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

In re	)	
	)	
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

PETITION FOR RECONSIDERATION

Pursuant to section 1.429 of the Commission's rules, the Satellite Industry Association[1] hereby petitions for reconsideration of the November 1, 2001 "First Order on Reconsideration" in this proceeding,[2] which modified some of the rules adopted in the earlier *Report and Order.*[3] Although the *First Order on Reconsideration* corrects some of the more arbitrary aspects of the *Report and Order,* it actually exacerbates some of the difficulties that were inherent in the *Report and Order* and creates entirely new problems where none had existed before. Because of the Commission's evident intention to use the rules adopted in the 18 GHz *Report and Order* as a

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1 SIA is a national trade association representing the leading U.S. satellite manufacturers, service providers, and launch service companies. SIA serves as an advocate for the U.S. commercial satellite industry on regulatory and policy issues common to its members. With member companies providing a broad range of manufactured products and services, SIA represents the unified voice of the U.S. commercial satellite industry. SIA has previously participated in this proceeding and is an "interested person" within the meaning of 47 C.F.R. § 1.429(a).

2 *Redesignation of the 17.7-19.7 GHz Band,* First Order on Reconsideration, FCC 01-323 (released Nov. 1, 2001) (hereafter "*First Order on Reconsideration*").

3 *Redesignation of the 17.7-19.7 GHz Band,* Report and Order, 15 F.C.C. Rcd. 13,430 (2000) (hereafter "*Report and Order*").

template for relocations in other bands,[4] the Commission should take this last opportunity to ensure that the rules it is adopting are consistent with the policies it is attempting to pursue.

I. The Commission's Rules Do Not Further Its Articulated Policies.

The Commission's articulation of its policy goals has evolved significantly from the NPRM, through the *Report and Order* and an intervening decision regarding the 2 GHz MSS spectrum, to the *First Order on Reconsideration.* The NPRM was based on the assumption that terrestrial and satellite operators would be able to share the 18 GHz band indefinitely as long as FS deployment in satellite bands were frozen at 1998 levels; consequently, the Commission proposed permanent grandfathering of incumbent FS stations with no relocation rules.[5] In the original *Report and Order* in this proceeding, the Commission recognized that sharing was infeasible and relocation inevitable, which doomed the permanent grandfathering proposal and called into question the extent to which existing FS operations ought to be or could be protected during a large-scale relocation. The Commission articulated a policy of "protect[ing] the existing fixed terrestrial operations in [the 18 GHz] band to the maximum extent possible, while at the same time providing for the growth of both satellite and terrestrial services."[6] The speed with which relocation occurs is mentioned once or twice in the *Report and Order,* but it plays a very minor role.

The Commission's emphasis has now shifted considerably in the *First Order on Reconsideration.* Repeatedly pressed to justify relocation rules that are incredibly favorable to

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[4] See, e.g., Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service, Second Report and Order and Second Memorandum Opinion and Order, 15 F.C.C. Rcd. 12,315 (2000).

[5] Notice of Proposed Rulemaking, 13 F.C.C. Rcd. 19,933, 19,941-42 (1998).

[6] *Report and Order,* 15 F.C.C. Rcd. at 13,431-32.

FS incumbents, the Commission has increasingly invoked speed as a primary consideration. Hence, the *First Order on Reconsideration* formulates the Commission's policy as "seeking to ensure that incumbents have every possible reasonable incentive to relocate promptly and voluntarily."[7] According to the Commission, "[T]he fact that an incumbent that is subject to relocation will have the entire relocation cost paid by the new applicant [*sic*], will encourage the incumbent to negotiate voluntarily with the new applicant [*sic*], and further the interest of clearing incumbent operations *as promptly as possible* from any portion of the band allocated for use by the new entrants."[8] Because the so-called "comparable facilities" standard gives incumbents an absolute right to have their aging equipment replaced with brand new equipment if it cannot be retuned – not to mention the right to hold out for "premiums" over and above the cost of replacement facilities – the Commission seems to believe that incumbents will essentially be bribed into conformity with the Commission's band plan, and that sanctioning this sort of private payoff is better and faster than actually managing the band.

Paradoxically, however, the Commission has consistently rejected proposals for a fast, objective, monetary approach to involuntary relocation. For example, commenters have proposed that relocation payments be keyed to the book value of the equipment replaced, or to some other measure of its fair market value.[9] Alternatively, there has been a proposal for a "sliding scale" system based on the age of the equipment, with a minimum "floor" to ensure that FS operators with old but operational equipment are not left with nothing.[10] These proposals are fairer, faster, and more efficient than the rules the Commission has consistently preferred: fairer,

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7 *First Order on Reconsideration*, ¶ 75.

8 *Id.* ¶ 76 (emphasis added).

9 *See, e.g., First Report and Order*, ¶ 78.

10 *See Ex parte* letter from Mark A. Grannis to Commissioner Harold Furchtgott-Roth (May 1, 2000), at 3.

because they compensate only for what is lost; faster, because they are based on objective measures that need not be haggled over; and more efficient, because they allow FS licensees to take the relocation payment and procure the most efficient means of carrying the traffic, which may not be a replacement of what was previously in use.

These proposals have been rejected – dismissed, really – in favor of a "comparable facilities" standard that requires individual negotiations for hundreds of thousands of links. The suggestion that this preference is based on speed is literally incredible. Given the number of links in the 18 GHz band, and the necessity for relocating the vast majority of them sooner or later, voluntary negotiations over the specifications and physical construction of replacement facilities would seem on its face to be perhaps the slowest possible method of accomplishing relocation. Moreover, the "comparable facilities" standard for involuntary relocation sets the floor for the negotiations so high that it promotes impasse rather than swift agreement. Indeed, counsel for the Commission recently told the U.S. Court of Appeals for the D.C. Circuit that relocation negotiations in the PCS bands, based on the 1993 *Emerging Technologies* rules, were *still going on more than seven years later.*[11] Clearly, the Commission needs to be honest with itself and with the public: If the systematic overcompensation of incumbents is supposed to be justified on grounds that it is fast, then that policy is a proven failure.

Of course, speed is not the only policy goal the Commission has articulated. The Commission has been concerned first and foremost with ensuring that involuntary relocation does not force FS operators to discontinue service. Thus, in the *First Order on Reconsideration*, the Commission states its belief "that compensating licensees merely for the depreciated value of their equipment is insufficient to enable incumbents to construct comparable facilities, and, thus,

[11] Transcript of Oral Argument, Teledesic v. FCC, No. 00-1466 (D.C. Cir. argued Nov. 5, 2001), at 39.

to remain in full operation, in replacement spectrum."[12] But there are two obvious problems with this statement of belief: First, constructing replacement facilities is not necessarily the most efficient thing for incumbents to do. If they can satisfy their communication needs by other means, they may be much better off pocketing the money and moving to fiber, satellite, or even unlicensed use. Second, even if replacement facilities are called for, there is no basis for thinking that the incumbent will be unable to construct such facilities unless the entire cost is underwritten by the new entrant. Indeed, this represents an extremely simplistic view of business finance that is unworthy of the Commission. New equipment is a capital investment, which must be renewed from time to time. Whether the FS operator chooses to buy the equipment outright once every ten or fifteen years, or to finance the equipment over time, the FS operator will have an unavoidable need to plan for equipment replacement and a financial strategy for doing so. Put another way, equipment replacement – whether it happens because of relocation or rather because the equipment simply wore out and broke down – is essentially a balance sheet transaction. If the Commission's policies compensate the incumbent for what disappears from the balance sheet, then the incumbent has been made completely whole and there is no danger of disrupting service.[13]

The U.S. Court of Appeals for the D.C. Circuit has recently ruled that the Commission's 18 GHz relocation rules are reasonable in light of the articulated policy of "protecting existing

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[12] *First Order on Reconsideration*, ¶ 77.

[13] It is possible to hypothesize an FS operator who is limping along with twenty-year-old equipment that is operational, but worthless as a financial matter (*i.e.*, the book value and the fair market value are essentially zero). Supposing further that this operator has insufficient customer revenue to finance equipment replacement, then such an operator might indeed discontinue operations after relocation if he received only a nominal sum from the new entrant. But leaving aside the question whether such a licensee exists, it is important to see that the reason for the discontinuance would be because revenues do not support equipment replacement – not because the relocation payment was inadequate. Indeed, under a "sliding scale" type proposal this operator might get a one-time payment far in excess of what anyone would willingly pay for such a defunct business.

FS operations 'to the maximum extent possible.'"[14] If protection of incumbents were the only goal, then to call the rules reasonable would be an understatement. But to the extent that the Commission wishes to facilitate the *prompt* relocation of incumbents and the *swift* deployment of new satellite services in the 18 GHz band, more is required. The Commission should take this last opportunity to evaluate the ten-year-old rules it has borrowed against the policies it has enunciated most recently in this very proceeding. SIA submits that the Commission's own goals would be served far better by the adoption of an objective measure of compensation for involuntary relocation, such as the "fair market value" or "sliding scale" proposals cited above.

II. Testing of Replacement Facilities in the 18 GHz Band Will Not Require Twelve Months.

In the *First Order on Reconsideration,* the Commission correctly rejected a request from Winstar to permit relocated incumbent operators to return to their original spectrum assignments at any time up to twelve months after the relocation.[15] Creating such a "right to return" would have been extremely disruptive to the FSS licensee(s) paying for the relocation, since it would subject nearby FSS customers to twelve months of being vulnerable to the possibility of harmful FS interference even after relocation has supposedly occurred. Instead of creating such a problematic *post hoc* remedy for FS incumbents, the Commission modified its rules to create a much longer period for pre-relocation testing of new facilities: Whereas the original section 101.91(c) had given incumbents "a reasonable time" for testing, the modified version gives FS incumbents up to twelve months.[16]

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[14] *Teledesic v. FCC*, No. 00-1466 (D.C. Cir. Dec. 28, 2001), slip op. at 6 (quoting *Report and Order,* 15 F.C.C. Rcd. at 13,431-32).

[15] *First Order on Reconsideration* ¶¶ 68-70.

[16] *Id.* ¶ 70.

In principle, SIA supports the "testing" approach, but twelve months is much, much too long to be "a reasonable time" in most cases. Indeed, nothing in the record supports the implicit proposition that testing of FS equipment could possibly take twelve months, unless one supposes that the facilities repeatedly fail the incumbents' tests. Moreover, the effect of a twelve-month testing period would be to require satellite operators to pay for relocation much sooner than would otherwise be necessary, exacerbating the "frontloaded" capital requirements of satellite infrastructure deployment without any attending benefit. Moreover, the new version of the rule would permit, if not encourage, footdragging by recalcitrant FS incumbents, in derogation of the Commission's increasing emphasis on the need to accomplish relocation "as promptly as possible."[17]

SIA believes that it should be possible for any relocated 18 GHz incumbent to test new FS facilities for comparability within thirty days of the time they are represented by the FSS operator(s) to be ready for use. In the event the new facilities are found inadequate, a new thirty-day period could begin each time the FSS entrant modifies the facilities. This would provide the FSS entrant with every incentive to make sure the facilities are right the first time, and would avoid even the possibility of unreasonable delay by relocated incumbents. SIA therefore requests that the Commission once again amend section 101.91(c) to provide that FS incumbents may test replacement facilities for up to thirty days, rather than up to twelve months.

CONCLUSION

The Commission is obviously attempting to develop an approach to relocation compensation that is largely the same from band to band. It is essential that the rules be fair and

[17] *Id.* ¶ 76.

efficient. Before the Commission reaffirms its 18 GHz rules or exports them to another band, it should take a hard look at the policies it has articulated and the very poor fit between those policies and the chosen rules.

Respectfully submitted,

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