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

FCC 94-303

In the Matter of	)	
	)	
Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	)	ET Docket No. 92-9
	)	
	)	RM-7981
	)	RM-8004

SECOND MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1994 Released: December 2, 1994

By the Commission: Commissioner Barrett issuing a statement.

INTRODUCTION

1. By this action, we are refining our rules and policies for making spectrum available for emerging telecommunications technologies. Specifically, we are amending the negotiation procedures for mandatory relocation of existing microwave facilities to provide for use of independent estimates of the cost to replace an existing facility in resolving disputes between licensees of existing facilities and new service providers. We are also modifying the relocation plan to extend the mandatory negotiation period for public safety entities to two years. The relocation plan for public safety facilities will now provide a three-year period for voluntary negotiations followed by a two-year period for mandatory negotiations. This action responds to a Petition for Reconsideration filed jointly by the Public Safety Microwave Committee (PSMC), the Association of Public-Safety Communications Officials-International, Inc. (APCO), the County of Los Angeles (LA County), and the Forestry-Conservation Communication Association (FCCA) (collectively "Petitioners"). By this action, we hope to encourage expeditious relocation of incumbent users of the emerging technologies band, and increase the speed with which new technologies and services will be brought to market in that band. At the same time, we believe that our actions properly balance the interests of the different parties and will safeguard the rights of incumbents and ensure a smooth transition for them and their customers.

BACKGROUND

2. At previous stages of this proceeding, we took the following general actions: 1) in the First Report and Order (First R&O), we allocated spectrum for emerging technologies in the 1850-1990 MHz, 2110-2150 MHz, and 2160-2200 MHz bands (2 GHz bands) that could be used by new services, such as personal communications services (PCS) and adopted most aspects of our voluntary relocation transition plan;[1] 2) in the Second Report and Order, we reallocated five fixed microwave bands and adopted associated rules to accommodate existing 2 GHz fixed microwave users required to relocate;[2] and, 3) in the Third Report and Order (Third R&O), we finished the details of our transition plan.[3] Finally, in the Memorandum Opinion and Order (MO&O) responding to petitions for reconsideration of the Third R&O, we revised and clarified the rules relating to relocation of existing microwave facilities, particularly those used for public safety purposes.[4]

3. Petitioners' request for reconsideration addresses specific decisions regarding public safety facilities that we made in the First R&O, the Third R&O and the MO&O. In the First R&O, we exempted licensees of incumbent public safety facilities from involuntary relocation, but encouraged them to relocate on a voluntary basis when the spectrum is needed by an emerging technology provider. At that time we believed that adequate spectrum could be made available for services using emerging technologies through the voluntary relocation of incumbent public safety facilities. In the Third R&O, we maintained the public safety exemption, but clarified the definition of public safety.[5] In the MO&O, on our own motion, we concluded that PCS may be precluded or severely limited in some areas unless public safety

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[1] First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

[2] Second Report and Order, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).

[3] Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

[4] Memorandum Opinion and Order, ET Docket No. 92-9, 9 FCC Rcd 1943 (1994).

[5] In the Third R&O, we defined the "public safety" facilities exempted from mandatory relocation as those on which the majority of communications are used directly for police, fire, or emergency medical services. See note 3, supra, at 6610.

licensees relocate; that in previous decisions we underestimated the difficulty that PCS will have in sharing spectrum with incumbent public safety licensees; and that 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. Consequently, we decided that it would be in the public interest to subject all incumbent facilities, including those used for public safety, to mandatory relocation if an emerging technology provider requires the spectrum used by the incumbent.

4. In the MO&O, we further concluded that public safety facilities warrant special consideration because they had previously been excluded from involuntary relocation and because of the sensitive nature of their communications. Therefore, we adopted for these entities a relocation plan consisting of a four-year voluntary period followed by a one-year mandatory period to negotiate relocation agreements, instead of the two-year voluntary and one-year mandatory negotiation periods to which all other 2 GHz fixed microwave incumbents are subject.[6] Further, we concluded that the involuntary relocation policy adopted in the First R&O, would ensure that all incumbent entities required to relocate their operations, including public safety, would receive equivalent or better facilities at no cost to them.[7] Specifically, the involuntary relocation provides that:

- All relocation expenses will be paid entirely by the emerging technology licensee. These expenses will include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.
- Relocation facilities must be fully comparable to those being replaced.

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[6] The voluntary period (four years for certain public safety incumbents, two years for all other incumbents) would commence with the Commission's acceptance of applications for license of emerging technology services for spectrum to be used by licensed services. The one-year mandatory period would begin for an incumbent whose facilities are in spectrum allocated for unlicensed devices when an emerging technology provider or representative initiates negotiations; it begins in spectrum to be used by licensed services when an emerging technology provider or representative initiates negotiations after the voluntary period.

[7] The obligations of the emerging technology provider when relocation is involuntary are set forth in the First R&O. See First R&O, supra, at 6890.

- All activities necessary for placing the new facilities into operation, including engineering and frequency coordination, must be completed before relocation.
- The new communications system must be fully built and tested before the relocation could commence.
- Should the new facilities, within one year, prove not to be equivalent in every respect, the emerging technology licensee must pay to relocate the incumbents licensee's operation to its original facilities until complete equivalency is attained.

5. PSMC, APCO, LA County, and FCCA filed a joint Petition for Reconsideration of the MO&O. Petitioners request that we not subject incumbent public safety facilities to any mandatory relocation. Six responses to the Petition for Reconsideration and five reply comments were filed.[8]

DISCUSSION

6. Petition. Petitioners argue that we should reinstate public safety's exemption from mandatory relocation because: 1) we ignored Congressional concerns; 2) we acted without prior notice and opportunity for public comment; 3) we failed to provide an adequate basis for our decision; 4) our decision is inconsistent with our grant of pioneer's preferences based on capabilities for sharing the 2 GHz band; 5) forced relocation of public safety operations will disrupt communications services that protect the safety of life and property; and 6) forced relocation will impose additional burden on rural public safety microwave systems.[9] These issues will be addressed *seriatim*.

7. Petitioners first argue that Congress has directed the Commission to give public safety special considerations when

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[8] Responses were filed by American Association of State Highway and Transportation Officials Special Committee on Communications; American Mobile Satellite Corporation; American Personal Communications; Cox Enterprises, Inc.; Personal Communications Industry Association; and UTAM, Inc. Reply comments were filed by Apple Computer, Inc.; the Los Angeles County Sheriff's Department; the Los Angeles Police Department; Petitioners; and the West Covina Police Department.

[9] Petition for Reconsideration (Petition) filed jointly by the Public Safety Microwave Committee, the Association of Public-Safety Communications Officials-International, Inc., the County of Los Angeles, and the Forestry-Conservation Communication Association (May 25, 1994).

allocation decisions are made.[10] They claim that Congress was even more explicit regarding public safety use of the 2 GHz band in its handling of the FY 1993 Appropriations Bill. In support of this argument, they cite an amendment to the Senate bill that specified a detailed transition plan for the reallocation of the 2 GHz band, similar to the overall plan subsequently adopted by the Commission.[11] They also note that the Senate adopted a perfecting amendment to the initial amendment that would have excluded state and local government 2 GHz fixed microwave licensees from mandatory relocation.[12]

8. Second, Petitioners contend that we acted without allowing opportunity for interested parties to comment. They claim that our decision to eliminate the public safety exemption was an arbitrary and unexplained departure from our prior policy.[13] Third, they argue that we failed to cite any substantial evidence in the record to support our decision.[14]

9. Fourth, Petitioners also claim that our conclusion that sharing the 2 GHz frequencies between the incumbent fixed microwave service and the new PCS service will not be possible contradicts our award of pioneer's preferences in the PCS proceeding to American Personal Communications (APC) and to Omnipoint Communications, Inc. (Omnipoint) based on their developmental technologies for sharing the available spectrum between these two services. Petitioners argue that if sharing is feasible that we should reinstate the public safety exemption from forced relocation.[15]

10. Fifth, Petitioners claim that if we do not reinstate the public safety exemption, public safety agencies will be forced to engage in complex negotiations with PCS providers where public safety incumbents will be at a disadvantage. Petitioners

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[10] Petition, supra, at 4-7, also See Rep. No. 356, 98th Cong., 1st Sess. 27 (1983).

[11] Id. at 5-6, 138 Cong. Rec. S10346 (July 27, 1992) (statement of Senator Hollings).

[12] Id. at 6, 138 Cong. Rec. S10351 (July 27, 1992) (statement of Senator Bumpers). The Senate amendment addressing relocation of 2 GHz incumbents and associated public safety concerns was removed from the legislation when the bill reached Conference Committee [138 Cong. Rec. H9570 (September 28, 1992)].

[13] Petition at 7-12.

[14] Id. at 12-17.

[15] Id. at 17-19.

argue that significant disputes are likely to arise regarding the direct and indirect cost of relocation and the acceptability of replacement facilities. They state that public safety entities, which have limited resources, are likely to be at a disadvantage in negotiations with PCS providers, who have ample resources. They submit that public service entities, therefore, could be forced to accept less favorable terms and replacement facilities.[16]

11. Sixth and finally, petitioners argue that even if there is a need for 2 GHz spectrum in urban areas, complete elimination of the public safety exemption will adversely affect rural public safety systems. They contend that our plan disadvantages these systems unnecessarily by giving them effectively only a one-year negotiation period as the four-year voluntary negotiation period will expire before PCS licensees are likely to need the spectrum. Petitioners claim that this will result in rural public safety microwave licensees having little or no advance notice that a PCS provider needs their frequencies and will result in unreasonably short time periods to reach mutually acceptable relocation agreements.[17]

12. Responses. Parties opposing the petition argue that: 1) our rules do not conflict with Congressional concerns; 2) the record concerning spectrum overcrowding supports our decision; 3) we changed our policy after reasoned analyses that included consideration of an adequate record; 4) our decision to award pioneer's preferences for spectrum sharing technologies does not conflict with our decision to eliminate public safety's exemption from mandatory relocation; and 5) Petitioners fail to demonstrate that relocation will be harmful to public safety fixed microwave operations.

13. Cox Enterprises, Inc. (Cox) and Apple Computer, Inc. (Apple) argue that our decision is consistent with the intent of Congress.[18] Cox states that throughout this proceeding, all of our actions reflect the Congressional concern that the protection of "safety of life and property" be a top priority in the allocation of spectrum. It further submits that the special transition period for public safety facilities combined with the additional safeguards against expense, reduction of quality of facilities, and disruption of service, fully recognizes the Congressional concerns over the protection of life and property. Cox also states that rather than posing any threat to the quality or continuity of services, our rules grant public safety

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[16] Id. at 2.

[17] Id. at 19-20.

[18] Cox at 8-10 and Apple reply at 2-3.

licensees the opportunity to obtain new and substantially improved facilities at no cost to the public safety organizations or the taxpayers. Apple argues that our decision is consistent with Congressional intent because it strikes an appropriate balance among the needs of the parties to this proceeding. It states that our decision fully recognizes the special needs of public safety licensees while ensuring that the efforts to protect these licensees do not thwart the deployment of PCS.

14. American Mobile Satellite Corporation (AMSC), the Personal Communications Industry Association (PCIA) and Apple state that our decision to subject all incumbents 2 GHz facilities, including public safety, to mandatory relocation if an emerging technology provider requires the spectrum is consistent with, and strongly supported by, the record and represents a careful balancing of the interests of all affected parties.[19] AMSC submits that our decision in the MO&O is a natural outgrowth of the record and policies under development throughout this proceeding. It further states that our increasing awareness of the difficulty of implementing a spectrum sharing plan was apparent at each stage.

15. Cox and AMSC argue that the MO&O sets forth a reasoned analysis that supports the change in policy made therein. Cox states that both its and APC's research studies provide well-documented data regarding spectrum congestion in the emerging technologies bands and the associated impact on the implementation of PCS, particularly in the metropolitan high demand areas. Cox also states that in the Los Angeles Major Trading Area for which it has a pioneer's preference grant, approximately 25 percent of the incumbent 2 GHz microwave facilities appear to be licensed to government entities, including public safety entities. Accordingly, Cox claims that it likely would be unable to deploy PCS in the Los Angeles market if it does not succeed in relocating a significant number of those entities.[20] AMSC and PCIA note that several comments at the PCS task force hearings and petitions for reconsideration of the Third R&O argued that the allocated frequencies may prove inadequate for the introduction of PCS because of the public safety exemption.[21]

16. UTAM, Inc. (UTAM) and Apple similarly state that throughout this proceeding and in the related PCS proceeding they have repeatedly argued that PCS and, especially, unlicensed nomadic PCS, cannot share spectrum with fixed microwave

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[19] AMSC at 1-6, PCIA at 4, and Apple reply at 2.

[20] Cox at 4.

[21] AMSC at 5 notes 3, 4, and 5, and PCIA at 5 note 11.

facilities.[22] They claim restoring the public safety relocation exemption would impede unlicensed deployment and, if PCS is to flourish, all existing microwave facilities must be subject to relocation.

17. APC submits that our decision to award pioneer's preferences to parties that developed spectrum sharing technologies does not conflict with our decision to subject all existing 2 GHz facilities, including public safety operations, to mandatory relocation if an emerging technology provider requires the spectrum.[23] APC argues that without spectrum sharing technologies, PCS could not operate until all the incumbent fixed microwave facilities had been relocated. APC states that the spectrum sharing technologies that it developed will allow immediate initiation of PCS services with no immediate need to relocate all existing licensees.

18. Several responding parties argue that before we reverse our decision on the public safety exemption, Petitioners should be required to show that public safety will be harmed by relocation.[24] PCIA states that the regulatory framework we have provided, particularly the expanded four-year voluntary and one-year mandatory negotiation periods, ensures that public safety facilities are fully protected. PCIA and AMSC argue that we should not reconsider our mandatory relocation requirements for public safety facilities absent a showing of potential economic or operational harm.[25]

19. In their reply, Petitioners argue that undue reliance has been placed on the needs of unlicensed PCS. They argue that we must analyze the degree to which unlicensed devices can be coordinated with microwave systems and whether there are other bands that may be more appropriate for nomadic devices. They submit that even if there is a basis for requiring relocation of all microwave facilities in the unlicensed portion of the spectrum, nothing in that argument supports the need to relocate facilities from the 120 MHz of spectrum allocated for licensed PCS.[26]

20. Decision. We continue to believe that it is in the public interest to subject all incumbent 2 GHz fixed microwave

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[22] UTAM at 4-5, and Apple reply at 1.

[23] APC at 1.

[24] AMSC at 6 and PCIA at 4.

[25] PCIA at 4-6.

[26] Petitioners' reply at 10.

facilities, including public safety licensees, to mandatory relocation if an emerging technology provider requires the spectrum they are using. We are convinced that PCS service may be precluded or severely limited in some areas unless public safety licensees relocate. Of particular concern is providing adequate spectrum for operation of licensed services in major urban areas and for operation of unlicensed PCS devices generally. 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. This decision is supported by the record in this proceeding.[27] Further, this decision, along with the associated transition adopted in previous decisions as modified below, provides a fair balance between the interests of the incumbent fixed microwave service and those services that will use new emerging technologies, such as PCS.

21. The concerns of Congress, as expressed in discussions and correspondence with members of Congress and their staffs and the proposed amendments to the FY 1993 Appropriations Bill as well as those stated in the Omnibus Reconciliation Act of 1993, were carefully considered during our deliberations.[28] As indicated in the Senate amendment cited by Petitioners, the Senate's concerns regarding the relocation of existing 2 GHz licensees were that the communications of all interested fixed microwave operations at 2 GHz, particularly public safety, must be protected; that a new provider must not cause interference to the operations of existing licensees; that we should permit voluntary negotiations between incumbents and new providers; that any mandatory relocation of incumbent commercial facilities not be immediate; that no relocation should adversely impact the fixed service provided or the entity owning that operation; that

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[27] See MO&O, supra, at 1947.

[28] Two of the guidelines in the Omnibus Budget Reconciliation Act of 1993, are:

> "(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
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> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, ... "

See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a)(3), 107 Stat. 312, 392 (1993); 47 U.S.C. § 309(j)(3).

we should retain jurisdiction to resolve disputes; and that public safety operations should be considered separately and be fully protected, both financially and technically.[29]

22. The Senate amendment was not enacted into law.[30] Nevertheless, the regulatory framework that we have established addresses the concerns expressed during consideration of the FY 1993 Appropriations Bill. Specifically, we will allow the 2 GHz spectrum to be shared by new services and existing services.[31] The rules provide new licensees with access to 2 GHz spectrum within a reasonable timeframe, and at the same time, prevent disruption of existing 2 GHz operations and eliminate any economic impact on existing licensees. In cases where both services cannot share 2 GHz spectrum, the rules protect incumbent operations. A new licensee can require relocation of an incumbent only if it provides the incumbent facilities that are technically equivalent to those being replaced and that fully support the communications requirements of the incumbent. All relocation costs are to be paid by the new licensee. Incumbents will have one year to test their new facilities to ensure that they are equivalent in every respect to their original facilities. If the new system is not equivalent, the licensee may move back to its original facilities and stay there until complete equivalency (or better) is attained. Further, the transition process allows all incumbents to remain in the band for a minimum of three years and certain public safety incumbents for a minimum of five years. This plan fully protects the integrity of all existing public safety operations at 2 GHz.[32]

23. In the MO&O, after reconsidering the record, we concluded that in previous decisions we had underestimated the difficulties PCS will experience in permanently sharing spectrum with incumbent fixed microwave licensees.[33] While we indicated that it appears that PCS can be initiated rapidly in most areas on a shared basis with existing operations, we also concluded that in the long term most of the existing 2 GHz operations will have to be relocated to allow PCS to expand. Therefore, on our own motion we decided to subject public safety operations to mandatory relocation.

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[29] See 138 Cong. Rec. S10346, supra.

[30] See H.R. Conf. Rep. No. 918, 102d Cong. 2d Sess. (1992); 138 Cong. Rec. S15997 (Oct. 1, 1992)(Statement of Senator Hollings).

[31] See First R&O, supra, at 6890-6891.

[32] See MO&O, supra, at 1947-1948.

[33] Id. at note 4.

24. Our decision was made after full opportunity for public comment. The Commission initially proposed "to exempt state and local government 2 GHz fixed microwave facilities from any mandatory transition periods."[34] Many parties, including PSMC, addressed the public safety exemption throughout this proceeding. It was in response to the comments, that the Commission encouraged public safety entities to engage in voluntary negotiations with emerging technology providers users to relocate,[35] and later narrowly defined "public safety" entities.[36] As explained in the subsequent MO&O, other comments, including the market studies submitted by APC and Cox, demonstrated that emerging technology providers, particularly with respect to urban areas and unlicensed nomadic devices, would be "precluded or severely limited" unless public safety incumbents relocate.[37] Based on the record amassed in this proceeding, the Commission eliminated the public safety exemption, but provided public safety entities with a longer negotiation period than other incumbent 2 GHz incumbents, in recognition of their previous exempt status as well as the sensitive nature of the communications they provided. Contrary to petitioner's assertion, the fact that the Commission's final rule regarding public safety entities differed from that proposed did not violate APA notice and comment procedural requirements.[38] The Commission's adoption of the final rule was well within the ambit of issues clearly and unambiguously raised in this proceeding, responded to the comments submitted that addressed the issue, considered the entire record, and represented a reasonable accommodation of the concerns raised therein.[39]

25. In the MO&O we concurred with PCS proponents that incumbent public safety facilities must be subject to relocation, particularly in major urban areas, if licensed PCS is to be given a reasonable opportunity to develop, and that all incumbent microwave facilities must be relocated out of the unlicensed spectrum before nomadic unlicensed PCS operations can be

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[34] See Notice of Proposed Rulemaking, 7 FCC Rcd at 1542.

[35] See First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd at 6891.

[36] See Third and Report and Order and Memorandum Opinion and Order, 8 FCC Rcd at 6610-11.

[37] Memorandum Opinion and Order at 1947.

[38] 5 U.S.C. Section 553(b),(c).

[39] See Public Service Commission v. FCC, 906 F.2d 713, 717-18 (D.C. Cir. 1990).

implemented. At the same time, our relocation plan provides a reasonable balance and will protect the communications and facilities of all fixed microwave incumbents. Incumbents will be no worse off, and in many cases will be better off if they relocate. Under our plan incumbents are required to relocate only when there is actual, not just theoretical, demand for the spectrum. Therefore, incumbent operations in rural areas may not be required to move for a substantial amount of time, if at all. As indicated above, all incumbent facilities that must relocate will also be provided with systems of equivalent reliability at no cost.[40] In many cases fixed microwave incumbents will gain improved communications capabilities in the relocation process by replacing aged analog equipment. Finally, the protections in our rules ensure that there will be no disruption to the communications of public safety licensees.

26. Our grants of pioneer's preferences to APC and Omnipoint based on their development of sharing technology does not undermine our conclusion that, especially in areas of dense population, long-term sharing of the band may impede the introduction of new technologies and services. We believe that sharing spectrum between incumbents and new licensees may be crucial to the start-up of new services during the initial years while the relocation of existing facilities is being accomplished. The record indicates that in many instances, particularly in the more densely populated urban areas, the ability to share spectrum will be important in the period when incumbents are being relocated.[41] We therefore adopted an approach that encourages sharing and granted PCS pioneers' preferences to APC and Omnipoint for the spectrum sharing technologies they developed. However, we continue to believe that spectrum sharing will be only an interim solution in many areas.

27. In view of the evidence that the introduction of new communications services that will benefit the public could be precluded unless clear spectrum can be obtained, and that relocation can be accomplished reliably, we continue to believe that it is in the public interest to require all incumbents to relocate if their spectrum is required for new services using emerging technologies. Because the requirements of each particular system and operator are different, it is difficult to provide a "bright line" test to ensure that each incumbent licensee fairly receives comparable equipment. Therefore, our

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[40] The bands identified in this proceeding for relocation currently support fixed microwave operations over equivalent distances with comparable reliability, including those of public safety operations. See First R&O, supra, at 6889.

[41] PCIA at 5 and APC at 1.

rules encourage the parties to negotiate voluntary relocation agreements in which the parties themselves establish the relocation process and requirements that are unique to those parties. We believe that in most instances this voluntary negotiation arrangement will work well.

28. When disputes do arise in relocation negotiations, we believe that they can be resolved best through individual mediation and arbitration efforts rather than adjudication by the Commission. Thus, we emphasize again our intent to use alternative dispute resolution ("ADR") techniques to expedite and improve the relocation process whenever feasible.[42] Resolution of such disputes entirely by our adjudication processes would be time consuming and costly to all parties. Therefore, we continue to encourage parties unable to voluntarily conclude relocation agreements to employ ADR techniques during both the voluntary and mandatory negotiation periods.

29. Nevertheless, we are cognizant of Petitioners' concern that public safety entities with limited resources not be placed in situations in which they would have to accept less favorable terms if disputes arise in the negotiation and relocation process. In considering this issue, in addition to or as a supplement to ADR, we believe an effective way to expedite the negotiation process and minimize the burden on all parties in these situations is to encourage parties to utilize independent, impartial estimates of the costs to relocate the existing operation to a comparable facility. In order to be fair to all parties, the independent estimates would need to include both the specifications for a comparable new facility and the costs associated with providing that facility to the incumbent licensee. We believe that in most cases the availability of the option of choosing to resolve disputes through the use of independent estimates will provide an incentive for both sides in a negotiation to work quickly towards a mutually agreeable solution. In cases in which such estimates are obtained, they will provide a benchmark for an agreement that could avoid the need for the parties bringing the dispute to the Commission. However, where such disputes come before the Commission, we will expect the incumbent to have obtained bona fide independent estimates of its relocation costs and to present those estimates to the Commission for consideration.

30. We therefore are modifying the Commission's mandatory relocation procedures to provide for consideration of independent estimates by third parties not associated or otherwise affiliated with either the incumbent licensee or the new service provider. Under this new provision, we will consider independent estimates

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[42] See Third R&O, supra, note 51; and Alternative Dispute Resolution Procedures, 6 FCC Rcd 5669 (1991).

of the cost of comparable replacement facilities obtained by incumbent licensees in deciding any relocation disputes that are brought before us. We believe that the responsibility for obtaining independent estimates should rest with the incumbent licensee, as it will be in the best position to describe to parties preparing estimates the operating requirements for the new facility.[43] Incumbent licensees are encouraged to present two separately prepared estimates obtained from qualified professional third parties.[44]

31. Independent estimates presented in disputes brought to the Commission for resolution must include a specification for the comparable facility and a statement of costs of providing that facility to the incumbent licensee. The specification should describe the design and technical parameters of the new facility, the equipment to be used in its construction, a statement attesting to the comparability of the proposed new facility to the facility it would replace, and a testing and transition plan. The cost statement should include individual estimates for the design of the new facility, equipment, and testing, as well as the transition. Where the two estimates are substantially different, we expect parties to choose the most reliable and reasonable estimate, average the two estimates, or obtain a third estimate by a mutually agreeable party. If a dispute is brought to us, we will consider the two estimates as evidence of the relocation cost but retain discretion to make our own determination based upon the facts presented to us. In deciding such cases, we intend to be guided by the principle of ensuring that the incumbent is provided a comparable facility at the minimum cost to the new service provider.

32. Public safety licensees are not required to obtain two independent estimates of the cost to relocate with comparable facilities, but we encourage that they do so early in the relocation process. We believe that such estimates will be very helpful in the negotiation process, including those cases that employ ADR techniques. Moreover, having such estimates at our disposal, should Commission intervention become necessary, will expedite a relocation process that is fair to all parties.

33. We also share Petitioners' concern that public safety systems, especially those in rural areas, must have adequate time to negotiate relocation agreements. Previously, we recognized

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[43] We utilize a similar requirement for third party appraisals with regard to broadcast distress sales. See, e.g. Northland Television Inc., 72 FCC 2d 51,56 (1979).

[44] We will consider the cost of obtaining the estimates as part of the cost of relocation and therefore recoverable from the new service provider.

that the demand for the new technology spectrum will vary from market to market and from one area to another and that in some areas, incumbent 2 GHz facilities may not need to relocate as quickly as in areas where spectrum is needed more quickly for emerging technologies.[45] We adopted the bifurcated four-year voluntary/one-year mandatory negotiation period to accommodate these variations in demand. However, we agree with Petitioners that public safety licensees may need more than one year to negotiate agreements where the negotiations do not start until sometime after the voluntary period has expired. Accordingly, we are modifying the relocation plan to extend the mandatory negotiation period for public safety facilities to two years. We do not, however, believe it would serve the public interest in implementing broadband PCS to extend to six years the current five year period of protection for public safety facilities. As stated previously, our primary goal in this proceeding is to provide usable spectrum for the implementation of emerging technologies in an expeditious manner. We therefore are maintaining the current five year period for public safety facilities by shortening the four year voluntary period to three years. The relocation plan for public safety facilities will thus provide a three year period for voluntary negotiations followed by a two year period for mandatory negotiations. This will provide applicable public safety entities, especially those with facilities in rural areas, ample time to negotiate and conclude agreements.[46]

PROCEDURAL MATTERS

34. Ordering Clauses. Accordingly, IT IS ORDERED, that the petition for reconsideration filed jointly by the Public Safety Microwave Committee, the Association of Public-Safety Communications Officials-International, Inc., the County of Los Angeles, and the Forestry-Conservation Communication Association IS GRANTED to the extent described above and IS DENIED in all other respects. Further, IT IS ORDERED, that Part 94 of the Commission's Rules and Regulations IS AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a),

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[45] See Third R&O, supra, at 6594-6601.

[46] As an added safeguard, this five-year period will apply to all public safety facilities, that is, those in spectrum allocated for licensed services and in spectrum allocated for unlicensed devices. As is the case with other fixed microwave incumbents, the voluntary period will start with our acceptance of applications from emerging technology providers and the mandatory period starts any time after the voluntary period expires and the emerging technology provider initiates discussions with a particular incumbent.

303(c), 303(g), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix: Final Rules

I. Title 47 of the Code of Federal Regulations, Part 94, is amended as follows:

PART 94 - PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read:

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

2. Subpart C is amended by revising Sections 94.59(b) and 94.59(f) 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, 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 (two-year voluntary negotiation period), and until one year after an emerging technology service licensee initiates negotiations for relocation of the fixed microwave licensee's operations (one-year mandatory negotiation period) 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 (one-year mandatory negotiation period). When it is necessary for an emerging technology provider or representative of unlicensed device manufacturers to negotiate with a fixed microwave licensee with operations in spectrum adjacent to that of the emerging technology provider, the transition schedule of the entity requesting the move will apply. Public safety facilities defined in paragraph (f) of this section will maintain primary status in these bands until three years after the Commission commences acceptance of applications for an emerging technology service (three-year voluntary negotiation period), and until two years after an emerging technology service licensee or an emerging technology unlicensed equipment supplier or representative initiates negotiations for relocation of the fixed microwave licensee's operations (two-year mandatory negotiation period).

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(f) Public safety facilities subject to the three-year voluntary and two-year mandatory negotiation periods, are those in which the majority of communications carried 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 pursuant to 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. 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.

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SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Second Memorandum Opinion and Order (ET Docket No. 92-9)

Pursuant to this Second Memorandum Opinion and Order, we are amending the negotiation procedures for mandatory relocation of existing microwave facilities and modifying the relocation plan for public safety facilities. I write separately to reiterate my concern that the five year relocation plan not impede their ability to operate or to serve the public in any way.

I am pleased that the Commission has incorporated numerous safeguards to ensure that public safety facilities placed at a disadvantage during the negotiation and relocation processes. Moreover, the Commission has recognized the need for these facilities to have adequate time to negotiate relocation agreements by extending the mandatory negotiation period from one (1) to two (2) years. While these changes demonstrate a certain measure of flexibility and sensitivity to their concerns, the fact remains that public safety facilities will still have five (5) years within which to relocate. To that end, I hope that the Commission continues to monitor the negotiation and relocation process to make certain no disruption to public safety operations results from our requirements.