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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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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

TO: The Commission

COMMENTS OF THE  
UTILITIES TELECOMMUNICATIONS COUNCIL  
ON  
PETITIONS FOR RECONSIDERATION

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## SUMMARY

The two-year voluntary negotiation period should commence only upon the granting of licenses to a new service applicant, or alternatively, the acceptance of actual facilities applications. Tax certificates should be available in all cases unless the Commission is forced to modify the incumbent's license over the incumbent's objections and the Commission finds that the incumbent's objections were patently without merit. The Commission should restore the exemption for state/local government entities as originally proposed by it and as intended by the Senate. In-band "retuning", as proposed by Apple Computer, Inc. will burden incumbent microwave licensees, as well as licensed PCS users, and will serve only to delay the ultimate conversion of these bands to new technologies, increase the overall costs of transition, and prolong the need for UTAM, or a similar such group, to oversee the transition process for equipment manufacturers in the unlicensed band. Finally, AMSC Subsidiary Corporation's petition, requesting a change in the bands which have been reallocated for emerging technologies, should be dismissed as procedurally defective.



Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM), and UTC.<sup>1/</sup>

I. Background

In the First Report and Order and Third Notice of Proposed Rule Making in this docket, 7 FCC Rcd 6886 (1992) (First R&O), the Commission adopted rules to create a "reserve" of spectrum for emerging technologies in the 1850-1990, 2110-2150 and 2160-2200 MHz bands. To protect the significant investment and critical communications operations of the incumbent users of these bands, the FCC also adopted rules and policies designed to ensure that incumbents would be fully reimbursed for relocation expenses and would be relocated to comparable replacement facilities through voluntary negotiations. At the same time, the Commission requested comment, in a Third Notice of Proposed Rule Making, on the appropriate negotiation period and on how the Commission should resolve disputes over involuntary relocations.

The Third R&O was limited to defining the appropriate negotiation periods, outlining the procedures for dispute resolution, authorizing use of federal government spectrum as replacement spectrum for displaced microwave systems,

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<sup>1/</sup> Public Notice was given of these petitions by publication in the Federal Register, 58 Fed. Reg. 54591 (October 22, 1993).

revising the previously-adopted exemption for state and local government licensees, and authorizing the issuance of tax certificates to displaced microwave licensees.

**II. Voluntary and Mandatory Negotiation Periods**

Both AAR and UTC have requested clarification and/or reconsideration of the Commission's decision to commence the two-year voluntary negotiation period with the acceptance of applications for a new technology service.<sup>2/</sup> UTC noted that it was not clear whether the Commission was setting a single commencement date for voluntary negotiations for all of the emerging technology spectrum, even for frequency bands or markets which have not been allocated to particular services or opened for the filing of applications. UTC urged the Commission to clarify that the acceptance of applications only triggers a two-year voluntary negotiation period for those bands and markets for which new services licenses are to be granted. UTC further requested clarification that the triggering event should be the acceptance of formal requests for frequency assignment and licensing, and not the preliminary "postcard" applications likely to be used by parties desiring to participate in competitive bidding.

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<sup>2/</sup> AAR at 4-5; UTC at 2-5.

Similarly, AAR requested the Commission to revise the commencement of the voluntary negotiation period to the date a license is granted to provide new service in a specific geographic market.

UTC concurs with AAR that the mere acceptance of applications is unlikely to lead to negotiations between incumbent users and new service applicants. Neither party would have much incentive to engage in negotiations over microwave relocation prior to grant of a new service license.

UTC suspects that the typical new service applicant will not care to invest the time and money in negotiating a contingent relocation agreement with incumbent microwave users until: (1) it is clear that the applicant will be successful in securing a license for the spectrum; and (2) it is clear that implementation of the new service will require relocation of the incumbent's microwave system.<sup>3/</sup>

From the perspective of the incumbent microwave licensee, there is very little incentive to negotiate a

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<sup>3/</sup> Because it is anticipated that applicants will not be required to submit detailed engineering proposals until licenses have been tentatively awarded through competitive bidding, UTC suspects that many applicants will not prepare system designs until just prior to or after competitive bidding.

contingent relocation agreement with a new service applicant when it is not known whether this applicant will be successful; or, even if successful, when this applicant will receive a license and begin construction.

UTC therefore recommends that the commencement of the two-year voluntary negotiation period be established as the date a license is granted to a new service applicant. In the alternative, the voluntary negotiation period should commence on the date the successful auction participant files its "second-phase" application for facilities authorization.

With respect to termination of the negotiation periods, Apple argues that the Commission should establish a date certain (for example, one year after termination of the one-year mandatory period) by which incumbents in unlicensed bands would be required to retune or relocate.<sup>4/</sup> Expressing pessimism that unlicensed users will be able to negotiate for relocation of incumbent systems, Apple requests the Commission to develop a process that will ensure that within one year of the close of the mandatory relocation period, all microwave incumbents will be relocated from the unlicensed band. In addition, Apple suggests that the Commission should commit to resolving all

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<sup>4/</sup> Apple at 11.

disputes within six months of the close of the mandatory negotiation period.

Apple's argument assumes that the Commission has provided for a unified one-year period for mandatory negotiations in the unlicensed band and that all negotiations must be completed within this one-year period. However, this is not the case. Pursuant to Sections 22.50 and 94.59, as modified by the Third R&O, an incumbent microwave licensee will retain primary status 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." In the text of the Third R&O, the Commission explained that a separate one-year mandatory negotiation period is to commence with each notification to an incumbent licensee:

The one year period will commence when an unlicensed equipment supplier or representative initiates a written request for negotiation with a specific licensee.<sup>5/</sup>

While nothing per se would preclude an unlicensed equipment manufacturer or its representative from providing simultaneous notice to multiple microwave licensees, it would be unreasonable and presumptive evidence of bad faith

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<sup>5/</sup> Third R&O at para. 23.

if the manufacturer, or its representative, gave simultaneous notice to multiple licensees knowing that it would be virtually impossible to complete negotiations with these licensees within the ensuing year. Apple's suggestion that it, or its representative, would give simultaneous notice to all incumbent licensees in the spectrum designated for unlicensed operations strongly indicates that Apple does not intend to engage in good faith, bona fide, negotiations with the incumbent licensees.<sup>6/</sup>

The Commission should clarify that a request for "mandatory negotiations" is not simply a "notice to vacate": it must be a bona fide request to engage in negotiations over relocation arrangements, and should only be given when the new service licensee, unlicensed equipment manufacturer, or the manufacturer's representative is ready, willing and able to negotiate in good faith with each notified licensee.

UTC agrees with Apple that disputes over relocation should be resolved as promptly as possible. However, there is no reason for the Commission to commit to resolving

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<sup>6/</sup> UTC understands there are nearly 1,900 licensed microwave paths in the 1890-1930 MHz band, which has been allocated for unlicensed PCS devices. See Second Report and Order in GEN Docket No. 90-314, FCC 93-451, released October 22, 1993.

disputes within any particular timeframe. As noted above and in UTC's own Petition for Clarification and/or Reconsideration, it is unreasonable to assume that all disputes over relocation will be the result of bad faith on the part of incumbent users.<sup>2/</sup> The Commission has established a mechanism to promote use of marketplace forces in transitioning these bands to the use of new technologies, and has set strict timetables for both "voluntary negotiations," in the case of licensed spectrum, and "mandatory negotiations," in the case of both licensed and unlicensed spectrum.

UTC therefore supports Apple to the extent it calls for assurances that disputes presented to the Commission will be resolved promptly, but disagrees with Apple's suggestion that the Commission should establish extraordinary procedures, including a special task force within the agency, to handle what will hopefully be a small number of disputes.

### **III. Tax Certificates**

Several petitioners, including UTC, have requested reconsideration of the Commission's decision to limit the issuance of tax certificates to incumbents who negotiate

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<sup>2/</sup> UTC Petition for Clarification and/or Reconsideration, filed October 4, 1993, at 6.

relocation agreements during the two-year "voluntary negotiation" period.<sup>2/</sup> Apple and UTAM note that there is no two-year voluntary negotiation period for incumbents forced to relocate from bands allocated for unlicensed services, and that the Commission might have inadvertently limited the award of tax certificates to incumbents who relocate from licensed bands. AAR and UTC made similar observations in their petitions, urging the Commission to grant tax certificates for any voluntarily-entered agreement over relocation terms.

Tax certificates should not be limited to entities who enter agreements during the two-year voluntary negotiation period. In the Third R&O, the Commission found that tax certificates would promote the Commission's policies and would be in the public interest:

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 fixed two year period.<sup>2/</sup>

Significantly, the Commission made no findings as to why tax certificates would not serve the same function during other time periods. As pointed out by AAR, no matter when the agreement is reached, the relocation is the direct

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<sup>2/</sup> UTC at 5-7, UTAM at 3-5, AAR at 5-8, and Apple at 11-12.

<sup>2/</sup> Third R&O at para. 42.

result of the Commission's adoption of policies necessary to license new technologies in the 2 GHz band. Therefore, to encourage voluntary agreements and to remove the issue of tax liability from these negotiations, tax certificates should be awarded in all cases unless: (1) the Commission is forced to modify the incumbent's license over the incumbent's objections, and (2) the Commission finds that the incumbent's objections were patently without merit.

**IV. Public Safety Exemption**

UTC agrees with the petitioners who have challenged the Commission's decision to narrow the exemption for state/local government agencies to those microwave systems licensed under the eligibility provisions of Sections 90.19 (Police Radio Service), 90.21 (Fire Radio Service), 90.27 (Emergency Medical Radio Service), and Subpart C of Part 90 (Special Emergency Radio Services) and which are principally used to transmit communications used for police, fire, or emergency medical services involving safety of life and property.<sup>10/</sup>

The petitioners have noted the practical realities of communications systems operated by state and local government agencies, and the efficient intermixture of traditional "public safety" and other communications on the

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<sup>10/</sup> AASHTO, FCCA, PSCC, and PSMC.

same facilities. For years the Commission has encouraged licensees to optimize the use of limited radio spectrum by combining communications requirements on a common system.<sup>11/</sup> Part 94 of the Commission's Rules specifically endorses these spectrum-conserving arrangements by permitting licensees to transmit a wide range of communications on either a private, private carrier, or non-profit cost-shared basis with other eligible users.<sup>12/</sup>

In this proceeding, however, the Commission has announced that state or local government agencies that transmit "public safety" communications with other communications are not entitled to the same protection as agencies which have devoted a majority of their communications capacity to "public safety" communications. This new policy is ill-advised from a true public safety standpoint, and is inconsistent with the way the Commission has traditionally sought to protect the special interests of state and local government agencies.

UTC therefore urges the Commission to reconsider the "public safety" exemption and to restore the general exemption for state and local government agencies as

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<sup>11/</sup> See Report and Order in PR Docket No. 83-426, 57 RR 2d 1486 (1985).

<sup>12/</sup> See 47 C.F.R. §§90.9 and 90.17.

originally proposed by the Commission and as intended by the Senate.

V. "Retuning" Within the 2 GHz Band

Apple requests the Commission to actively encourage "in-band retuning" of 2 GHz microwave facilities as a cost-effective means of meeting the spectrum needs of new service providers. Apple disagrees with the Commission's earlier assessment that retuning will increase the overall cost of relocations, and would burden microwave licensees with two relocations instead of only one.

UTC concurs with the Commission's disposition of Apple's retuning proposal. First, despite numerous references in this docket and in the media to its alleged "frequency optimization" proposal, Apple has yet to produce any details to substantiate its claims. Without more information, the Commission should reject Apple's attempts to inject a major restructuring of the 2 GHz bands and significant modifications to the Commission's 2 GHz transition plan.<sup>13/</sup>

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<sup>13/</sup> UTC raised similar objections to Apple's retuning idea in Comments, filed September 15, 1993, in response to Apple's September 13, 1993, "Emergency Petition" in GEN Docket No. 90-314. Those comments are incorporated herein by reference.

Second, Apple has not rebutted the Commission's determination that retuning will likely result in greater costs to both new service providers and incumbent microwave licensees. Apple only suggests that in some circumstances a retuned microwave path might never have to be relocated, and in any event, the "entity that performed the retuning would remain responsible for the costs of any subsequently-required out-of-band move."<sup>14/</sup>

Apple's own arguments are inconsistent on this point. Apple suggests that some paths that are retuned might be able to remain in the 2 GHz band a very long time before they would have to be relocated from the band. Yet Apple also argues that the entity that performed the retuning would remain responsible for the costs of any out-of-band move. In the case of paths relocated from the unlicensed band, the entity that would perform the retuning presumably would be UTAM. Thus, under Apple's proposal, UTAM (or a similar such entity) would have to remain viable until such time as all retuned paths were relocated from the 2 GHz band. UTC strongly doubts whether UTAM or any other entity designated to fund the relocation of microwave paths from the unlicensed band will be interested in maintaining such open-ended responsibility. If the goal is to clear the unlicensed band as promptly as possible and to eliminate

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<sup>14/</sup> Apple at 7-8.

the need for an administrative organization such as UTAM, Apple's request for a two-step "retuning" process should be denied.<sup>15/</sup>

#### VI. Mobile Satellite Service

AMSC requests that the transition rules adopted in this proceeding not be applied to the 1970-1990 MHz and 2160-2180 MHz bands. AMSC claims that it plans to petition for reallocation of these bands to the Mobile Satellite Service (MSS), but that the relocation rules adopted in this docket "may not be feasible for mobile satellite systems, which operate nationwide, or in some cases, worldwide."<sup>16/</sup>

AMSC's Petition for Reconsideration is procedurally defective and should be dismissed. The 1850-1990, 2110-2150 and 2160-2200 MHz bands were reallocated for emerging technologies and were made subject to market-based transition rules by the Commission's First Report and Order in this docket. Neither AMSC nor any other party requested

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<sup>15/</sup> UTC does not read the Third R&O as foreclosing the possibility of in-band retuning as a voluntary relocation option for parties who so desire it; for example, to permit a microwave "frequency shift" within a licensed PCS channel. UTC doubts, however, whether retuning would be of any value in the case of unlicensed PCS devices since the "shift" would have to be out of the unlicensed band and into licensed spectrum.

<sup>16/</sup> AMSC at 4.

reconsideration of that decision insofar as choice of bands was concerned. Prior to the First R&O, it was clear that MSS was one of the services that might be allocated to this spectrum. In fact, the Commission was well aware that the 1992 World Administrative Radio Conference (WARC-92) had made provision in Region 2 for MSS allocations in the 2 GHz band, including the bands under review in this docket.

The Commission addressed AMSC's objections in the First R&O by stating it was not necessary to identify the exact services that would be permitted to occupy the emerging technologies bands prior to making a general spectrum allocation:

The rationale for our action making spectrum available for emerging technologies is to accommodate rapidly new services as the technology advances and these services become feasible. These could be additional PCS or even future MSS, if they can co-exist with other users of the 2 GHz band.<sup>17/</sup>

AMSC has petitioned for reconsideration of the Third R&O, which dealt with issues such as length of the voluntary and mandatory negotiation periods, dispute resolution procedures, and issuance of tax certificates. The Third R&O did not address the basic issue of the bands that would be subject to the transition rules.

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<sup>17/</sup> First R&O at para. 39 (emphasis added).

Accordingly, AMSC's Petition is an untimely request for reconsideration of the First R&O and should be dismissed.

**VII. Conclusion**

The Commission should revise the commencement date for the two-year voluntary negotiation period to coincide with the granting of licenses, or at a minimum, the acceptance of actual facilities applications. Tax certificates should be available for any voluntary agreement concerning relocation. The Commission should restore the exemption for state/local government entities as it originally proposed and as that exemption was endorsed by the Senate. Incumbent microwave licensees, as well as licensed PCS users, should not be burdened with in-band retuning that will only serve to delay the ultimate conversion of these bands to new technologies, increase the overall costs of transition, and prolong the need for UTAM, or a similar such group, to oversee the transition process for equipment manufacturers in the unlicensed band. Finally, AMSC's petition, requesting a change in the bands which have been reallocated for emerging technologies, should be dismissed as procedurally defective.

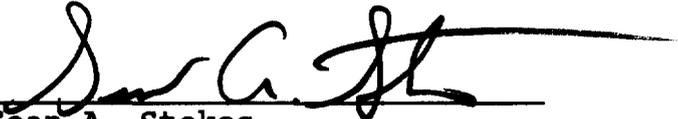
**WHEREFORE, THE PREMISES CONSIDERED,** the Utilities Telecommunications Council respectfully requests the Commission to take action on these petitions consistent with the views expressed herein.

**Respectfully submitted,**

**UTILITIES TELECOMMUNICATIONS  
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Dated: November 8, 1993

**CERTIFICATE OF SERVICE**

I, Kim B. Winborne a secretary of the Utilities Telecommunications Council, hereby certify that I have caused to be sent, by first class mail, postage prepaid, this 8th day of November 1993, a copy of the foregoing to each of the following:

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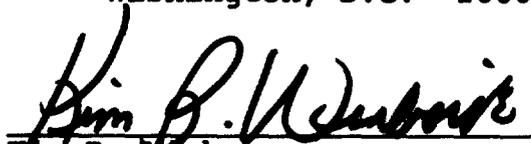
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