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Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF 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

PETITION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER

The Public Safety Microwave Committee ("PSMC"), the Association of Public-Safety Communications Officials-International, Inc. ("APCO"), the County of Los Angeles, and the Forestry-Conservation Communications Association ("FCCA") (collectively referred to herein as "Petitioners"), by their attorneys and pursuant to Section 1.429(i) of the Commission's rules, hereby seek reconsideration of the Commission's Memorandum Opinion and Order in the above-captioned proceeding, FCC 94-60 (released March 31, 1994), 59 Fed. Reg. 19642 (April 25, 1994) ("MO&O")^{1/}

INTRODUCTION AND SUMMARY

In an abrupt reversal of its prior findings and conclusions, the FCC has adopted rules requiring State and local government public safety agencies to vacate 2 GHz microwave radio frequencies that provide the "backbone" for police, fire, emergency medical, forestry conservation,

^{1/} Petitioners have participated jointly and/or separately in prior stages of this proceeding.

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highway maintenance and other critical public safety mobile radio communications services. Forced relocation of these facilities will cause severe and unnecessary disruption to vital taxpayer supported communications services that protect the safety of life and property.^{2/} To make matters even worse, the Commission acted surreptitiously, without prior notice and opportunity for public comment.

If not reconsidered, public safety agencies will be forced to engage in complex negotiations with PCS providers and possible lengthy and costly litigation before the FCC. The endless disputes likely to arise regarding the direct and indirect cost of relocation and the acceptability of replacement facilities will severely strain the limited financial and staff resources of state and local governments.^{3/} Throughout this disruptive process State and local governments also stand to be unfairly outgunned by PCS providers with millions of dollars at stake and ample resources for extensive engineering and legal support. Negotiating at such a disadvantage, State and local governments could be forced to accept less favorable terms and, more importantly, less reliable replacement facilities.

Previously, the Commission recognized the disruptive impact of forced relocation, and repeatedly found that the

^{2/} See Comments of PSMC (filed June 8, 1992), Reply Comments of PSMC (filed July 8, 1992).

^{3/} These issues are likely to include frequency selection and coordination, interference protection, system design, equipment requirements, reliability, performance specifications, and network redundancy.

"grandfathering" of public safety licensees in the 2 GHz band was in the public interest. This public safety exemption reflected the express Congressional intent that the Commission give top priority to communications services protecting the safety of life and property, and, in particular, to unusually specific Congressional intent that public safety licensees in the 2 GHz band not be subject to forced relocation.

Nevertheless, on March 8, 1994, on its own motion and without any prior notice to the public safety community or the public at large, the Commission reversed course 180 degrees and summarily dropped the public safety exemption. MO&O at ¶¶30-35. The Commission totally ignored the relevant legislative concerns, acted without any new scientific or technical evidence of record that could possibly support elimination of the exemption, and did not rationally explain its dramatic and unexpected policy reversal. All the MO&O contains are overly broad, speculative, and internally inconsistent statements regarding the perceived impact of public safety microwave incumbents on PCS deployment.

This sudden reversal of position is predicated solely on the bald claim that PCS providers will not be able to co-exist in the 2 GHz band with those public safety microwave systems that do not relocate voluntarily. Not only is no evidence or technical analysis offered to support this claim, but it directly contradicts the Commission's own

recent findings and conclusions in granting extraordinarily valuable PCS pioneer's preferences to companies that have purportedly developed and demonstrated spectrum sharing technologies for the 2 GHz band.

For these and other reasons discussed below, the Commission must reconsider its decision and reinstate the public safety exemption from forced relocation.

I. THE COMMISSION'S ORDER IGNORED STRONG CONGRESSIONAL CONCERNS OVER CONTINUED PUBLIC SAFETY USE OF THE 2 GHz BAND.

The Commission must always take heed of the general Congressional mandate that "public safety consideration should be a top priority when frequency allocation decisions are made." House Rep. No. 98-356, 98th Cong., 1st Sess. 27 (1983), reprinted in 1983 U.S. Code Cong. & Admin. News 2219, 2237 (emphasis added). In the case of public safety use of the 2 GHz microwave band, Congress has been even more explicit, expressing strong concern that public safety licensees in the 2 GHz band should not be subject to forced relocation. Yet, the Commission completely ignores this legislative history, failing even to acknowledge Congress' concern.

Section 1 of the Communications Act, subsequent amendments to the Act, and the underlying legislative history thereto, make clear that the Commission must allocate spectrum in a manner that promotes the "safety of life and property," 47 U.S.C. §151. See National Association

of Broadcasters v. FCC, 740 F.2d 1190, 1213-14 (D.C. Cir. 1984). As the Court of Appeals emphasized therein,

"radio services which are necessary for the safety of life and property deserve more consideration in allocating spectrum than those services which are more in the nature of convenience or luxury." S.Rep. No. 191, 97th Cong., 2d Sess. 14 (1981), reprinted in [1982] U.S. Code Cong. & Ad. News 2237, 2250.

Id. at 1213. The Commission has turned that mandate on its head by giving more consideration to PCS, a service "more in the nature of convenience or luxury" than to vital public safety communications.^{4/}

Moreover, Congress has been even more explicit when it comes to public safety use of the 2 GHz band. During consideration of the FY 1993 Appropriations Bill for the FCC (S.3026), Senator Ernest Hollings (D-SC) proposed restrictions on the Commission's reallocation of the 2 GHz band, including a detailed transition plan very similar to

^{4/} Title VI of the Omnibus Budget Reconciliation Act of 1993, reiterates the special radio spectrum needs of State and local government public safety agencies. For example, Section 6001 of the Act requires the FCC and NTIA to meet, "at least biannually, to conduct joint spectrum planning with respect to ... the future spectrum requirements for public and private uses, including State and local government public safety agencies." The FCC must also develop a plan for allocating the released spectrum and such plan "shall...contain appropriate provisions to ensure...the safety of life and property...." Finally, as a condition of its continued authority to use competitive bidding procedures, Section 6002 requires the FCC to submit to Congress, by February 1995, a "study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees."

the overall plan subsequently adopted by the Commission.^{5/} As initially offered, the Hollings Amendment allowed for a period of voluntary relocation of current licensees in the 2 GHz band, followed by a period of mandatory relocation of any licensee where a new user of the band agreed to bear the expenses of relocation.

On the Senate floor, during reconsideration of the Bill, Senator Dale Bumpers (D-Ark) offered a "perfecting amendment" to the Hollings Amendment to exclude state and local government licenses from any mandatory relocation.^{6/} It was intended to

preserve and codify the grandfathering of the right of state and local governments to retain the portions of the 2 GHz band of the radio spectrum which they now control for use by public safety agencies. This amendment will, in effect, write into law the current proposed rule of the Federal Communications Commission, issued last January, that provides for indefinite grandfathering of the rights of public safety users of the 2 GHz band. The FCC proposed rule would respect the priority of public safety users of the spectrum, as provided for by law.^{7/}

The Bumpers Amendment was accepted by Senator Hollings, the floor manager for the bill, and unanimously adopted by the full Senate.^{8/}

The Commission obviated the need for legislation when it adopted rules incorporating many of the provisions in the

^{5/} 138 Cong. Rec. S10346 (July 27, 1992).

^{6/} See 138 Cong. Rec. S10350 (statement of Sen. Hollings).

^{7/} 138 Cong. Rec. S10350 (statement of Sen. Bumpers).

^{8/} 138 Cong. Rec. S10351.

Hollings/Bumpers Amendment, including the public safety exemption. First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992). As a result, Senator Hollings withdrew the specific 2 GHz provisions when the bill reached the Conference Committee, presumably confident that the FCC was now progressing in a manner consistent with Congressional intent.^{2/}

Now, without even acknowledging this history and acting as if it had never happened, the Commission has eliminated the public safety exemption, forcing all microwave licensees to vacate the 2 GHz band. This is exactly the result that Congress sought to prevent in the Hollings/Bumpers Amendment. Yet, the Commission has not even attempted to explain how its action can be reconciled with these express Congressional concerns.

II. THE COMMISSION'S ACTION IS AN ARBITRARY AND UNEXPLAINED DEPARTURE FROM PRIOR POLICY, WHICH WAS UNDERTAKEN WITHOUT ADEQUATE NOTICE OR OPPORTUNITY FOR PUBLIC COMMENT.

Until its most recent action, the Commission had been steadfast in its exemption of public safety licensees from forced relocation. While the Commission narrowed the definition of an exempt "public safety" entity, it never proposed or even hinted that the wholesale elimination of

^{2/} This legislative history was discussed at length in PSMC's Comments in response to the Third Notice of Proposed Rulemaking (filed Jan. 11, 1993), and again in its Petition for Partial Reconsideration of Third Report and Order (filed Oct. 4, 1993).

the public safety exemption was under consideration. Nor did any party file a petition for reconsideration seeking such a result. Rather, the Commission acted on its own and in complete secrecy.

This secret aspect of the Commission's action was particularly troublesome to Commissioner Quello, who expressed "concerns about the process by which the Commission came to this conclusion and the procedure for relocating these critical public safety communication service providers." In his view, the "Commission should have apprised the public safety community of this impending change." Separate Statement of Commissioner James H. Quello. He reluctantly concurred with the MO&O, as did Commissioner Barrett, who invited further reconsideration of the matter if public safety entities "believe that additional procedural safeguards are required to support the ability to operate without disruption." Separate Statement of Commissioner Andrew C. Barrett.

Until the MO&O, such "additional procedural safeguards" had been part of every Commission proposal and order in this proceeding. In initially proposing to create an "emerging telecommunications technology" band at 2 GHz, the Commission clearly recognized the special public safety situation:

We recognize that state and local government agencies would face special economic and operational considerations in relocating their 2 GHz fixed microwave operations to higher frequencies or alternative media. We are particularly sensitive to the need to avoid any disruption of police, fire, and other public safety communications. To address these concerns,

we propose to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods. Rather, these facilities would be allowed to continue to operate at 2 GHz on a co-primary basis indefinitely, at the discretion of the state and local government licensees. These agencies would be permitted to negotiate the use of their frequencies with other parties. In this manner, transfer of state and local government operations could be arranged so as to accommodate fully any special economic or operational considerations with regard to the institutions affected.

Notice of Proposed Rulemaking in ET Docket 92-9, FCC 92-20
(released February 7, 1992) ("NPRM") at ¶25.

After a presumably thorough review of the record, the Commission completely exempted State and local government licensees from mandatory relocation. First Report and Order at ¶26. While some issues, such as the length of the transition period for licensees subject to relocation, were left for further comment in the Third Notice phase of the action, the public safety exemption was contained in the "final" rules adopted as part of the First Report and Order. Those rules were included in the amended Section 94.59(b) attached to the Order and subsequently published in the Federal Register, 57 Fed. Reg. 49020, 49022 (October 29, 1992).

Significantly, no party filed a petition for reconsideration of the State and local government exemption from mandatory relocation.^{10/} Two parties, Apple Computer,

^{10/} Two parties, the Utilities Telecommunications Council and the American Public Power Association, filed petitions asking the Commission to clarify that the exemption also applied to municipal utilities.

Inc. and ROLM, did criticize the exemption in their comments responding to the Third Notice of Proposed Rulemaking.

However, their comments were limited to a general expression of concerns regarding the impact of the exemption on the unlicensed PCS band. Their comments were, in any event, filed long after the period had run for filing petitions for reconsideration.^{11/}

Thereafter, in rejecting requests that the State and local government exemption include public power companies, the Commission reaffirmed that its "purpose in providing an exemption from mandatory relocation was to ensure that important and essential safety of life and property communications services are not disrupted" and that its

concerns for exempting such facilities from involuntary relocation were directed towards the economic and extraordinary procedural burdens, such as requirements for studies and multiple levels of approvals, that are often necessary to make changes in public safety systems as well as the unique importance of communications involved in the provision of police, fire, and emergency medical services. While our rules ensure that the financial burden of any relocation is placed on the new technology provider, we continue to believe that the public safety and special emergency services warrant special protection.

^{11/} Their comments were filed on January 13, 1993. Pursuant to Section 1.429(d) of the Commission's rules, a Petition for Reconsideration would have been due on November 30, 1992, thirty days after the new rules appeared in the Federal Register.

Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6610 (1993), at ¶50.^{12/}

While reaffirming the need to protect "public safety" licensees from mandatory relocation, the Commission limited the definition of "public safety" facilities to those licensed under Part 90, Subparts B and C, and on which a majority of communications are for the protection of life and property. PSMC, FCCA, and others subsequently filed petitions for reconsideration of this action.^{13/} Several parties opposed those petitions. However, again no party filed a petition for reconsideration or otherwise sought to eliminate the public safety exemption.

Thus, it was a surprise, to say the least, when the Commission, sua sponte, completely repealed the public safety exemption in its March 8, 1994, Memorandum Opinion and Order. With no prior proposal, notice to interested parties or further record, the Commission had an even greater burden than normal to explain the rationale for the complete reversal of its prior position. As discussed

^{12/} The Second Report and Order, 8 FCC Rcd 6495 (1993), modified certain rules regarding other microwave bands to which 2 GHz licensees are likely to migrate as a result of the relocation rules.

^{13/} Those Petitions were denied in the MO&O, at ¶¶36-41. The FCC's rules do not permit a further petition for reconsideration on the issues raised therein. Nevertheless, we take this opportunity to suggest that the Commission re-examine its overly narrow definition of "public safety" as it will ultimately force the Commission to make inherently difficult and arbitrary decisions as to which State and local government agencies protect the safety of life and property, and which do not.

below, the Commission failed to come even close to meeting that burden.

III. THE FCC HAS FAILED TO PROVIDE AN ADEQUATE BASIS FOR ITS SUDDEN REVERSAL OF THE PUBLIC SAFETY EXEMPTION.

An administrative agency must provide a well-reasoned rationale supported by the record for any significant change in its policies or rules. An "agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." Greater Boston Television Corporation v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); Office of Communications of the United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977); Atchinson, Topeka & Santa Fe Railroad v. Wichita Board of Trade, 412 U.S. 800, 806-809 (1973); Motor Vehicle Mfrs. Ass'n. v. State Farm, 463 U.S. 29 (1983). In this case, the Commission has failed to meet any of those requirements.

Previously, the Commission had concluded (presumably after careful analysis) that "State and local government agencies would face special economic and operational considerations in relocating their 2 GHz microwave operations," NPRM at ¶25, including "economic and procedural burdens, such as requirements for studies and multiple levels of approvals, that are often necessary to make changes in public safety systems." Third Report and Order at

¶50. Therefore, said the Commission: "While our rules ensure that the financial burden of any relocation is placed on the new technology provider, we continue to believe that public safety and special emergency services warrant special protection." Id.

Even in its most recent decision, the Commission acknowledges that the purpose of the exemption "was to ensure that essential safety of life and property communications services are not disrupted or otherwise disadvantaged." MO&O at ¶30. Yet, nowhere in the MO&O does the Commission suggest that either the disruption or the "economic and procedural burdens" of forced relocation have been eliminated or even diminished. What change in circumstances, therefore, could be so compelling as to overcome the serious problems posed by any forced displacement of communications facilities that protect the safety of life and property?^{14/}

To the extent that the MO&O provides an answer, it appears to be that the Commission has suddenly and somewhat mysteriously come to a completely different conclusion that "it will not be possible for PCS and fixed microwave to operate in the same geographic area on the same frequency without interfering with each other." MO&O at ¶34. Without even mentioning, let alone weighing, its previous findings

^{14/} Certainly the fact that PCS provider must pay the costs of relocation is not the explanation, as that was also true in the Commission's prior decisions to exempt public safety facilities from forced relocation.

regarding the impact on public safety of forced relocation, the Commission has completely changed course. Its sudden reversal is based on a "particular concern" in

providing adequate spectrum for operation of licensed services in major urban areas where there are a large number of incumbent public safety fixed microwave facilities and for operation of unlicensed PCS devices....allowing all public safety facilities to remain in the band indefinitely would defeat our primary goal in this proceeding of providing usable spectrum for the implementation of emerging technologies.

Id.

At this late stage and considering the long history of this proceeding, the Commission must do much more than simply assert a "particular concern" that "PCS service may be precluded or severely limited in some areas unless public safety licensees relocate." Id. First, even assuming that the Commission's concern is well placed (and it is not), the Commission must balance that concern against the disruption to public safety communications caused by relocation, the statutory "priority" for communications that protect the safety of life and property, and the unusually specific legislative intent that 2 GHz public safety microwave systems not undergo forced relocation. The Commission's failure even to discuss, let alone balance, these competing concerns is reason enough for the Commission to reconsider its decision in the MO&O.

Yet, there is further, even more compelling, reason for reversal. The conclusion that incumbent public safety microwave licensees will prevent PCS from developing is

nothing more than a bald assertion, unsupported by the record or valid technical analysis. To support its claims, the Commission cites just three comments filed after the Third Report and Order (APC, Cox and UTAM). MO&O at 32-33. Yet, none of those parties took the position in their comments that the alleged impact of public safety incumbents was so severe as to require complete elimination of the public safety exemption (and none had filed a petition for reconsideration on that point). Rather, their comments were in support of the Commission's decision in the Third Report and Order to narrow the public safety exemption, and in opposition to petitions seeking to restore a broader "State and local government" exemption.

Indeed, Cox stated in its Comments that the Commission's "decision recognizes that microwave incumbents providing services that directly and predominately protect lives and property cannot risk any possibility of service disruption or inconvenience." According to Cox, the "balance struck by the Commission is equitable, necessary and will benefit ultimately both emerging technology service providers and microwave incumbents." Cox Comments at 6-7 (emphasis in original, footnotes omitted). APC similarly agreed that the Commission decision in the Third Report and Order "strikes a fair balance between ensuring that spectrum is available for emerging technologies and exempting vital services from involuntary relocation." APC Comments at 12.

Even the PCS industry appears to have accepted the need to protect at least some public safety microwave licensees.

In going beyond what the PCS industry itself had advocated the Commission based its conclusion on its own assertion that "it will not be possible for PCS and fixed microwave to operate in the same frequency without interfering with each other." MO&O at ¶34. However, the Commission fails to cite any substantial evidence in the record to support that conclusion. Rather, the Commission merely points to a few comments containing factual statements regarding the number of public safety licensees in particular frequency bands and geographic locations, something which has remained largely unchanged throughout this proceeding. MO&O at ¶32. No engineering studies or economic analysis, internal or external, analyzing the actual impact of those microwave facilities on PCS deployment is cited, let alone a reasoned attempt to balance that impact against the harm caused by forced relocation of public safety licensees.

The absence of such evidence suggests that either the Commission acted without any basis for its decision (in which case it must be reversed on substantive grounds), or the Commission relied upon information not cited in this MO&O or filed in the record of this proceeding. If the latter case, to the extent studies or other information were not placed in the record for public review and comment,

there would be a serious violation of the Commission's rules regarding ex parte communications.

As the Commission is well aware, there have been numerous allegations regarding improper ex parte communications in the related PCS and pioneer's preference proceeding (Gen. Docket 90-314). These allegations are now the subject of a Congressional investigation,^{15/} a raging debate before the Commission, and numerous judicial appeals of the pioneer's preference awards. Given the apparent lack of support for its abrupt policy shift, it is incumbent on the Commission also to review the potential for infestation of this proceeding by impermissible ex parte contacts.

IV. THE FCC'S ACTION IS TOTALLY INCONSISTENT WITH THE COMMISSION'S FINDINGS UNDERLYING THE AWARD OF VALUABLE PCS PIONEER'S PREFERENCES.

The Commission's cursory and unsupported conclusions regarding sharing of the 2 GHz band also directly contradicts its own statements and actions in the PCS pioneer's preference proceeding. Third Report and Order in Gen. Docket 90-314, FCC 93-550 (released February 3, 1994), ¶¶ 7-36, 51-74. There, the Commission granted extraordinarily valuable PCS pioneer's preferences to APC and Omnipoint, based upon their development of technologies to facilitate exactly the type of sharing of the 2 GHz spectrum that the Commission now says "will not be possible."

^{15/} See Communications Daily (May 15, 1994) at 2-3.

APC received its pioneer's preference for developing and demonstrating the Frequency Agile Sharing Technology (FAST), which the Commission said will "facilitate spectrum sharing by mobile PCS and fixed microwave systems at 2 GHz." Id. at ¶7. The Commission also concluded that "APC's analysis and testing demonstrate that unused spectrum exists in the 1850-1990 MHz band sufficient to allow immediate initiation of PCS services with no need to immediately relocate existing licensees." Id. at ¶35.

Similarly, Omnipoint received a pioneer's preference for developing spread spectrum PCS technology that it claimed will result "in less interference to incumbent microwave operations than that of other proposed PCS equipment, and that this permits greater spectrum sharing." Id. at ¶51. Omnipoint's technology is designed to "coexist with other users and fixed microwave operations on the same frequencies with minimum disruption and maximum flexibility." Id. at ¶52. Thus the Commission concluded that "the concepts and technological developments pioneered by Omnipoint will facilitate the implementation of PCS in the 2 GHz band and permit sharing with fixed microwave licensees." Id. at ¶57.

The Commission cannot have it both ways. Either spectrum sharing is feasible (as suggested in the significantly more detailed pioneer's preference decision), or it "will not be possible" as claimed in the latest MO&O in this proceeding. If the latter is true, then

Commission's grant of pioneer's preferences to APC and Omnipoint must be re-examined. If sharing is feasible, the Commission must reconsider and reverse its blatantly inconsistent ruling to repeal the public safety exemption from forced relocation.

V. THE WHOLESALE ELIMINATION OF THE PUBLIC SAFETY EXEMPTION IMPOSES ADDED BURDENS ON RURAL MICROWAVE SYSTEMS.

The Commission's blanket elimination of the public safety exemption is also overly broad. The Commission's principal concern is with the impact of incumbent microwave licensees in major urban markets and in the unlicensed PCS band.^{16/} Yet, the public safety exemption was repealed for all public safety entities, including rural systems (which make up the majority of microwave facilities) and those in the licensed PCS portion of the 2 GHz band.

For many rural public safety microwave systems, there is really only a one-year negotiation period under the Commission rules. The voluntary negotiation period will expire simultaneously for all public safety 2 GHz microwave licenses four years after the FCC accepts the first PCS applications. However, PCS licensees are unlikely to need to relocate rural microwave paths, if at all, until well after the expiration of the voluntary four-year period. Since PCS providers can initiate the one-year mandatory period at any time thereafter, rural microwave licensees

^{16/} See MO&O at ¶34.

will have little or no advance notice that PCS providers need their frequencies, and will have an unreasonably short time period to reach mutually acceptable relocation agreements. Therefore, the MO&O, in addition to being unsupported by the record and inconsistent with other Commission actions, will have an arbitrary and capricious impact on rural public safety microwave users.^{17/}

^{17/} Petitioners also suggest that non-exempt microwave licensees be given the option of initiating binding arbitration as an alternative to Commission intervention should mandatory negotiations fail.

CONCLUSION

Therefore, for the reasons discussed above, Petitioners urge the Commission to reconsider and reverse its sudden and unsupported decision to force public safety 2 GHz licensees to relocate. The Commission must reinstate the public safety exemption.

Respectfully submitted,



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