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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Petition for Rulemaking)
of Pacific Bell Mobile) RM - 8643
Services Regarding a Plan)
for Sharing the Costs of)
Microwave Relocation)

DOCKET FILE COPY ORIGINAL

To: The Commission

UTC COMMENTS ON
PETITION FOR RULEMAKING

Pursuant to Section 1.405 of the Federal Communications Commission's (FCC) Rules, UTC^{1/} hereby submits its comments with respect to the May 5, 1995, Pacific Bell Mobile Services (PBMS) "Petition for Rulemaking" regarding the sharing of 2 GHz microwave relocation costs.^{2/}

UTC is the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines. Utilities and pipelines operate extensive private microwave systems in

^{1/} UTC, The Telecommunications Association, was formerly known as the Utilities Telecommunications Council.

^{2/} On May 16, 1995, the Commission issued a Public Notice requesting comments on PBMS' petition. Thus, these comments are timely filed, being within the specified time period under FCC Rule Section 1.4.

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order to meet their obligations to provide essential services to the public, and are among the primary incumbent occupants of the spectrum designated for broadband PCS. As such, utilities and pipelines 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 PBMS' petition.

I. BACKGROUND

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, PBMS does not question the application of the transition plan to PCS licensees. However, PBMS 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, PBMS suggests that it will also result in certain PCS licensees bearing the burden of relocating microwave links for competing PCS licensees -- the "free rider" problem.

In order to resolve these concerns, PBMS recommends that the FCC adopt a relocation cost sharing plan in which all PCS licensees participate. Last August, UTC addressed a similar cost sharing plan that was put forward by the Personal Communications Industry Association (PCIA). While the PCIA plan had some appeal, UTC opposed it as being insufficiently developed and likely to create additional complexities and points of dispute among the various parties. In its Third Memorandum Opinion and Order in GEN Docket 90-314, the Commission agreed with UTC and rejected the PCIA proposal.^{3/}

II. COST SHARING CONCEPT HAS MERIT BUT NEEDS GREATER FLEXIBILITY

From the perspective of incumbent 2 GHz microwave licensees the PBMS proposal has merit. A cost sharing plan would: facilitate a coordinated relocation of large integrated microwave networks; streamline the number of different parties with whom an individual microwave licensee has to negotiate; and provide incumbents with a greater degree of certainty regarding the ability of PCS licensees to fully reimburse all microwave relocation expenses.

^{3/} Third MO&O, GEN. Docket no. 90-314, 9 FCC Rcd 6908 (1994).

The PBMS proposal is a significant improvement over the PCIA plan both in terms of creating a workable cost-sharing framework and in "fleshing out" the some of the details of the proposal. However, despite these improvements, a number of aspects of the proposal need to be revised in order to retain the flexibility of the Commission's microwave transition plan.

A. Transfer of Interference Rights

The PBMS plan proposes the creation of "interference rights" that transfer with the successful migration of a microwave link. Specifically, upon relocation of a microwave link the plan would transfer the incumbent microwave licensee's right of non-interference to the PCS licensee that relocates the station. The PCS licensee's interference rights would be indicated in the FCC's data base as if the microwave path was still in operation. When another PCS provider conducts an interference analysis for its system, it would have to approach the PCS licensee holding the "interference rights" concerning reimbursement of the initial PCS licensee's costs of relocating the microwave station.

UTC supports the PBMS proposal to transfer interference rights as an elegant resolution to the issue of free riders. The transfer of interference rights will provide a reasonable assurance of cost sharing and should therefore facilitate negotiations between microwave licensees and PCS licensees since it will enable the discussion to encompass entire microwave systems rather than just individual co-channel stations.

UTC would recommend that the transfer of interference rights extend to unlicensed PCS operations as well as licensed PCS. In this way, PCS licensees and UTAM would each obtain interference rights for the relocation of paired microwave paths that are located outside of their respective spectrum blocks.

B. PBMS Formula Too Restrictive

While supporting the idea of transferring interference rights as a manner of ensuring cost sharing among PCS licensees, UTC has significant concerns with regard to the adoption of a rigid relocation reimbursement formula. The transition plan is based on the use of market-forces to resolve relocation issues. The adoption of price caps, no matter how high, might place an artificial constraint on relocation negotiations.

It is particularly important for regulated entities, such as utilities, that face state agency and public utility commission scrutiny regarding the disposition of rate payer assets, that there be no constraints on the ability to recover fair market value.

Many of the already-concluded and on-going negotiations between utilities and PCS licensees involve issues that are unrelated to cash transactions. Yet, the PBMS formula does not recognize or account for negotiations that consist of non-cash transactions. Adoption of a mandatory formula approach might have the effect of discouraging the use of such creative relocation arrangements 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. This is particularly true given the likelihood that creative relocation arrangements will facilitate early roll-out of PCS.

Limiting cost-sharing contributions to a specific formula will undermine 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...^{4/}

To adopt PBMS' recommendation for a limitation on recoverable expenses would be at odds with the 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 PBMS' proposed formula is that it requires parties to assign a value to a negotiated deal but does not consider externalities that

^{4/} Third Report and Order, ET Docket No. 92-9, 8 FCC Rcd 6589, 6603 (1993).

may impact upon the value of a relocation. For example, the formula does not account for the value to a PCS licensee or expense to a incumbent microwave operator of an expedited relocation from the band. Finally, the formula does not indicate how values would be assigned for individual stations in a transaction that deals with the relocation of a multi-station system.

As an alternative to the adoption of a specific reimbursement formula UTC would suggest that the Commission require mandatory negotiations between PCS licensees that would have required the relocation of a microwave station and the PCS licensees holding the "interference rights" to the relocated station. If the parties are unable to agree on cost-sharing the negotiating parties should be subject to arbitration. PBMS' proposed formula could be adopted as a suggested procedure for the arbitrator to use.

C. The Clearinghouse Proposal Raises Some Confidentiality Concerns

As part of its cost-sharing proposal PBMS recommends that a "clearinghouse" be established to administer the reimbursement. The clearinghouse would maintain all of the cost and payment records related to each microwave link.

The creation of such a clearinghouse raises issues of confidentiality for PCS and microwave licensees. For example, the terms and conditions of negotiated relocations may involve strategic business information that the parties desire to keep confidential, especially those relocations involving non-cash consideration. In addition, the PBMS petition provides insufficient information as to how the clearinghouse would be funded or how it would actually work.

III. CONCLUSION

The PBMS proposal provides a solid framework for the development of workable cost-sharing procedures. In particular, UTC supports the concept of transferring interference rights to PCS licensees upon successful relocation of a microwave link.

A number of aspects of the proposal must be revised to retain the flexibility of the Commission's microwave transition plan. Adoption of a rigid price cap could frustrate creative relocation arrangements that would facilitate the rapid roll-out of PCS.

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests the Commission to take actions consistent with the views expressed herein.

Respectfully submitted,

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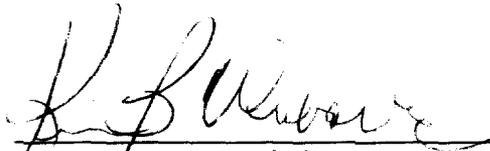
CERTIFICATE OF SERVICE

I, Kym B. Winborne, a secretary with UTC, hereby certify that I have caused to be sent, by first class mail, postage prepaid, this 15th day of June, 1995, a copy of the foregoing "Comments" to the following:

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