BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)	WT Docket No. 95-157

To: The Commission

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COMMENTS OF APCO

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COMMUNICATIONS OFFICIALS-
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The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), by its attorneys, hereby submit the following comments in response to the Commission's Notice of Proposed Rulemaking, FCC 95-426 (released October 13, 1995), in the above-captioned proceeding.

APCO is the nation's oldest and largest public safety communications organization, with over 12,000 worldwide members involved in the management and operation of police, fire, emergency medical, forestry-conservation, highway maintenance, disaster relief, and other public safety communications facilities. Many of these are state and local government 2 GHz microwave facilities that provide the backbone for critical public safety mobile radio communications systems.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission has proposed significant modifications to recently adopted rules requiring existing 2 GHz fixed microwave licenses, including state and local government agencies, to relocate 2 GHz

microwave facilities through a process of negotiations with PCS licensees.[1/] When the Commission reallocated the 2 GHz bands, it assured microwave incumbents that under no circumstances would they incur direct or indirect relocation costs, and promised that incumbents would receive "fully comparable" replacement facilities. To accomplish this, the Commission adopted rules which were intended to leave the specifics of relocation to the negotiation process between the affected parties. Now, however, in the midst of these negotiations, the Commission is unfairly proposing to change the basic ground rules to the detriment of incumbent microwave licensees.

Prior to the Notice, the Commission staff had repeatedly assured incumbents and their representatives that Commission consideration of the cost-sharing proposals would not include significant changes in the current rules regarding mandatory and voluntary negotiations. Yet, what are now billed as "clarifications" in the Notice are in fact major changes that would have a dramatic and detrimental impact on public safety incumbents.

[1/] Mandatory relocation was strongly opposed by APCO insofar as state and local government public safety systems were concerned. APCO's Petition for Review of the Commission's decision to subject public safety agencies to involuntary relocation is now pending in the United States Court of Appeals for the District of Columbia Circuit. APCO v. FCC, No. 95-1104 (filed Feb. 10, 1995). These comments addressed to relocation process should not be construed to suggest that APCO accepts the principle of mandatory relocation of public safety systems.

These proposed "clarifications" appear to result from a carefully orchestrated and misleading PCS industry campaign suggesting that many incumbents are taking unfair advantage of the process to demand "excessive" relocation arrangements. This is a specious charge which ignores that the process is working as envisioned by the Commission. When the rules were adopted, both the Commission and the PCS industry recognized that the negotiation process would vary widely from case-to-case and some negotiations would be easier than others. Particularly in the voluntary period where there is no obligation at all to negotiate, it was recognized that it might be necessary for PCS licensees to offer incentives to some incumbents to expedite the difficult and disruptive relocation process.

As the Commission expected, many negotiations are now under way, though many microwave incumbents have only recently received their first contact from PCS licensees or their agents. These negotiations can be extremely difficult and time consuming for public safety incumbents, requiring understaffed agencies to devote scarce time and resources that would normally be assigned to other more critical projects. This commitment of time and resources is necessary, however, due to the complexity of relocating multiple path microwave systems and, more importantly, the needs to ensure that public safety communications systems will continue to provide state-of-the-art service and reliability.

Nevertheless, some relocation agreements have already been entered into and PCS service has been or will soon be initiated in some parts of the country as a result (including the Baltimore-Washington MTA). In actuality, there is no significant evidence that the introduction of PCS services to the public is being impeded or that PCS licensees are being unfairly disadvantaged.

To the contrary, most microwave incumbents who have been contacted have readily entered into negotiations even during the current voluntary period. Agreements are being negotiated at least two to three years prior to any requirement that incumbents even meet with the PCS licensees. None of those negotiations would be taking place, let alone resulting in voluntary relocation agreements, if the current rules were as imbalanced as the PCS industry suggests.

Rather than change the ground rules midstream, the Commission should let the process work. The 2 GHz band was reallocated for PCS use on condition that all relocation costs of the fixed microwave licensee were borne by the new PCS licensee. In particular, public safety fixed microwave licensees were subjected to involuntary relocation requirements in specific reliance on the protections afforded by this relocation plan. Having done so, the Commission cannot now proceed to remove some of these protections and shift some or all of the burden and costs of relocation to the incumbent fixed microwave user. Such an

arbitrary action would constitute the most blatant form of administrative double talk.

As described more fully below, APCO opposes the proposed rule changes in the Commission's Notice, with the exception of reasonable "cost-sharing" procedures which do not artificially cap the costs of relocation.

I. DEFINITIONS OF "GOOD FAITH" AND "COMPARABLE"

The current Commission rules provide for a voluntary negotiation period (three years for public safety entities and two years for non-public safety entities), followed by a mandatory negotiation period (two years for public safety entities and one year for non-public safety entities). If no agreement can be reached by the end of the mandatory period, the PCS licensee can take the matter to the Commission for resolution.

Until now, the Commission has wisely left it to the parties to define the scope and nature of both voluntary and mandatory negotiations. Indeed, the reason that the Commission adopted a negotiation period was to avoid endless disputes before the Commission as to what constitutes a comparable system and appropriate compensation to cover the direct and indirect costs for the thousands of microwave path relocations necessary to clear the PCS bands.

Now, the Commission proposes to change the rules midstream, and to impose harsh and arbitrary restrictions on negotiations during the mandatory period. In particular,

the Commission proposes that an incumbent will be acting in "bad faith" if it does not accept a PCS licensee's offer during the mandatory period to provide a "comparable" replacement system. The problem is that the Commission goes a step further and proposes a highly arbitrary and unfairly restrictive definition of "comparable," effectively eliminating the possibility of meaningful negotiations during the mandatory period.

The Commission proposes that, during the mandatory period, "comparable" facilities will not include more spectrum efficient digital equipment where the existing facilities are analog. This proposed arbitrary rule ignores the reality of microwave system design and replacement. Digital equipment is now state-of-the-art, just as current analog equipment was state-of-the-art when it was installed. Therefore, digital equipment is in most cases a "comparable" replacement for any licensee that requires state-of-the-art equipment.

Few if any new analog systems are now being installed, and analog replacement parts will soon be extremely difficult, if not impossible, to find. Therefore, a microwave incumbent may be endangering the long-term reliability of its communications system if it is forced to install a new analog system at this time. Public safety incumbents, in particular, have an obligation to ensure that their communications systems are the very best available to

protect their critical safety of life and property operations.

Most incumbents have long-term plans to replace their analog systems with digital, once the useful life of current equipment has expired and/or adequate funding has been found for the digital replacement. However, the PCS negotiation process is forcing them to greatly accelerate their replacement plans, in many cases long before they have any funding in place. Unfortunately, few state and local government microwave incumbents will have the ability to pay the difference between analog and digital equipment at this time. Therefore, unless a PCS licensee provides all of the funding for the "upgrade," many agencies will be stuck with out-dated (albeit "new") equipment, or forced to raise additional tax revenue to pay the difference. That is not a "comparable" replacement.

If public safety licensees are to be subject to mandatory relocation requirements, APCO continues to believe that arms-length negotiations, not arbitrary and restrictive FCC guidelines, should define the replacement facilities in each specific circumstance. This should be the case regardless whether the negotiations take place during the mandatory or the voluntary negotiation periods. Parties should be allowed to resolve their differences without Commission intervention.

The Commission's proposal is made even more offensive by its suggestion that after the voluntary period expires,

incumbents should not be entitled to reimbursement of fees for attorneys and consultants. The Commission describes these as "extraneous expenses" that are "premium payments." This description is inaccurate and patently unfair to the many incumbents, especially small public safety agencies, that find it necessary to retain outside experts to aid them in the negotiation process. Many PCS licensees have retained outside consultants to handle their negotiations (e.g., Columbia Spectrum). Why should incumbents be forced to "go naked" into negotiations when the PCS industry is "fully clothed" with their own platoon of expert attorneys, consultants and engineers.

Microwave incumbents should not be required to bear any expense that would not have been incurred but for the demands of the PCS industry that they vacate their 2 GHz frequencies. This must include reasonable external expenses such as fees for engineers, consultants and attorneys retained by an incumbent to ensure that its rights and system integrity are fully protected. Otherwise, incumbents with limited resources will be forced to trust the PCS licensees as to whether they are getting the best possible agreement, whether the replacement facilities will meet their specialized communications needs, and whether the band clearing and related agreements provide adequate assurances that the PCS licensee will fulfill its obligations. Such "trust" is particularly inappropriate

when the systems at issue are used for the protection of life and property.

Similarly, incumbents should be entitled to reimbursement at any stage for reasonable internal expenses. For example, rather than hiring outside experts, an incumbent may commit the time of its own engineers and attorneys. Incumbents should be reimbursed for that overhead, based on standard accounting principles.

Overall, if the scope of negotiations in the mandatory period is so arbitrarily limited, this will practically eliminate the mandatory period as a realistic option for many existing public safety microwave licensees and convert the voluntary period into a mandatory period. Effectively, the Commission will have significantly shortened the transition period for these licensees in direct contravention of its prior findings that a five year transition period was necessary in light of the special needs of public safety. Having premised the mandatory relocation of public safety systems on this longer five year transition period, shortening the period in this surreptitious fashion would be a highly arbitrary and capricious action.

II. PUBLIC SAFETY CERTIFICATION

The Commission's rules provide for a longer voluntary and mandatory negotiation period for public safety entities. In the NPRM, the Commission has proposed that public safety

licensees be required to demonstrate that they meet the FCC's definition of public safety. As an initial matter, there is a serious error in the Commission's discussion of this issue. The Commission states that current rules provide that "public safety" facilities are those:

> Part 94 facilities currently licensed on a primary basis under 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, provided that the majority of communication carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property.

Notice at ¶79. However, the Notice left out a critical sentence in the rule which states that:

> 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 communications carried on those facilities are used for operations involving safety of life and property.

47 C.F.R. §94.59(f). This provision ensures that facilities used for operations involving the safety of life and property do not loose their "public safety" status merely because they may be licensed under the Local Government Radio Service, Forestry Conservation Radio Service, and Highway Maintenance Radio Service. This is an important provision since many microwave systems used exclusively by police, fire, and/or emergency medical agencies were licensed under the Local Government Radio Service simply as

a matter of convenience.[2/] This is particularly common for microwave networks that provide the backbone for spectrum efficient trunked public safety mobile radio systems shared by police, fire, EMS, and other public safety agencies. The fact that these microwave systems are licensed as "Local Government" does not make these systems any less important for the protection of life and property.

If such a certification requirement is adopted, it must incorporate the current rules in Section 94.59(f), and not repeat the error in the Commission's Notice described above. Moreover, PCS licensees should not be allowed to force government agencies to meet burdensome reporting requirements regarding the nature of their communications traffic. In most cases, it will be obvious that a microwave system is used primarily for operations that protect the safety of life and property (e.g., a microwave network that provides the backbone for a 9-1-1 dispatch system). Public safety agencies, already burdened with the relocation process, should not be forced to prove the obvious.

III. SECONDARY STATUS AFTER TEN YEARS

The Commission proposes, as a major change in its rules, that as of April 4, 2005, all remaining 1850-1990 MHz

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[2/] Similarly, a microwave system may be licensed under the Subpart B Forestry Conservation Radio Service and used for emergency communications related to forest fires and law enforcement activities on public lands. Those operations obviously involve the safety of life and property.

microwave facilities will become "secondary" operations. APCO strongly opposes this change as it prejudices public safety agencies operating microwave facilities in remote areas, and those few systems in heavily congested areas for which "comparable" facilities may not exist outside of the 2 GHz band.

Many of the public safety microwave paths in the 1850-1990 MHz band are used to connect land mobile transmission facilities located in remote areas. It may be more than ten years, if ever, before all of those paths need to be relocated to accommodate PCS. That, however, should not diminish the primary status of those systems well into the future. Once a public safety system becomes secondary, it is likely to be relocated voluntarily because public safety agencies cannot risk interference to their operations. Thus, public safety systems in very remote areas will be forced to move after ten years even though their frequencies may <u>never</u> be needed for PCS.

Another (probably smaller) group of 1850-1990 MHz microwave incumbents will still be operating even in urban areas after 2005 because of the inability to find comparable facilities. In a few spectrum congested metropolitan areas, 6 GHz and other replacement bands may not be able to accommodate all of the current 2 GHz licenses. The inability to obtain new repeater sites may also prevent the relocation of some 2 GHz paths that are too long for higher frequency bands. Fiber may be an alternative (albeit an

expensive alternative) in some of these situations. However, fiber may not provide sufficient reliability, especially earthquake prone areas.

Therefore, paths remaining after 2005 should not be sacrificed and converted to secondary status merely because of the passage of time. An incumbent system should remain primary indefinitely, unless and until a PCS licensee agrees to pay all of the costs of relocation to fully comparable facilities.

IV. COST-SHARING

APCO does not object to cost-sharing procedures among PCS licensees. If properly administered, a cost-sharing mechanism will facilitate negotiations in the majority of situations where a microwave licensee operates a complex network of microwave paths, each of which may impact different (and in come cases, multiple) PCS licensees. Eliminating the need to reach separate agreements with each PCS licensee will aid all involved in the relocation process.

However, APCO opposes placing an arbitrary cap on reimbursements among PCS licensees, even if it does not have a direct impact on the compensation paid to the microwave incumbent. The actual cost of replacing a microwave link varies greatly depending upon the unique characteristics of each path, its current equipment and tower facilities, and other factors. Adopting a cap will "bless" that number as

the target for all negotiations, even if it has no relevance to a specific situation. PCS providers will resist paying more than that amount per path, even where it is well below the actual cost of relocation.

Therefore, APCO supports a cost-sharing mechanism, but without a reimbursement cap.

CONCLUSION

For the reasons stated above, except for reasonable cost-sharing rules, APCO opposes the proposed modifications to the microwave relocation rules.

Respectfully submitted,

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