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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In re | ) | |
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| **REDESIGNATION OF THE 17.7-19.7 GHZ FREQUENCY BAND,** BLANKET LICENSING OF EARTH STATIONS IN THE 17.7-20.2 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 | ) | IB Docket No. 98-172, RM-9005 RM-9818 |

# OPPOSITION OF TELEDESIC LLC

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## SUMMARY OF ARGUMENT

Teledesic LLC hereby opposes the petitions for reconsideration filed by the FWCC and Winstar. The petitioners present no new information or arguments, and are merely seeking another bite at the apple. Furthermore, almost every change sought by the petitioners would make the *18 GHz Report and Order* even more one-sided than it already is.

Teledesic opposes the request by both the FWCC and Winstar to redesignate the 19.26-19.3 GHz band for terrestrial fixed service. The Commission specifically addressed this issue in the *18 GHz Report and Order,* and reached the right result for the right reasons.

Teledesic also opposes the litany of suggestions from Winstar that the Commission should tilt the already-imbalanced relocation rules even further toward terrestrial incumbents. In particular,

- Every grandfathered FS licensee should be required, when ownership or control changes, to justify the continuation of grandfathered status, in order to prevent trafficking in grandfathered facilities;
- New FSS entrants should not be required to endure a full year of stonewalling before demanding that incumbents negotiate in good faith;
- Terrestrial incumbents should not be given a twelve-month "right to return" to replaced FS facilities after comparable replacement facilities have been provided;
- New entrants should not be required to replace unused and therefore excess capacity; and
- Every relocation should take due account of the possibility of migrating to fiber and other media.

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## OPPOSITION OF TELEDESIC LLC

Teledesic LLC hereby opposes the petitions for reconsideration filed by the FWCC and Winstar in the above-captioned proceeding.[1] The *18 GHz Report and Order* challenged by the FWCC and Winstar is indeed deeply flawed in a number of respects – so deeply flawed that Teledesic is currently challenging it in federal court.[2] However, almost all of the clarifications and reconsiderations sought by these two petitioners would make the Report and Order even more one-sided than it is already.

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[1] Petition for Reconsideration of the Fixed Wireless Communications Coalition (filed Oct. 10, 2000); Petition for Clarification and Reconsideration of Winstar Communications, Inc. (filed Oct. 10, 2000).

[2] *See Teledesic LLC v. FCC,* No. 00-1466 (D.C. Cir.). In addition, Teledesic has sent an *ex parte* letter to the Commission pointing out some clerical errors in the rules adopted in this proceeding. The Commission's public notice properly states that this letter was filed as an *ex parte* presentation and indicates that it will be considered as such. Teledesic has not filed a petition for reconsideration.

## I. The Commission Properly Designated the 19.26-19.3 GHz Band for Non-Geostationary Fixed Satellite Service

The FWCC and Winstar ask the Commission – again – to designate the 19.26-19.3 GHz band for terrestrial fixed service rather than non-geostationary fixed satellite service. However, neither petition provides any justification for a reconsideration of this issue.

The Commission specifically addressed the use of the 19.26-19.3 GHz band at some length in the *18 GHz Report and Order*, and (after considering exactly the same arguments the FWCC and Winstar now advance[3]) reached the right result for the right reasons. The Commission noted that the 18.8-19.3 GHz band, which was designated globally for NGSO FSS at the 1995 and 1997 World Radiocommunication Conferences, has "unique international status" as "the only downlink spectrum available for Ka-band NGSO/FSS systems."[4] The Commission also "recognize[d] that NGSO/FSS systems are likely to use the entire 500 MHz of spectrum," and that "designing equipment to make locally varying adjustments to earth station receiving equipment would be extremely difficult and a costly project, possibly delaying the deployment of NGSO/FSS service in the band and certainly reducing the available service capacity."[5]

Neither the FWCC nor Winstar produces evidence or argument against any of the Commission's facts and conclusions. There is no claim that other spectrum is just as good for NGSO FSS. There is no claim that the Commission was mistaken about the difficulty of accommodating local variations in the available spectrum. There is no claim that the 40 MHz in

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[3] *See 18 GHz Report and Order*, FCC 00-212 ¶¶ 50-52.

[4] *18 GHz Report and Order*, ¶ 51.

[5] *18 GHz Report and Order*, ¶ 51.

question is peculiarly suited for FS. There is, in short, no basis for reconsideration of the NGSO FSS designation.

The FWCC tries to manufacture a "changed circumstances" argument by claiming that there has been unanticipated FS growth in the 18 GHz band.[6] This is transparently false. The whole premise of band segmentation, in this band as in any other, is that both terrestrial and satellite services need adequate spectrum for growth, and that co-primary sharing between the services will impede that growth by constraining both services. Indeed, Teledesic and other satellite operators repeatedly urged the Commission to conclude the 18 GHz rulemaking quickly precisely because of the brisk FS licensing activity that was taking place in this spectrum. The suggestion that rapid growth of the FS in the 18 GHz band is a "new fact" justifying reconsideration is, in a word, frivolous. The Commission should thus reaffirm its designation of the entire 18.8-19.3 GHz band for NGSO FSS operations.[7]

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[6] Winstar also wastes many pages on its recent growth. Teledesic congratulates Winstar on its robust growth, but this information has little or no relevance in this proceeding because the overwhelming majority of Winstar's spectrum rights are in the 28 GHz and 38 GHz bands.

[7] There is, however, an aspect of the FWCC petition that Teledesic does not oppose. The FWCC notes that narrowband FS systems in parts of the 18.58-18.82 GHz and 18.92-19.16 GHz bands are being displaced by this segmentation, and that the most efficient way to accommodate these systems elsewhere in the 18 GHz band is to rechannelize the spectrum currently used for wide-band FS spectrum. Teledesic agrees with the FWCC that it is necessary to accommodate narrower channel bandwidths in the 17.7-18.14 GHz and 19.3-19.7 GHz bands. (Obviously, the NGSO FSS designation in the 19.26-19.3 GHz segment makes it impossible to accommodate narrowband FS operations in that spectrum.) Rechannelization should facilitate the relocation of FS stations with channel bandwidths as small as 5 MHz. Indeed, given the fact that some existing 5 MHz links are likely to be underloaded, the Commission may well wish to consider even narrower channel bandwidths. Teledesic thus opposes the FWCC petition only to the extent that it asks the Commission to designate (or rechannelize) the 19.26-19.3 GHz spectrum for FS rather than NGSO FSS use.

## II. The Commission Should Reject Winstar's Suggestions for Further Obstacles to the Deployment of Satellite Services

Winstar's petition for clarification and reconsideration raises numerous questions about the way that "grandfathering" and relocation will work under the Commission's rules. All of Winstar's requests, whether styled as requests for "clarification" or for reconsideration, would make the rules adopted in the *18 GHz Report and Order* even more irrational and unbalanced than they already are. Winstar seeks (A) more liberal grandfathering for ownership changes that are "major modifications" under the Commission's rules; (B) a "voluntary negotiation period" for all 18 GHz relocations; (C) a right to test all replacement facilities for 12 months and then reject them and return to the old facilities; (D) a requirement that new entrants replace an incumbent's unused capacity as well as its actual traffic; and apparently (E) a ban on replacing microwave facilities with fiber. Each of these proposals would make relocation slower, more expensive, or both.

The Commission sets forth "the basic premise of this *Report and Order,* which has been accepted by the majority of the commenters to this proceeding: that the public interest is best served by separating terrestrial fixed service operations from ubiquitously deployed FSS earth stations."[8] Band segmentation is thus the first principle of this proceeding, from which all analysis must flow; *any* terrestrial operations in spectrum designated exclusively for satellites, or *vice versa,* is a departure from the Commission's band plan that must be justified. Grandfathering of FS links is one such departure, and the Commission has attempted to justify this departure as a way to recognize "the importance of providing continuity of service to the

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[8] *18 GHz Report and Order,* ¶ 70.

public, as well as the need to reasonably protect investments in existing terrestrial fixed service operations."[9]

But in order for the public to enjoy the benefits of band segmentation, the "exceptions" created by the grandfathering rules must diminish over time; the non-conforming spectrum uses must sooner or later give way to conforming spectrum uses. This is where relocation comes in. Segmentation, like other spectrum management policies, is about optimally managing the future; grandfathering is about respecting the less-than-optimal past; and relocation is about effecting the transition from the sub-optimal past to the optimal future.

Relocation imposes costs, and much ink has been spilled in this proceeding on arguments over who must bear these cost burdens, and to what extent. But before the Commission imposes cost burdens on anyone, it is only common sense to see if at least some costs can be avoided altogether, while still providing for a reasonably prompt achievement of the full segmentation that the public interest requires. All other things being equal, a faster transition is better than a slower one, and a less expensive transition (from a social perspective, *i.e.,* ignoring who pays) is better than a more expensive one. That is simple common sense. Unfortunately, every one of Winstar's proposals fails this simple, common-sense standard.

### A. Assignment and Transfer of Control of Grandfathered FS Stations.

Winstar notes that changes of ownership or control are often "major" modifications of FS station licenses under section 1.929 of the Commission's rules, and that ownership changes that constitute "major modifications" under 1.929 would appear under new section 101.97 to jeopardize the co-primary status of grandfathered FS stations (*i.e.,* stations that enjoy co-

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[9] *18 GHz Report and Order,* ¶ 63.

primary rather than secondary status despite the fact that they use spectrum designated primarily for satellite use). Winstar asks the Commission to "clarify" that grandfathered FS stations may be freely assigned, and control over them may be transferred, without jeopardizing the grandfathered (co-primary) status of those stations.

Teledesic agrees with Winstar that sections 101.97 and 1.929 of the Commission's rules have the effect of placing the co-primary status of grandfathered FS links in doubt when a major ownership change takes place. Unlike Winstar, however, Teledesic believes it would be entirely inappropriate for the Commission to make the grandfather privileges accorded to current FS incumbents freely transferable. On the contrary, Winstar's proposal would tend to *increase* terrestrial use of bands designated for satellite use, and would aggravate the costs of relocation rather than mitigate them.

The key to this issue lies not in the treatment of heavily used links, but rather in the treatment of lightly used links. As the Commission knows, customer requirements for wireless services can change quite rapidly, as can ownership of communications facilities. All licensees, including terrestrial microwave licensees, find from time to time that they no longer need some license or facility they have, in which case the license need not be renewed and may even be turned in to the Commission before it expires. Where, as here, the Commission wishes to change the way the spectrum is used, each such abandonment by an incumbent is to be welcomed and encouraged. Every time a grandfathered FS licensee decides to turn in an unneeded authorization, society moves one step closer to a future in which the benefits of band segmentation can be enjoyed by everyone – satellite and terrestrial operators, incumbents and new entrants alike. To the extent that this transition can be achieved by abandonment of non-

conforming uses rather than expensive relocations, the total social cost of the transition goes down.

A grandfathering policy that allows modifications too liberally will have exactly the opposite effect, and the free transferability sought by Winstar illustrates this perfectly. Under the Winstar proposal, for example, no grandfathered FS licensee would ever discontinue use of the 18.8-19.3 GHz band, because that licensee would possess a very scarce resource – a co-primary FS authorization in what had become a satellite-only band. Even if the FS licensee were discontinuing its operations for internal business reasons having nothing to do with the introduction of satellite services in the band, Winstar's proposal would induce the licensee to sell the grandfathered license to a new FS operator who would not otherwise be able to get a co-primary authorization in the band. Even if the assignee did not want to continue using the link between the same two points, the prospective assignee might buy up the soon-to-be abandoned license in order to get what amounts to a voucher for new equipment from the FSS entrant – equipment that could be used at any location. In other words, the Winstar proposal would make abandonment of lightly used FS links irrational, depriving society of the chance to decrease the amount of non-conforming use in the band without any cost at all.

There may well be some situations in which a change of ownership should not jeopardize the co-primary status of a grandfathered FS link, and section 101.97 provides for such situations by permitting the incumbent to affirmatively justify a continuation of co-primary status. Given the fact that the Commission has designated the 18.58-19.3 GHz band exclusively for FSS, and that conformity with that band plan is in the public interest, that is where the burden should stay. The Commission should therefore reject Winstar's suggestion that grandfather privileges be freely transferable under section 101.97.

**B. The "Voluntary Negotiation Period."** Winstar also asks the Commission to require a "voluntary negotiation period" at the start of the relocation process. Winstar's insistence on a "voluntary negotiation period" for 18 GHz relocations requires little discussion once we recognize that the "voluntary negotiation period" is not really about voluntary negotiations. The parties do not need the FCC's permission in order to engage in voluntary negotiations, and the rule sought by Winstar would not make voluntary negotiations any easier. **The real purpose and effect of the "voluntary negotiation period" sought by Winstar would be to give incumbents the right *not to negotiate*.** In past relocations, for example, the Commission's rules make clear that the so-called "voluntary negotiation period" has in reality been a period during which the incumbent *need not negotiate* in good faith or at all, and need not permit the new entrant to inspect its facilities or develop any independent, third-party estimates of how to provide comparable facilities.[10] In the *18 GHz Report and Order,* the Commission properly concluded that this provision would prolong rather than promote the relocation of 18 GHz incumbents. Winstar does not and cannot explain how the public interest is served by sanctioning a full year of stonewalling before the negotiations begin.

**C. Involuntary Relocation.** Winstar's broadest attack on the Commission's order concerns the mechanics of involuntary relocation. First Winstar asks the Commission to "clarify" that incumbents must receive "comparable" replacement facilities before they are required to move. Winstar also asks the Commission to reconsider its decision to omit any provision for a relocated incumbent to return to its old facilities during the first twelve months after relocation. Neither clarification nor reconsideration is required on these points.

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[10] *Cf.* 47. C.F.R. §§ 101.71 and 101.73 (2000).

There is nothing particularly unclear about the involuntary relocation process. An FSS entrant commences the process by notifying the incumbent that it wishes to negotiate either a voluntary relocation or a sharing agreement. There is then a two-year negotiating period (three years for public safety incumbents), during which time the incumbent is required to negotiate and both parties are bound to negotiate in good faith. Negotiations are to be "conducted with the goal of providing the FS licensee with comparable facilities," defined in terms of throughput, reliability, and operating costs. If there is no agreement during the two- or three-year negotiation period, the FSS licensee may force involuntary relocation by (1) guaranteeing payment of relocation costs; (2) completing all activities necessary for implementing replacement facilities; and (3) building the replacement system and testing it for comparability. Section 101.91(c) states, "The FS licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff."

Since the rules are so clear, Winstar's request for clarification may be an attempt to bait the Commission into stating that the facilities must be perfect in every respect before relocation is required. The Commission should resist this effort. The rules are clearly to the effect that the relocated incumbent gets "a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff." The amount of time that is reasonable would presumably depend at least in part on how well the replacement facilities performed and how many "adjustments" were required. But just as terrestrial microwave licensees sometimes find it necessary to make post-installation adjustments for their own customers, it may well be that further adjustments to the replacement facilities are required after the switchover has occurred. To state otherwise by way of "clarification" would be unreasonable.

The Commission should likewise reject Winstar's call for a twelve-month right to return to the replaced facilities. The practical effect of a twelve-month right to return is that the satellite entrant cannot guarantee its own ability to fulfill customer requirements free of harmful interference for twelve months after relocation occurs. This is both onerous and pointless. It is onerous because no prospective FSS customer will wait twelve months for service, and it is pointless because if there has been a reasonable time for testing there will be no need to return to the replaced facilities.

Winstar's suggestion that the twelve-month right to return is necessary to place relocation negotiations "on a level playing field"[11] is entertainingly far-fetched. Let's review: The rules require satellite licensees to bear the full cost of providing facilities that are "at least equivalent" to the replaced facilities, which means in practice that most replacement facilities given to FS incumbents will amount to no-cost equipment upgrades. Incumbents get full replacement of their equipment no matter how old it is, without regard to fair market value and without any discount for depreciation taken on the equipment. The full burden of funding the whole relocation is on the FSS entrant, despite the fact that the relocated FS incumbent shares equally in the benefits from segmentation. The rules expressly authorize incumbents to hold out for "premiums" over and above the amount necessary to give them these no-cost upgrades. And the hold-out threat is a powerful one because involuntary relocation cannot take place until after two or three years of stalled negotiations. The responsibility of the FSS entrant for cost reimbursement does not sunset for ten years, and for a narrow sliver of spectrum that is coincidentally licensed to the Commission's harshest critic on these matters,

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[11] Apparently Winstar would like the FS incumbent to start with a twelve-month right of return so that the incumbent can sell that right back and sweeten the relocation settlement even further.

the reimbursement obligation *never sunsets.* A "level playing field"? In the 18 GHz band, FS incumbents need more bargaining leverage like OPEC needs more oil.

**D. Replacement of Unused Capacity.** Next Winstar complains that the Commission's involuntary relocation rules only require the replacement of capacity that is actually used by the incumbent at the time of relocation, rather than the total capacity of the FS system. Winstar is once again overreaching.

As noted above, the point of the relocation rules should be to move toward conformity with the Commission's band plan as quickly as possible and with as little social cost as possible. If a facility using an over-sized 40 MHz channel pair has customer requirements that require only a 20 MHz channel pair, the incumbent will be made whole with a 20 MHz pair and society is enriched by making the unused 20 MHz available. This is a far better outcome than requiring the new entrant to obtain and build a 40 MHz facility that will most likely remain under-used and result in spectrum warehousing – particularly if FS channel pairs are as scarce as the FS community claims.

**E. Migration to "Other Media."** Finally, Winstar devotes several pages to the proposition that "fiber networks and other options are not always a reasonable or logical option."[12] It is far from clear what action Winstar would like the Commission to take based on this discussion.[13] What is clear is that fiber networks and other options may *sometimes* be a reasonable relocation option, and they should therefore always be considered. Where fiber is

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[12] Winstar Petition, ¶ 19.

[13] *Cf.* 47 C.F.R. § 1.429(c) (2000) ("The petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken should be changed.").

not a cost-effective alternative, the new entrant is highly unlikely to suggest it since it is the new entrant that is saddled with the cost. Indeed, the beauty of the Commission's lopsided relocation rules from Winstar's perspective is that, no matter what the situation is, Winstar can rest assured that it will bear none of the burden, take none of the risks, and enjoy all of the benefits. To the extent, therefore, that Winstar is suggesting that the Commission should either prohibit or discourage a transition to other frequency bands or other media, that suggestion should be rejected.

## III. Conclusion

It is odd, to say the least, for Teledesic to be defending the relocation provisions in the *18 GHz Report and Order,* given Teledesic's vigorous and long-standing criticism of those provisions as an illegal and economically inefficient windfall for FS incumbents. The *18 GHz Report and Order* sets forth a segmentation plan on which there was extremely broad consensus, and gives both terrestrial and satellite services the opportunity to flourish unconstrained by the burdens of co-primary sharing. FS licensees in the 18 GHz band almost unanimously supported the segmentation, and many FS licensees in higher-frequency bands would be thrilled to have such a segmentation plan in place. Despite the clear benefits to the FS, however, the entire burden of relocation was placed on the satellite industry alone. And to make matters worse, the Commission stubbornly refused to adopt any sensible limitation on the ability of FS incumbents to hold out for so-called "premiums" that bear no relation to actual economic cost. In these respects and others, the *18 GHz Report and Order* is truly arbitrary and capricious.

Under these circumstances, the suggestions from Winstar and the FWCC that the *18 GHz Report and Order* does not do enough for terrestrial interests are completely meritless. Both petitions should be quickly and firmly denied.

Respectfully submitted,

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13 November 2000

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## CERTIFICATE OF SERVICE

I, Lee Mullins, with the law firm of Harris, Wiltshire & Grannis LLP, do hereby certify that copies of the foregoing Consolidated Opposition of Teledesic LLC was served on the parties listed below by first-class U.S. mail, postage prepaid, on this 13th day of November, 2000.

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