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

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SUMMARY

UTC opposes Apple's petition to hold the transition rules in abeyance adopted in the First R&O. The "transition framework rules" are final rules, and are not dependent on the outcome of the remaining issues being considered under the Third NPRM.

UTC fully supports APPA's request that the FCC clarify that the exemption for state and local governments applies to all state and local government agencies, including public power agencies.

Finally, UTC agrees with Telesis that the FCC should clarify its rules to indicate that: (1) the cost of removal and disposal of unneeded and unwanted existing facilities is to be borne by new technology providers; and (2) the incumbent microwave user has the right to oversee the engineering and construction of its replacement facilities.

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In the Matter of)
)
Redevelopment of Spectrum to)
Encourage Innovation in the)
Use of New Telecommunications) ET Docket No. 92-9
Technologies)

To: The Commission

COMMENTS OF THE
UTILITIES TELECOMMUNICATIONS COUNCIL
ON PETITIONS FOR RECONSIDERATION/CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, the
Utilities Telecommunications Council (UTC) hereby submits the
following consolidated comments with respect to the various

millions of customers to small, rural electric cooperatives and water districts serving only a few thousand customers. All utilities depend upon reliable and secure communications facilities in carrying out their public service obligations.

Many utilities operate extensive private microwave systems to meet these communications requirements. Utilities rely heavily on private microwave facilities operating in the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz (2 GHz) bands, and would be severely hampered in their ability to provide vital public services if they were forced to vacate these bands without adequate replacement spectrum with equivalent reliability to which they could migrate their systems. Thus, UTC has been an active participant in this proceeding and the related proceedings dealing with the continued use of the 2 GHz band for fixed microwave. Further, UTC has itself filed a "Petition for Clarification and/or Reconsideration" regarding certain aspects of the First R&O.

UTC's comments will address the petitions filed by Apple Computer, Inc. (Apple), the American Public Power Association (APPA), and the Pacific Telesis Group (Telesis). As will be discussed in greater detail below, UTC opposes the Apple petition, and fully supports the APPA and Telesis petitions.

II. APPLE'S PETITION FOR RECONSIDERATION SHOULD BE REJECTED

A. The Framework Rules Adopted In The First R&O Are Final

Apple's petition requests the FCC to hold the transition rules adopted in the First R&O in abeyance pending the resolution of the outstanding issues covered under the Third Notice of Proposed Rulemaking (Third NPRM).^{2/} Apple argues that it would be premature at this stage to adopt transition rules, because key elements of the transition plan have yet to be resolved.^{3/}

Apple's argument is without merit. The First R&O adopted a "transition framework" for the orderly migration of incumbent microwave systems from the 2 GHz band in order to facilitate the introduction of emerging technologies. The rules, as adopted by the FCC, provide that: (1) incumbent licensees and new service licensees may negotiate voluntarily over the terms for relocating incumbent users to other bands or alternative media; and (2) after a specified period of time, a new licensee may request mandatory relocation of a non-exempt incumbent microwave system, subject to certain conditions necessary to ensure that the incumbent licensee is made "whole," both operationally and financially. Among the conditions required for mandatory relocation are the following:

^{2/} On January 13, 1993, Apple withdrew a portion of its original November 30, 1992, "Petition for Clarification or Reconsideration" and submitted a revised "Petition for Reconsideration. Accordingly, UTC's comments only address Apple's revised petition.

^{3/} Apple, p. 2.

1. The new service licensee guarantees payment of all relocation costs;
2. The new service licensee is responsible for implementing the replacement facilities;
3. The new service licensee is responsible for building and testing the replacement facilities;
4. The incumbent licensee is not required to relocate until the "comparable alternative facilities" are available for a reasonable time to make adjustments and to ensure a "seamless handoff;" and
5. If, within one year, the incumbent licensee demonstrates that the new facilities are not comparable to the old facilities, the new service licensee is responsible for remedying the defects or relocating the incumbent to its former facilities.^{4/}

Contrary to the insinuations of Apple's petition the above described transition framework rules are final rules, and are not at all dependent on the outcome of the remaining issues being considered under the Third NPRM. The transition framework rules adopted in the First R&O embody the major structural components of the transition plan, whereas the Third NPRM is merely concerned with a few implementation details, such as timing. As such, the rules adopted in the First R&O will not be substantively impacted by the outcome of the Third NPRM.

Moreover, it is important to note that Apple's petition itself does not question the substance of the rules adopted in the First R&O. Indeed, Apple's petition is purely concerned with the procedural propriety of the rules in terms of when they

^{4/} First R&O, Appendix A ("Final Rules"), to be codified at 47 C..F.R. § 94.59(b).

become effective.

B. The First R&O Rules Are Not In Violation Of The APA

In an attempt to convince the Commission that the rules adopted in the First R&O should be held in abeyance, Apple argues that adoption of transition rules at this stage would violate the mandate of Section 553(d) of the Administrative Procedure Act (APA) that agencies conducting informal rulemaking proceedings make "publication or service of a substantive rule...not less than thirty days before its effective date."^{5/} Apple maintains that although the "effective date" for the rules adopted in the First R&O has passed (January 27, 1993), material portions of the transition rules have not been published or served because they do not exist.

Apple's argument is seriously flawed. The Commission has published all of the material provisions of the transition framework rules that were adopted in the First R&O. The fact that some of the issues related to the transition rules have not yet been resolved and therefore published does not lessen the validity of those rules that have been enacted. As noted in National Association of Broadcasters v. FCC, 740 F.2d 1190 (1984) the Courts have recognized "the reasonableness of the Commission's decision to engage in incremental rulemaking and to defer resolution of issues in a rulemaking even when those issues

^{5/} Apple, p. 2.

are related to the main ones being considered."^{6/}

Moreover, there are numerous examples of the Commission adopting final rules in a proceeding and then tying the commencement of those rules to another event or proceeding. For example, in its Direct Broadcast Satellite (DBS) proceeding, GEN. Docket No. 80-603, 90 FCC 2d 676 (1982), aff'd NAB v. FCC, the Commission adopted a Report and Order reallocating the 12 GHz band to DBS but deferred the effective date of the relocation of

sophistry, as the Commission provided ample discussion within the First R&O to support the rules it adopted. As discussed above, the issues that remain to be resolved in this proceeding will not impact the finality of the rules adopted in the First R&O. Further, there is no evidence to suggest that the Commission will not provide an equally adequate record when it adopts rules regarding the remaining procedural issues in this proceeding.

III. UTC AGREES WITH APPA THAT THE FCC MUST CLARIFY/AMEND RULES ON EXEMPTION OF STATE AND LOCAL GOVERNMENT 2 GHz LICENSEES

A. Restricting Exemption To Public Safety Is Inconsistent With FCC Proposals And Subsequent Actions

In its NPRM the FCC recognized that state and local government agencies would face special economic and operational considerations in relocating their 2 GHz fixed microwave operations. To address these concerns the Commission proposed to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods, and to allow these facilities to continue to operate in the 2 GHz band on a co-primary basis indefinitely.^{2/}

The primary thrust of APPA's petition is that the FCC's final rules, as contained in the First R&O, may have inadvertently restricted the granting of indefinite co-primary status to "public safety licensees," and not to all state and

^{2/} NPRM, para. 25.

local government licensees, such as public power agencies.^{8/}
UTC expressed an identical concern in its petition.

As APPA notes, state- and municipally-owned electric, gas and water utilities rely extensively on microwave facilities in the 2 GHz band for day-to-day operations and for critical communications during emergency situations.^{9/}

UTC is in complete agreement with APPA that to restrict the exemption to "public safety" entities at this late stage would be inconsistent with the Commission's proposal. Throughout this proceeding the FCC has indicated that the proposed exemption was inclusive of all state and local government agencies licensed in the 2 GHz band, irrespective of specific agency functions. Moreover, as both APPA and UTC have indicated, Commission actions subsequent to the adoption of the NPRM reinforced this conclusion. For example, in a May 20, 1992, letter to Senator Alan Cranston, the FCC's Chief Engineer assured the Senator that the Commission's proposal would "permit state and local government licensees such as Metropolitan Water District of Southern California to continue their operations indefinitely on a primary basis."^{10/}

^{8/} APPA, p. 3.

^{9/} APPA, p. 3

^{10/} Letter from Dr. Thomas P. Stanley to Senator Alan C. Cranston, May 20, 1992.

Further, the September 17, 1992, New Release that the Commission issued upon adoption of the R&O stated that "2 GHz fixed microwave operations licensed to state and local governments, including public safety, would be exempt from any involuntary relocation."^{11/} UTC therefore joins APPA in urging the Commission to clarify that, consistent with its original proposal, the exemption includes all state and local government incumbents.

B. Exemption Status Should Not Turn On Procedural Licensing Anomalies

Under the FCC's Rules the eligibility for state and local agencies to operate private microwave systems is based on their eligibility to hold a license under Part 90 in the Private Land Mobile Radio Service.^{12/} Under Part 90 a state or municipal utility is eligible to hold a license in either the Public Safety Radio Service (under the Local Government Radio Service as a state or local government agency)^{13/}, or to hold a license in the Industrial Radio Service under the Power Radio Service as a

^{11/} While news releases are generally not to be relied upon as official Commission action, the Conference Report accompanying H.R. 5678 specifically cited the FCC's news release as the basis for its decision to delete the "Hollings" amendment from the final language of the FCC's appropriations bill. The Report stated that "[t]he conferees expect that the text of the Commission's decision will reflect the decision announced by the Commission in its press release of September 17, 1992," 138 Cong. Rec. H9569 (1992).

^{12/} 47 C.F.R. § 94.5

^{13/} 47 C.F.R. § 90.17

utility service provider^{14/}. As UTC noted in its petition, it is often the utility department of a municipality that operates the municipality's telecommunications system, and therefore it is not uncommon for a municipality to license its microwave system on the basis of its eligibility under the Power Radio Service. Thus, while incumbent state and local government utilities operating in the 2 GHz band could arguably qualify for the Commission's exemption by amending their station licenses to change the basis of their private microwave radio eligibility from Power Radio to Local Government, this would appear to impose an inefficient and unnecessary burden on licensees and the Commission's licensing staff. Instead, the Commission should amend its transition Rules to explicitly state that it is exempting from any mandatory relocation all incumbent licensees eligible to be licensed in any of the Public Radio Services.^{15/}

**C. If Restriction Is Intentional It Is Arbitrary,
Unwarranted And Unworkable**

UTC agrees with APPA's assessment that if the FCC has intentionally limited the exemption to "public safety," the Commission's decision is arbitrary, unwarranted and unworkable. As APPA notes a decision to exempt "public safety," as opposed to all other state and local government agencies, cannot be

^{14/} 47 C.F.R. § 90.63

^{15/} Appendix A to UTC's petition contains suggested Rule language.

reconciled with the rest of the FCC's decision.^{16/} As APPA argues, if the decision is based on the need to protect public safety agencies from incurring any expenses, this implies that the Commission is not confident that the rules it has adopted will truly protect all microwave users.^{17/} Likewise, APPA notes that the FCC has not explained why "public safety" agencies are more in need of financial protection than other public agencies.^{18/} APPA further notes that Congress has exempted all state and local government agencies from paying FCC application fees.^{19/} UTC would add to this point that the current "spectrum auctioning" legislation that is being proposed in the Senate would exempt state and local governments from having to engage in competitive bidding.^{20/}

UTC agrees with APPA that if the exemption is based on the fact that public safety agencies should not be forced into commercial "arbitration," the FCC has not explained why public safety agencies are different from other state agencies.^{21/}

^{16/} APPA, p. 6.

^{17/} APPA, p. 6.

^{18/} APPA, p. 6.

^{19/} 47 U.S.C. Section 158(d)(1)(A) and (B).

^{20/} "The Emerging Telecommunications Technology Act of 1993", S.335.

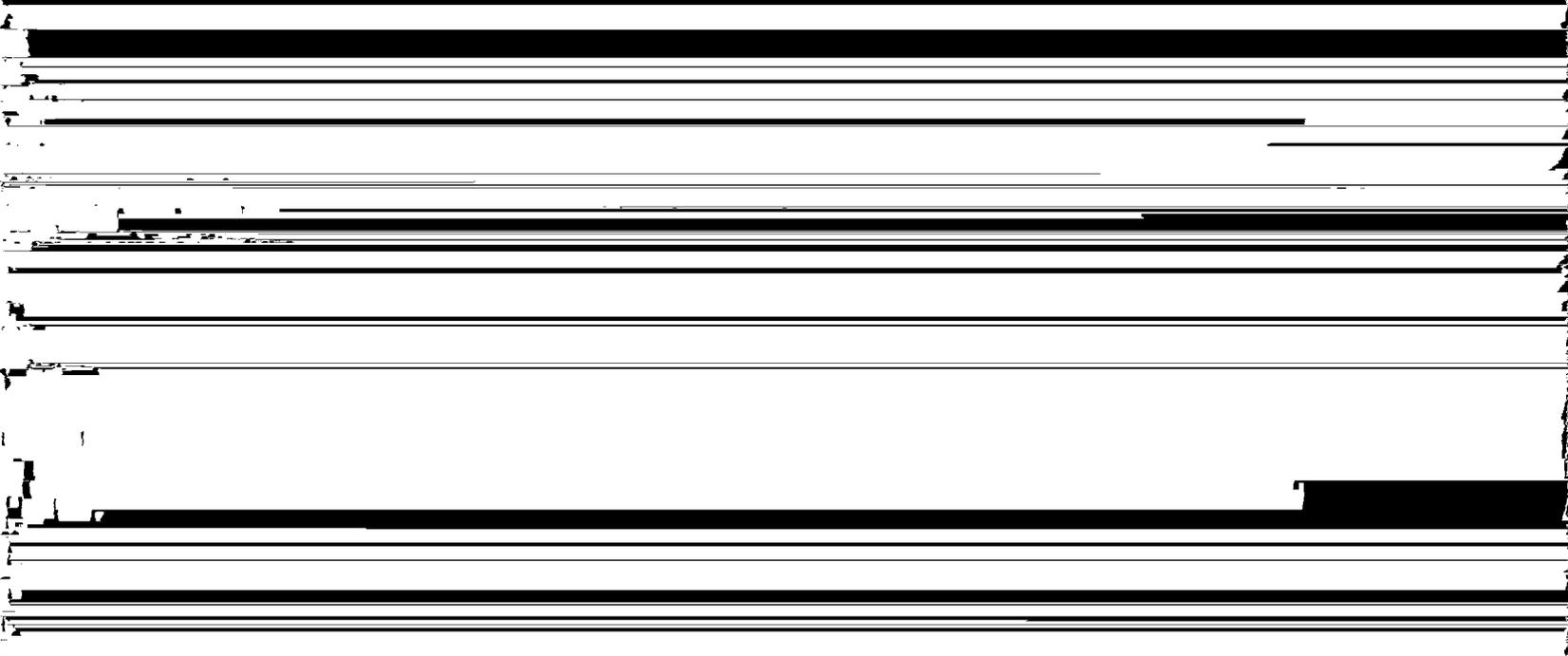
^{21/} APPA, p. 6.

Finally, UTC is in complete agreement with APPA that as a practical matter, the decision ignores the fact that many municipal utilities operate the microwave systems on which public safety entities rely. For example, in many cases it is the municipality's utility department that holds the license and operates the microwave network that is relied upon by all of the agencies -- including public safety agencies -- that comprise the municipality. Thus, to exempt public safety entities alone would not necessarily protect the integrity of the 2 GHz microwave system on which public safety services depend.

IV. UTC AGREES WITH TELESIS THAT THE FCC SHOULD CLARIFY THE OBLIGATIONS OF EMERGING TECHNOLOGY SERVICE PROVIDERS

A. Removal And Disposal Of Existing Facilities Must Be Included In Reasonable Costs

Telesis maintains that the Commission should specifically clarify that the costs involved in the removal and disposal of existing facilities must be included in its list of relocation



longer needed or wanted by the incumbent licensee.

B. Incumbent Must Be Given Option of Constructing Replacement Facilities

Telesis further requests that the FCC allow incumbent 2 GHz microwave licensees who have well-qualified technical and engineering staffs to perform the relocation work "in house"

microwave user has the right to oversee the engineering, construction and testing of its microwave replacement facilities. Moreover, as pointed out in UTC's petition, such oversight authority should include the right of the incumbent to engineer, build and test the replacement facilities itself or to select the contractors.

V. CONCLUSION

UTC opposes Apple's petition to hold in abeyance the transition rules adopted in the First R&O. The "transition framework rules" are final rules, and are not dependent on the outcome of the remaining issues being considered under the Third NPRM. UTC fully supports APPA's request that the FCC clarify that the exemption for state and local governments applies to all state and local government agencies, including public power

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

Respectfully submitted,

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I, Kim Winborne, a secretary with the Utilities Telecommunications Council, hereby certify that a copy of the foregoing comments was hand delivered, this 30th day of March June, 1993, to each of the following:

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