Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
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

PETITION FOR RECONSIDERATION

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

In its *Second Report and Order* in this proceeding, the Commission has displaced Multipoint Distribution Service ("MDS") licensees from the 2150-2162 MHz band without identifying any comparable replacement spectrum and without providing any assurance that their relocation costs will be fully reimbursed. The Commission's decision is (1) arbitrary and capricious, (2) an evisceration of the rights MDS licensees purchased at the Commission's MDS Basic Trading Authority ("BTA") auction, and (3) a breach of faith with MDS licensees who have made every effort to cooperate with the Commission in this matter for over two years. The Wireless Communications Association International, Inc. ("WCA") thus requests that the Commission's decision be reversed and MDS be returned to the 2150-2162 MHz band until the Commission can assure that MDS licensees will be afforded comparable replacement spectrum and full compensation for their relocation costs.

Certainly, the *Second Report and Order* reaffirms the maxim that no good deed goes unpunished. On multiple occasions, the Commission has asked interested parties to comment on the impact MDS relocation will have on deployment of MDS wireless service, the availability of comparable replacement spectrum and the relocation costs that would have to be reimbursed if MDS were moved out of the 2150-2162 MHz band. At every turn, WCA and the major holders of MDS spectrum rights have provided the Commission with detailed comments addressing each of these issues, whereas those who seek to displace MDS from the 2150-2162 MHz band have offered virtually nothing. Moreover, when it became clear that those who wish to displace MDS were not going to identify any comparable replacement spectrum, WCA and the major MDS stakeholders took the initiative and filed a highly specific, comprehensive relocation plan that accommodates the interests of all concerned parties. To date, no party has submitted an alternative proposal that is even feasible, much less superior.

Incredibly, however, the Commission has rewarded the MDS industry's efforts by formally reallocating the 2150-2155 MHz band for AWS (thus effectively displacing MDS from the 2150-2162 MHz band) and deferring consideration of all MDS relocation issues to a ***third*** *Notice of Proposed Rulemaking* (the "*Third NPRM*"), without indicating how or when those issues might be resolved. That is arbitrary, "cart before the horse" decision-making — since identification of comparable replacement spectrum and full reimbursement for relocation costs are the predicates for relocation of MDS licensees, the Commission's failure to address them in the *Second Report and Order* necessarily leaves no foundation for MDS relocation. Moreover, should the Commission ultimately determine that no comparable replacement spectrum exists and/or that full reimbursement of MDS relocation costs is not feasible, the agency will have no choice but to reverse its decision to displace MDS from the 2150-2162 MHz band, thus throwing its entire AWS allocation scheme into doubt.

Equally baffling is the Commission's refusal to explain how its repossession of the 2150-2162 MHz band can be squared with the rights MDS licensees bought and paid for at the Commission's 1996 nationwide MDS Basic Trading Authority ("BTA") auction. Indeed, it should be obvious that repossession of previously auctioned spectrum without the *quid pro quo* of comparable replacement spectrum and full reimbursement of relocation costs threatens the integrity of the Commission's entire auction process. Once the Commission establishes this sort of precedent, there will be no turning back – those who have already won auctioned licenses, and

those who are contemplating participation in future auctions, will undoubtedly take note of the Commission's actions and reassess their willingness to invest the substantial sums of money now required to obtain and develop wireless licenses through the competitive bidding process. Furthermore, even if the Commission were to ignore the ramifications of the *Second Report and Order* on future spectrum auctions (and it should not), it cannot escape the substantial legal issues and inevitable court challenges that will arise from repossessing spectrum auctioned for one service and handing it over to another, without giving comparable replacement spectrum to the dispossessed auction winners and providing for full recovery of relocation costs.

Finally, the Commission's action violates the legally protected interests that incumbent licensees have in their licenses, whether bought at auction or otherwise. It is well established that incumbent licensees have vested interests in their licenses that are akin to property interests, and thus the Commission's decision implicates the Fifth Amendment's prohibition on takings of property without just compensation. Even in the absence of relief predicated on Fifth Amendment principles, courts have been willing to consider claims of detrimental reliance where the Commission has thwarted the legitimate investment-backed expectations of its licensees. Where MDS is concerned, the *Second Report and Order* gives those expectations very short shrift.

In sum, the Commission has taken the 2150-2162 MHz band from MDS licensees without giving them anything in return for it, and neither the *Second Report and Order* nor the *Third NPRM* provide any assurance that the Commission will be able to identify comparable replacement spectrum and ensure full reimbursement of their relocation costs. Again, the MDS industry has done everything possible to cooperate with the Commission in this proceeding. For their trouble, MDS licensees have been thrown out of their spectrum with the Oz-like mandate that they "come back tomorrow" for yet another iteration of comments and reply comments on issues that have already been fully vetted in this proceeding. This is not fair, reasoned decision-making and must be rectified immediately.

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

PETITION FOR RECONSIDERATION

The Wireless Communications Association International, Inc. ("WCA"), pursuant to Section 1.429(d) of the Commission's Rules, hereby petitions for reconsideration of the Commission's *Second Report and Order* in the above-captioned proceeding.[1] For the reasons set forth below, the Commission's decision to relocate Multipoint Distribution Service ("MDS") licensees in the 2150-2162 MHz band without both identifying comparable replacement spectrum and assuring that all their relocation costs will be paid is (1) arbitrary and capricious, (2) an evisceration of the rights MDS licensees purchased at the Commission's MDS Basic Trading Authority ("BTA") auction, and (3) a breach of faith with MDS licensees who have made every effort to cooperate with the Commission in this matter for over two years. WCA thus requests that the Commission reverse its decision and return MDS to the 2150-2162 MHz band until it can assure that MDS licensees will be afforded comparable spectrum and full compensation for their relocation costs. Any failure to do so will expose the Commission's

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[1] *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*, 17 FCC Rcd 23193 (2002) (the "*Second Report and Order*").

entire allocation scheme for advanced wireless services ("AWS") to further regulatory delays and a heightened risk of judicial challenge.[2]

I. INTRODUCTION.

WCA's stake in the Commission's treatment of MDS licensees in this proceeding is well documented and need not be reiterated here.[3] Throughout the entire course of ET Docket No. 00-258, the Commission has repeatedly asked and WCA has answered a variety of questions raised in the Commission's initial *Notice of Proposed Rulemaking* and subsequent *Further Notice of Proposed Rulemaking* as to the impact relocation of MDS licensees from the 2150-2162 MHz band would have on deployment of MDS wireless service, the availability of comparable replacement spectrum and the relocation costs that must be reimbursed in order to make displaced MDS licensees whole. Indeed, WCA and the major holders of rights to MDS spectrum at 2150-2162 MHz have been the only parties to address these issues in any depth, notwithstanding the Commission's repeated request that all interested parties help the agency solve the problem. Moreover, when it became clear that those who seek to displace MDS licensees out of the 2150-2162 MHz band were not going to identify comparable replacement spectrum, WCA and the major MDS stakeholders took the initiative and submitted a highly

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[2] Alternatively, AWS is referred to herein as third generation or "3G" mobile service. The Commission has recognized that 3G will be the primary use of AWS spectrum. *See, e.g., Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, at ¶ 3 (rel. Nov.22, 2002).

[3] *See, e.g.,* Comments of Wireless Communications Association International, ET Docket No. 00-258 (filed Feb. 22, 2001) ("WCA NPRM Comments"); Reply Comments of Wireless Communications Association International, ET Docket No. 00-258 (filed March 9, 2001) ("WCA NPRM Reply Comments"); Comments of Wireless Communications Association International on Final Report, ET Docket No. 00-258 (filed Apr. 16, 2001); Comments of Wireless Communications Association International on Further Notice of Proposed Rulemaking, ET Docket No. 00-258 (filed Oct. 22, 2001) ("WCA FNPRM Comments"); Reply Comments of Wireless Communications Association International on Further Notice of Proposed Rulemaking, ET Docket No. 00-258 (filed Nov. 8, 2001) ("WCA FNPRM Reply Comments"); Comments of Wireless Communications Association International, WT Docket No. 02-353 (filed Feb. 7, 2003) ("WCA AWS Service Rules Comments").

detailed, comprehensive relocation proposal that to date remains the *only* workable solution to clearing the 2150-2162 MHz band and allowing an auction of the full 2110-2155 MHz band for AWS.

The Commission's *Second Report and Order*, unfortunately, reaffirms the maxim that no good deed goes unpunished. Incredibly, the Commission has rewarded the MDS industry's cooperation by reallocating the 2150-2155 MHz band for AWS *without identifying any comparable replacement spectrum and without assuring MDS licensees in the 2150-2162 MHz band that they will be fully compensated for their relocation costs.* Instead, the Commission effectively has taken the matter back to square one by deferring the relocation question to a third round of comments and reply comments, leaving MDS licensees in the dark as to how and when the matter might be resolved. The irony here is a cold one: for all of their good faith and responsive filings in this proceeding (and, conversely, the non-responsive filings of those who seek to displace them), MDS licensees in the 2150-2162 MHz band have been left spectrally homeless, with no guarantee that they will be given an acceptable place to relocate and be fully reimbursed for moving there. This is not fair, reasoned decision-making and must be corrected immediately.

The Commission should not underestimate the seriousness of what it has done here – its deferral of the matter notwithstanding, the fact remains that it has taken the 2150-2162 MHz band away from MDS licensees and given them absolutely nothing in return for it. MDS licensees in that spectrum thus are now materially worse off than they were when these proceedings began, and will have no choice but to defend their rights as aggressively as possible in any available forum if the Commission fails to reverse its error.

II. DISCUSSION.

A. The Commission's Displacement of MDS Licensees From the 2150-2162 MHz Band Is Not Reasoned Decision-Making.

It is well settled that the Commission's discretion is not unfettered – whether in spectrum reallocation matters or otherwise, the Commission must articulate a satisfactory explanation for its decisions, including a rational connection between the facts found and the choice made.[4] Put another way, "[w]hile agency expertise deserves deference, it deserves deference only when it is exercised."[5] As noted by the Seventh Circuit:

> It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational – must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving.[6]

Insofar as MDS licensees are concerned, the fundamental legal issue here is whether the Commission acted in an "arbitrary and capricious" manner by displacing MDS licensees from the 2150-2162 MHz band without identifying any comparable replacement spectrum and without providing assurance that their relocation costs will be fully reimbursed. Presumably, the Commission intends to take refuge in the fact that it has already released yet another notice of proposed rulemaking on the subject (albeit without indicating how or when that proceeding might be resolved) and requested further comment on the issue there.[7] However, the

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[4] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 43 (1983); *SEC v. Chenery Corp*., 318 U.S. 80, 87-88 (1943).

[5] *Achernar Broadcasting Company v. FCC*, 62 F.3d 1441,1447 (D.C. Cir. 1995), *quoting Cities of Carlisle and Neola v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984).

[6] *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (citations omitted).

[7] *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 et al.*, ET Docket No. 00-258 *et al.*, FCC 03-16, at ¶¶ 62-73 (rel. Feb. 10, 2003) ("*Third NPRM*").

Commission's discretion to defer critical decisions is not unlimited. Although the Commission clearly has some authority to conduct "incremental" rulemaking, it "cannot 'restructure [an] entire industry on a piecemeal basis' through a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale."[8] To understand why the Commission's displacement of MDS licensees from the 2150-2162 MHz band fails that standard, it is necessary to review the history of this proceeding leading up to adoption of the *Second Report and Order*.

The First *Notice of Proposed Rulemaking*. Even prior to the adoption of its initial *Notice of Proposed Rulemaking* in this docket over two years ago, the Commission recognized that MDS broadband service provides unique and substantial benefits to the public that are not being provided by traditional wireline technologies. Most important, the Commission found that (1) "[t]he growth of [MDS] two-way service is intended to provide affordable service to those market sectors that are more likely to be underserved and provide a competitive choice to consumers in more urban and more affluent markets,"[9] and (2) "in rural or otherwise underserved markets in the country, [MDS] may be the sole provider of broadband service."[10] Logically, then, the *NPRM* requested comment on the impact reallocation of MDS spectrum for AWS would have on the viability of MDS wireless service. As to the 2150-2162 MHz band, the Commission specifically asked MDS licensees to comment on "what effect reallocation or relocation of the 2150-2162 MHz band would have on their current and planned use of the

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[8] *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) ("*NAB*"), *quoting ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984) ("*ITT*").

[9] "Interim Report - Spectrum Study of the 2500-2690 MHz Band: The Potential for Accommodating Third Generation Mobile Systems," ET Docket No. 00-258, *FCC Staff Report*, at 22-23 (Nov. 15, 2000).

[10] *Id.* at 22.

spectrum."[11] The Commission also invited comment on whether it should apply its existing microwave relocation procedures to displacement of any incumbent MDS licensees. [12]

In response, WCA and the major holders of MDS spectrum rights submitted detailed comments describing the current and planned use of the band and the unsuitability of the Commission's existing microwave relocation procedures to any relocation of MDS incumbents out of 2150-2162 MHz.[13] In particular, WCA emphasized that the Commission's relocation policies have been applied to services, such as point-to-point microwave, broadcast auxiliary service ("BAS") and land mobile radio, that are fundamentally different from services being offered over MDS spectrum.[14] As a result, those policies fail to address considerations that may not have been relevant in the past, but are highly relevant to making existing MDS licensees, the system operators who lease MDS channels, and consumers whole.[15] WCA then provided an extensive list of those considerations,[16] including but not limited to the following:

- MDS would be the first mass-market consumer service to be relocated by the Commission. As a result, MDS operators will incur extraordinary expenses to notify subscribers that their customer premises equipment must be replaced, to schedule appointments for such replacement, and to then supervise and successfully complete innumerable truck rolls and equipment change-outs.

- In addition to the costs associated with acquiring new customer premises equipment to replace existing equipment (which obviously must be reimbursed), operators will incur expenses in connection with either (1) the diversion of their own personnel from the task

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[11] *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 596, 619 (2001) ("*NPRM*").

[12] *See id.*

[13] *See, e.g.,* WCA NPRM Comments at 41-43, 50-52; Comments of Sprint Corporation, ET Docket No. 00-258, at 26-28 (filed Feb. 22, 2001).

[14] *See* WCA NPRM Comments at 49.

[15] *See id.*

[16] *See generally id.* at 50-52.

of marketing and installing new subscribers to the task of relocation, or (2) hiring additional personnel to perform relocation-related functions. Although in the past the Commission has not provided for reimbursement of internal costs, such a policy would be grossly unfair under these circumstances.[17] Moreover, because system operators do not have unlimited resources to devote to relocation *and* expanding their existing operations, every resource that an MDS operator devotes to relocation is one *not* devoted to marketing MDS broadband service aggressively in direct competition with cable modem and DSL service, including DSL provided by the ILECs (some of whom, through their wireless subsidiaries and affiliates, are the very same entities attempting to relocate MDS incumbents out of the 2150-2162 MHz band). Because the personnel that have been hired, trained, and paid to add new subscribers will be diverted to the relocation effort, MDS-based broadband systems will inevitably lose potential subscribers to competing cable modem and DSL services.

- A relocation of MDS from the 2150-2162 MHz band would represent the first relocation of a service in which licensees routinely lease capacity to system operators who invest substantial sums in reliance on the availability of that capacity. Thus, the Commission's relocation policies would require a substantial overhaul to assure that the lessees are made whole, as well as the MDS licensees. Particularly at a time when the Commission is attempting to promote the use of secondary market transactions (such as leasing) to alleviate spectrum shortages, it would be unthinkable for the Commission to leave lessees without redress in the case of a forced relocation.[18]

- At the time the *NPRM* was released, at least one operator of MDS-based broadband services was selling customer premises equipment at retail, and many operators are planning on such sales in the near future. As a result, the Commission's relocation policies will need to be expanded to assure that consumers who have purchased customer premises equipment are made whole.

- An MDS system (whether a broadband system or a video system) is comprised of facilities licensed to multiple licensees operating on multiple channels. Historically, the Commission has utilized a "selective relocation" policy under which the newcomer was free to pick and choose the facilities it will relocate (provided no interference was caused).[19] Such a policy could be disastrous here, since it threatens to Balkanize MDS deployment into multiple bands that would vary from market to market, depriving the MDS industry of economies of scale in the design and manufacturing of equipment. The Commission must facilitate a simultaneous migration of all MDS licensees from 2150-

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[17] *Cf.* 47 C.F.R. § 101.75(a)(1) (no reimbursement required for "internal resources devoted to the relocation process").

[18] *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 15 FCC Rcd 24203 (2000).

[19] *See, e.g., Amendments to the Commission's Rules Regarding a Plan for Sharing Costs of Microwave Relocation*, 11 FCC Rcd 8825, 8845 (1996); *see also* 47 C.F.R. § 101.75(a).

2162 MHz to any new spectrum, and not allow someone else to pick and choose which stations will be relocated.

Significantly, the parties who openly supported displacing MDS licensees had virtually nothing to say about the issues discussed above, and made no serious attempt to identify any comparable replacement spectrum.[20] Simply put, on the question of how, when and where to relocate MDS licensees to accommodate AWS, the position of those parties (adopted, unfortunately, in the *Second Report and Order*) was "just do it" – the substantial and unprecedented legal, technical, economic and public policy implications of relocating MDS licensees from the 2150-2162 MHz band were mere inconveniences that merited no substantive discussion. While certain mobile carriers offhandedly suggested that the Commission could move MDS incumbents from the 2150-2162 MHz band to the 2155-2165 MHz band, WCA demonstrated on reply that this idea was seriously flawed.[21] Perhaps not coincidentally, those carriers did not submit the proposal again.

The *Further Notice of Proposed Rulemaking.* With all of the above in hand, on August 20, 2001 the Commission issued a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in this proceeding, in which it again sought comment on whether it should reallocate the 2150-2160 MHz band for AWS or as relocation spectrum for other services displaced by AWS.[22] The Commission also requested comment on the impact of reallocating the 2150-2160 MHz band for AWS and asked commenting parties to identify other frequency bands

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[20] *See generally* WCA NPRM Reply Comments at 18-24.

[21] *See id.* at 31-34.

[22] *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, 16061 (2001) (the "*FNPRM*").

that might serve as comparable replacement spectrum.[23] Equally important, the Commission proposed that MDS incumbents be "entitled to comparable facilities and/or adequate replacement spectrum," and solicited comment on the possibility of using the 1910-1930 MHz and/or 1990-2025 MHz bands for that purpose.[24] In addition, the Commission sought comment on the applicability of its existing microwave relocation policies to MDS and the "types and magnitude of costs to relocate incumbent [MDS] operations."[25] In other words, in most material respects the *FNPRM*'s inquiry as to the 2150-2162 MHz band was similar to that in the *NPRM*.

WCA's response to the *FNPRM* was cooperative and straightforward: it advised the Commission that while MDS licensees would strongly prefer to remain in the 2150-2162 MHz band, they would be willing to move to new spectrum if, among other things, truly comparable replacement spectrum were identified and those seeking to displace MDS licensees were required to bear all related relocation costs.[26] In addition, WCA reiterated why the Commission's existing microwave relocation policies were not appropriate for MDS, listing the relevant considerations it had already identified in the comments it had submitted eight months earlier in response to the *NPRM*.[27]

Yet again, however, those seeking to displace MDS licensees from the 2150-2162 MHz band failed to answer the call. No party challenged WCA's proposed relocation criteria for

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[23] *Id.*

[24] *See id.* at 16048 ("We seek comment on whether some or all of the 1910-1930 MHz band should be reallocated for new advanced wireless services use or for incumbents displaced by advanced wireless services."); *id.* at 16055 ("this spectrum [1990-2025 MHz] could be made available for displaced incumbents.").

[25] *Id.*

[26] *See, e.g.* WCA FNPRM Reply Comments at 5-6, 16-17.

[27] *Id.* at 10-14

MDS. In fact, *all parties who addressed the issue agreed that relocated MDS licensees must receive comparable replacement spectrum and be fully compensated for the costs associated with any relocation*.[28] However, the advocates for clearing the 2150-2162 MHz band again did not submit any technical studies demonstrating that any comparable replacement spectrum exists. Instead, relying on rhetoric in lieu of technical analysis, those parties suggested four bands as possible replacement spectrum for MDS licensees displaced from the 2150-2162 MHz band: the 2385-2400 MHz band, the 2185-2200 MHz band, the 2010-2025 MHz band, and the 1910-1930 MHz band.[29] On reply, WCA submitted a detailed response showing why those proposing these alternatives had failed to demonstrate their feasibility.[30] None of those parties have submitted responsive technical information or otherwise taken issue with WCA's assessment of their proposals.

The MDS Industry Compromise. Seeing that their opponents were unenthusiastic about helping the Commission identify comparable replacement spectrum, WCA and the major MDS stakeholders took matters into their own hands and submitted a highly detailed and comprehensive compromise proposal to relocate MDS licensees from the 2150-2162 MHz band to paired spectrum in the 1910-1916/1990-1996 MHz band.[31] The specifics of that proposal have been a matter of public record for over seven months and will not be repeated *verbatim*

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[28] *See, e.g.,* 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); Comments of Cingular Wireless LLC, ET Docket No. 00-258, at 4 (filed Nov. 8, 2001).

[29] *See* WCA FNPRM Reply Comments at 4.

[30] *Id.* at 4-16.

[31] *See* Letter from Wireless Communications Association International, *et al.*, to Michael K. Powell, Chairman, Federal Communications Commission, ET Docket No. 00-258 (filed July 11, 2002). The full text of the proposal, titled "A Compromise Solution for Relocating MDS From 2150-2162 MHz," was attached to that letter and is referred to herein as the "MDS Industry Compromise."

here. Most important, the MDS Industry Compromise is a quintessential "win-win" solution, since (1) it clears the 2150-2162 MHz band of MDS incumbents, thus permitting an auction of the 2110-2155 MHz band for AWS; (2) although the plan takes away some of the operational flexibility that MDS licensees currently enjoy at 2150-2162 MHz, it eliminates the crippling threat of relocation and thus permits MDS licensees to move forward with their business plans; and (3) the plan may be implemented without causing harmful interference or otherwise having any adverse impact on any incumbent stakeholder. To date only three parties have opposed the MDS Industry Compromise, and WCA has already rebutted their objections.[32] Significantly, *neither the opponents of the MDS Industry Compromise nor any other party submitted an alternative relocation proposal that is feasible, much less superior.*

Hence, as of the date of its adoption of the *Second Report and Order*, the Commission had twice requested and received comment on the impact of displacing MDS licensees out of the 2150-2162 MHz band, twice requested and received comment on whether it should apply its existing microwave relocation policies to those licensees, and requested and received proposals as to possible replacement spectrum. Now, however, the Commission has responded by formally reallocating the 2150-2155 MHz band for AWS, but without identifying any comparable replacement spectrum for MDS licensees who necessarily will be displaced from the 2150-2162 MHz band.[33] Instead, the Commission punted that issue and all others relating to MDS

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[32] *See* Letter from Wireless Communications Association International, *et al.*, ET Docket No 00-258, IB Docket No. 01-185, and WT Docket No. 02-55 (filed Aug. 29, 2002); Letter from Wireless Communications Association International, *et al.*, ET Docket No 00-258, IB Docket No. 01-185, and WT Docket No. 02-55 (filed Sept. 23, 2002); Letter from Wireless Communications Association International, *et al.,* ET Docket No. 00-258, IB Docket No. 01-185 and WT Docket No. 02-55 (filed Sept. 5, 2002).

[33] *See Second Report and Order*, 17 FCC Rcd at 23212-13.

relocation to a ***third*** notice of proposed rulemaking, in which it has repeated the questions that have already been asked and answered in the *NPRM* and *FNPRM*, thus effectively bringing the process back to square one.[34]

The Commission's backhanded treatment of MDS licensees in the *Second Report and Order* is not fair, reasoned decision-making. Certainly, there is no legal or other requirement that the Commission initiate a *third* rulemaking to adopt the MDS Industry Compromise or otherwise address relocation of MDS licensees from the 2150-2162 MHz band. As detailed above, the possibility of reallocating the 2150-2162 MHz band for AWS and relocating incumbent MDS licensees to alternative spectrum was raised in both the *NPRM* and the *FNPRM*. Moreover, in the *FNPRM* the Commission requested comment on the possibility of using the 1910-1930 MHz and/or 1990-2025 MHz bands as relocation spectrum for displaced MDS licensees. The Commission has also had ample opportunity to review the MDS Industry Compromise, and interested parties too have had ample opportunity to comment on that proposal.[35] In other words, the issues of MDS replacement spectrum and relocation costs have already been fully vetted in this docket, and thus the Commission may decide those matters without further proceedings - the Administrative Procedure Act requires nothing more.[36]

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[34] *See id.*; *Third NPRM* at ¶ 72 ("We seek comment on the amount and location of spectrum needed to relocate MDS operations at 2150-2160/62 MHz.") and ¶ 73 ("We also seek additional comment on the appropriate relocation spectrum for MDS. Comments should address what spectrum should be used to accommodate existing MDS operations and how such spectrum is adequate to provide comparable facilities to minimize disruption to existing services.").

[35] *See* Letter from Regina M. Keeney, Counsel for Nextel Communications, to the Federal Communications Commission, ET Docket No. 00-258 (Aug. 9, 2002); Comments of ICO Global Communications, ET Docket No. 00-258 (filed Aug. 8, 2002); Comments of the Cellular Telecommunications & Internet Association, ET Docket No. 00-258 (filed Aug. 8, 2002).

[36] *See, e.g., Owensboro On The Air v. United States*, 262 F.2d 702, 708 (1958), *quoting Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 28 (D.C. Cir. 1954). The Commission's decision not
(continued on next page)

Further, the Commission's treatment of MDS in this proceeding represents precisely the sort of "piecemeal regulation" that courts have previously found to be arbitrary and capricious. As noted by the D.C. Circuit, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future."[37] Here the conflict is even more striking than that – since identification of comparable replacement spectrum and full reimbursement for relocation costs are the predicates for relocation of MDS licensees, the Commission's failure to address them in the *Second Report and Order* necessarily leaves no foundation for MDS relocation. Moreover, the relocation issues deferred here are unprecedented and far more complex than those deferred with judicial approval in *National Ass'n of Broadcasters v. FCC*.[38] In that case, the Commission was relocating only approximately 1900 point-to-point microwave ("FS") links from the 12 GHz band to comparable replacement spectrum *it had already identified*,[39] and used a variety of safeguards to protect incumbent point-to-point licensees pending adoption of final relocation procedures.[40] By contrast, in this case the Commission is attempting to relocate an exponentially larger number of

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to resolve the MDS relocation issue in the *Second Report and Order* is particularly odd given its agreement that "[the] key characteristics of any spectrum we find to be suitable for the provision of AWS are our ability to readily identify incumbent users and to provide a clear and comprehensive procedure to migrate incumbent users to suitable alternate bands." *Second Report and Order*, 17 FCC Rcd at 23203. As demonstrated throughout the record and in the MDS Industry Compromise, MDS licensees in the 2150-2162 MHz band have satisfied both criteria.

[37] *ITT*, 725 F.2d at 754.

[38] *See* n. 8 *supra*.

[39] *See NAB*, 740 F.2d at 1209, 1211.

[40] Specifically, in *NAB* the Court found that the uncertainty created by deferral was mitigated by (1) the Commission's findings as to the estimated costs of relocating incumbent FS licensees to higher spectrum; (2) the Commission's stipulation that incumbent FS licensees would continue to hold primary spectrum rights in the 12 GHz band for five years, and could remain in the band on a secondary basis thereafter; (3) the Commission's creation of a special relief process for FS licensees whose relocation proved unworkable for technical or financial reasons; and (4) the Commission's completion of other related rulemaking proceedings. *Id.* at 1212.

point-to-multipoint MDS links to unidentified spectrum with no protective safeguards whatsoever, under irrelevant relocation policies with no substitute procedures in hand. These are hardly trivial issues - should the Commission ultimately determine that no comparable replacement spectrum exists and/or that full reimbursement of MDS relocation costs is not feasible for any reason, the agency will have no choice but to reverse its decision to relocate MDS out of the 2150-2162 MHz band, thus throwing its entire AWS allocation scheme into doubt.[41] This is the epitome of unreasoned, "cart before the horse" decision-making.

The irrationality of the Commission's treatment of MDS becomes even more apparent when viewed in the context of all pending Commission spectrum allocation proceedings directly or indirectly relating to AWS. As an initial matter, the Commission is statutorily prohibited from designating the 2110-2155 MHz band as flexible use spectrum absent a finding that, *inter alia*, such use "would not result in harmful interference among users."[42] Since it has yet to identify relocation spectrum for MDS or adopt service rules for AWS, the Commission is left to explain how it could have possibly concluded that flexible use of the 2110-2155 MHz band will not cause harmful interference to MDS. This lapse of logic highlights the fact that MDS relocation is one strand of an extremely complicated weave of interrelated issues -- reallocating spectrum for AWS, relocating non-MDS licensees displaced by AWS to comparable spectrum, recapturing spectrum in the 1990-2025/2165/2200 MHz band from the Mobile Satellite Service ("MSS") for AWS or displaced incumbents, allowing MSS licensees to utilize their remaining spectrum for a so-called ancillary terrestrial component ("ATC"), and imposing service rules (particularly

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[41] *See id*.

[42] 47 U.S.C. § 303(y)(2)(C).

interference protection rules) on AWS and ATC operations.[43] As WCA has already noted, the Commission's decision to address these issues in separate proceedings at separate times has thrust MDS into the spectral version of musical chairs – as each round is completed it becomes more and more likely that, once the spectrum needs of others have been satisfied, there will be no adequate spectrum to which MDS channel 1 and 2/2A licensees can be relocated to make room for 3G.[44] This is because inter-service interference considerations, coupled with the current state of technology, impose significant practical limitations where spectrum used for subscriber-to-base transmissions is located in close proximity to spectrum used for base-to-subscriber transmissions.[45]

Finally, the Commission's relegation of MDS to second-class status in the debate over an additional 3G spectrum allocation cannot be reconciled with the overriding policy objectives of this proceeding. As the Commission has stated from the very beginning, the overriding goal of this proceeding is to "explore the possibility of introducing new advanced mobile and fixed services," including those allocated for MDS.[46] In that vein, the Commission subsequently acknowledged the "significant value" of MDS broadband service in refusing to displace

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[43] *See* WCA AWS Service Rules Comments at 1-2 (filed Feb. 7, 2003).

[44] *Id.* at 2.

[45] This issue is of particular concern in view of the Commission's recent decision to permit MSS operators to operate ATC facilities in the 2000-2020 MHz and 2180-2200 MHz bands. *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, et al.*, IB Docket No. 01-185 *et al.*, FCC 03-15 (rel. Feb. 10, 2003). Although WCA is still reviewing the impact of that decision on MDS relocation, the Commission's determination that relocated MDS licensees will be obligated to provide interference protection to ATC necessarily limits (unless reversed on reconsideration) the options available to the Commission for relocating MDS and freeing the entire 2110-2155 MHz band for AWS.

[46] *See NPRM*, 16 FCC Rcd at 597.

incumbent MDS licensees from the 2500-2690 MHz band for the benefit of AWS.[47] Unarguably, the Commission's goal of promoting the development of *all* advanced wireless services is poorly served by the agency's harsh and potentially fatal treatment of MDS here. The Commission can and should strive to achieve a "win-win" solution that accommodates the need for expeditious 3G deployment *and* preservation of the wireless broadband service that by the Commission's own admission MDS is well suited to provide. Before such a "win-win" can be accomplished, however, the Commission must first undo the "win-lose" created by the *Second Report and Order*.[48]

B. The Commission's Failure to Acknowledge the Rights of MDS BTA Auction Winners Undermines the Entire Auction Process and Gives MDS BTA Auction Winners Additional Legal Grounds for Challenging the *Second Report and Order*.

By now it is no secret that many MDS licensees acquired their spectrum rights (including rights to the 2150-2160 MHz band) at the Commission's 1996 nationwide auction of MDS Basic Trading Area ("BTA") authorizations.[49] Strangely, however, the Commission does not discuss this in the *Second Report and Order* – instead, the Commission merely states that it must

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[47] *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 Services,* 16 FCC Rcd 17222, 17238 (2001).

[48] The *Third NPRM* does not cure the above-described flaws in the *Second Report and Order*, and in fact appears to pull the Commission even further away from a feasible, legally sustainable solution to the MDS relocation issue. Among other things, the problem here is the Commission's stubborn refusal to acknowledge that its existing microwave relocation procedures were designed for point-to-point, non-consumer services, and thus are poorly suited to the point-to-multipoint, consumer-based services provided by MDS. Indeed, the *Third NPRM* reads as if the substantial record created by WCA and others on that point does not exist — virtually all of the language used by the Commission appears to have been taken *verbatim* from its microwave relocation orders in its *Emerging Technologies* proceeding which, again, were applied exclusively to point-to-point, non-consumer services. *See Third NPRM* at ¶ 71.

[49] *See, e.g.,* WCA NPRM Comments at 45.

eventually "address certain issues regarding MDS operations."[50] For the reasons set forth below, the Commission will only further undermine its already precarious position with respect to MDS if it continues to sidestep the issue.

Plainly, any Commission decision that results in the repossession and reauction of previously auctioned spectrum without the *quid pro quo* of comparable replacement spectrum and full reimbursement of relocation costs would put the Commission's auction process in disarray. Once the Commission establishes a precedent for repossessing and reauctioning spectrum to accommodate some other wireless service, there will be no turning back – those who have already won auctioned licenses, and those who are contemplating participation in future auctions, will undoubtedly take note of the Commission's actions and reassess their willingness to invest the substantial sums of money now required to obtain and develop wireless licenses through the competitive bidding process.[51] As a result, the very entities that the Commission hopes will participate in spectrum auctions, *i.e.*, those that are "most likely to offer new, better, and lower cost services"[52] will be discouraged from doing so, a result which in no way serves the public interest.

Furthermore, even if the Commission were to ignore the ramifications of the *Second Report and Order* on future spectrum auctions (and it should not), it cannot escape the substantial legal issues and inevitable court challenges that will arise from repossessing spectrum auctioned for one service and handing it over to another, without giving comparable replacement spectrum and full reimbursement of relocation costs to the dispossessed auction winners. The

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[50] *Second Report and Order*, 17 FCC Rcd at 23212.

[51] *Cf. FCC Report to Congress on Spectrum Auctions*, 13 FCC Rcd 9601, 9637 (attributing low bids for WCS licenses to uncertainty surrounding the auction).

[52] *Review of the Pioneer's Preference Rules*, 9 FCC Rcd 4055, 4059 (1994).

governing auction statute (47 C.F.R. § 309(j)) gives the Commission no express authority to do this, nor does it otherwise suggest that the Commission's discretion includes the right to subvert the whole process by taking auctioned spectrum away from winning bidders after it has been bought and paid for. Indeed, the D.C. Circuit "start[s] from the intuitive premise that an agency cannot, in fairness, radically change the terms of an auction after the fact,"[53] and has confirmed that "a bidder in a government auction has a 'right to a legally valid procurement process'; a party allegedly deprived of this right asserts a cognizable injury."[54] It is also clear that post-auction decisions that defeat the auction process are actionable, even where the auction itself was conducted properly – as the D.C. Circuit has noted, "[t]here is no basis for suggesting . . . that *ex post* changes can never affect the validity of a government auction."[55]

It must be emphasized that the *Second Report and Order* is not a mere *post hoc* adjustment to the MDS auction rules in response to unanticipated changes in market conditions. *The Commission's repossession of the 2150-2162 MHz band is a repossession of the asset that winning MDS bidders bought and paid for at the Commission's 1996 MDS BTA auction.* For that reason alone, this case is immediately distinguishable from *U.S. Airwaves v. FCC*, in which the D.C. Circuit upheld the Commission's post-auction amendment of its rules to create a new "menu" of financing options for winning bidders in the agency's auction of C-block PCS licenses. In that case, the Commission did *not* take spectrum away from bidders who had legitimately bought and paid for their licenses – it simply created new financing options for entrepreneurs and small businesses that may have overpaid for their licenses. Moreover, in *U.S.*

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[53] *U.S. Airwaves v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) ("*U.S. Airwaves*").

[54] *Id.* at 232, *quoting DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997).

[55] *Id.* at 232.

Airwaves the Commission justified its action as "enabling C block licensees to remain participants in the wireless market."[56] That cannot be sensibly asserted for what the Commission has done in the *Second Report and Order* – taking spectrum away from winning MDS auction bidders sabotages their participation in the wireless market.

It should also be remembered that contract principles limit the Commission's ability to repossess MDS spectrum in the manner set forth in the *Second Report and Order.* An auction is a mechanism for an exchange of an offer and acceptance - the close of the auction constitutes the acceptance of the bid, or offer, and creates "an executory contract of sale."[57] In fact, the Commission itself has consistently recognized that the close of a spectrum auction, like any auction, creates a binding contractual obligation between the Commission and the winning bidder.[58] In turn, when the United States enters into contractual relations, its rights and duties are governed generally by the law applicable to contracts between private parties.[59] By extension, then, the Commission has breached its "contract" with winning MDS auction bidders by unilaterally changing the terms of the auction after the fact, *i.e.,* by taking the spectrum they bought and paid for, without providing comparable replacement spectrum.

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[56] *Id.* at 234, *quoting Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service Licensees*, 13 FCC Rcd 8345, 8350 (1998).

[57] 7 AM. JUR. 2d, Auctions and Auctioneering § 34 (1997); *see also NextWave Personal Communications Inc.*, 200 F.3d 43, 60 (2d Cir. 1999).

[58] *See BDPCS, Inc.*, 15 FCC Rcd 17590, 17599-600 (2000) ("The announcement of the winning bidder in an auction conducted by the Commission [is] like the acceptance of high bids in auctions in other settings."); *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 14 FCC Rcd 6571, 6581 n.66 (1999) (auction creates a "contractual obligation" between the Commission "and the winning bidder as of the close of the auction").

[59] *See Franconia Assocs. v. United States*, 122 S. Ct. 1993, 2001 (2002); *Mobile Oil Exploration v. United States*, 530 U.S. 604, 607 (2000).

C. The Commission's Repossession of the 2150-2162 MHz Band Undermines the Legally Protected Interests of Incumbent MDS Licensees.

It is well established that Commission licenses convey legally protected interests that are akin to property interests. As recognized long ago by the D.C. Circuit, "[i]t is . . . apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted."[60] The Commission's reclamation of the 2150-2162 MHz band thus is susceptible to challenge under the Fifth Amendment of the Constitution of the United States, which limits the federal government's power to take property without just compensation.[61]

In *Connolly v. Pension Benefit Guarantee Corp.,* the United States Supreme Court held that there is no set formula for identifying a "taking of property" prohibited by the Fifth Amendment – instead, the Court relies upon an *ad hoc* analysis of: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[62] Here, the Commission is well aware that incumbent MDS licensees paid billions of dollars for their spectrum at auction and/or via secondary markets, and have invested even more towards deploying the facilities necessary to deliver broadband and other services over their spectrum.[63] The integrity of those investments is put at risk where the Commission repossesses and

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[60] *Yankee Network, Inc. v. FCC*, 107 F.2d 212, 217 (D.C. Cir. 1939).

[61] *See generally Railway Labor Executives Ass'n v. United States*, 987 F.2d 806, 815-16 (D.C. Cir. 1993).

[62] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986) (citation omitted); *See also Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005-06 (1984).

[63] *See*, *e.g.*, WCA NPRM Comments at 24-25.

reauctions that spectrum at will, without providing or offering any assurance that it will provide comparable replacement spectrum and full reimbursement of MDS relocation costs. Hence, under *Connolly,* the Commission's repossession of the 2150-2162 MHz band and consequent displacement of MDS licensees from that spectrum in the *Second Report and Order* arguably is tantamount to an unlawful taking of property under the Fifth Amendment, and, if not reversed, leaves the Commission vulnerable to a potentially endless parade of Tucker Act lawsuits in the Federal Court of Claims.[64]

Even in the absence of relief predicated on Fifth Amendment principles, courts have been willing to consider claims of detrimental reliance by Commission licensees. For example, in *Mobile Comm. Corp. of Am. v. FCC,* the D.C. Circuit found that the Commission, in withdrawing its previous promise of a free pioneer's preference license, had failed to give adequate consideration to the appellant's reliance concerns.[65] Elsewhere, the D.C. Circuit has recognized that even applicants may have enforceable reliance interests.[66] In the present case, MDS licensees have made enormous investments in reliance on the integrity of the Commission's licensing process, spending billions of dollars to acquire and develop MDS licenses that granted them exclusive use of specific spectrum. The Commission's repossession of the 2150-2162 MHz band in the *Second Report and Order* lays that reliance to waste, and if not reversed, will require dispossessed MDS licensees to seek judicial relief.

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[64] Under the Tucker Act, 28 U.S.C. § 1491(a), the United States Court of Federal Claims has original and exclusive jurisdiction over suits seeking compensation from the United States under the Constitution.

[65] *See Mobile Comm. Corp. of Am. v. FCC,* 77 F.3d 1399, 1407 (D.C. Cir. 1996); *see also Reuters Ltd.v. F*CC, 781 F.2d 946, 950-52 (D.C. Cir. 1986).

[66] *See, e.g., McElroy Elec. Corp. v. FCC,* 86 F.3d 248, 257 (D.C. Cir. 1996); *Florida Inst. Of Tech. v. FCC,* 952 F.2d 549, 554 (D.C. Cir. 1992).

III. CONCLUSION.

The Commission has, plain and simple, taken the 2150-2162 MHz band from MDS licensees without giving them anything in return for it. Furthermore, neither the *Second Report and Order* nor the *Third NPRM* provide any assurance that the Commission will be able to identify comparable replacement spectrum for displaced MDS licensees or devise a relocation plan that ensures fair reimbursement of all their relocation costs. The MDS industry has done everything possible to cooperate with the Commission in this proceeding, notwithstanding the substantial economic and logistical burdens relocation will impose on them. For their trouble, MDS licensees have been thrown out of their spectrum with the Oz-like mandate that they "come back tomorrow" for further proceedings, thus prolonging regulatory uncertainty for the indefinite future. There is no plausible justification for that choice. WCA therefore requests that the Commission's decision in the *Second Report and Order* as to MDS be reversed, and that MDS licensees be returned to the 2150-2162 MHz band until the Commission can assure that they will be provided comparable relocation spectrum and full reimbursement for their relocation costs.

Respectfully submitted,

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