a positive effect on efficient and fair relocation. The voluntary period is essential for resolving many of the troubling details associated with any relocation in the best interests of all parties concerned.

²⁶ Id.

V. **CONCLUSION**

The Commission must ensure that implementation of its 18 GHz Order does not come at the expense of FS providers and the valuable services they provide. To that end, Winstar urges the Commission to clarify and reconsider its Order as described above.

Respectfully Submitted,

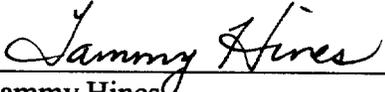
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CERTIFICATE OF SERVICE

I, Tammy Hines, do hereby certify that on this 10th day of October, 2000, I have caused a copy of the foregoing "Petition for Clarification and Reconsideration of Winstar Communications, Inc." in IB Docket No. 98 to be served by hand delivery upon the persons listed below.



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