

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

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TELECOMMUNICATIONS DIVISION
WASHINGTON, D.C. 20540

In the Matter of)
)
Amendment of the Commission's)
Rules Regarding a Plan for)
Sharing the Costs of)
Microwave Relocation)

WT Docket 95-157
RM-8642 3

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**COMMENTS OF THE
SPRINT TELECOMMUNICATIONS VENTURE**

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November 30, 1995

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SUMMARY

The Sprint Telecommunications Venture, which directly and through affiliates will provide PCS service to an area populated by some 180,000,000 Americans, intends to provide spirited competition to the wireline monopoly and the cellular duopoly. The Commission has made exceptional efforts over the past three Administrations to make possible the competitive PCS service we envision, and the PCS licensing process that created this service and brought in billions of dollars in revenue to U.S. taxpayers can be fairly characterized as the crown jewel of the accomplishments of the current Commission.

The Commission's regulatory framework, however, contains an unintentional but profound defect that threatens to undercut the realization of its competitive goal — the creation of a so-called "voluntary" negotiation period for microwave relocation during which incumbent licensees may extort extreme premium payments from new PCS licensees or even refuse to negotiate at all. Thousands of microwave paths across the country must be relocated for PCS to be implemented nationwide. The abusive tactics of some microwave incumbents to profiteer using spectrum licenses issued to them free of charge as public trustees will, if left unchecked, stand in the way of bringing PCS to American consumers.

This regulatory time-bomb must be decommissioned in a manner that protects both PCS licensees and reasonable incumbents, who now are accomplishing successful relocations at acceptable costs. The Commission should, consistent with Congressional intent, adopt remedies targeted toward stopping the bad-faith tactics that now have been well documented. STV suggests an integrated three-year good-faith negotiation period (or an integrated five-year period for public safety). STV also supports the Commission's proposal to define "good faith" and proposes appropriate procedures in lieu of penalties for relocating incumbents that, despite the Commission's best efforts, continue to use bad-faith negotiating tactics.

STV also supports the Commission's proposed cost-sharing rules, with only two exceptions. Specifically, STV believes that a "proximity threshold" test should be adopted for calculating interference and demonstrates here how such a test would operate. It also suggests that the \$250,000/\$150,000 cap be a "soft cap" that is flexible enough to appropriately take unique circumstances into account. STV also suggests technical improvements to the Commission's proposed rules.

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- B. Utilities Telecommunications Counsel Service Corporation, *Important Information for All 2 GHz Licensees: Big Money and Your 2 GHz Microwave Band Relocation*
- C. Suffolk County, New York, Police Department, *Position Paper on Market Valuation*
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- E. Colloquy Between Senators Breaux and Hollings, 141 Cong. Rec. 14471 (September 28, 1995)
- F. Agreement Among AT&T Wireless Services, Inc., Wireless Co., L.P., PhillieCo, L.P., PCS PrimeCo, L.P. and GTE Macro Communications Services Corporation (September 28, 1995)

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

Amendment to the Commission's Rules) WT Docket No. 95-157
Regarding a Plan for Sharing) RM-8643
the Costs of Microwave Relocation)

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**COMMENTS OF THE
SPRINT TELECOMMUNICATIONS VENTURE**

The advertisement from the November 10 *Washington Post* attached to this pleading graphically demonstrates why the issues in this proceeding importantly affect competition in the telecommunications marketplace and must be promptly and effectively resolved.^{1/}

The advertisement was placed by an incumbent cellular duopolist in the Washington/Baltimore market on the very day that the country's first PCS competitor launched its service in that region.^{2/} Faced with a new entrant in the market, the entrenched cellular operator targeted its advertising on one issue only — the lack of PCS coverage outside the greater Washington/Baltimore market. PCS will not achieve that broader coverage for many months in part because it has only recently been licensed but in part because it must relocate numerous existing microwave users in its spectrum.

The Commission has sought to introduce competition in the wireless marketplace by licensing PCS systems. Yet the regulatory framework it has established contains a defect that threatens seriously to delay and undercut realization of that goal. Thus, the Commission has

^{1/} See Attachment A.

^{2/} Sprint Telecommunications Venture ("STV") is a limited partner of the licensee of that PCS system, and that system is also an affiliate of STV's planned nationwide PCS network.

provided for a period of two (or in the case of public safety, three) years for microwave incumbents voluntarily to enter into relocation arrangements with PCS licensees. This defective system appears to entitle microwave incumbents, trading on their government-conferred licenses, to exact from PCS licensees "premium" payments going beyond any actual relocation costs or to refuse to negotiate at all. Or so the system has been interpreted by some, though not all, microwave incumbents.

The Sprint Telecommunications Venture ("STV") is a joint venture formed by subsidiaries of Sprint Corporation, Tele-Communications, Inc., Comcast Corporation, and Cox Communications, Inc.^{3/} Directly or through its affiliates, STV currently has the right to provide PCS service in areas populated by more than 180 million Americans. It intends to acquire other PCS licenses and to affiliate with additional PCS licensees to expand this extensive service footprint throughout the United States. It recognizes, as the attached advertisement asserts, that national coverage is crucial if PCS is to be competitive and succeed. STV likely will be required to relocate some 1,400 microwave paths in its markets across the country.^{4/} The costs and delays STV will have to incur in the relocation process will directly and critically affect its ultimate ability to compete effectively with the local-loop telephone monopoly (which, of course, has ubiquitous coverage) and even with its cellular

^{3/} STV was formed to provide nationwide competitive wireline and wireless services. The wireless component of STV will offer PCS services through WirelessCo, L.P. and PhillieCo, L.P.

^{4/} Relocations will be necessary for other PCS licensees and in other parts of the country where STV does not currently have a license or affiliate. Although one cannot simply extrapolate numerically because microwave links overlap PCS license bands, one can see that the relocation process poses monumental problems.

rivals (which have an 11-year headstart, did not have to bid for their spectrum, and obtained clean spectrum unencumbered by incumbents).

Section I of these Comments addresses that important issue by demonstrating the scope of the problem and suggesting mechanisms the Commission should utilize to remedy the abuses being perpetrated in the relocation process without unduly burdening those incumbents that already are negotiating responsibly and in good faith. Section II deals with the issue during the subsequent mandatory negotiation period of when deadlock is reached. Section III comments on the basically well-conceived and well-crafted proposals for cost-sharing set forth in the *Notice of the Proposed Rule Making* in this docket (the "*Notice*").

I. IT IS ESSENTIAL THAT THE COMMISSION REMEDY THE CRUCIAL AND DEVASTATING DEFECT IN THE NEGOTIATION PERIOD, NAMELY THE ABSENCE OF A REQUIREMENT OF GOOD-FAITH NEGOTIATION.

The Commission has recognized that the absence of a prompt and fair microwave relocation process will cripple PCS' ability to emerge as a viable and effective competitor in the local loop monopoly and to cellular, providing innovative and affordable wireless service to the public.^{5/} In light of this recognition, the Commission must confront the reality, detailed below, that some microwave incumbents are using their government-conferred licenses to hold new PCS licensees hostage to demands for "premium" payments

^{5/} In the *Notice*, the Commission expressed this realization most explicitly in the context of public safety. The Commission stated that it is "convinced that PCS service may be precluded or severely limited in some areas unless public safety licensees relocate" and that it does "not intend for public agencies to delay deployment of PCS services if at all possible." *Notice*, ¶¶ 79, 81. The same concerns apply with equal force and even greater effect to commercial microwave incumbents because there are far more commercial incumbents than public safety incumbents.

to relocate to other suitable spectrum bands. The unfortunate efforts of a minority of microwave incumbents threaten to delay the advent of PCS and to make it less competitive and more expensive to consumers. The Commission should act promptly and decisively to prevent these practices.

A. Experience from Current Negotiations Demonstrates Both That Responsible Relocation Efforts Are Possible And That Abuses Undoubtedly Are Occurring.

1. Evidence Of Abuses

The regulatory framework set forth in the *First Report and Order* in ET Docket 92-9 to relocate incumbent 2 GHz licensees sought to promote the speedy deployment of PCS systems.^{6/} However, the experience of many PCS licensees reveals a growing number of microwave incumbents are abusing the relocation rules for their own selfish gain.^{7/} While many microwave incumbents are proposing reasonable compensation demands in negotiating voluntary relocation agreements, a disturbing number of incumbents are seeking to misuse the Commission's rules to secure windfall payments well beyond full relocation costs for comparable facilities. Although limited in number, these bad actors often are highly

^{6/} See *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, First Report & Order and Third Notice of Proposed Rule Making, 7 F.C.C. Rcd. 6886 (1992).

^{7/} To evaluate the excessive demands made by bad actor incumbents, it is appropriate to ascertain the actual cost of relocating an average microwave link. Earlier this year, Columbia Spectrum Management estimated that the cost per link of relocating microwave incumbents would be between \$250,000 and \$500,000. This cost reportedly reflected "financ[ing] engineering, hardware and negotiation incentives." Paul Kagan Associates *Wireless Market Stats.*, April 21, 1995, at 16. The *Notice* itself (¶ 43) recognizes by its proposal for cost-sharing that costs of \$250,000 for reimbursement, with an additional \$150,000 provided for where a new tower is required, generally are reasonable.

organized and are assisted by enterprising consultants. Through seminars and direct solicitation, these consultants recruit microwave incumbents to assert a "right" not to negotiate during the voluntary period unless PCS licensees are willing to pay excessive and unreasonable relocation costs — which can exceed actual costs by four or five times. Delay and added costs result. Thus, the overall pattern of responsible behavior exercised by many microwave incumbents is marred by the extortionist tactics of others, frustrating the Commission's aim of encouraging good faith negotiations during the voluntary period.

PCS licensees are in a precarious position in attempting to redress abusive conduct. Without the full use of the spectrum for which they bid, including that occupied by microwave incumbents, their \$7.7 billion auction investment produces no return. Nor can they "go public" or seek administrative remedies for fear that the incumbents will, as reprisal, further delay negotiations or increase their asking price.^{8/} As a result of this intimidation, PCS licensees can speak only generically and anonymously about microwave incumbent abuses. Consequently, the Cellular Telecommunications Industry Association ("CTIA") developed an "operation ski mask" procedure to protect the identity of PCS licensees and thus forestall retribution. Under this procedure, CTIA has engaged the accounting firm of Farren & Lanman, an independent third party, to act as a clearinghouse for information provided by PCS licensees describing the unreasonable practices of microwave operators.

^{8/} In many cases, the incumbent microwave licensee is also a governmental entity from which PCS licensees must seek important zoning and other permits essential to their businesses.

The following are just a few anonymous anecdotes of improper conduct which have emerged through the CTIA procedure:^{9/}

- The PCS licensee surveyed the incumbent's 1.9 GHz system and an equipment manufacturer quoted a relocation price of \$225,000 per link, including an upgrade of equipment. The incumbent demanded \$400,000 in cash for each relocated link, more than 70% over actual relocation costs. The PCS licensee's negotiator took the incumbent's demand back to the licensee for consideration.

During the interim, the incumbent attended a seminar on the "value" of these frequencies to PCS licensees.^{10/} The incumbent then rescinded its \$400,000 offer and stated that it would not take less than \$1,200,000 per link. This would put the total demanded by the incumbent to relocate twelve links at \$15,600,000. That is \$12,900,000 more than, or almost five times, the actual cost to relocate the links.

- An incumbent municipality engaged a law firm to negotiate microwave relocations with PCS licensees. Without regard to actual relocation costs, the incumbent's negotiators demanded \$1,000,000 per link.

The incumbent stated that it has a right to get "whatever it can when it sells its assets." When confronted with the fact that its citizens will have to pay more for PCS services, the incumbent also stated, "that's why we like this — it's a hidden tax."

- The incumbent, a governmental entity, has four analog links which the PCS licensee needs to relocate. The PCS licensee determined that the cost of providing comparable systems is \$760,000. The incumbent has stated that it would like a cash payment, and it will do the relocation on its own. The PCS licensee offered \$800,000 for the relocation of all four links. The incumbent refused twice to make a counter-offer. Later, the incumbent informed the PCS licensee that it would relocate only for a payment of \$1,000,000 for each relocated link (a total of \$4 million), plus its consulting fees of \$250,000.

^{9/} By accepting and acting on the results of the "operation ski mask" procedure, the Commission can eliminate the fear factor which has deterred PCS licensees from coming forward publicly.

^{10/} Since the PCS licensee had already paid full "value" for this spectrum in the auctions, the conduct of the microwave incumbent was both illogical and violative of the Commission auction process.

- The incumbent utility company which has 22 links, 21 of which are analog systems ranging from 132-140 channels. The PCS licensee estimated relocation costs at \$4 million. At the first meeting, the incumbent requested \$22 million to relocate its network. The incumbent based its request on the book value recovery, replacement value, territorial value, and speed of relocation. In addition, the incumbent added the cost of relocating several links in the network which do not need to be relocated. The incumbent has also requested that the PCS licensee pay its consultant costs.
- Another incumbent stated it believes it is unconscionable to demand amounts in excess of the actual relocation costs. Nevertheless, it does not want to look foolish or negligent to its shareholders. The incumbent wanted to know if the PCS licensee would "hold the line" against unreasonable demands by other incumbents, and if not, would the PCS licensee be willing to pay the incumbent additional funds if the incumbent settles early for the costs of relocation.
- Other examples of unreasonable demands include an incumbent that has already relocated demanding a premium payment to release the PCS band and an incumbent requesting a premium of \$1 million above the cost of relocating.

Perhaps the most glaring example of overreaching, however, affects STV directly and now is public. The Suffolk County, New York, Police Department demanded \$18 million "as an inducement to consummate the negotiation" *and* a total digital rebuild of the *entire* microwave system despite the fact that only a single link would interfere with STV's use of the frequencies for which it paid tens of millions of dollars at auction. STV has made three independent proposals to Suffolk County, including an offer to provide a digital upgrade as an inducement for the incumbent to relocate, but STV's offers have been rejected out of hand in a two-sentence fax containing no counteroffer.

2. Evidence Of Responsible Negotiations

The process of negotiating with and relocating microwave incumbents from the 2 GHz band has not been without its successes. Many microwave incumbents have been

willing to negotiate during the voluntary period and have put forth proposals seeking reasonable premiums in addition to actual relocation costs.^{11/}

- An incumbent utilities company sought analog-to-analog relocation costs, plus \$25,000 compensation to expedite and \$50,000 to waive the testing period, for a total of \$250,000. Estimated costs for analog replacement were \$160,000-\$175,000.
- A state county incumbent's negotiation is an example of a premium in the form of a systemic upgrade. The incumbent county desired a premium for a systemic digital upgrade to 6 GHz to relocate its three analog paths. The estimated costs for replacement of the county's three analog paths was \$472,921.88.
- An incumbent industrial firm sought a cash payment of \$50,000 to relocate its one path.
- Similarly, an incumbent public utilities cooperative is considering the relocation of seven paths for \$932,551.85. This figure includes relocation costs of about \$120,000 to \$140,000 per path, as well as an additional \$44,000 for miscellaneous expenses.
- Another company is negotiating the relocation of two digital paths in New Jersey for an estimated \$301,340.

Although these are not final agreements, they represent the type of reasonable and collaborative negotiations practiced by many microwave incumbents and envisioned by the Commission. In each of these cases, responsible incumbents are seeking premiums which reasonably induce speedy relocation but without leveraging the public trust of their licenses as a means to profiteer.

These cooperative, fair and expeditious negotiations are significant for two reasons. First, they demonstrate that it is possible for PCS licensees and incumbents to reach equitable voluntary relocation agreements, proving that resort to extortionist tactics is unwarranted.

^{11/} In some instances, rather than seeking additional cash, incumbents have requested an upgrade from an analog to a digital system as a premium.

Second, the existence of responsible incumbent conduct heightens the urgency of curtailing the abusive conduct of bad actors to preserve the integrity of reasonable negotiations.

3. The Danger Of The Downward Spiral

The absence of any mechanism to police bad actors means what it always means — an encouragement for others to follow suit. It takes not a moment's reflection to realize that if Pipeline Company A holds out for exorbitant premiums, Pipeline Company B in an adjoining region will be under great pressure to abandon a cost-based approach to negotiations and also seek to maximize its windfall from the process. Indeed, stockholders and management might insist on such an approach.

Moreover, this inevitable tendency to emulate the lowest common denominator is being fanned by the national trade associations. For example, prior to the end of the PCS auction, UTC Service Corporation distributed a flyer to various 2 GHz licensees touting the "big money" investments PCS providers were expending for portions of the spectrum. *See* Attachment C. This flyer highlighted the urgency PCS providers would feel to enter the PCS market to recoup their investment. It suggested that in developing a negotiation strategy, the 2 GHz incumbent should keep in mind that delay would be equivalent to \$5,000,000 per month for the Washington/Baltimore PCS licensee. These associations continue to tout the voluntary negotiation process as an opportunity to extort large sums far beyond actual costs, as is illustrated dramatically by a consultant's "market valuation" of the spectrum licensed to the Suffolk County, New York, Police Department:

The Suffolk County marketplace contains a population of approximately 1.3 million people. Suffolk County is a key element in the lifestyle of the wireless consumers in the New York BTA. . . . PCS industry authorities and service providers are projecting market penetrations of over 35% of this population in the next decade. Using current industry revenue projections . . . these markets represent a potential revenue pool to be shared by the industry [that includes revenue potential of \$39 million per month and annualized revenues of \$467 million per year].

[T]he Suffolk County market area will be a highly valuable wireless marketplace due to the high profile income demographics of the county. . . . Suffolk County offers a potential base of approximately 900,000 high income wireless users. . . . The projected revenues at risk through delayed entry into the Suffolk County marketplace are comprised of several factors: (a) the loss of direct Suffolk County revenues; (b) the penalties of product and service attractiveness in the New York BTA; (c) permanent loss in the New York BTA in the amount of 10-20 percentage points of the market share.^{12/}

This "position paper" goes on to argue that STV would lose some \$572 million in "permanent loss of market share" if it did not accede to Suffolk County's demands and thus obtain access to the spectrum represented by Suffolk County's microwave path.

The only way to stem this ineluctable downward spiral is for the Commission to act quickly and forcefully. It should not even wait until the end of this proceeding to issue a public notice warning that during the voluntary negotiation period bad actor conduct — that is, bad faith negotiations — is inconsistent with incumbents' status as Commission licensees and could jeopardize their licenses or lead to other penalties. Then, at the conclusion of this proceeding, the Commission should adopt effective remedies for dealing with this problem.

^{12/} See Attachment C.

B. The Commission Has The Authority And The Obligation Effectively To Resolve These Issues In This Docket.

1. The Public Has A Vital Stake In The Outcome Of This Conflict.

In addition to impacting PCS licensees, the improper manipulation of the microwave relocation rules by bad actor incumbents will ultimately cost American consumers.

First, if PCS licensees are left unprotected against the outrageous demands of bad actor incumbents, the value of yet-to-be auctioned PCS spectrum will be lowered significantly, because of the need to factor in these excessive relocation costs. Second, the cost of delay in instituting PCS services would be borne by consumers, who would pay higher prices for cellular services due to the absence of PCS competition. A recent study conducted by Professor Paul Milgrom of Stanford University underscores the cost implications of bad actor conduct. *See* Attachment D.

Potential PCS licensees must discount their auction bids to account either for paying excessive premiums demanded by microwave incumbents or for the delay in implementing their business plans until after the voluntary negotiation period has expired. This translates into not only \$2 billion in future PCS auction revenues lost to the U.S. Treasury, but also delays in (a) new services for consumers, (b) the development of new businesses creating new jobs and paying their share of taxes, and (c) a more competitive telecommunications marketplace. Professor Milgrom notes that recent demands from microwave incumbents have called for payments of \$1 million per link, compared to an estimated actual relocation cost of \$200,000 for an average link. If such demands by microwave licensees are representative of bargaining outcomes, losses in government auction revenues from sales of the C, D, E,

and F-bands as a result of payments to microwave users would total between \$930 million and \$1.9 billion.^{13/}

Second, the relocation process and the need to negotiate with existing microwave licensees seeking exorbitant payments will undoubtedly delay the advent of competitive PCS services. This delay will further entrench the wireline telephone monopoly and cellular incumbents. This delay will harm PCS licensees and consumers not merely for the short term, for it has been proven that speed-to-market considerations create lasting competitive imbalances. Estimates of costs to consumers resulting from delays in PCS deployment depend on assumptions about the nature of competition and the effectiveness of regulation in the industry, as well as forecasts of demand. However, even conservative assumptions about demand indicate that the loss to consumers from delaying the introduction of PCS services in the A and B bands nationwide amounts to \$55 million per month of delay. The loss due to delays in introducing services in the C band amount to at least \$11 million per month.^{14/} Under less conservative estimates, the costs could be several times higher than this. Thus, permitting continued abusive bargaining tactics by incumbents will result in heavy financial losses to both government and consumers.^{15/}

^{13/} See Statement of Paul R. Milgrom, Attachment D, at ¶ 7. Professor Milgrom noted that if incumbent demands nearing \$1 million per link persist, the loss of auction revenues would amount to \$1.9 billion. Alternatively, Milgrom opined that smaller demands or compromise settlements could halve the cost to about \$900 million. See Attachment D.

^{14/} See *id.*

^{15/} It was estimated that delays in implementing cellular services cost consumers and the economy some \$86 billion. See J.H. Rohlfs, C.L. Jackson, & T.E. Kelly, *Estimate of the Loss to the United States Caused by the FCC's Delay in Licensing Cellular*

Third, if microwave incumbents are allowed to extort payments for relocation of their links during the vital voluntary negotiation period,^{16/} those costs will be passed on to consumers in the form of higher prices. Gouging by incumbents is, in effect, an implicit tax on consumers for the benefit of microwave incumbents.

Fourth, to the extent that suitable and fair relocation arrangements cannot be made during the voluntary negotiation period, coverage and quality of service will be drastically affected. In most markets, the heaviest microwave congestion is in the heart of the market. Very few customers are interested in a PCS service, for example, that covers the donut around New York but not downtown Manhattan. Yet, that could be the result if microwave users in the center of Chicago insist on holding out for prohibitive premium payments as the price for relocating to brand new, wholly effective substitute facilities.

All of these ill-effects, which are being permitted by the Commission's seeming failure to adopt meaningful, but fair, standards for the voluntary relocation process, will impair PCS' ability to create viable and effective competition initially against the wireline monopolies and existing cellular duopolists.

Telecommunications (National Economic Research Associates, 1991).

^{16/} Because the voluntary negotiation period is two to three years in duration and because, as shown below, time-to-market is so critical to the success of new PCS entrants, the public interest will not be adequately protected by waiting until the mandatory relocation period begins.

2. The Commission May Remedy Incumbent Abuses Consistent With The *Notice*, Its Statutory Authority, and Legislative Intent.

The Commission may, consistent with this rule making and its current authority, clarify the standards by which microwave incumbents must conduct themselves during the three- or five-year negotiation period. All incumbents — public safety and commercial microwave operators alike — are licensed by the Commission to serve "the public interest, convenience, necessity." All must seek renewal of their licenses as being consistent with the public interest. All are subject to complaints. And all may have their licenses revoked for good cause. Their licensed operations *are* subject to the public interest standard. Commission regulation is particularly appropriate where the activity in question is, in essence, profiteering in government-conferred licenses, the very terms of which require the licensees to forswear any private property rights.

Crafting appropriate remedies to these abuses is not forestalled by prior Congressional involvement in this issue. To the contrary, current Congressional intent stands foursquare in favor of limiting attempts to exact unreasonable premium payments from PCS licensees.

In 1992, Congress raised concerns that forced migration of microwave users out of the 2 GHz spectrum ideally suited for PCS could disrupt their service or provide them with insufficient compensation for their legitimate relocation costs. The facts that have since emerged demonstrate that those concerns are no longer at issue. No microwave incumbent is complaining about disruption of service or the suitability of the new facilities to which it would move. No incumbent is complaining that it has been offered payments that do not fully reimburse its costs. Those issues, to the extent they continue to be of any concern at

all, are in any event fully and effectively protected against by the safeguards imposed by the Commission for the mandatory relocation period.

Rather, the issue now is to what extent microwave incumbents can exact unreasonable premium payments during the voluntary negotiation period that bear no relationship to actual relocation costs. This issue has emerged because the voluntary renegotiation period established by the Commission has been interpreted as not requiring microwave incumbents to negotiate at all, let alone in good faith.

The mismatch between (a) the legitimate public policy concerns expressed by some members of Congress and others with respect to the microwave relocation process and (b) the unpoliced invitation to take the public's new PCS service for hostage is nowhere better expressed than in a September 28, 1995 exchange between Senator Breaux and Senator Hollings. The latter was the acknowledged leader of those who were concerned about disruption to incumbent microwave service and inadequate reimbursement of their actual relocation costs. That exchange, in part, was as follows:

Senator Breaux: The Senator from South Carolina . . . is aware, as we have discussed, that certain enterprising individuals have recruited a number of microwave incumbents as clients and now seem to be manipulating the FCC rules on microwave relocation to leverage exorbitant payments from new PCS licensees. . . . Would the Senator agree with me:

First, that this type of gaming of relocation negotiations was unintended, is unreasonable and should not be permitted to continue unchecked;

Second, that the affected parties should attempt to agree on a mutually acceptable solution to this problem;

Third, that if an acceptable compromise cannot be brought forth by the affected parties within a reasonable time period, then either Congress or the FCC should address this matter as quickly as possible with appropriate remedies?

Senator Hollings: . . . My amendment, which the FCC subsequently adopted in its rules, guaranteed that the utilities could only be moved out of the 2 gigahertz band if they are given 3 years to negotiate an agreement, if their costs of moving to the new frequency are paid for, and if the reliability of their communications at the new frequency is guaranteed.

Now I understand that some of the incumbent users may be taking advantage of the negotiations period to delay the introduction of new technologies. It was certainly not my intention to give the incumbent users an incentive to delay moving to the 6 gigahertz band purely to obtain more money. I agree with my friend that the parties involved in this issue should try to work out an acceptable solution to this issue. If the parties cannot agree to work out a compromise, I believe that Congress or the FCC may need to revisit this issue.^{17/}

In fact, Congressional intent at the time ET Docket 92-9 was finalized was simply that the Commission should provide adequate time for negotiation and ensure incumbents adequate cost compensation and reliability. It did not require any "voluntary" negotiation period during which incumbents would be free to use bad-faith negotiating tactics to exact the market value of their free spectrum from PCS licensees, who already have paid market value to the U.S. Treasury at auction. This colloquy demonstrates beyond doubt that the license to extort, which some have interpreted the voluntary period to mean, goes far beyond what is fair and reasonable protection of incumbents' legitimate interests.

^{17/} 141 Cong. Rec. S14533 (Attachment E hereto).

3. The Commission Should Clarify Or Amend Its Rules To Provide A Single, Integrated Good Faith Negotiations Period.

The concept of a voluntary negotiation period during which microwave incumbents may ask for whatever premium they wish, however unconnected with their costs, or may refuse to negotiate at all, is profoundly flawed. As demonstrated above, it is unrelated to legitimate Congressional concerns and, therefore, unnecessary to protect against those concerns. All the provisions necessary to protect against legitimate concerns are built into the regulatory regime that applies during the mandatory negotiation period:

- requirement of full cost reimbursement;
- requirement of fully effective substitute facilities and spectrum; and
- requirement of a year's experience to assure the reliability of the new facilities.

Accordingly, the straightforward remedy is to collapse the voluntary and mandatory negotiation periods into a single "good-faith negotiation period" and thereby eliminate the incentives for irresponsibility built into the concept of a "voluntary negotiation period."^{18/}

The touchstone for negotiations during this integrated three-year period (or, in the case of public-safety licensees, a five-year period) would be the requirement that both PCS licensees and microwave incumbents negotiate in good faith. Upon the initiation of negotiations by the PCS licensee, incumbent microwave users would be required to engage

^{18/} This change could be accomplished either by clarifying that specific, bright-line good-faith negotiations will be required across both the "voluntary" and "mandatory" negotiation periods — a clarification that would be consistent with Congressional intent both in 1992 and 1995 — or, more directly and preferably, by amending the relocation rules to collapse the "voluntary" and "mandatory" periods into a single good-faith negotiation period.

in good-faith negotiations. Of course, all microwave incumbents would be entitled to full protection from bearing any relocation costs or any risk that their new facilities would be less reliable than their current facilities. Even if the entire good-faith period ended without an agreement and a PCS licensee sought to have the Commission amend the incumbent's license to specify secondary-status operation, the PCS licensee would remain subject to the current requirement that it (a) guarantee payment of all relocation costs, including equipment, engineering and site costs; (b) complete all activities necessary for implementing the replacement facilities; and (c) build the replacement system and test it for comparability with the replaced system.^{19/} Accordingly, no microwave incumbent will bear any cost or any risk under a good-faith negotiation period; the sole incumbents that will be impacted by such a revision would be the "bad actors" that are engaging in bad-faith negotiating tactics.^{20/}

We support the Commission's proposed clarification of the meaning of "good faith" and believe it should apply over the entire course of an integrated good-faith negotiating period. Under the Commission's proposal, "an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities . . . constitutes a 'good faith' offer" and "failure to accept an offer of comparable facilities would create a rebuttable

^{19/} See 47 C.F.R. § 94.59(c) (1994).

^{20/} This change also will not alter the total amount of time that is available for incumbents to relocate to other suitable frequencies — that time period will remain, in total, either three years or five years. Experience has shown that the practical difficulties of relocating microwave links are not nearly what they were feared to be some years ago and do not justify a voluntary negotiation period or any negotiation period of the duration currently contemplated by the Commission's rules.

presumption that the incumbent is not acting in good faith."^{21/} This proposal is precisely consistent with Congressional intent and with the Commission's proper desire to ensure that microwave incumbents are ensured adequate cost reimbursement and system reliability.

4. If the Commission Does Decide To Retain The Voluntary Period, It Should Define And Prohibit "Bad Actor" Behavior.

The single best and most straightforward way to rationalize the regulatory structure at issue here would be to adopt a single, integrated good-faith standard that covers the entire negotiation period. If, however, the Commission decides to retain the ill-considered mechanism of a "voluntary" negotiation period, it must police the "bad actor" behavior of a minority of microwave incumbents that threatens to delay the nationwide roll-out of PCS.

A bright-line test is needed for this purpose, both to provide the regulatory certainty that will prevent the Commission from being embroiled in myriad specific conflicts and to facilitate negotiations among private parties. Given all the existing precautions against dislocation of existing microwave incumbents for less than full-cost reimbursement for reliable systems, rules which STV fully supports, the issue boils down to a single issue — the premium to be paid to microwave users by PCS licensees. In virtually all such cases, the incumbent will, at the very least, be receiving the premium of brand new transmission equipment to take the place of existing, older equipment. In many cases the incumbents will receive additional benefits, for example, better engineered systems, digital replacement equipment, or system-wide upgrades. In some cases, the parties may agree upon reasonable (but not excessive) cash premiums to facilitate an expeditious relocation. The question is one

^{21/} Notice, ¶ 69.

of degree: at what point is a demand for a premium, above simply comparable facilities, an untoward attempt to extract excessive value from spectrum that was issued to the incumbent for free and as a public trustee?

STV suggests for this purpose that the Commission find that a demand for a premium in excess of 20 percent of the actual costs of relocating to a comparable facility constitutes bad faith. There is nothing magic about this number, but a bright-line test should be chosen to avoid uncertainty, administrative delays and burdens, and litigation. The 20 percent standard would permit an exceedingly generous return on what is, after all, the public's spectrum. We believe further that the 20 percent standard should be reduced to 10 percent if the negotiations are not concluded by the end of the first year of the period. Of course, adoption of this benchmark would not preclude the parties from negotiating different voluntary deals based on unique circumstances.

This proposal could amount to very substantial payments to microwave incumbents. But this standard would substantially approve the ability of PCS operators to launch their service expeditiously. In cases in which the cumulative costs of these 20 percent premium deals became prohibitive, the PCS operator could hold off on relocating the less important links until the mandatory negotiation period kicks in.