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Before The  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Redevelopment of Spectrum to )  
Encourage Innovation in the Use )  
of New Telecommunications )  
Technologies )

ET Docket No. 92-9 ✓

COMMENTS OF PERSONAL COMMUNICATIONS NETWORK  
SERVICES OF NEW YORK, INC., A LOCATE COMPANY,  
ON THE THIRD NOTICE OF PROPOSED RULEMAKING

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## SUMMARY

Relocation of incumbent users of the 2 GHz band is the only proven mechanism for providing adequate spectrum for emerging technologies and adequate interference protection for incumbent users. The Commission must continue to provide incentives for relocation. The incentive for incumbent users to relocate expeditiously is dependent on the adoption of a fixed time frame that terminates the incumbent users' primary use of the 2 GHz band. The Commission's revised transition plan eliminates this requirement. The Commission has replaced the time frame with an involuntary relocation process that could result in delay or increase significantly the costs of relocation. A better approach to accommodating existing 2 GHz users who claim that relocation is infeasible is to establish a waiver procedure. The waiver procedure would permit existing users to demonstrate that the Commission should not convert their facilities to secondary status at the end of the transition period.

If the involuntary relocation process proposed by the Commission is adopted the standards must be modified to limit the relocation costs paid by the emerging technology service provider to those that are reasonable and to limit the duration for which increased operational costs are paid. Mediation should be used to resolve any issues of network comparability.

PCNS-NY has demonstrated unparalleled success in developing innovative relocation proposals and in negotiating actual relocation agreements with incumbent 2 GHz users. PCNS-NY's ability to reach agreement, even prior to award of a PCS license, demonstrates that

relocation negotiations can be completed promptly. A three year transition period is more than sufficient to permit the evolution of relocation negotiations in major metropolitan areas.

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Personal Communications Network Services of New York, Inc., a LOCATE company ("PCNS-NY"), by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") Third Notice of Proposed Rulemaking ("Notice") in this proceeding. In the Notice, the Commission proposes to revise its transition plan for reallocating spectrum in the 1.85 to 2.20 GHz band (the "2 GHz band") to emerging technologies.<sup>1/</sup> PCNS-NY believes that relocation of existing 2 GHz users to higher frequencies through the three step transition plan originally proposed by the Commission continues to offer the only acceptable solution for

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<sup>1/</sup> The Commission has proposed to allocate 110 MHz of the spectrum in this band to personal communications services. In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Docket No. 90-314, Notice of Proposed Rulemaking and Tentative Decision (rel. Aug 14, 1992).

providing suitable spectrum and interference protection for existing users of the 2 GHz band and emerging technologies.

PCNS-NY has demonstrated through its pioneering and successful relocation negotiations that market-based negotiations between PCS licenses and incumbent 2 GHz users can be successful if a specific time frame for relocation is established by the Commission. Regrettably, the Commission's revised transition plan eliminates this critical component of the transition plan. The omission of this step eliminates the predominant incentive for existing 2 GHz users to engage in reasonable relocation negotiations.

**I. MARKET-BASED NEGOTIATIONS HOLD THE MOST PROMISE FOR BALANCING THE NEEDS OF EXISTING 2 GHZ USERS AND NEW LICENSEES**

As originally proposed, the Commission's transition plan for migrating existing users to higher frequencies or alternative media had three essential elements. The elements were: (1) the issuance of new licenses for microwave facilities in the 2 GHz band on a secondary basis only; (2) the adoption of a fixed time frame after which existing users' facilities would be transformed from primary to secondary status; and (3) the encouragement of market-based negotiations between existing users and emerging technology licensees.

Prior to the Commission's pronouncement of its initial transition plan, PCNS-NY already had developed innovative proposals to liberate spectrum for PCS by negotiating with

existing 2 GHz licensees to relocate their facilities to higher frequencies. As part of its experimental efforts PCNS-NY implemented and tested those proposals through actual relocation negotiations with existing users.<sup>2/</sup> These efforts were successful. As concrete proof of the viability of market-based negotiations four different 2 GHz incumbents in vastly different geographic areas in the United States and with unique networks submitted letters and comments to the FCC expressing their support of market-based negotiations as proposed by PCNS-NY. (The letters from the Long Island Lighting Company, Suffolk County Police Department, San Diego Gas & Electric and the comments filed by the City of San Diego are attached to PCNS-NY's comments filed in this docket on June 8, 1992 as Exhibits A through D.)<sup>3/</sup>

PCNS-NY's negotiations have been successful, to a high degree, because of the perception by existing users that the FCC intended to require these users to relocate their facilities to higher frequencies or alternative media and to reduce their use of the spectrum to secondary status. The revised transition plan proposed in the Notice eliminates the most meaningful incentive

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<sup>2/</sup> See PCNS-NY Experimental Progress Reports filed pursuant to Experimental License No. 1734-EX-R-90.

<sup>3/</sup> Significantly, two of the incumbent users who expressed their support for relocation are public safety and local government entities. Although these users are exempt from involuntary relocation, they are more than willing, at a time of sparse fiscal resources, to relocate their communications networks to new communications facilities at no cost to their taxpayers.

for existing users to engage in relocation negotiations. It eliminates the definite time frame for converting existing users' facilities from primary to secondary status. The new proposal provides for a transition process that could result in either: (1) continuous primary use of the 2 GHz band by microwave facilities licensed prior to January 16, 1992; or (2) protracted "involuntary" relocation negotiations. The Commission's proposed elimination of a fixed time frame for converting existing users from primary to secondary status will impede substantially the success and expediency of relocation negotiations. As a direct result of the Commission's proposal, PCS will be required to operate on a secondary basis to certain microwave facilities operating in the band and its service quality will be compromised.

The continued primary occupancy of the band by microwave facilities licensed prior to January 16, 1992 will impede the availability of adequate spectrum for PCS. At first blush, the Commission's proposal for "co-primary" use of the band appears to contemplate equal and shared use of the spectrum by emerging technology service providers and incumbent licensees. In fact, however, the Commission's proposal, as revised, does not contemplate a true sharing arrangement in which occupants of the band are equal in their use of the spectrum. Existing users who have facilities licensed in the band prior to January 16, 1992

will have primary use of the band. The Commission states that interference issues will be resolved by a first in time rule:

[i]n disputes involving interference between co-primary emerging technology and fixed microwave licensees, the facility first licensed will be afforded interference protection from the offending facility.<sup>4/</sup>

This first in time preference in essence gives all facilities licensed prior to January 16, 1992, a right to require PCS providers to cease operation if there is any interference with the microwave licensees' operations.

Moreover, to the extent that joint use of the band is contemplated, it is dependent on the success of sharing techniques. PCNS-NY has experimented with sharing technologies for PCS but has not found a technology that is accepted by existing users of the 2 GHz band. Although spectrum sharing technologies may provide a hopeful solution for future technologies, the Commission appropriately recognizes that "the feasibility of spectrum sharing between new services and fixed microwave services has not been fully determined and will depend on the technical design of individual new systems and services."<sup>5/</sup> Furthermore, existing users generally have expressed a strong disbelief that spectrum sharing will provide their facilities with adequate interference protection. Indeed, in relocation negotiations with PCNS-NY, incumbent users,

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<sup>4/</sup> Notice at n.34.

<sup>5/</sup> Notice at ¶ 29.

including public safety agencies, have advised PCNS-NY repeatedly that they would rather relocate than share spectrum.

The only way to provide reliable PCS without interruption will be through liberating spectrum by relocation of incumbent 2 GHz users. The revised transition period's incorporation of an involuntary relocation process rather than a fixed time frame for conversion of incumbent users' facilities from primary to secondary status tips the scales of bargaining power in favor of the existing users. Existing users will be able to use the threat of forcing a PCS licensee to commence involuntary relocation proceedings as a means to boost the "price" of relocation and achieve windfall profits.<sup>6/</sup>

Involuntary relocation proceedings can also be used as a delay tactic. Under the Commission's proposals, the incumbent user would be able to delay migration to higher frequencies by invoking the procedures proposed by the Commission in the Notice. Incumbent users will be able to resist voluntary negotiations through the transition period of three to ten years, force the PCS licensee to proceed with involuntary relocation proceedings and then challenge any Commission order mandating relocation of its facilities through litigation and the appellate process. The ability of an incumbent user to intentionally delay relocation of its facilities could foreclose a PCS licensee's viable use of the

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<sup>6/</sup> See First Notice of Proposed Rulemaking, ET Docket No. 92-9 (rel. Feb. 7, 1992).

frequencies for a significant period of time<sup>2/</sup> or alternatively increase the price of the negotiated relocation to include a premium for foregoing proceedings provided by the Commission's revised transition plan.

As an incentive to engage in voluntary negotiation where relocation is feasible, the Commission should require the party whose position is not adopted in the relocation proceeding to reimburse the other party and the Commission for the expenses, including reasonable attorneys' fees, incurred in the relocation proceeding. The risk that a reticent incumbent user could be saddled with paying the PCS licensee and the Commission for the costs of a relocation proceeding will ensure that incumbent users do not use the involuntary relocation proceeding in bad faith. In addition, before invoking the involuntary relocation process, emerging technology licensees will analyze critically the feasibility of relocation. Imposition of such a cost-shifting mechanism also will reduce the possibility that the Commission will be swamped with meritless involuntary relocation proceedings.

PCNS-NY believes that the incentive for voluntary negotiations will be best preserved if a waiver procedure is adopted rather than the Commission's proposal for involuntary

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<sup>2/</sup> The Commission recognizes the potential for delay in the Notice. It suggests that a shorter transition period may be appropriate in geographic areas where available spectrum in the 2 GHz band is scarce: "waiting for voluntary negotiations may frustrate the introduction of services using new technologies." Notice at ¶ 28.

relocation. Specifically, PCNS-NY urges the Commission to retain the fixed time frame for converting existing users to secondary status but to permit the existing user to apply for a waiver from the conversion. A waiver procedure would place the burden appropriately on the existing user to demonstrate why it is not feasible to relocate its facilities to higher frequencies or alternative media. The incumbent user, as opposed to the new licensee, is in a better position to articulate the technical characteristics and requirements of its existing communications system and to prove that there is no reasonable alternative to its occupancy of the current frequencies. In addition, with the onus on the incumbent user to bear the burden of proof and to substantiate its claim for a waiver, the incumbent user will assess critically any waiver claim.

**II. PCNS-NY HAS PROPOSED AND IMPLEMENTED IN ITS NEGOTIATIONS WITH EXISTING USERS FOUR ESSENTIAL ELEMENTS OF NEGOTIATION THAT PARALLEL THOSE PROPOSED BY THE COMMISSION**

In its initial comments, PCNS-NY described the innovative proposals and process it developed in negotiating relocation agreements with existing 2 GHz users. These negotiations have demonstrated the feasibility of market-place negotiations as a means of relocation. The plan subsequently proposed by the FCC is a reasonable outgrowth of PCNS-NY's proposals.<sup>8/</sup>

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<sup>8/</sup> The Utilities Telecommunications Council ("UTC") and Telocator proposed a transition framework for consideration by the Commission. Even prior to these proposals, however, PCNS-NY had begun to negotiate relocation agreements based on its own  
(continued...)

Specifically, in each negotiation with an incumbent user, PCNS-NY demonstrates its commitment to providing the existing user with satisfactory replacement facilities through its agreement to:

- (1) pay the reasonable costs of relocation;
- (2) design a replacement system to meet the existing user's needs;
- (3) "prove in" the existing system to prevent disruption to service; and
- (4) ensure equivalent reliability of the new network.<sup>2/</sup>

The Commission's proposed standards for involuntary relocation parallel the relocation principles developed by PCNS-NY. The Commission has proposed to require the emerging technology service provider to:

- (1) guarantee payment of all relocation costs;
- (2) complete all activities necessary for implementing the new facilities; and
- (3) build the new microwave facility (or alternative) and test it for comparability to the existing 2 GHz system.<sup>10/</sup>

PCNS-NY's willingness to provide existing users with all of the requirements outlined by the Commission for involuntary relocations and the corresponding willingness of existing users to agree to relocate on these terms, demonstrates that a

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<sup>8/</sup> (...continued)  
proposals. The success of these negotiations demonstrate the feasibility of market-based relocation.

<sup>2/</sup> PCNS-NY Comments on First Notice of Proposed Rulemaking, ET Docket No. 92-9 (filed June 8, 1992) ("PCNS-NY Initial Comments").

<sup>10/</sup> Notice at ¶ 24.

Commission mandate is not required to provide incumbent users with these protections. The need for PCS licensees and other emerging technology service providers to obtain clear spectrum in the 2 GHz band expeditiously provides an ample incentive for PCS licensees to negotiate relocation agreements that are acceptable to existing incumbent users.

PCNS-NY's proposals have been influenced by the expertise of its parent company, LOCATE. LOCATE currently operates a fully digital common carrier microwave network in the New York City metropolitan area. LOCATE also designs and constructs microwave facilities and systems for other common carrier and private carrier networks. Over the past decade, LOCATE has engineered and constructed over 275 digital microwave systems for Fortune 500 companies including Regional Bell Operating Companies. LOCATE's own network includes facilities operating in the 2.1 to 2.2 GHz band. LOCATE intends to migrate these facilities to higher frequencies. Accordingly, LOCATE and PCNS-NY are clearly aware of the technical parameters that must be satisfied to provide comparable capacity and reliability for incumbent microwave users on the higher frequencies.

If adopted, the Commission's proposed elements for involuntary relocation should be modified to prevent the process from becoming a revenue raising vehicle for incumbent 2 GHz users. In all its negotiations, PCNS-NY has specified that the outside price boundary for negotiated agreements between existing

users and new licensees is the reasonable costs of relocation.<sup>11/</sup> Significantly, the Commission's proposal to require emerging technology service providers to "guarantee" payment of all relocation costs does not limit all of the cost components to those that are reasonable. The Commission provides that the costs the new licensee shall guarantee include:

all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee may incur as a result of operation in a different fixed microwave band or migration to other media.<sup>12/</sup>

The only costs that are required to be reasonable are the additional costs incurred as a result of operation in a different band. Costs for engineering and equipment and site fees are not limited to those that are reasonable. The absence of this limitation could expose PCS licensees and other emerging technology service providers to unlimited liability. Accordingly, PCNS-NY urges the Commission to modify its proposal to require emerging technology service providers to guarantee payment of all reasonable relocation costs. In its negotiations to date, PCNS-NY has not encountered any resistance from incumbent 2 GHz users to limiting relocation costs to those that are reasonable.

The requirement that emerging technology service providers, such as PCS licensees, guarantee payment for reasonable

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<sup>11/</sup> PCNS-NY Initial Comments at 12.

<sup>12/</sup> Notice at ¶ 24.

additional costs incurred as a result of operation in a different fixed microwave band or migration to other media also should be modified. While the costs must be reasonable there is no outside time limit established to define the costs that are guaranteed. The potential liability is open ended. Certainly, the emerging technology service provider should not be liable for ongoing operational costs of the migrated user for the lifespan of the communications network. Imposition of such unlimited costs would increase exponentially the costs of the emerging technology service providers' services. A finite time frame should be adopted for the payment of reasonable costs attributable to a change in frequencies or media.

The Commission has proposed that if an existing microwave licensee demonstrates that its new facilities are not comparable to the replaced facilities that the existing user be given a one year window in which it can relocate back to its 2 GHz frequencies at no cost or require the new emerging technology service provider to remedy the deficiencies in the new network. PCNS-NY does not believe that a one year time period is necessary to test the system. It is common industry practice to "prove in" a new system before the old system is taken out of service. Specifically, the new system is constructed parallel to the existing communications network while the existing system remains functional. The new system is operated for a period of time to ensure that it functions properly. The existing system is only dismantled once the new system is determined to be satisfactory.

### **III. COMPARABILITY SHOULD BE DEFINED BY MEDIATION**

The Commission has requested comment on how it should define comparable alternative facilities.<sup>13/</sup> The unique requirements of each network and its geographic location establish the parameters of "comparability." The directly opposing comments filed in this proceeding demonstrate the vastly contradictory opinions on reliability and characteristics of portions of the radio frequency spectrum. Methods of evaluating comparability cannot be prescribed generically. They must be decided and evaluated on a case-by-case basis. Accordingly, PCNS-NY endorses the use of mediation as the procedure to resolve disputes over the comparability of service on new microwave facilities in relocation bands.

### **IV. THE TRANSITION PERIOD SHOULD BE THREE YEARS AND NO LONGER**

The Commission has requested comment on how long the transition period for voluntary negotiations should extend. PCNS-NY through its unprecedented negotiations with existing users throughout the United States has developed an expertise in relocation strategies. PCNS-NY believes that within one year of being granted a PCS license in a metropolitan area it could relocate existing users to higher frequencies or alternative media.

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<sup>13/</sup> Notice ¶ 25.

The Commission has proposed to start the transition period running from the date of adoption of a report and order establishing a channelization plan for the higher frequency bands. Potential PCS licensees do not need to wait for this procedural trigger to begin negotiating with incumbent users. Potential PCS licensees can begin to explore the framework for relocation with incumbent microwave users immediately. Commencement of voluntary relocation negotiations will speed the process of relocation if and when a PCS license is awarded to the emerging technology service provider.<sup>14/</sup> Early negotiations also will assist the incumbent user in defining with specificity the requirements for its relocated network. Should the potential PCS provider not receive a license for that area, the process will still be advanced by the specification required to participate in negotiations. In addition, early discussions may promote the formation of alliances that could provide for the collaborative provision of PCS by incumbent 2 GHz users and emerging technology service providers.

PCNS-NY believes that a three year time frame is more than adequate to permit the evolution and development of voluntary negotiations. A shorter time frame rather than an extended time frame such as ten years, will bring the parties to the table.

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<sup>14/</sup> PCNS-NY disagrees with the Commission's conclusion that agreements entered into in advance should not create a preference in the licensing process. Efforts that promote the liberation of spectrum for PCS by voluntary negotiations should be credited by the Commission in the licensing process for PCS. See PCNS-NY Reply Comments to Notice of Proposed Rulemaking, Gen. Docket 90-314 (filed January 8, 1993).

The viability of voluntary relocation is ascertainable within three years. The availability of a waiver process or the involuntary relocation process proposed by the Commission in the Notice will provide a safety net for those incumbent users who determine voluntary relocation is not feasible.

Should the Commission adopt a time frame longer than three years, PCNS-NY urges the Commission to provide a shorter time frame for metropolitan areas where there is more spectrum congestion. As recognized by the Commission, waiting for voluntary negotiations in areas where there is little or no spectrum available in the 2 GHz band may frustrate the introduction of services using new technologies.<sup>15/</sup> PCNS-NY further supports the elimination of a transition period for unlicensed devices and services covered by blanket licenses.<sup>16/</sup>

**V. NEW FACILITIES SHOULD CONTINUE TO BE LICENSED ON A SECONDARY BASIS ONLY**

PCNS-NY strongly supports the Commission's decision to adhere to its sound policy choice to license new microwave facilities in the 2 GHz band on a secondary basis only. This decision is essential if the 2 GHz band is to provide adequate spectrum for emerging technologies such as PCS. Existing users of the 2 GHz band have already taken a protectionist stance. Several incumbent users have suggested that they will take steps

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<sup>15/</sup> Notice at ¶ 28.

<sup>16/</sup> Id. at ¶ 27.

to maximize their use of the spectrum. These users can be expected to accelerate these activities if they are permitted to apply and receive additional licenses on a primary basis.<sup>17/</sup> These protectionist measures would not result in the most efficient use of the spectrum and would impede the development of new services.

The FCC and the National Telecommunications and Information Administration ("NTIA"), the government experts on the radio spectrum, concur that adequate spectrum exists above 2 GHz to accommodate existing users making the incumbent users' protectionist tactics unfounded. In addition, NTIA has agreed, to the extent necessary and on a case-by-case basis, to facilitate the relocation of existing microwave users to government frequencies below 2 GHz. The availability of this spectrum provides no rational basis for incumbent users to insist that they be able to remain or expand their occupancy of the 2 GHz band. Higher frequencies, including the 6 GHz band, offer adequate and reliable spectrum that can be utilized by these users for their communications needs.

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<sup>17/</sup> For example, McCaw has indicated in its comments filed in this docket that it is actively seeking new licenses for facilities in the 2 GHz band despite the Commission's decision to grant new licenses on a secondary basis only. McCaw Comments on First Notice of Proposed Rulemaking at n.22.

## VI. CONCLUSION

Relocation of incumbent users of the 2 GHz band is the only proven mechanism for providing adequate spectrum for emerging technologies and adequate interference protection for incumbent users. The Commission must continue to provide incentives for relocation. The incentive for incumbent users to relocate expeditiously is dependent on the adoption of a fixed time frame that terminates the incumbent users' primary use of the spectrum. The Commission's revised transition plan eliminates this requirement. The Commission has replaced the time frame with an involuntary relocation process that could result in delay or increase significantly the costs of relocation. A better approach to accommodating existing 2 GHz users who claim that relocation is infeasible is to establish a waiver procedure. The waiver procedure would permit existing users to demonstrate that the Commission should not convert their facilities to secondary status at the end of the transition period.

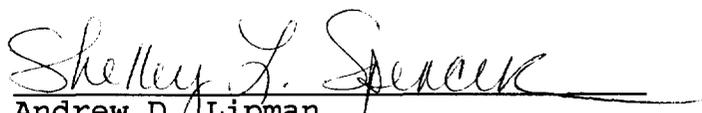
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PCNS-NY has demonstrated unparalleled success in developing relocation proposals and in negotiating actual relocation agreements with incumbent users. PCNS-NY's ability to reach

agreement even prior to award of a PCS license demonstrates that relocation negotiations can be completed promptly. A three year transition period is more than sufficient to permit the evolution of relocation negotiations in major metropolitan areas.

Respectfully submitted,

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