

**BELLSOUTH CORPORATION  
SPRINT CORPORATION  
WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.**

April 7, 2004

Hon. Michael K. Powell  
Chairman  
Federal Communications Commission  
Washington, DC 20554

Re: *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems -- ET Docket No. 00-258*

Dear Chairman Powell:

It has been more than three years since the Commission first proposed in ET Docket No. 00-258 to relocate Multipoint Distribution Service ("MDS") channels 1 and 2/2A from the 2150-2162 MHz band to alternative spectrum in order to clear the way for Advanced Wireless Services ("AWS") in the 1.7/2.1 GHz bands,<sup>1</sup> and more than sixteen months since the Commission decided to actually relocate MDS, albeit without identifying the relocation spectrum.<sup>2</sup> MDS licensees are being harmed every day this regulatory cloud remains over Channels 1 and 2/2A. Because the Commission is unlikely any time soon to designate the one viable alternative proposed to date as MDS relocation spectrum, BellSouth Corp., Sprint Corp. and the Wireless Communications Association International, Inc. ("WCA") submit that prompt designation of the 1730-1735/2130-2135 MHz band as MDS relocation spectrum, an alternative not heretofore considered, is the next best option.

### **Background**

The record developed in response to the *Notice of Proposed Rulemaking*, the *Further Notice of Proposed Rulemaking*<sup>3</sup> and the *Third Notice of Proposed Rulemaking*<sup>4</sup>

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<sup>1</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Notice of Proposed Rulemaking, 16 FCC Rcd 596, 619 (2001)[*"NPRM"*].

<sup>2</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23193, 21212-13 (2002)[*"Second R&O"*].

<sup>3</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking 16 FCC Rcd 16043 (2001).

in this docket demonstrates that, save for one exception, the relocation alternatives suggested to date by the Commission pose serious risks of interference either to relocated MDS operations or from relocated MDS operations to their new spectrum neighbors given the practical limitations of technology and the need to avoid draconian operational restrictions.<sup>5</sup> The sole viable alternative among those bands under active consideration has been the spectrum located at 1910-1916 MHz and 1990-1996 MHz, otherwise known as the “G Block.” On July 11, 2002, BellSouth, Sprint and the WCA, along with other MDS licensees, proposed that the Commission reallocate the G Block for MDS relocation.<sup>6</sup> Although not a perfect substitute for the current MDS allocation and although relocation to the G Block would not allow continuation of all existing MDS operations, we were prepared to accept that compromise alternative to put an end to the harm that MDS licensees are suffering due to the ongoing regulatory uncertainty. To date, it is the only proposal before the Commission that would allow relocated MDS systems to operate in full harmony with their new spectrum neighbors, without either risk that MDS licensees would cause or suffer harmful interference or the need for draconian operational restrictions to avoid such interference.<sup>7</sup> However, after this proposal was filed with the Commission, Nextel Corp. and its allies revised their “Consensus Plan” to propose that Nextel be awarded the 1910-1915/1990-1995 MHz bands in exchange for

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<sup>4</sup> See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 MHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Spectrum*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223 (2003) [“*Third NPRM*”].

<sup>5</sup> See *infra* at note 7. In addition, in response to the *Notice of Proposed Rulemaking* in IB Docket No. 02-364 proposing to reallocate the Mobile Satellite Service (“MSS”) spectrum at 2483.5-2492.5 MHz and 2498-2500 MHz for other uses, one commenter suggested that the Commission instead reallocate the 2490-2500 MHz band for relocation of MDS. WCA’s reply comments in that proceeding discussed in detail the serious harmful interference that would result among MDS, MSS and the Broadcast Auxiliary Service (“BAS”) were that proposal to be adopted. See Reply Comments of Wireless Communications Ass’n Int’l, IB Docket No. 02-364 (filed July 25, 2003). To date, no response has been filed demonstrating any solution to the serious interference-based concerns expressed by WCA.

<sup>6</sup> See “A Compromise Solution for Relocating MDS From 2150-2162 MHz,” attached as an appendix to Letter from Wireless Communications Ass’n Int’l, *et al.*, to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258 (filed July 11, 2002).

<sup>7</sup> See Comments of Wireless Communications Ass’n Int’l on Further Notice of Proposed Rulemaking, ET Docket No. 00-258 (filed Oct. 22, 2001) [“WCA FNPRM Comments”]; Reply Comments of Wireless Communications Ass’n Int’l on Further Notice of Proposed Rulemaking, ET Docket No. 00-258 (filed Nov. 8, 2001); Comments of Wireless Communications Ass’n Int’l on Third Notice of Proposed Rulemaking, ET Docket No. 00-258 (filed April 14, 2003); Comments of Sprint Corporation, ET Docket No. 00-258 (Oct. 21, 2001); Reply Comments of Sprint Corporation, ET Docket No. 00-258 (filed Nov. 8, 2001); Comments of Cingular Wireless, ET Docket No. 00-258, (filed April 14, 2003); Reply Comments of Wireless Communications Ass’n Int’l, IB Docket No. 02-364 (filed July 25, 2003); Letter from Paul J. Sinderbrand, Counsel to WCA, to . Marlene H. Dortch, FCC Secretary, ET Docket No. 00-258 (filed March 19, 2004).

Nextel's voluntary taking of certain actions designed to mitigate the interference Nextel itself causes to public safety operations in the 800 MHz band.<sup>8</sup>

BellSouth, Sprint and WCA continue to believe that the problem of interference to public safety can be resolved without giving the G Block to Nextel and that the public interest will best be served by relocating MDS to the G Block in accordance with their original proposal. Nonetheless, we also recognize that the Commission may conclude that it is not in a position to permit such relocation until it has fully resolved the controversy surrounding Nextel's continuing insistence on receipt of the G Block as a *quid pro quo* for resolving public safety interference. Because the controversy over the Consensus Plan has reached fever-pitch, we believe it will be years before the administrative proceedings and inevitable judicial reviews have been completed. Thus, BellSouth, Sprint and WCA have redoubled their efforts to identify alternative relocation spectrum for MDS that does not pose the interference risks of other bands, and have developed an alternative solution that should prove acceptable as the next best available option.

### **Relocating MDS To 1730-1735/2130-2135 MHz Is The Next Best Option**

BellSouth, Sprint and WCA are today suggesting that the Commission consider requiring the winners of the auction for the AWS E Block spectrum to relocate MDS channels 1 and 2/2A within their license area to the AWS C Block, unless otherwise agreed by an MDS licensee.<sup>9</sup> Because the AWS E Block overlaps the current MDS allocation at 2150-2162 MHz, the AWS E Block licensee will be the primary beneficiary of relocating MDS and thus it is fair and appropriate to impose this obligation on it.

More specifically, we are suggesting that each MDS channel 1 licensee be entitled to a license for the 1730-1732.5/2130-2132.5 MHz channel pair covering its Geographic Service Area ("GSA"),<sup>10</sup> and each MDS channel 2 or 2A licensee be entitled to secure a

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<sup>8</sup> See Letter from Regina M. Keeney, Counsel for Nextel Communications, Inc., to the Federal Communications Commission, ET Docket No. 00-258 (Aug. 9, 2002); Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55, at 49-51 (filed Aug. 7, 2002).

<sup>9</sup> The AWS C Block is located at 1730-1735/2130-2135 MHz, while the E Block is located at 1740-1755/2140-2155 MHz.

<sup>10</sup> At present, each MDS licensee has a protected service area ("PSA"). Licenses awarded prior to the Commission's use of competitive bidding for MDS have a PSA that is a circle with a 35-mile radius, while auctioned MDS licenses have a PSA that is the Basic Trading Area, less any 35-mile radius circles that had been licensed prior to the auction. The circular PSAs overlap in some instances, which had deterred the provision of service in those overlap areas due to co-channel interference concerns. Thus, a proposal is pending in WT Docket No. 03-66 to eliminate those overlaps and to carve exclusive GSAs out of non-exclusive PSAs in a specific manner. See "A Proposal for Revising The MDS and ITFS Regulatory Regime," Wireless Communications Ass'n Int'l, National ITFS Ass'n, and Catholic Television Network, Appendix A, RM-10586 (filed Oct. 7, 2002); Comments of Wireless Communications Ass'n Int'l, WT Docket No. 03-66, at 58-61 (filed Sept. 8, 2003). Because we contemplate that MDS licensees relocated to the AWS band will be required to operate in accordance with the AWS service rules, and because those

license for the 1732.5-1735 MHz/2132.5-2135 MHz channel pair covering its GSA.<sup>11</sup> Relocated MDS licensees would thereafter be required to operate in accordance with the fixed and mobile service rules recently adopted by the Commission for the AWS.<sup>12</sup> Admittedly, this means that relocated MDS licensees will often have less spectrum, will have to operate at lower power than presently authorized, will not be able to deploy the time division duplex technologies that are permitted under the current MDS rules, and will have to devote one-half of their spectrum to upstream transmissions and one-half their spectrum to downstream transmissions, in contrast to the current rules that allow licensees full flexibility to determine how much of their spectrum is to be devoted in any direction. In addition, relocated MDS licensees will have to bear the additional burden of constructing their facilities to avoid causing harmful interference to or receiving harmful interference from grandfathered Federal Government facilities that are not required to move out of the 1710-1755 MHz band.<sup>13</sup> However, given the lack of readily available viable alternatives and the substantial burden continued delay in identifying relocation spectrum is placing on Sprint, BellSouth and other MDS licensees, we are prepared to accept AWS spectrum with these restrictions in the spirit of compromise.

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service rules are predicated on the notion that AWS licensees will have exclusive use of their spectrum within their service areas, it is logical to award relocated MDS licensees exclusive use authorizations based on the pending proposal for splitting overlap areas among the affected MDS licensees.

<sup>11</sup> We recognize that adoption of this approach would mean that MDS licensees who today hold 6 MHz channels will have their holdings reduced by almost 17%. Although BellSouth, Sprint and WCA believe that licensees of MDS channels that are 6 MHz wide are entitled to 6 MHz of replacement spectrum, we are willing to accept a reduction in the interest of securing a workable new spectrum home. As explained in WCA's comments in response to the *Further Notice of Proposed Rulemaking* in this docket, it is fair and appropriate for the Commission to relocate licensees of MDS channel 2A (who today only have access to 4 MHz in the 2156-2160 MHz band) to 5 MHz of spectrum, as the 25-year old rationale for awarding full channels only in fifty large markets (to protect point-to-point microwave services) will not apply upon relocation of MDS to the AWS band. See WCA FNPRM Comments at 7. Most importantly, it provides some measure of "rough justice" – to make this particular proposal work, licensees of MDS channels 1 and 2 are prepared to sacrifice 1 MHz of spectrum each so as to better fit within the AWS bandplan. Since the licensee of MDS channel 2A is often the licensee of MDS channel 1, this proposal results in that licensee retaining exactly the same 10 MHz it holds today. Moreover, even where MDS channels 1 and 2A are not commonly owned, providing the licensee of MDS channel 2A with 5 MHz avoids spectral inefficiency. Failure to eliminate this obsolete restriction will result, as a practical matter, in the stranding of 1 MHz of spectrum outside of the fifty major markets and others areas where full 6 MHz licenses are currently awarded for MDS channel 2. If the Commission only provides MDS channel 2A licensees 4 MHz in the 1732.5-1734.5 MHz/2132.5-2134.5 band pair, it is difficult to envision that any independent use will develop for the 1734.5-1735/2134.5-2135 MHz band pair. The resulting 0.5 MHz paired channels would only be available in areas distant from the fifty major markets and other areas where full 6 MHz MDS channel 2 licenses are issued, making it unlikely that any vendor would develop technology for use in the band or that any service provider would find the opportunity attractive. Moreover, paired 0.5 MHz channels are so narrow (particularly if industry-standard guardbands are required to protect adjacent channel users) that service offerings outside the 50 major markets and other areas could be impossible.

<sup>12</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, FCC 03-251 (rel. Nov. 25, 2003).

<sup>13</sup> See *id.* at ¶ 48 n.111.

To effectuate this approach, each E Block AWS licensee would be required to secure the C Block AWS license at auction. The Commission can utilize package bidding in its AWS auction to facilitate the acquisition of the C Block by E Block bidders.<sup>14</sup> The Commission permitted the use of package bidding for the first time in Auction 51, its 2003 auction of six narrowband PCS licenses. While concerns have been raised from time to time about the ability of the Commission's auction software to manage an auction in which package bidding is permitted and a large number of licenses are available, in this case package bidding would only link the six E Block licenses with the six C Block licenses. We believe, based on discussions with the staff, that the use of package bidding as contemplated here would not tax the Commission's auction capabilities. Upon conclusion of the AWS auction, the E Block winners would be required to clear the C Block of incumbent users to facilitate MDS relocation, and to thereafter partition and disaggregate the C Block spectrum as necessary to provide the relocated MDS licensees with appropriate authorizations. Attachment A to this letter contains a proposal for addressing the details of relocation.

There is certainly ample precedent for requiring the winner of the AWS E Block auction to secure a license for the MDS licensees being relocated to accommodate operations on the AWS E Block. Indeed, under the Commission policies that governed the relocation of point-to-point microwave licensees to free the 1850-1990 MHz band for broadband PCS, the PCS auction winners who were relocating microwave licensees to alternative bands were obligated to secure Commission licenses for those alternative bands.<sup>15</sup> Although in that case the PCS licensee generally secured an initial license in the name of the incumbent, that approach cannot be implemented here because the Commission is not offering AWS licenses with exactly the right amount of spectrum and exactly the right geographic service area to make relocated MDS licensees whole.

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<sup>14</sup> The Wireless Telecommunications Bureau has described "package bidding" as:

an auction design in which bidders may place bids on groups, or packages, of licenses. A bid on a package is an all-or-nothing bid for all of the licenses in that package. This is a departure from the Bureau's usual simultaneous multiple-round (SMR) design, in which bidders only have the ability to submit individual bids for each license. Like our existing SMR design, our current implementation of package bidding uses a simultaneous multiple-round design. In addition to submitting bids on packages, bidders may also submit bids on individual licenses.

"Auction Of Regional Narrowband PCS Licenses Scheduled For September 24, 2003, Comment Sought On Package Bidding Procedures, Reserve Prices Or Minimum Opening Bids, And Other Auction Procedures," *Public Notice*, DA 03-1065 (rel. April 3, 2003).

<sup>15</sup> See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886, 6890 (1992); 47 C.F.R. § 101.75 (providing that a fixed microwave licensee is required to relocate to alternative spectrum, so long as the newcomer "[c]ompletes all activities necessary for implementing the replacement facilities, including the engineering and cost analysis of the relocation procedure and . . . identifying and obtaining on the incumbents' behalf, new microwave frequencies and frequency coordination").

Therefore, it is necessary to have the E Block AWS auction winner also secure the AWS C Block in its own name, and use disaggregation and partitioning to provide each relocated MDS licensee the appropriate replacement authorization.<sup>16</sup>

Finally, BellSouth, Sprint and WCA submit that, if the Commission will not rapidly designate the G Block as MDS relocation spectrum, the Commission can and should expeditiously enter an order designating the C Block AWS spectrum as MDS relocation spectrum and otherwise adopting the relocation policies set forth above. Although the 173-1735/2130-2135 MHz bands have not been specifically identified as relocation spectrum in any of the notices of proposed rulemaking released to date in this proceeding, the Commission has solicited comment from the public on alternative relocation spectrum beyond those specific bands mentioned by the Commission. Most recently, in the *Third Notice of Proposed Rulemaking*, the Commission proposed several bands, but more generally sought “comment on the appropriate relocation spectrum for MDS.”<sup>17</sup> Thus, the interested parties were on notice that this docket would explore all potential relocation spectrum for MDS channels 1 and 2/2A, and no one can be heard to complain if the AWS C Block is designated as that relocation spectrum without a further notice and comment rulemaking.<sup>18</sup> Certainly, we would not object to the issuance of a public notice soliciting comment on our suggested approach. However, equitable considerations deriving from the three year plus duration of this proceeding dictate that the Commission move quickly towards a resolution, and avoiding an unnecessary further notice of proposed rulemaking will advance that objective.

In conclusion, although it is not a perfect substitute for the current MDS allocation and many MDS licensees will be harmed by relocation to AWS, adoption of this approach is acceptable to the MDS community because it finally will eliminate the regulatory cloud that has hung over MDS channels 1 and 2/2A for more than three years now. Save for the G Block, none of the other options before the Commission have proven viable once interference considerations, the current limitations of technology and the need to avoid draconian operational restrictions are considered, and thus designating the C Block AWS band as MDS relocation spectrum is the best solution to an unfortunate situation.

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<sup>16</sup> A benefit of this approach is that, in areas where there is no MDS license holder (which occurs where no incumbent acquired an MDS license prior to the 1996 MDS auction, and the auction winner subsequently defaulted in its obligations to the Commission), the AWS E Block auction winner can retain the AWS C Block for its own use.

<sup>17</sup> *Third NPRM*, 18 FCC Rcd at 2257.

<sup>18</sup> See, e.g., *MTS and WATS Market Structure*, 3 FCC Rcd 5518, 5530 (1988) (“Section 553(b)(3) of the APA has been interpreted to mean that an agency is not required to publish in advance every precise proposal it may adopt. . . [T]he submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the adopted rule differs somewhat from the proposed rule.”) (footnotes omitted).

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Respectfully submitted,

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## APPENDIX A – RELOCATION AND BAND-CLEARING

### RELOCATION OF MDS LICENSEES AND OPERATORS FROM 2150-2162 MHz

Throughout ET Docket No. 00-258, the Multipoint Distribution Service (“MDS”) industry has stressed that relocation of MDS to any new spectrum will present novel relocation and compensation issues, as it will be the first time the Commission has forced the migration of a mass market, consumer-based subscription service to new spectrum and the first time the Commission has relocated a service where the spectrum is frequently leased to non-licensee system operators who provide service to the public.<sup>1</sup> None of the commenters has opposed the compensation requirements proposed by the MDS industry to address these unique circumstances, so it is unnecessary to repeat here in detail the industry’s position that all relocation costs incurred by licensees, system operators and consumers must be reimbursed. Indeed, even those advocating the relocation of MDS from 2150-2162 MHz concede that full compensation is required.<sup>2</sup>

The mechanics of relocating MDS licensees and system operators from 2150-2162 MHz to the 1730-1735/2130-2135 MHz bands (the “AWS C Block”) need not be complicated. Indeed, the Fixed Microwave Service (“FMS”) relocation rules set forth in Sections 101.69 *et seq.* of the Commission’s Rules provide a useful starting point for establishing a transitional mechanism. We propose, similar to the process used free the FMS spectrum for broadband Personal Communications Service (“PCS”), a one-year voluntary negotiation period, followed by a one-year mandatory negotiation period, would commence when the winner of the auction for the Advanced Wireless Service (“AWS”) E Block spectrum at 1740-1755/2140-2155 MHz bands serves a written request for negotiation on the MDS licensee.<sup>3</sup> However, provisions for separate negotiations with any system operator utilizing the MDS channels will have to be included in the MDS relocation rules to reflect the fact that MDS channels, unlike the FMS links at issue when the Part 101 relocation rules were initially drafted, are frequently leased to system operators who have made substantial investments in reliance on those leases and must be reimbursed for costs incurred as a result of any relocation.<sup>4</sup> If the auction winner, licensee and any system operator/lessee are unsuccessful in negotiating a settlement within that one-year

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<sup>1</sup> See, e.g. Comments of Wireless Communications Association Int’l, ET Docket No. 00-258, at 10-14 (filed Oct. 22, 2001)[“WCA Comments”]; Comments of Sprint Corp., ET Docket No. 00-258, at 5-6 (filed Oct. 22, 2001)[“Sprint Comments”]; Comments of Wireless Communications Association Int’l, ET Docket No. 00-258, at 48-53 (filed Feb. 22, 2001)[“WCA NPRM Comments”].

<sup>2</sup> See Comments of Motorola, Inc., ET Docket No. 00-258, at 13 (filed Oct. 22, 2001); Comments of Nortel Networks, ET Docket No. 00-258, at 5-6 (filed Oct. 19, 2001); Reply Comments of Cingular Wireless LLC, ET Docket No. 00-258, at 4 (filed Nov. 8, 2001).

<sup>3</sup> See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 8 FCC Rcd 6589, 6598 (1993); see also 47 C.F.R. § 101.69(b).

<sup>4</sup> Although consumers may, in some cases, have purchased MDS equipment, such consumers have subscriber relationships with system operators who can be expected to protect the consumers’ interests in relocation negotiations. Thus, although operators will have to be reimbursed for the costs they incur in reimbursing consumers, direct negotiations between consumers and the AWS E Block auction winner can be avoided.

voluntary negotiation period, an involuntary relocation procedure similar to that afforded by Section 101.75 of the Commission's Rules (but modified to reflect both the additional cost considerations present with an MDS relocation and the role of the system operator) could then be invoked by the affected AWS E Block auction winner.

The involuntary relocation procedures set forth in Section 101.75 will require modification to reflect that any relocation of MDS to the 1730-1735/2130-2135 MHz bands adds a new wrinkle to the Commission's prior experience with forced migrations, as MDS will be unable to relocate until the replacement spectrum is first cleared of current users.<sup>5</sup> In this case, those incumbents include both Federal Government and non-Government facilities, with the former already subject to relocation procedures established by the National Telecommunications & Information Administration.<sup>6</sup> Because of the need for a sequential, dual band-clearing here (which was not required when the FMS rules were adopted), any MDS relocation rule based on Section 101.75 will have to be modified such that the commencement of mandatory negotiations between an MDS licensee or system operator/lessee and the applicable AWS E Block auction winner is deferred until the date on which the 1730-1735/2130-2135 MHz bands are fully cleared of all incumbent operations within the MDS licensee's service area, plus any incumbent operations within the MDS licensee's Proximity Threshold calculated under Section 24.247 of the Rules and any additional incumbent operations that might otherwise interfere with MDS.

The Commission permits FMS licensees to self-relocate and later secure compensation for their expenses.<sup>7</sup> Similarly, to avoid undue delay in the clearing of the 1730-1735-2130-2135 MHz bands and the relocation of MDS, the Commission must permit MDS licensees and system operator/lessees, at their sole discretion, to undertake the expenses of the band-clearing and relocation subject to later reimbursement.<sup>8</sup> Thus, to promote the earliest possible relocation of

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<sup>5</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 16 FCC Rcd 16043, 16048, 16057-58 (2001)[“FNPRM”].

<sup>6</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, FCC 03-251, ¶¶ 49-50 (rel. Nov. 25, 2003); *Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems*, Department of Commerce, National Telecommunications and Information Administration, 67 Fed.Reg. 41182 (June 17, 2002) (“NTIA Reimbursement Order”).

<sup>7</sup> See *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, 12 FCC Rcd 2705, 2717-18 (1997). Because of the possibility for lengthy delays between MDS self-relocation and the 1.7/2.1 GHz AWS auction, compensation should include a payment for the time value of expenditures incurred by MDS licensees and operators for the benefit of the eventual auction winners.

<sup>8</sup> This self-help approach not only will speed the clearing of the 1730-1735/2130-2135 MHz bands, but it also accommodates the possibility that in some cases, MDS system operators will choose to migrate existing services from 2150-2162 MHz to spectrum other than the 1730-1735/2130-2135 MHz (such as WCS spectrum at 2.3 GHz or MDS/ITFS spectrum at 2.5 GHz) pending the clearing of the 1730-1735-2130-2135 MHz bands. There are several reasons why this option might be elected.

For example, as previously explained in ET Docket No. 00-258, one of the primary concerns MDS system operators have with any migration from 2150-2162 MHz is the negative impact on the subscriber, who will be required in many cases to remain at home for a service call during which its current consumer premises equipment will be exchanged for equipment capable of operating on the new spectrum. See WCA NPRM Comments, at 48-53

MDS from the 2150-2162 MHz band, MDS licensees should be provided with immediate authority to operate in the 1730-1735/2130-2135 MHz band (subject to the clearing of those bands as discussed below), as well as in the 2150-2162 MHz band. For there to be a seamless transition for subscribers requires that systems operate concurrently in the 2150-2162 MHz band and in the relocation spectrum until all subscribers can be provisioned with the equipment necessary to operate on the relocation spectrum. Providing MDS licensees the earliest possible access to the 1730-1735/2130-2135 MHz bands will expedite the transition of subscribers that are currently receiving service via the 2150-2162 MHz band, as it will permit MDS licensees (if they so choose) to immediately construct facilities in the 1730-1735/2130-2135 MHz bands and commence the process of providing subscribers with the equipment necessary to receive service in the new spectrum.<sup>9</sup>

### **SPECIAL CONSIDERATIONS ARISING FROM THE NEED TO CLEAR THE 1730-1735/2130-2135 MHz BANDS**

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The loss of customer good-will caused by this disruption is a “soft cost” that simply cannot be fully reimbursed, and must be minimized wherever possible. Operators may choose to minimize the disruption by starting to migrate customers immediately to currently-available alternate spectrum whenever a routine service call is made to the home, without awaiting the clearing of the 1730-1735/2130-2135 MHz band. While some operators are spectrum constrained and cannot avail themselves of this option, others may have spectrum that had been set aside initially for future use as the customer base expands. This expansion spectrum could be put to use more rapidly as part of a migration plan, and the 1730-1735/2130-2135 MHz band would then become that operator’s expansion spectrum once it is cleared. For example, some system operators may choose to immediately migrate subscribers from MDS channels 1 and 2/2A to available Wireless Communications Service (“WCS”) spectrum, and then utilize the relocated MDS channels for additional capacity when the WCS channels are saturated.

Another scenario, which derives from the fact that the 1730-1735/2130-2135 MHz band is not directly comparable to 2150-2162 MHz, may occur where the entire 2150-2162 MHz band is currently used for upstream communications. In such a situation, the system operator may find that due to the loss of six megahertz of upstream capacity, the new 1730-1735 MHz upstream band alone would not satisfy its immediate capacity requirements, and therefore decide to supplement the 1730-1735 MHz upstream band with channels in other bands on either a TDD or FDD basis. For example, a system that today uses all of the 2150-2162 MHz band for upstream communications may need to utilize MDS channels in the 2.5 GHz band to replace the upstream capacity lost as a result of the relocation of MDS channels 1 and 2/2A. In any such cases, the AWS E Block auction winner should be required to bear the expenses incurred as a result of the move to the chosen relocation band, but not any of the costs incurred by the system operator in purchasing or leasing that new band (as such costs are essentially covered by the provision of spectrum at 1.7/2.1 GHz). In other words, returning to the prior example, the AWS E Block auction winner should be responsible for the costs of clearing the 1730-1735/2130-2135 MHz band and the costs of migrating subscribers to the MDS channels at 2.5 GHz, but not the cost of buying or leasing those MDS channels. Similarly, in some cases spectrum constrained system operators may find that although the existing services offered over MDS channels 1 and 2/2A cannot be offered at 1730-1735/2110-2135 MHz because of the operating restrictions required to protect broadband PCS, they can provide those services in the 2.5 GHz band by introducing newer technologies. In such cases, the AWS E Block auction winner should be required to bear the expenses incurred in introducing those technologies, but again, not any of the costs incurred by the system operator in purchasing or leasing the spectrum. In either of these cases, the system operator can migrate consumers immediately (regardless of whether the 1730-1735/2130-2135 MHz band can be quickly cleared), and then commence using the 1730-1735/2130-2135 MHz band later.

<sup>9</sup> See WCA Comments, at 8 n. 14; Reply Comments of Wireless Communications Association In’t, ET Docket No. 00-258, at 33 n. 88 (filed March 9, 2001).

The task of developing rules to govern clearing the 1730-1735/2130-2135 MHz bands of incumbents will be simplified because, with some minor revisions, the Commission can rely on existing relocation procedures for those bands, *i.e.*, the NTIA procedures for relocating Federal Government incumbents out of the 1710-1755 MHz band and the Commission's own procedures for relocating non-Government FMS licensees out of the 2110-2150 MHz band. While these procedures differ somewhat in their particulars, they are similar in that they now or eventually will (1) establish a negotiation period prior to involuntary relocation of incumbents and (2) require subsequent beneficiaries of relocation to share relocation costs according to formulae in the Commission's rules. With these fundamental concepts in mind, the existing relocation procedures for the 1730-1735/2130-2135 MHz bands should generally be retained, except as noted below.

*Relocation of Federal Government Incumbents From 1710-1755 MHz*<sup>10</sup>

In a decision released on June 17, 2002, NTIA adopted rules and procedures governing the relocation of incumbent Federal Government operations out of the 1710-1755 MHz band after the spectrum has been auctioned for non-Government use.<sup>11</sup> Under those rules, Federal Government incumbents are required to advise NTIA of their projected reimbursement costs at least 240 days prior to the date on which the Commission begins the 1710-1755/2110-2155 MHz auction; NTIA, in turn, is required to make that information available to the Commission for distribution to potential auction bidders at least 180 days prior to commencement of the auction.<sup>12</sup> Within 30 days after public notice of the grant of its license for use of the 1710-1755 MHz band, the winning auction bidder is required to provide the Federal entity that occupies its spectrum with written notification of the license grant.<sup>13</sup> The public notice commences a 135-day mandatory negotiation period, during which the parties are encouraged to resolve any differences with respect to relocation or modification costs or any other related issues, either through party-to-party negotiations and/or a third party mediator.<sup>14</sup> If the parties are unable to reach agreement, they must enter into non-binding arbitration.<sup>15</sup>

Upon completion of the negotiation/arbitration process, the licensee must submit a petition for relocation to NTIA, demonstrating that the licensee guarantees payment of the Federal Government incumbent's relocation costs, that all activities necessary for implementing the relocation have been completed; and that any necessary replacement facilities, equipment

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<sup>10</sup> BellSouth, Sprint and WCA appreciate that efforts are underway to secure legislation that would permit the proceeds of the AWS auction to be utilized by Government incumbents in the 1710-1755 MHz band to relocate. Affording relocating MDS licensees the same status as AWS auction winners for purposes of band-clearing, as discussed below, would be consistent with the underlying objectives of that legislation and would expedite the clearing of the band.

<sup>11</sup> *NTIA Reimbursement Order*, n.5 *supra*.

<sup>12</sup> 47 C.F.R. § 301.110(a).

<sup>13</sup> *Id.* § 301.120(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 301.130.

modifications, or other changes have been implemented and tested to ensure that the Federal Government incumbent is able to operate as before.<sup>16</sup> NTIA is required to act on the licensee's petition within six months of its filing date – if the petition is granted, the Federal Government incumbent's license is terminated or limited as necessary and the AWS licensee may commence operations on the incumbent's spectrum.<sup>17</sup>

Because the AWS E Block auction winner must observe the NTIA relocation procedures when clearing the AWS C Block to make room for MDS, no relocation of MDS licensees to the 1730-1735/2130-2135 MHz band would be possible until the AWS E Block completes those procedures to NTIA's satisfaction. In turn, since there is no sunset of the Federal Government's right to reimbursement under NTIA's rules,<sup>18</sup> this effectively means that MDS licensees could remain in the 2150-2162 MHz band indefinitely until all relocation issues between AWS E Block auction winners and the Federal Government are resolved. Hence, to permit the most expeditious relocation of MDS licensees from the 2150-2162 MHz band to the 1730-1735/2130-2135 MHz bands, the Commission should provide MDS licensees with immediate authority to operate in the 1730-1735/2130-2135 MHz band, giving them the status of "licensees" and thereby enabling them to commence relocation of Federal Government incumbents in accordance with NTIA's procedures.

Finally, to date NTIA has not adopted any rules specifying how the costs of relocating Federal Government incumbents should be shared by subsequent users of the 1710-1755 MHz band who benefit from such relocation.<sup>19</sup> Obviously, if MDS licensees elected to undertake the relocation process themselves, they would be subject to whatever cost sharing requirements are ultimately adopted by NTIA. However, consistent with the policy that a relocating MDS licensee or system operator/lessee should be fully reimbursed for any relocation expenses, any band-clearing costs incurred by the MDS licensee or system operator/lessee that are not recovered under NTIA's cost-sharing rules for the 1710-1755 MHz band ultimately must be reimbursed by the AWS E Block auction winner.

#### *Relocation of Non-Government FMS Incumbents at 2130-2135 MHz*

The Commission has already adopted relocation procedures for non-Government FMS incumbents in the 2110-2155 MHz band that would apply to any clearing of the 2130-2135 MHz band for MDS.<sup>20</sup> Those rules generally track the Commission's long-standing microwave relocation procedures adopted in the agency's *Emerging Technologies* proceeding, and thus can

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<sup>16</sup> *Id.* § 301.140(a).

<sup>17</sup> *Id.*; see also AWS Service Rules R&O at ¶ 48.

<sup>18</sup> 47 C.F.R. § 301.10(d).

<sup>19</sup> See *NTIA Reimbursement Order*, 67 Fed. Reg. at 41188.

<sup>20</sup> See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Second Report and Order, 17 FCC Rcd 23193, 21213-15 (2002) ["*Second R&O*"].

easily be applied here.<sup>21</sup> Again, consistent with the policy that a relocating MDS licensee or system operator/lessee should be reimbursed for any relocation expenses, any band-clearing costs incurred by the MDS licensee or system operator/lessee that are not recovered under the Commission's relocation procedures for the 2110-2150 MHz band ultimately must be reimbursed by the AWS E Block auction winner.. However, to avoid excessive premiums from MDS licensees or system operators/lessees to FMS licensees to expedite FMS relocation, the AWS E Block auction should only be liable for reimbursement of those relocation costs actually required to provide the incumbent with "comparable facilities" as defined under the Commission's rules.

The Commission also notes that some FMS licensees at 2130-2150 MHz use links that are paired with frequencies in the 2180-2200 MHz band that remains allocated to MSS.<sup>22</sup> For these incumbents, the Commission has adopted a modified procedure under which the first new licensee would relocate each paired link – including the "second" link that was not in the new licensee's licensed band.<sup>23</sup> Once a subsequent licensee seeks to begin operations on frequencies formerly used by the second link, that licensee would be obligated to reimburse the first licensee that relocated the paired microwave facilities half of the total relocation costs.<sup>24</sup> Accordingly, an MDS licensee, system operator/lessee or AWS E Block auction winner that incurs band-clearing expenses should be entitled to recover from MSS whatever costs are associated with clearing paired FMS incumbents out of the 2180-2200 MHz band, again subject to the limitation on premiums discussed above.

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<sup>21</sup> *Id.* at 23213. Thus, incumbents at 2110-2150 MHz are entitled to compensation for relocation of any links that may pose an interference threat to new fixed or mobile system licensees, including all engineering, equipment, site and Commission fees. See *AWS Service Rules R&O* at ¶ 52.

<sup>22</sup> *Id.*

<sup>23</sup> *AWS Allocation Order*, 17 FCC Rcd at 23214.

<sup>24</sup> *Id.*