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FEDERAL COMMUNICATIONS COMMISSION  
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AUG 30 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
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Amendment of the )  
Commission's Rules to ) GEN Docket No. 90-314  
Establish New Personal )  
Communications Services )

To: The Commission

COMMENTS OF THE  
UTILITIES TELECOMMUNICATIONS COUNCIL  
ON  
PETITION FOR PARTIAL RECONSIDERATION

Pursuant to Section 1.429 of the Federal Communications Commission's (FCC) Rules, the Utilities Telecommunications Council (UTC) hereby submits its comments with respect to the Personal Communications Industry Association's (PCIA) "Petition for Partial Reconsideration" of the Memorandum Opinion and Order (MO&O), released June 13, 1994, in the above-captioned proceeding.<sup>1/</sup>

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. As the FCC well

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<sup>1/</sup> On August 15, 1994, public notice of PCIA's petition was published in the Federal Register, 59 Fed. Reg. 41760. Thus, these comments are timely filed, being within the specified time period under FCC Rule Sections 1.4(b) and 1.429(f).

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knows, utilities and pipelines are among the primary incumbent occupants of the spectrum designated for broadband PCS, and thus have a significant interest in all policy matters related to the relocation of 2 GHz microwave licensees. Accordingly, UTC is pleased to offer its comments on PCIA's petition.

#### I. PCIA'S PLAN

In its "emerging technologies" proceeding, ET Docket No. 92-9, the FCC adopted a market-based "transition plan" that is based in large part on a plan first developed by UTC. Under the plan, PCS and other emerging technology licensees are required to avoid interference to incumbent microwave licensees, and to fully compensate such licensees for their relocation to comparable alternative facilities. In its petition for reconsideration PCIA does not question the application of the transition plan to PCS licensees. However, PCIA expresses concern over the fact that certain PCS licensees may have overlapping responsibilities with regard to individual incumbent microwave links. In addition to the attendant confusion of such a process, PCIA suggests that it will also result in certain PCS licensees bearing the burden of relocating microwave links for competing PCS licensees.

In order to address these concerns, PCIA requests that the FCC mandate participation of the PCS industry in a cost sharing plan. Under PCIA's proposal, PCS licensees benefitting from relocation of a microwave link would be required to contribute a pro rata share of the costs incurred in providing comparable facilities

**II. A COST SHARING CONCEPT HAS MERIT BUT IS BEYOND THE SCOPE OF A PETITION FOR RECONSIDERATION**

From the perspective of incumbent 2 GHz microwave licensees the PCIA proposal has some facial appeal. A cost sharing plan would facilitate a coordinated relocation of large integrated microwave networks, and would provide incumbents a greater degree of certainty with regard to the very real issue of individual PCS licensees having sufficient funding to fully reimburse microwave relocation expenses.

Despite UTC's interest in a cost-sharing proposal, it has a number of concerns with PCIA's plan. As a preliminary matter, UTC questions whether a petition for reconsideration is the appropriate vehicle in which to handle PCIA's request. PCIA states that it seeks relief from the MO&O's failure to address concerns about ensuring that PCS licensees participate in reasonable arrangements for sharing the costs of relocating incumbent 2 GHz microwave links. Yet the MO&O of which PCIA seeks

reconsideration was issued in response to 67 petitions for reconsideration of the Second Report and Order in this proceeding, and none of those petitions addressed the issue of instituting a licensed PCS cost-sharing mechanism for microwave relocation. It would, therefore, appear that PCIA's request is outside of the scope of a petition for reconsideration,<sup>2/</sup> and should more properly be raised in a separate petition for rulemaking. In the rulemaking context all parties would be given sufficient time to address the most appropriate structure of a cost-sharing plan.

### III. PCIA'S PLAN COULD UNDERMINE ASPECTS OF THE FCC'S DOCKET 92-9 TRANSITION PLAN

While supporting the general idea of a cost sharing plan, UTC has some concerns with regard to the adverse impact that PCIA's proposal might have on the Commission's transition plan in actual practice. The transition plan is based on the use of market-forces to resolve relocation issues. However, a rigid procedure such as that suggested by PCIA might place an artificial constraint on relocation negotiations. That is, the proposal might have the effect of discouraging use of creative relocation arrangements

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<sup>2/</sup> See 47 C.F.R. §1.429(i). To the extent the Second Report and Order did not address cost-sharing mechanisms, a petition for reconsideration of that decision might have been appropriate. However, given the fact that the MO&O did not modify the Second Report and Order on this issue, reconsideration is not appropriate at this juncture.

with incumbents (e.g., agreements relating to the exchange of PCS service for voluntary relocation, interconnection of PCS cell sites, etc.). The value of such non-cash agreements, and the portion to be reimbursed by third-party PCS licensees could be difficult to quantify.

Limiting cost-sharing contributions to the pro rata cost of "comparable alternative facilities" will allow third-party PCS licensees, that were not a party to specific PCS-microwave negotiations, to second-guess the parties' determination of what constitutes comparable alternative facilities. In adopting the transition plan the FCC specifically held that questions of comparability should be individually determined between the parties, stating:

A number of different design factors will vary in importance in each incumbent's system, and therefore we agree with those parties arguing that adopting an inflexible definition of comparable facilities for general application is inadvisable...[W]e decline to adopt a specific definition of comparable facilities and allow the parties in each case to negotiate mutually agreeable terms for determining comparability...<sup>3/</sup>

To adopt PCIA's recommendation with regard to the limitation on recoverable expenses could undermine the

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<sup>3/</sup> Third Report and Order, ET Docket No. 92-9, 8 FCC Rcd 6589, 6603 (1993).

Commission's decision as to how to best determine comparable facilities. At the very least, there should be a rebuttable presumption that all expenses directly related to relocation are part of the cost of comparable alternative facilities.

An additional concern raised by PCIA's plan relates to the event which would trigger the obligation to make cost sharing payments for the previous relocation of a microwave link. PCIA proposes that this obligation would be triggered upon a determination that the PCS licensee's operations would have caused interference to the link but for its prior relocation. Such a determination is bound to be contested, particularly when it is made by an entity seeking compensation from one of its competitors. The PCS licensee being asked to pay its pro rata share could easily argue that it would have taken corrective steps (e.g., deployment of different technology or system configuration) that would have alleviated the need to relocate the link. It would also involve competing PCS providers second-guessing each other's deployment plans, system architecture, channel capacity, likely growth and myriad other factors involved in developing and operating a PCS network.

Although PCIA cites the comments of UTAM, Inc. the PCIA proposal is silent on the cost-sharing that would be mandated between licensed PCS operators, on the one hand, and UTAM on the other. As detailed more fully in the "UTAM Plan for Financing and Managing 2 GHz Microwave Relocation," filed in this docket on August 1, 1994, licensed PCS providers are expected (at least by UTAM) to fund the relocation of at least half of the microwave paths in the unlicensed PCS band and 90% of the paths in the bands adjacent to the unlicensed band.<sup>4/</sup> PCIA should address how the cost-sharing would be implemented with respect to UTAM and the unlicensed band.

Finally, the PCIA plan fails to recognize that PCS licensees may negotiate a relocation of incumbent microwave facilities in order to avoid interference to their own PCS operations, and not simply for the purpose of avoiding interference into the microwave system.

#### IV. CONCLUSION

A cost-sharing mechanism for microwave relocation has merit, however the development of such a plan is beyond the scope of a petition for reconsideration in this proceeding, and should be more properly raised as a separate petition for rulemaking in which all parties would be free to

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<sup>4/</sup> See UTAM Plan, at pp. 28-29.

comment. Such a rulemaking could be instituted without delaying the roll-out of PCS. The development of a cost-sharing plan must not be allowed to adversely impact the market-based or individually negotiated aspects of the Commission's microwave transition plan.

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

Respectfully submitted,

**UTILITIES TELECOMMUNICATIONS  
COUNCIL**

By:

  
\_\_\_\_\_  
Jeffrey L. Sheldon  
General Counsel

By:

  
\_\_\_\_\_  
Sean A. Stokes  
Senior Staff Attorney

Utilities Telecommunications  
Council  
1140 Connecticut Avenue, N.W.  
Suite 1140  
Washington, D.C. 20036

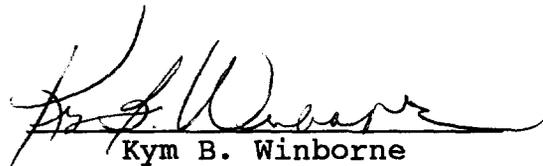
(202) 872-0030

August 30, 1994

**CERTIFICATE OF SERVICE**

I, Kym B. Winborne, a secretary with the Utilities Telecommunications Council, hereby certify that I have caused to be sent, by first class mail, postage prepaid, this 30th day of August, 1994, a copy of the foregoing "Comments" to the following:

Mr. Mark Golden  
Acting President  
The Personal Communications  
Industry Association  
1019 - 19th Street, N.W.  
Suite 1100  
Washington, D.C. 20036



Kym B. Winborne