

new service licensees have the same obligation, to negotiate for relocation rights.

If, on the other hand, the "transition period" is keyed to the date each new service licensee is authorized, it would be unnecessary to consider whether different transition periods should be adopted for rural or urban areas, or because of technical considerations such as path length. We simply do not know where new services will develop, when they will commence, or how likely it is they will be able to share spectrum with fixed microwave systems. Therefore it would be premature to adopt different "transition periods" for different areas or to accommodate different types of microwave systems. A "sliding" period for voluntary negotiations would best accommodate the needs of all new service licensees as well as incumbent users.

The Commission has asked whether no transition period should be used in some instances, such as with unlicensed devices or services covered by blanket authorizations.^{18/} Under the flexible transition rules suggested by UTC, there is no need to specify a separate period of time for special services that may or may not develop in the 2 GHz band. In

^{18/} Third NPRM, para. 27.

the case of unlicensed devices, for example, the problem is not whether there is a transition period before mandatory relocation procedures become effective: the problem is identifying who will be responsible for paying relocation costs and correcting interference. The transition framework adopted in the First R&O should be applied to all segments of the 2 GHz band equally, and the obligation to negotiate in good faith should apply equally to all new users of the 2 GHz band.

With a "sliding" transition plan as recommended by UTC, the 5-year negotiation period can be set to commence with the adoption of technical rules for the type acceptance of unlicensed devices designed to operate in this band. During this so-called "transition period," equipment manufacturers, prospective users, or a consortium of entities, could negotiate with incumbent microwave licensees for relocation from the band. Any non-exempt microwave systems remaining in the band after five years would be subject to the mandatory relocation procedures adopted in the First R&O.

The Commission asks whether microwave systems relocated to accommodate unlicensed devices should be given "priority access" to government spectrum or other 2 GHz

spectrum if they cannot be relocated to higher bands.^{19/}
As noted above, UTC sees no need to alter the transition framework, nor any need to provide "priority access" to any particular replacement spectrum, in order to accommodate unlicensed devices.

UTC questions the viability, and wisdom, of relocating 2 GHz microwave systems to other portions of the non-government 2 GHz band. UTC suspects that most private microwave systems operating in the unpaired 1910-1930 MHz band were coordinated in this part of the band as a "last resort," and that relocating to other portions of the 2 GHz band may be impossible. Even where it is possible, it makes little sense to relocate a microwave system into another part of the band as this might require further relocation by a new service licensee authorized to use the same spectrum.

Commission licensing records show there are fewer than 500 licensed facilities in the 1910-1930 MHz band, so it should not be an insurmountable task for the manufacturers or users of unlicensed devices to relocate these systems under the same rules as will apply to new service licensees.

^{19/} Third NPRM, para. 27.

The Commission has asked whether there should be a minimum period of time for voluntary negotiations after grant of a new service license; for example, a one-year period. Although UTC strongly believes a "sliding" transition period would be the most rational way of treating all licensees uniformly and fairly, if a "fixed" transition period is adopted there must also be a period of time for each microwave user to discuss voluntary relocation. A fixed transition period could expire long before a new service licensee enters the area, so there must be a separate period for voluntary negotiations.^{20/} As noted above, by allowing a period for voluntary negotiations, the Commission will minimize its own burden by encouraging parties to negotiate before invoking mandatory relocation procedures. In addition, it must be remembered that incumbent microwave users are, by and large, not in the communications "business" and will probably be unprepared to begin discussing relocations immediately upon receipt of a request for relocation. An incumbent licensee will need time to analyze the new service licensee's relocation proposal or to prepare its own relocation proposal. Therefore, UTC recommends that,

^{20/} In allocating spectrum for the Direct Broadcast Satellite (DBS) Service, for example, the transition period expired before any DBS services were implemented; in fact, DBS has never materialized, despite the fact that all microwave systems in the band were relegated to secondary status over 5 years ago.

if a "fixed" transition period is adopted, a new service licensee should be prohibited from invoking mandatory relocation procedures unless it is able to demonstrate bona fide efforts at negotiation continuing over at least a one year period.^{21/}

The Commission asks whether there should be a shorter transition period in areas where there may be little or no spectrum available if it can be shown that the voluntary negotiations have not succeeded.^{22/} UTC is adamantly opposed to this suggestion. Because new technologies have not been identified, and because even among PCS proponents there are significant differences in their spectrum-sharing capabilities, it is impossible to predict whether any given area will have "little or no spectrum available."

If a new service licensee is permitted to foreshorten the negotiation period by claiming there is "little or no spectrum available," there will be no incentive for new service licensees to use spectrum-sharing techniques. In fact, this proposal would eviscerate the transition rules

^{21/} This one year time period could be set to commence when a new service licensee presents the incumbent with a detailed relocation plan, together with evidence of financial capability, or when the incumbent responds to a new service licensee with its own relocation plan.

^{22/} Third NPRM, para. 28.

adopted in the First R&O because the whole premise behind this docket is that new service licensees should negotiate with incumbents if they cannot find vacant spectrum on which to operate. If a new service licensee can merely state that it cannot locate spectrum, and thereby invoke the mandatory relocation procedures, there is no incentive for the licensee to negotiate with the incumbents. Although the Commission suggests this procedure would be available only if a new service licensee can show that voluntary negotiations have failed, this would require the Commission to decide that negotiations have failed and that there is no possibility for settlement. This would open the Commission to just the sort of litigation it sought to minimize by premising its transition framework on voluntary negotiations.

D. Tax Certificates Should Be Used As An Incentive for Voluntary Settlements

As was pointed out by a number of commenters at the NPRM stage of this proceeding, the awarding of tax certificates to displaced microwave users would support the Commission's policy and statutory mandate to encourage new technologies, and is therefore an appropriate exercise of the FCC's authority.^{23/}

^{23/} See e.g., Comments of GTE, pp. 19-21; Telocator, pp. 12-13, filed in ET Docket No. 92-9, June 5, 1992.

UTC recommends that the FCC use tax certificates as a regulatory incentive for parties to reach voluntary settlements on relocation issues. A tax certificate should be granted to any incumbent licensee who voluntarily agrees to relocation. If, on the other hand, the Commission is forced to modify the incumbent's license over the incumbent's objections, and, if the Commission finds that the incumbent's objections were patently without merit, the tax certificate could be withheld. In this manner, tax certificates could be used as an incentive for incumbents to voluntarily relocate, and as a disincentive for incumbents to raise patently frivolous objections.^{24/}

IV. UTC'S RECOMMENDED TRANSITION PROCEDURES WILL SERVE ALL PARTIES EQUITABLY

In view of the foregoing, UTC recommends the following procedures to implement the mandatory relocation program adopted in the First R&O:

1. The mandatory relocation procedures outlined in Section 94.59(b) will become available to any new service licensee five (5) years after the grant of its license to operate in a given service area.

^{24/} The Commission does not need to use negotiated rulemaking to decide the issue of tax certificates in this proceeding. The comments filed earlier in this proceeding generally supported the use of tax certificates. UTC also questions whether negotiated rulemaking would be appropriate to develop "legal justifications" for issuance of tax certificates: either the FCC has authority to issue tax certificates in these situations or it does not. Parties should not have to "negotiate" this issue.

2. Once the mandatory relocation procedures become available to a new service licensee in a given area, the procedures are invoked by the new service licensee serving the incumbent licensee with a written request for relocation. The written request should provide for one or both parties to prepare detailed relocation proposals, and should identify a reasonable timeframe for the exchange of relocation proposals, including evidence of the new service licensee's financial ability to execute the relocation.
3. If, after twelve months of negotiations (but no more than eighteen months after the commencement of negotiations), the parties are unable to reach agreement on the proposed relocation, either party may serve the other party with a Request for Mediation pursuant to the Commercial Mediation Rules of the American Arbitration Association. (Nothing precludes the parties from voluntarily agreeing to submit issues to mediation at any time earlier in the negotiations, or from voluntarily agreeing to other dispute resolution procedures, such as commercial arbitration.) Costs of mediation must be borne by the party requesting mediation.
4. If the parties are unable to reach agreement on all remaining issues within six months after the designation of a mediator, the new service licensee may petition the FCC for involuntary modification of the incumbent's license. The FCC will afford the incumbent an opportunity to file comments in opposition to the relocation and to present any evidence as to why the relocation proposal does not meet the conditions of Section 94.59(b) or would otherwise be inconsistent with the public interest.
5. If the Commission orders involuntary modification of the incumbent's license, it shall condition the effectiveness of the order on the new service licensee establishing a bond or escrow account to guarantee completion of the authorized modification and the payment of any reasonable incremental increases in operating expenses that

will fall upon the incumbent licensee due to the modification.^{25/}

V. CONCLUSION

The optimum method of expediting the introduction of emerging telecommunications services, while at the same time fulfilling the Commission's commitment to protect the operational and financial integrity of the incumbent 2 GHz microwave users, is to rely on marketplace mechanisms. In order for such an approach to be effective, a sufficiently lengthy period of voluntary negotiations is required to allow market forces to work.

Accordingly, the Commission should promote the use of voluntary negotiations between new service providers and incumbent microwave licensees through the adoption of a "sliding period" of negotiations, of at least five (5) years, commencing with the date each new service license is granted in any particular area. In the few situations where voluntary negotiations fail to achieve a satisfactory result and mandatory relocation procedures must be invoked, UTC recommends the use of mediation as a first step in resolving points of disagreement.

^{25/} The Commission adopted a similar requirement to establish a bond or escrow account in its ITFS/MMDS relocation rules, Second Report and Order, in GEN. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

WHEREFORE, THE PREMISES CONSIDERED, the Utilities Telecommunications Council respectfully requests the Federal Communications Commission to take action consistent with the views expressed herein.

Respectfully submitted,

UTILITIES TELECOMMUNICATIONS
COUNCIL

By: Jeffrey L. Sheldon /SAS/
Jeffrey L. Sheldon
General Counsel

Utilities Telecommunications
Council
1140 Connecticut Ave., N.W.
Suite 1140
Washington, D.C. 20036

(202) 872-0030

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ATTACHMENT A
ROUTINE MICROWAVE RELOCATION TIMELINE

Schedule Name : IMPLEMENTATION SCH. NEW MW NOP
 Responsible :
 As-of Date : 16-Nov-92 Schedule File : .

Dependencies : PREPARE FCC APPS.

Task Name	Status	Start Date	End Date	92		93			94									
				Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan
OBTAIN APPROVED STUDY JOB		16-Nov-92	1-Dec-92	█														
PERFORM SITE SURVEYS	C	16-Nov-92	15-Dec-92	█	█													
PREPARE CONSTR. BUDGET PKG	C	15-Dec-92	30-Dec-92		█													
PROJECT APPROVAL PROCESS		30-Dec-92	26-Apr-93		█	█	█	█	█	█	█	█	█	█	█	█	█	█
PREPARE FCC APPS.	C	30-Dec-92	22-Jan-93		█	█												
FREQ.COORD & RECEIVE LIC.		22-Jan-93	1-Jun-93		█	█	█	█	█	█	█	█	█	█	█	█	█	█
PREPARE & ISSUE RADIO BID PK	C	22-Jan-93	12-Feb-93		█	█												
RECEIVE MANU. BIDS	C	12-Feb-93	29-Mar-93		█	█	█											
BID EVAL. & ISSUE REQS.	C	29-Mar-93	19-Apr-93		█	█												
ISSUE PURCHASE ORDERS.	C	19-Apr-93	17-May-93		█	█												
PREPARE ENG. DRAWINGS.		12-Feb-93	12-Apr-93		█	█	█											
DELIVERY OF RADIOS (ARO)	C	17-May-93	6-Jan-94		█	█	█	█	█	█	█	█	█	█	█	█	█	█
DELIVERY OF ANTENNA ETC.ARO		17-May-93	28-Jul-93		█	█	█											
INSTALL RADIOS	C	6-Jan-94	18-Feb-94		█	█												
INSTALL ANTENNA ETC	C	6-Jan-94	18-Feb-94		█	█												
end	C	18-Feb-94	18-Feb-94		█	█												▲

 ████ Detail Task ████ Summary Task ***** Baseline
 ..███ (Progress) ..███ (Progress) >>> Conflict
 ████ (Slack) ████ (Slack) ..███ Resource delay
 Progress shows Percent Achieved on Actual ▲ Milestone
 ----- Scale: 5 days per character -----