

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

II. Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation continues to read as follows:

**AUTHORITY:** 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.50 is amended to read as follows:

**§ 22.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Public Mobile Service to emerging technologies.**

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(b) Public Mobile Service licensees in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) The Commission will amend the operating license of the fixed microwave operator to secondary status only if the following requirements are met:

- (1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

- (2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

- (3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

- (d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

- (e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

III. Part 94 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation continues to read as follows:

**AUTHORITY:** Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.59 is amended to read as follows:

**§ 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.**

\* \* \* \* \*

(b) Private Operational-Fixed Microwave Service licensees, with the exception of public safety facilities defined in paragraph (f) of this section who will be exempt from any mandatory relocation, in bands allocated for licensed emerging technology services will maintain primary status in these bands until two years after the Commission commences acceptance of applications for an emerging technology service, and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations or, in bands allocated for unlicensed emerging technology services, until one year after an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations.

(c) The Commission will amend the operating license of the fixed microwave operator to secondary status only if the following requirements are met:

(1) The service applicant, provider, licensee, or representative using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service entity completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination; and

(3) The emerging technology service entity builds the replacement system and tests it for comparability with the existing 2 GHz system.

(d) The 2 GHz microwave licensee is not required to relocate until the alternative facilities are available to it for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.

(e) If within one year after the relocation to new facilities the 2 GHz microwave licensee demonstrates that the new facilities are not comparable to the former facilities, the emerging technology service entity must remedy the defects or pay to relocate the microwave licensee back to its former or equivalent 2 GHz frequencies.

(f) Public safety facilities are not required to be relocated, provided that the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property. The facilities within this exception are those Part 94 facilities currently licensed on a primary basis under the eligibility requirements of Section 90.19, Police Radio Service; Section 90.21, Fire Radio Service; Section 90.27, Emergency Medical Radio Service; and Subpart C of Part 90, Special Emergency Radio Services. As an additional safeguard, current licensees of other Part 94 facilities licensed on a primary basis under the eligibility requirements of Part 90, Subparts B and C, are permitted to request similar treatment upon demonstrating that the majority of the communications carried on those facilities are used for operations involving safety of life and property.

**Appendix B: Final Regulatory Flexibility Analysis for the Third Report and Order and Memorandum Opinion and Order**

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the First Report and Order and Third Notice of Proposed Rule Making (First R&O/Third Notice) in ET Docket No. 92-9. Written comments on the proposals in the First R&O/Third Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need for and Objective of Rules. Our objective is to provide spectrum for the development and implementation of new innovative technologies and services, while preventing disruption to current users of that spectrum. Providing spectrum for emerging technologies is necessary in order to bring new services to the public, and to foster U.S. competitiveness in the global telecommunications marketplace.

B. Issues Raised by the Public in Response to the Initial Analysis. Many parties supported reallocating spectrum to accommodate emerging technologies. Although most suggested modifications to specific proposals set forth in the Third Notice, they did not suggest modifications specifically to the initial regulatory flexibility analysis with the exception of the U.S. Small Business Administration (USSBA).<sup>76</sup> USSBA, while generally supporting the Commission's actions in this proceeding, argues that the Commission should consider requiring the incumbents to pay for their relocation to other bands or alternative media because many of the potential users of the 2 GHz spectrum are small businesses who lack the substantial capital needed to move the incumbents. It claims this will delay or inhibit the development of emerging technologies. Further, it argues that most of the incumbents are large business that recoup their cost through rate regulation and therefore, they would not suffer as their increased cost due to relocation would be absorbed, for the most part, by their customers. USSBA also suggests that tax certificates or deferred payment schedules should be considered as an alternative to reduce the substantial costs faced by small businesses in developing emerging telecommunications technologies.

We are cognizant that the cost to relocate the incumbent facilities is substantial and will to some degree impede both large and small businesses' ability to develop emerging technologies. However, as stated above, the 2 GHz fixed microwave bands support a number of industries that provide vital services to the public; therefore, we are committed to ensuring that the incumbents services are not disrupted and that the economic impact of this proceeding on the incumbents is

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<sup>76</sup> See USSBA at 5-7.

minimized. Further, we must take into consideration that not all of the incumbent licensees are big business, particularly in the bands above 2 GHz, and that many of the licensees are local government entities that are not funded through rate regulation.

We believe that tax certificates would further our policy of encouraging voluntary agreements to relocate fixed microwave facilities to other bands or other media during the two year period. Tax certificates would remove the possibility of any financial disincentive to relocate in instances that a 2 GHz fixed user may be deemed to have received a capital gain under the tax laws due to new facilities acquired to implement the relocation. In Telocator, the Commission broadly interpreted its authority to issue tax certificates, as defined in Section 1071 of the IRS Code, to include services other than a radio broadcasting station in order to further the Commission's pro-competitive policies. As with our tax certificate policy to cover certain cellular radio transactions set forth in Telocator, we find it in the public interest to authorize grant of tax certificates to incumbent fixed microwave operators during the two year period to facilitate voluntary agreements effectuating our new policy of providing 2 GHz spectrum for emerging technology providers. Accordingly, we are authorizing the grant of tax certificates for any sale or exchange of property in connection with voluntary agreements for the relocation of fixed microwave facilities during the two year period.

C. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives. We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this Third Report and Order and Memorandum Opinion and Order to the Chief Counsel for Advocacy of the Small Business Administration.

**Separate Statement**

**of**

**Commissioner Andrew C. Barrett**

**RE: Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies [ET Docket 92-9]**

This action represents a significant step in our endeavor to authorize Personal Communications Services [PCS] in the United States. I fully support this Order. I believe it represents a balanced effort to accommodate the concerns of fixed microwave licensees in the 2 GHz band. At the same time, the item utilizes the appropriate transition periods to allow PCS licensees to deploy a vast array of new services within a reasonable period of time. Further, our decision to utilize tax certificates as an incentive for relocating fixed microwave users is an excellent policy decision. I believe the tax certificate will enhance our efforts to launch PCS services in this country as quickly as feasible.

Our action today recognizes the great potential for future PCS services, in terms of future economic and business activity, as well as the potential for competitive local exchange services. I encourage PCS proponents and fixed microwave users to cooperate in their negotiations during the transition period. I look forward to addressing the licensing and eligibility issues in our pending PCS docket. We must continue to be vigilant in our effort to authorize PCS services which will unleash the technological and economic potential of the communications industry.