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

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JUN 29 1994

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

OPPOSITION OF COX ENTERPRISES, INC.

Werner K. Hartenberger
Laura H. Phillips

DOW, LOHNES & ALBERTSON
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Its Attorneys

June 29, 1994

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SUMMARY

Cox Enterprises, Inc. ("Cox") opposes the joint petition for reconsideration filed by 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") for reconsideration of the Federal Communications Commission's Order of March 31, 1994. The Order eliminated the exemption from involuntary relocation for public safety microwave operators.

Petitioners' primary complaint is that the Commission's decision is not supported by evidence in the record or adequately explained. However, Petitioners fail to establish that the rule was not the result of reasoned analysis developed from facts contained in the record. The Order in fact discusses commentary, technical evidence and studies filed in this proceeding that support the Commission's conclusion that it is impossible for PCS and fixed microwave to operate in the same geographic area on the same frequency without interference. Moreover, the Commission articulates the connection between the facts in the record and its decision to eliminate the public safety exemption and explains that it had previously underestimated the difficulty of spectrum sharing in light of spectrum overcrowding. Petitioners' suggestion that the Commission did not employ and articulate a reasoned analysis is incorrect and warrants no further consideration.

Petitioners' assertion that the Order is contrary to a Congressional mandate that public safety services remain a "top priority" in decisions regarding

allocation of spectrum is similarly misplaced. The Commission has been highly sensitive to the concerns of public safety licensees throughout these proceedings, expressly providing public safety incumbents with a five year ability to veto their relocation as compared to the three year period provided to other incumbents. Bearing in mind its responsibilities to all segments of the public, the Commission designed sufficient protection for all public safety microwave incumbents. Under the Commission's rules, no microwave user will ever be required to relocate unless or until the emerging technologies provider guarantees payment of all relocation expenses, builds the new microwave facilities at the relocation frequencies, and demonstrates that the new facilities are comparable in quality to the old facilities. Relocated microwave operators will in fact benefit directly from the Commission's regulations because they will receive new and modernized microwave equipment at no cost, without suffering serious operational dislocations.

Because the Order requires that emerging technologies providers bear all the costs and burdens of relocation, there is no danger of disruption or financial collapse for public safety microwave users as a result of the Commission's decision. In contrast, if the Commission fails to ensure that clear spectrum can be made available for PCS providers to offer new services, the Commission will fall far short of the objective in these proceedings of "providing usable spectrum for the implementation of emerging technologies." Order at 13. In that event, the Commission's time and effort in drafting balanced rules will be wasted and the introduction of new services stymied.

Further, contrary to the assertions by Petitioners, the Commission's Order is fully consistent with Congressional policies. The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") authorized competitive bidding for the allocation of new spectrum. A primary impetus for this legislation was the desire to design a system for allocation of new spectrum which is equitable, efficient and economically viable. In particular, the spectrum auctioning process is intended to recover for the public a portion of the value of new spectrum sold for commercial purposes and to encourage the development and deployment of emerging technologies to the public. The Commission's decision in these proceedings is in accord with Congressional policy.

Finally, the suggestion made by Petitioners of improper ex parte contacts in this proceeding is patently absurd. The Commission acted on the record in the best interests of the public as a whole and demonstrated great sensitivity to the needs of public safety incumbents. While the Petitioners plainly feel aggrieved by the Commission's recent action, interposing wild and unsubstantiated claims of abuse of process does not improve their case for reconsideration.

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OPPOSITION OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its opposition to the petition of 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") for reconsideration of the Federal Communications Commission's Memorandum Opinion and Order, released March 31, 1994, 59 Fed. Reg. 19642 (April 25, 1994) ("Order") in the above-referenced docket.

Petitioners urge the Commission to reconsider and reverse its decision to eliminate the exemption from involuntary relocation for public safety 2 GHz licensees. Petitioners argue that the Order ignores consistently expressed Congressional concerns over public safety use of the 2 GHz band, departs from prior policies without opportunity for notice and comment, and fails to explain the reasons or cite to evidence in support of its ruling. Petitioners also allege that the proceedings leading up to issuance of the Order were shrouded in "secrecy" and may

have been the result of "impermissible ex parte contacts." Petition at 17. Finally, Petitioners complain that the Order is inconsistent with awards of pioneer's preferences to APC and Omnipoint based on their development of technologies to facilitate spectrum sharing. Petition at 17.

The Commission's Order articulates the logic of its decision and is supported by the record. Moreover, the Order in fact gives "special consideration" to the concerns of public safety microwave users by delaying the involuntary relocation period from three to five years. If the Commission were to resurrect the exemption, the amount of spectrum available for PCS would be so significantly restricted that the service would not develop as Congress and the Commission envisioned. The Commission's decision therefore strikes a proper balance between providing room for development of PCS technology and services and protection for public safety microwave facility operators. The Commission's carefully crafted 5-year transition period, and provisions requiring PCS operators to pay for all costs associated with relocation, provide ample safeguards against disruption and financial burden for the public safety microwave facility operators. Therefore, Cox urges the Commission to reject the petition and reaffirm its elimination of the public safety exemption from involuntary relocation in the 2 GHz band.

I. Evidence In The Record Concerning Spectrum Overcrowding Supports The Commission's Rule Requiring Relocation of Public Safety Licensees.

Petitioners complain that the Commission's decision relies on "[n]o engineering studies or economic analysis, internal or external ... let alone a reasoned attempt to balance [the] impact against the harm caused by forced relocation of public safety licensees." However, the Order cites to and relies upon substantial evidence in the record regarding serious concerns of spectrum overcrowding and its impact on the economics of new service development. In particular, the Commission explicitly notes four sets of filings in the proceeding to buttress its conclusions.

First, the Commission cites to comments submitted by Apple Computer and Rolm in response to the First Report and Order to the effect that allowing public safety facilities to remain in the band allocated to unlicensed devices would impair or even prohibit technology implementation.^{1/} In their comments, Apple Computer and Rolm argued that all incumbent microwave facilities, including public safety facilities, should be subject to relocation.^{2/}

Second, the Order relies upon studies performed by American Personal Communications (APC) regarding the use of spectrum in major metropolitan areas.^{3/} The APC study, submitted to the Commission in connection with APC's

1/ Order at 12.

2/ See comments of Apple Computer, Comments to the Third Notice of Proposed Rule Making at 5-7; Rolm Comments to the Third Notice of Proposed Rule Making at 2-3.

3/ Order at 12.

response to petitions for reconsideration of the Third Report and Order, analyzes the spectrum availability in the 11 largest United States markets under three proposed allocation plans for PCS (40, 30, and 20 MHz per licensee).^{4/} The APC study concluded that, in a shared spectrum environment, generally only a small percentage of the spectrum allocated to each PCS licensee is actually available for PCS services due to interference with existing microwave facilities. The APC study indicated that relocation of the "worst" microwave paths in each market, whether public safety or non-public safety facilities, would reduce interference and raise the percentage of spectrum allocated to each PCS licensee which is actually available for use. The APC study thus provides substantial evidence that, in the 11 largest markets, relocation of incumbent microwave operators would increase PCS licensees' ability to deploy PCS technology and services.

Third, the Order cites Cox's analysis of spectrum congestion in the Los Angeles MTA which reveals that approximately 25 percent of the incumbent 2 GHz microwave facilities appear to be licensed to governmental entities, including public safety entities.^{5/} The Order notes Cox's observation that Cox likely would be unable to deploy PCS if it does not succeed in relocating a significant number of microwave incumbents.

^{4/} See APC Response to Petitions for Reconsideration, CC Dkt No. 90-314, filed November 9, 1992 (also filed in this proceeding).

^{5/} Order at 12, citing Cox response to petitions for reconsideration of the Third Report and Order at 6-9.

The record in this proceeding also includes the results of a previous Cox study of interference areas around microwave paths in the 1850-1990 MHz band in and around San Diego, the site of Cox's cable testbed.^{6/} The study indicates that there are a total of 24 microwave paths licensed in San Diego alone, 10 of which are used for public safety operations. Cox's study concluded that there are "numerous critical, high demand areas [in which] PCS providers would be blocked from providing service ... even after those microwave licensees that can be involuntarily relocated under the Commission's rules are relocated."^{7/}

Both the APC and Cox research studies provide well-documented data regarding spectrum congestion in the emerging technologies bands, particularly in metropolitan high demand areas. These studies also reflect the adverse impact on PCS development of providing interference protection to all existing microwave licensees and, in particular, indefinite exemptions to public service microwave operators.

Finally, the Order considered comments submitted by the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM). UTAM's comments stated that delays in reaching voluntary relocation agreements with exempt microwave licensees would result in delays in deployment of unlicensed PCS technology.^{8/} The UTAM submissions, along with those by Cox,

6/ Cox Comments to Third Notice of Proposed Rulemaking, January 13, 1993.

7/ Cox Comments at 4.

8/ Order at 13.

APC and others, support the Commission's finding 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."^{9/}

The Commission properly reconsidered sua sponte these data and evidence already in the record. The Commission cited to and explained technical data in the record in these proceedings in support of its decision.

Courts have long held that Section 4(c) of the Administrative Procedure Act requires an agency to issue a basis and purpose statement sufficiently detailed to permit a reviewing court to determine "how and why the regulations were actually adopted," Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974), citing, Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). But the statement need not indicate that the agency considered all the relevant evidence presented. Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 27-28 (D.C. Cir. 1954). The Commission's Order in these proceedings meets this standard. Accordingly, there is no merit to Petitioners' assertions that the Commission "acted without any basis for its decision" or "relied upon information not cited in this [Order] or filed in the record."^{10/}

9/ Id.

10/ Petition at 16-17.

II. The Order Supplies A Reasoned Analysis Indicating That Prior Policies Are Being Deliberately Changed, Not Casually Ignored.

The Commission's elimination of the exemption for public safety licensees from involuntary relocation was amply supported by economic and engineering data in the record of the PCS rulemaking and Emerging Technology proceedings. Nevertheless, Petitioners claim the Commission's change was unexpected and not supported by a reasoned articulation of the link between the underlying facts and the conclusion. The courts, however, have long held that:

[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But 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 Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

The Commission's Order discusses and cites evidence in support of the its action, and outlines the reasoning by which it arrived at its conclusion. After discussing the technical foundation for its analysis, the Order states that:

[o]f particular concern is 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. It has been recognized by incumbent fixed microwave and PCS interests alike 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. Upon review, and after considering these additional comments, we are now convinced that PCS service may be precluded or severely limited in some areas unless public safety licensees relocate. Order at 13.

The Commission further explained its reasons for changing its policy, noting that its previous decisions did not take into account fully the technical concerns expressed by some parties regarding spectrum overcrowding: "...in previous decisions, we believe that we underestimated the difficulty that PCS will have in sharing spectrum with incumbent public safety licensees." Order at 13.

Under these circumstances, it is nonsense for Petitioners to claim that the Commission has not explained the basis for its change of policy. Given the Commission's citation to technical data regarding the limitations of the 2 GHz range, and discussion of the excessive demands placed thereon, the above-quoted language makes a logical link between the underlying facts and the Commission's decision. The suggestion by Petitioners that the Commission's Order crosses the line from "tolerably terse" to "intolerably mute" is unfounded and cannot form the basis for reconsideration of the Order.

III. The Commission's Rule Requiring Public Safety Licensees To Relocate Does Not Conflict With Other Congressional Concerns.

Throughout these proceedings, the Commission has recognized the Congressional mandate to make the protection for "safety of life and property" a top priority in decisions regarding the allocation of spectrum.^{11/} Petitioners complain, however, that the Commission ignored Congressional intent that radio services which are necessary for protection of life and property receive "more consideration in

^{11/} See 47 U.S.C. Section 151.

allocating spectrum than those services which are more in the nature of convenience or luxury."^{12/}

Petitioners also claim that the Commission's decision contradicts statements made by Senators Hollings and Bumpers during debate over a bill passed by the Senate but never enacted into law. The statements were made in support of the "Bumpers Amendment," which would "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."^{13/} Most significantly, Petitioners allege that the Commission has "not even attempted to explain how its action can be reconciled with these express Congressional concerns."^{14/}

An examination of the terms of the Order demonstrates that these allegations are overblown and inaccurate. The Order did not ignore the particularized needs of public safety licensees. Rather, the Commission recognized that "certain public safety entities warrant special consideration because previously they have been excluded from involuntary relocation and because of the sensitive nature of their communications."^{15/}

^{12/} Petition at 5, citing S. Rep. No. 191, 97th Cong., 2d Sess. 14 (1981).

^{13/} Petition at 6, citing 138 Cong. Rec. S10350 (statement of Sen. Bumpers).

^{14/} Petition at 7.

^{15/} Order at 13 (emphasis added).

In express consideration of the special status of public safety microwave operators, the Commission adopted a special transition program consisting of a four-year voluntary negotiation period followed by a one-year mandatory negotiation period. This period is two years longer than the transition period afforded non-public safety licensees. This five-year transition period guarantees that public safety operations will have sufficient time to coordinate the construction and testing of new facilities before being required to rely on them fully. The Commission further has ensured that the costs of building and testing relocation facilities will be paid for entirely by the emerging technology licensee. Moreover, the relocation facilities are required, at a minimum, to be comparable in quality to those being replaced.

Rather than posing any threat to the quality or continuity of services, the Commission's rules grant public safety licensees the opportunity to obtain new and substantially improved facilities at no cost to taxpayers or to cash strapped public safety organizations. The special transition period, combined with additional safeguards against expense, reduction of quality of facilities, and disruption of service, gives full effect to the Congressional mandate to protect life and property. Reconsideration of the Commission's Order would do nothing to guarantee that this mandate is fulfilled and would greatly harm the Commission's goal of providing useable spectrum for development and rapid deployment of emerging technologies to the public.

IV. The Commission's Rule Requiring Public Safety Licensees To Relocate Is Consistent With The Onset Of Competitive Bidding.

In 1993 Congress enacted the Omnibus Budget Reconciliation Act ("Budget Act") authorizing competitive bidding for the allocation of new spectrum. A primary impetus for this legislation was the desire to design a system for allocation of new spectrum that would make "efficient and intensive use of the electromagnetic spectrum,"^{16/} and which would recover for the public "a portion of the value of the public spectrum resource made available for commercial use..."^{17/} Notwithstanding provisions in the Budget Act which prohibit the Commission from considering potential revenues from competitive bidding when making decisions concerning spectrum allocation,^{18/} a Commission decision to allocate spectrum for new services may consider the projected demand and efficient use of the spectrum as part of its

^{16/} Section 6002(j)(3)(D).

^{17/} Section 6002(j)(3)(C).

^{18/} § 6002(j)(7)(A) states:

In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

§ 6002(j)(7)(B) states:

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

determinations regarding the allocation of spectrum.^{19/} It is reasonable for the Commission to evaluate demand for PCS in making determinations regarding allocation of 2 GHz spectrum.

In light of the severe technical constraints on spectrum use, the public interest in rapid deployment of PCS to the public, the goal of recovery for the public of a portion of the value of the public spectrum sold depends to a significant extent on the ability of PCS licensees to deploy service quickly. Thus, achieving expressed Congressional objectives depend in part on regulatory transition mechanisms that facilitate the sale of licenses for frequencies where incumbent microwave operations can eventually be relocated.

Disregarding the harmony of the Commission's Order with the Budget Act, Petitioners argue that the Commission has acted contrary to Congressional concerns expressed in 1992.^{20/} Petitioners claim that an unenacted bill, and accompanying statements made during debate, establish a Congressional requirement that the Commission preserve the public safety exemption from relocation.

Congressional consideration of provisions which do not ultimately become law does not restrict the discretion of the Commission; rather, the

^{19/} § 6002(j)(7)(C) states that "Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services."

^{20/} Specifically Petitioners cite concerns stated by members of Congress in support of the Hollings-Bumpers Amendment to the FY 1993 Appropriations Bill for the FCC (S.3026). Petition at 6. The FY 1993 Appropriations Bill, including the Hollings-Bumpers Amendment, was approved by the Senate but was not enacted into law.

Commission must take appropriate measures to meet the requirements of laws that have been enacted and are binding. Cox submits that in these proceedings the Commission acted in accord with the objectives of Congress in authorizing competitive bidding, as expressed in Section 6002(j)(3).

V. **The Claim Of Impermissible Ex Parte Contacts Is Absurd.**

Exhausting facially colorable arguments, Petitioners finally allege that the "sudden" and "unexplained" reversal of policy could only have been the result illicit ex parte contacts. Petitioners offer no proof of such contacts, but speculate that ex parte contacts in separate PCS and pioneer's preference proceedings may have affected this proceeding. Putting aside that the Commission has already concluded that there was no basis for these allegations,^{21/} the Order is supported by evidence in the record. To the extent that there has been a shift in policy, it is the result of a reasoned analysis of the relevant data. Petitioners produce not a scintilla of evidence in support of a claim of abuse of process. Petitioners are plainly disappointed by the Commission's action. Concocting a scapegoat of the PCS pioneers, when the record speaks for itself, goes beyond the bounds of legitimate advocacy.^{22/}

^{21/} See letter of Andrew S. Fishel, FCC Managing Director to Michael K. Kellogg, Counsel to Pacific Bell, Gen Dkt. 90-314 and ET 93-266, May 27, 1994. See also letter of William E. Kennard, FCC General Counsel to the Honorable John Dingell, U.S. House of Representatives, June 3, 1994.

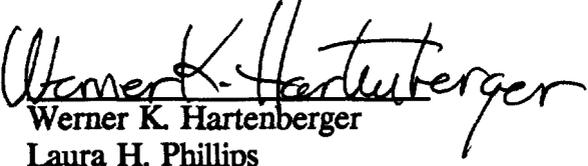
^{22/} Cox notes that the Petitioners also allege that the basis for APC and Omnipoint's preferences vanish if spectrum sharing is no longer required. Even assuming that the Petitioners' accurately state the case, this is not the appropriate
(continued...)

VI. Conclusion

Cox urges the Commission to reject Petitioners' arguments because they seek reversal of a rule which has been adequately explained and supported by evidence in the record. Cox also opposes reinstatement of the public safety exemption because such action stands in direct opposition to the ability of PCS licensees to develop and deploy new services. The Commission's rules provide ample protection against disruption, financial strain, or administrative burdens on incumbent microwave operators.

Respectfully submitted,

COX ENTERPRISES, INC.


Werner K. Hartenberger
Laura H. Phillips
Its Attorneys

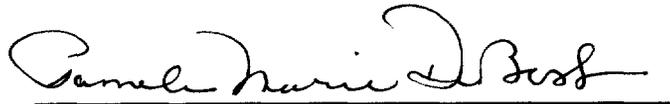
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Suite 500
Washington D.C. 20037
(202) 857-2500

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22/ (...continued)
proceeding to revisit the award of preferences. Petitioners had ample opportunities to raise objections to the award of PCS preferences to APC and Omnipoint and they were mute. To attempt a collateral attack on these PCS preferences in this proceeding is improper.

CERTIFICATE OF SERVICE

I, Pamela Marie DuBost, hereby certify that today on this 29th day of June, 1994, I caused a copy of the OPPOSITION OF COX ENTERPRISES, INC. to be served by first-class mail, postage prepaid to John D. Lane, Wilkes, Artis, Hedrick & Lane, Chartered, 1666 K Street, N.W., Suite 1100, Washington, DC 20006.



Pamela Marie DuBost