ORIGINAL

ORIGINAL

MORRISON & FOERSTER LLP

ATTORNEYS AT LAW

SAN FRANCISCO
LOS ANGELES
PALO ALTO
WALNUT CREEK
SACRAMENTO
ORANGE COUNTY
SAN DIEGO
DENVER

2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
BUENOS AIRES
LONDON
BRUSSELS
BEIJING
HONG KONG
SINGAPORE
TOKYO

EX PARTE OR LATE FILED

October 15, 1999

Writer's Direct Contact
(202) 887-1510
ctritt@mofo.com

By Messenger

RECEIVED

OCT 15 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: **EX PARTE**
ET Docket 95-18

Dear Ms. Salas:

On October 14, 1999, Richard DalBello, Francis Coleman and the undersigned representing ICO Services Ltd. ("ICO") and Norman Leventhal of Leventhal, Senter & Lerman, representing the ICO USA Service Group, met with Suzanne Tetreault and Jane Halprin of the General Counsel's office to discuss the above-captioned proceeding. The discussion focused how the costs for relocating 2 GHz fixed incumbents should be properly determined and allocated. The parties restricted their discussion to arguments presented in comments and ex parte letters previously filed in the above-captioned proceeding and in the attached discussion outline.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary for inclusion in the record.

Very truly yours,

Cheryl A. Tritt

Cheryl A. Tritt

Attachment

cc: Suzanne Tetreault
Jane Halprin

No. of Copies rec'd 0+2
List ABCDE

dc-178753

October 14, 1999

ECONOMICS, LEGAL PRECEDENT AND RELOCATION

- **Historical Perspective**

  - Why now? In discussions with incumbents over the last several months, we now realize that the existing "replacement" cost policy can not work for 2 GHz MSS.

  - In a single decision — PCS — the FCC, without meaningful discussion or analysis, decided that emerging technologies providing "comparable" facilities meant the replacement of existing equipment with entirely new facilities.

  - In ET Dkt 95-18, the FCC asks whether this same policy is appropriate for 2 GHz MSS.

- **Changed Circumstances Require Changed Policies**

  - Whereas PCS was a local service, MSS is national — indeed, global.

  - Whereas PCS was rolled out on a market-by-market basis as economic considerations justified the cost of relocation, this option is not available to MSS.

  - Whereas the earlier "replacement" cost policy allowed viable PCS entry (given that anticipated call volume could assimilate such expenses), a nationwide relocation on this basis would simply preclude MSS entry as its rate structure will not permit such assimilation.

  - "Comparable" facilities for incumbents will be provided by MSS, but without reliance on replacement costs as a means of doing so.

  - The FCC has a statutory obligation under the public interest standard to consider such "changed circumstances" in setting policies for new radio services. (See IUSG Ex Parte, ET Docket No. 95-18, at 9 and n. 33, June 21, 1999.)

- **<u>Economic Theory and FCC & Judicial Precedent Support the FCC's Stated Objective of "No better off, no worse off."</u>**

  - Economic theory holds that the proper value for "comparability" is the economic value of the equipment — i.e., its *remaining useful life*. (See Charles River Associates Inc., June 18, 1999, "An Economic Analysis of Regulatory Takings and Just Compensation With an Application to Mobile Satellite Services.")

    — Whereas such theory takes account of what already has been used up, changes in prices, and changes in technology and productivity, full "replacement" costs do not.

  - FCC's <u>OVS</u> ruling (based on law of "partial taking," not tort law) makes clear that it is the "market" value both before and after the "taking" that sets the standard for just compensation. (See IUSG June 21 Ex Parte at 6 n.24.)

  - Long-standing judicial precedent interpreting the law of eminent domain, likewise makes clear that "just compensation" for incumbents' facilities is the *fair market value* of such facilities (generally based on the equipments' remaining useful life). (See IUSG June 21 Ex Parte at 3-6.)

- **<u>Implementation of the Remaining Useful Life Standard</u>**

  - The Charles River Associates formula (see CRA Analysis at 15) provides the proper economic valuation, but may require broad estimates of equipment life.

  - On the other hand, book depreciation — more readily ascertainable — may provide a useful surrogate.

  - In either case, MSS would pay incumbents the cash equivalent of the value derived by these principles.

    — Significantly, this allows incumbents to modernize at their own pace and with equipment suitable to their particular needs (e.g., digital or fiber optic replacement).