

the use of other incumbent assets. Incumbents such as utilities, which are facing impending competition, are not willing to reveal their rates for these assets to potential competitors or to the general public. UTC suspects that most PCS licensees would also resist disclosure of any sensitive data relating to the build-out of their systems.

Instead of requiring the submission of actual agreements, UTC recommends that the Commission require that the parties submit a summary of the pertinent sections of their agreements, including any necessary data that the parties would need to determine cost-sharing obligations. This will provide the clearinghouse will all necessary data regarding the relocation agreement while protecting any sensitive information. To address the potential for fraud, both parties should be required to certify that the data submitted is accurate.

III. Relocation Guidelines

As one of the primary architects of the existing “transition plan,” UTC is in complete agreement with the Commission that there is no reason to reopen the proceeding as the general approach to relocation is “sound and equitable.”¹⁷ Accordingly, any modifications to the existing relocation procedures should be in the nature of clarifications rather than substantive changes impacting the underlying rights of the incumbents and PCS licensees.

¹⁷ *NPRM*, ¶3.

A. The Good Faith Requirement Should Not Substantively Impact The Ability Of The Parties To Negotiate During The Mandatory Negotiation Period

Over the past several months the PCS industry's propaganda machine has generated some confusion regarding the issue of "good faith." Under the "mandatory negotiation" phase of the transition rules there is an obligation for the parties to negotiate in "good faith." The Commission has indicated its belief that additional clarification of the term "good faith" will facilitate negotiations. UTC agrees. However, UTC does not believe that the clarification should be used to restrict the ability of the incumbent to engage in actual negotiations.

Specifically, UTC opposes the Commission's suggestion that a microwave licensee's failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Such a presumption is tantamount to equating good faith to an obligation to accept whatever the PCS licensee considers to be comparable facilities on a take-it-or-suffer-the-consequences basis.¹⁸ In addition to being grossly one-sided, such a definition begs the question of what constitutes comparable facilities. Moreover, by tying good faith to the acceptance of a PCS licensee's comparable facility offer, the Commission would eliminate the possibility of the parties actually agreeing on a mutual basis upon what constitutes comparable replacement facilities. If such a presumption were imposed it would also have to work in the other

¹⁸ While presumably the presumption of bad faith could be overturned by the Commission or an independent arbiter, this would needlessly and prematurely involve a third-party in the negotiation process.

direction (i.e., the failure of a PCS licensee to accept an incumbent's offer of what it considers to be comparable replacement facilities would create a rebuttable presumption of bad faith on the part of the PCS licensee).

The Commission's proposal to base the determination of good faith or bad faith solely on the acceptance of a relocation offer is grounded on the flawed assumption that "expansive" negotiations will have taken place during the voluntary negotiation period and that "by the time the parties have reached the mandatory negotiation period only the bare essentials should be required."¹⁹ The two-year voluntary negotiation period is a fixed period of time that expires on a date certain (April 5, 1997 in the case of incumbents in the A and B license blocks) In many areas of the country, particularly rural regions, PCS is not expected to be deployed during the initial two-years of licensing that constitute the voluntary negotiation period. In creating a second "floating" one-year mandatory negotiation phase, the Commission explicitly recognized this fact, stating that:

The one-year mandatory period ensures that an incumbent licensee will not be faced with a sudden or unexpected demand for involuntary relocation if an emerging technology provider initiates its relocation request after the two-year initial period.²⁰

An informal UTC survey indicates that to date the majority of incumbents in the A and B PCS license blocks have not even been contacted by a PCS licensee regarding relocation

¹⁹ *NPRM*, ¶69.

²⁰ *Third Report and Order and Memorandum Opinion and Order*, ET Docket No. 92-9, 8 FCC 6589 ¶16 (1993).

negotiations. The Commission should not now attempt to restrict these and other incumbents from the right to engage in negotiations over their own replacement facilities.

The term “good faith” is meant to govern the conduct of negotiations during the mandatory negotiation period. It is not meant to substantively restrict either party’s ability to negotiate over replacement facilities. The term good faith should therefore be given its common sense everyday business meaning: an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.²¹ In addition to these general requirements in the context of replacement negotiations good faith should also encompass an obligation between the parties to meet, exchange views, honor reasonable requests for information, and give serious consideration to offers in a timely manner.

B. Comparable Facilities

1. Three Primary Factors in Determining Comparability

The transition rules require PCS licensees to provide microwave incumbents with “comparable facilities” as a condition for involuntary relocation. Despite its earlier decision not to adopt a specific definition of comparable facilities, the Commission now proposes to clarify that the three main factors that it would look to in determining whether a facility is comparable are: (1) communications throughput; (2) system reliability; and (3) operating cost. While UTC generally concurs that these three factors represent a sound

²¹ *Black’s Law Dictionary*, Fifth Edition

basis for determining comparability, UTC would urge that the rules ensure that a party can make a showing on an individual case basis that some other factor(s) should be included.

Communications Throughput -- UTC would propose to clarify that the definition for communications throughput is the amount of information transferred within the system for a given amount of time without compression. In the case of many incumbents when comparing communications throughput between analog and digital systems, the measurement must be in terms of voice grade channels only (nominal bandwidth of 4 kHz), each being an encoded 64 kbps signal, regardless of whether the voice channel has any associated modems carrying data or not.

System Reliability -- UTC would propose to define system reliability as the amount of time information is accurately transferred within the system. UTC concurs with the Commission that the reliability of a system is a function of equipment failures (e.g., transmitters, feed lines, antennas, receivers, battery back-up power, etc.), the availability of the frequency channel due to propagation characteristics (e.g., frequency, terrain, atmospheric conditions, radio-frequency noise, etc.), and equipment sensitivity.

However, UTC disagrees with the Commission's proposal to define comparable reliability as that equal to the overall reliability of the incumbent system. The Commission states that it would not require a PCS licensee to build the radio link portion of the system to a higher reliability than that of the other components of the system, and goes on to give the example that if an incumbent system had a radio link with a reliability level of 99.9999

percent, but an overall reliability of only 99.999 percent because of limited battery back-up power, that it would only require the replacement system to have a radio link with a reliability level of 99.999 percent.²² In determining comparability, reliability of the radio links is one of the most critical factors. In no instance should a licensee have to accept individual replacement components that are not equal to or superior than the existing individual components. A PCS licensee is in no position to second guess an incumbent's existing system design and choice of components. For example, under the Commission's scenario it is possible that the licensee might have intended to upgrade its back-up power in the future in order to achieve 99.9999 reliability, but this option would be curtailed if the replacement radio link is downgraded.

Operating Cost -- UTC concurs with the Commission that operating costs should be defined as the cost to operate and maintain the replacement system, and that facilities will be considered comparable if the specific increased costs associated with replacement facilities (e.g., additional tower and associated radio equipment costs, additional rents, land acquisition costs, etc.) are paid by the PCS licensee.

2. Tradeoffs Should Be Purely At The Discretion Of The Incumbent

UTC strenuously opposes the Commission's suggestion that a PCS licensee could unilaterally "trade-off" system parameters in order to achieve comparable replacement facilities. Arbitrary trading off of system components is at odds with the fundamental

²² *NPRM*, ¶74, fn. 126.

premise of the Commission's transition plan -- incumbents will receive replacement facilities that are equal or superior to their existing system. Incumbent microwave systems have been individually designed and engineered to meet a multitude of specialized purposes. PCS licensees do not have sufficient knowledge or expertise regarding the incumbent's operational requirements to dictate appropriate trade-offs. For example, a public service utility or pipeline considering a system design trade-off would have to look at factors such as system performance, path availability, system capacity for emergency traffic restoral and the demand of future applications. Unless the PCS licensees are willing to assume the liability of malfunctioning electrical lines or damaged pipelines, it is unreasonable to allow these entities to substitute their judgment for that of the incumbents. Trade-offs should only be allowed at the option of the incumbents.

3. Other Aspects of Comparability

In addition to establishing the main factors that will be looked to in determining comparability, the Commission also seeks to clarify that certain other items do not fall within the comparable facility requirement. Specifically, the Commission proposes to clarify that the obligation to provide comparable facilities under involuntary relocation requires a PCS licensee to pay the cost of relocating only the specific microwave links in the incumbent's system that must be moved to prevent harmful interference by the PCS licensee's system. While UTC agrees that technically the PCS licensee's relocation obligations are only triggered with regard to those specific microwave paths to which the

PCS licensee causes interference, the Commission has also stated that “PCS licensees must provide incumbents with a seamless transition from the old facilities to the replacement facilities.”²³

Under the obligation to provide a seamless transition the Commission should clarify that PCS licensees are required to pay any expense incurred by an incumbent that is necessary to ensure the integrity of entire telecommunications system. In this way a PCS licensee may be obligated to relocate additional links in a multi-link system or pay the additional costs associated with integrating replacement links in different bands or employing different modulation techniques in order to preserve the system's overall integrity.

UTC also opposes the Commission’s proposal to limit comparable relocation costs to the actual costs associated with providing a replacement system. Specifically, the Commission proposes to exclude what it terms extraneous expenses, such as fees for attorneys and consultants that are hired by the incumbent without the advance approval of the PCS relocater. Such a limitation on reimbursable expenses is inconsistent with the Commission’s underlying commitment to have the PCS licensees pay all relocation expenses. Utilities and pipelines do not routinely maintain and budget for attorneys and consultants to engage in negotiations over the replacement of their existing facilities. Moreover, these are necessary expenses for ensuring that incumbents emerge from this

²³ *NPRM*, ¶. 76 (emphasis added).

proceeding “whole,” both operationally and financially, and are costs that would not have been incurred but for the relocation of their systems.²⁴ It is important to remember that the incumbent microwave licensees are being forced to undertake the operational and administrative burden of relocating their facilities. It is only fair that all²⁵ of the reasonable costs of this relocation be borne by the emerging technology licensees who will cause this disruption, and who will benefit directly from microwave displacement.

In assessing comparability the Commission seeks comment on how it should account for technological disparities between existing and replacement microwave equipment. The Commission proposes to require incumbents to bear any additional costs that might be incurred as a result of replacing analog microwave equipment with digital equipment. UTC opposes this recommendation as it does not account for the fact that digital microwave equipment is the predominant technology available now for new microwave systems and is therefore in many cases the *de facto* comparable technology. In assessing comparability costs, the Commission should not look solely to the incumbents' existing systems but also to what type of microwave systems it would be reasonable for these incumbents to purchase today if they were to do so on their own.

Further, in adopting the final transition rules the Commission specifically indicated that incumbents will not bear the cost of equipment “upgrades:”

²⁴ It should be noted that many of the PCS licensees have found it necessary to retain outside consultants to broker relocation agreements. Should utilities, pipelines and other incumbents be forced to fend for themselves against the hired guns of the PCS community?

²⁵ Other legitimate reimbursable expenses would include the zoning clearances and environmental impact assessments that may be required for relocated facilities/new site acquisitions.

They will not incur the cost of the relocation, and in fact will benefit to the degree that aging equipment using older technology may be replaced with new equipment using state-of-the-art technology.²⁶

Similarly, the Commission's inquiry into whether and how depreciation of existing equipment should be accounted for is inappropriate. It should make no difference to the PCS licensee whether the incumbent's existing equipment has been depreciated. The fact is that the incumbent is still utilizing that equipment and may have intended to do so for many years beyond a normal depreciation cycle. Again, it is the incumbent that is being forced to relocate and accept new equipment. PCS licensees should be required to pay the full costs of a new system. Moreover, the Commission has already stated unequivocally that amortization of existing equipment will not be an issue in relocation costs:

Because replacement equipment must be provided at no cost to existing licensees, concerns for amortizing or recouping investment in existing equipment are misplaced. Such replacement equipment will operate during the original amortization period that would have applied to the old equipment.²⁷

UTC opposes the Commission's suggestion that parties who are unable to reach an agreement within one-year after the commencement of the voluntary negotiation period should be required to submit an independent cost estimate. Such a requirement would impose an affirmative obligation on the parties during the voluntary negotiation period that does not currently exist and would be inconsistent with the Commission's stated intention

²⁶ *Third R&O/MO&O*, ET Docket No. 92-9, 8 FCC Rcd 6589, ¶16.

²⁷ *Third R&O/MO&O*, ET Docket No. 92-9, 8 FCC Rcd 6589, ¶16, fn. 18.

that this proceeding not reopen the substantive provisions underlying the transition rules adopted in the Emerging Technology Docket.²⁸ In describing the voluntary negotiation period, the Commission has emphasized that negotiations are strictly voluntary and are not defined by any parameters. As the Commission notes, the parties are not even obligated to meet or negotiate during this period.²⁹ Further, the proposed timing of the Commission's obligation is unrealistic as it ignores the fact that many incumbents have not, and will not, be contacted to negotiate relocation terms during the first year of the voluntary negotiation period.

IV. Twelve Month Trial Period

Under the transition rules, once the parties have reached a relocation agreement and the replacement facilities are actually constructed, the incumbent is entitled to a one-year trial period to determine whether the replacement facilities are indeed comparable. The purpose of this provision is to ensure that the incumbents have a full opportunity to test their new systems under real-world conditions and have the ability to seek redress from the PCS licensee to correct any operational problems or relocate to their original facilities. UTC is in agreement with the Commission's proposal to clarify that the twelve month period runs from the time that the microwave licensee commences operations on the new system, provided that the system is fully operational rather than partially activated. Further, UTC seeks clarification that if there are significant disruptions to the system once

²⁸ *NPRM*, ¶ 3.

²⁹ *NPRM*, ¶ 6.

activated, the twelve month clock will freeze until such problems are corrected. UTC recommends that the decision of whether a licensee should surrender its 2 GHz license to the Commission prior to the conclusion of the test period should be left purely to the discretion of the incumbent.

V. Licensing Issues

A. The Established Interim Fixed Microwave Licensing Policy Should Not Be Modified

The Commission proposes in the *NPRM* to modify its established policy governing the granting of new primary licenses to incumbents in the 2 GHz. This policy, as explained in the May 14, 1992, *Public Notice*,³⁰ permits incumbent licensees to obtain primary status for certain modifications. In the *NPRM*, the Commission proposes to limit the number and type of applications that can be granted on a primary basis and adds a new, more burdensome condition on the granting of primary status -- the proposed modification must not add to the relocation costs of PCS licensees.³¹

UTC opposes the changes to the Commission's established 2 GHz fixed microwave licensing policy. The incumbent systems must not be left to stagnate until a PCS licensee determines that relocation is necessary. Incumbent licensees must be permitted to make modifications to their systems to protect their vital communications; after all, these systems are tools which may require modifications to respond to evolving needs. The

³⁰ Mimeo No. 23115.

³¹ *NPRM*, ¶89.

established licensing policy recognized this and provided sufficient flexibility. The proposed changes to this policy threaten the viability of some incumbent systems and frustrate the Commission's intention in retaining co-primary status for incumbents. If incumbents are truly co-primary, then they should be permitted to make modifications that do not interfere with the deployed operations of PCS licensees.

UTC is mindful of the possibility of speculation among incumbent licensees, and believes that the Commission may impose restrictions aimed at preventing this speculation. For example, under the established licensing policy, certain modifications, such as the addition of new links, would be permitted only upon a valid showing by an incumbent of its need for the modification. UTC recommends that instead of permitting most modifications only on a secondary basis, the Commission permit the modifications specified in the May 14, 1992, *Public Notice*:

- (1) upon a showing that it would not increase the relocation costs for PCS licensees;
- or
- (2) upon a showing of a valid need for the modification.

B. Incumbent Operations Should Be Permitted To Operate On A Co-Primary Basis Indefinitely

UTC is confounded by the Commission's tentative conclusion in the *NPRM* that microwave incumbents should not be permitted to retain primary status indefinitely. UTC strongly opposes the reclassification of incumbent licensees which are still operating in the 1850-1990 MHz band on April 4, 2005, on the grounds that this conclusion is contrary to

the basis for the established regulatory framework, good spectrum management and basic principles of equity.

The Commission states at the outset of the *NPRM* that it does not intend to reopen the proceeding that established the regulatory framework because it believes that "the general approach to relocation in ... [the] existing rules is sound and equitable."³² UTC agrees and believes that the Commission's proposal to reclassify incumbents as secondary is contrary to the spirit and letter of the existing rules. Under the existing rules, which were designed to protect the important fixed microwave systems operating in the 2 GHz band from interference, the incumbent licensees remained co-primary indefinitely. The existing rules recognized that the 2 GHz systems operated by utilities, pipelines and others cannot tolerate interference, or operate on a secondary basis. Instead, they must operate with reliability levels exceeding 99.999 percent. By establishing a date when all 2 GHz licenses will become secondary, the Commission is stabbing at the very heart of existing rules.

The existing rules were not developed overnight, or in a vacuum. They were the product of a long and deliberate process in which numerous parties on both sides of the issues participated. Even Congress made its intentions known by introducing legislation that would have safeguarded incumbent systems and prohibited the Commission from reclassifying these systems as secondary. The Commission should not turn a blind eye to

³² *NPRM*, ¶3.

the intent of Congress or to the intention of the parties as embodied in the existing transition rules.

Sound spectrum management requires that the Commission permit indefinite co-primary status by incumbents. The Commission should promote the most efficient use of the spectrum by permitting the sharing of the 2 GHz band on a co-primary basis by both PCS and incumbent licensees. As noted above, utility and pipeline 2 GHz systems cannot tolerate secondary status due to their critical need for reliability. Secondary status would require these licensees to terminating operating on a moment's notice if interference to PCS systems is detected. Likewise, these systems would be subject to interference from PCS systems, with no right to relief from the Commission. It is likely, therefore, that unrelocated incumbents will have to cease 2 GHz operations if they are relegated to secondary status. In rural areas where PCS systems may not choose to offer service, or choose to delay offering services, incumbents will be forced off the band even when there has been no identified need for the spectrum by the PCS licensee. Moreover, the costs associated with this relocation will be borne by the incumbent's customers; in the case of utilities, this means that the ratepayers will bear the cost of relocating a system even where there is no identifiable need for this relocation.

In addition, PCS licensees have clearly indicated that they can share the spectrum with the incumbent licensees. PCS have heralded technologies that would permit them to share the bands with incumbents for years. In fact, one licensee, APC, was awarded a

"Pioneer's Preference" discount due to its interference avoidance technology. Currently, PCS licensees are informing some incumbents that they can and will engineer around them and therefore do not need to relocate them. The Commission should permit them to do so.

The current rules permit a much more efficient use of the spectrum. Under the current rules, if there is a need for the spectrum currently occupied by an incumbent, a new commercial licensee can relocate that incumbent and gain access to that spectrum. If there is no need for use of the spectrum, the incumbent can continue operations indefinitely. No spectrum is left fallow simply to "clear" a band.

The Commission's proposal also runs contrary to basic notion of fairness. Setting a date after which incumbents will become secondary will unfairly impact incumbent systems affected by subsequent PCS licensees (Blocks C, D, E and F). These licensees will have less opportunity to negotiate over relocation agreements and will be more likely to be relegated to secondary status without negotiations occurring. This will especially be true of incumbent systems operating in rural areas, where deployment of PCS is not likely to occur as quickly as in urban areas.

Establishing a date after which all incumbents will become secondary will also frustrate the Commission's goal in establishing a cost-sharing mechanism. Whole-system relocations may not occur because PCS licensees will be hesitant to relocate entire incumbent systems if there is a substantial possibility that they will not be reimbursed for

some of the links. As a result, the negotiation process will remain complex and difficult and the risk to the reliability of the incumbent systems will increase.

There is no need to tie the sunset of the clearinghouse and cost-sharing rules to the relinquishment of co-primary status. The Commission proposes to dissolve the cost-sharing mechanism on April 4, 2005, ten years after voluntary negotiations began for the A and B Block PCS licensees. While UTC expresses no opinion as to the appropriateness of this date for the dissolution of the cost-sharing mechanism, UTC opposes the Commission's efforts to tie this action with the primary status of the incumbent licensees. There is no reason that incumbents cannot remain co-primary after the cost-sharing mechanism is dissolved. The important reasons outlined above for continuing to license incumbents on a co-primary basis are unaffected by the need for a cost-sharing mechanism, or lack thereof, at some point in the future.

As an alternative to the Commission's secondary status proposal, to help clear the 2 GHz band quickly, the Commission could require the complete relocation of all 2 GHz licensees from the band by the PCS licensees. All incumbents still operating in the 2 GHz band on April 4, 2005, would be subject to involuntary relocation, and would be required to submit their relocation plans (including only actual relocation expenses) to the PCS clearinghouse. All relocation costs would be paid by the PCS licensees. The clearinghouse would allocate the responsibility for relocation costs among the PCS licensees and establish a program for the payment of these costs. Operating similarly to

UTAM, the clearinghouse would be required to seek the Commission's approval of its plans for the clearing of the band.

VI. Conclusion

UTC supports the adoption of a cost-sharing mechanism in order to promote a more orderly transition of incumbent systems. To ensure that incumbents receive reliable replacement facilities, the Commission should urge whole-system changeouts. Permitting PCS licensees to seek full reimbursement will encourage such changeouts and will help streamline negotiations.

Instead of imposing a standard formula by which to determine cost-sharing obligations - which could be difficult to apply to certain situations, could lead to inequities, and may deter parties from reaching agreements - UTC urges the Commission to allow the clearinghouse to determine (using TIA Bulletin 10-F) which licensees will benefit from each individual relocation and permit the parties to negotiate an equitable allocation of relocation costs.

Included in the shared costs should be all relocation-related expenses which benefit subsequent licensees. The FCC should also avoid placing an artificial cap on compensable expenses. To ensure that an incumbent's primary status not be adversely affected by a cost-sharing dispute between PCS licensees, UTC agrees that the Commission should

create “reimbursement rights” that will enforce the cost sharing plan. UTC also supports the establishment of a neutral administrative body to manage the cost-sharing mechanism.

UTC opposes the FCC’s suggestion that a microwave licensee’s failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Concerning the definition of comparable facilities, UTC generally supports the Commission’s recommendations but urges more flexibility in the proposed guidelines.

UTC agrees with the Commission’s proposal to clarify that the twelve month testing period for replacement systems runs from the time that the microwave licensee commences operations on the new system, provided that the system is fully operational rather than partially activated.

UTC opposes the changes to the Commission's established 2 GHz fixed microwave licensing policy and recommends that instead of permitting most modifications only on a secondary basis, the Commission permit the modifications specified in the May 14, 1992, *Public Notice*: (1) upon a showing that it would not increase the relocation costs for PCS licensees; or (2) upon a showing of a valid need for the modification.

UTC strongly opposes the reclassification of incumbent licensees which are still operating in the 1850-1990 MHz band on April 4, 2005, as secondary on the grounds that

this conclusion is contrary to the basis for the established regulatory framework, good spectrum management and basic principles of equity.

UTC urges the Commission not to adopt rules beyond those necessary to the implementation of a cost-sharing proposal. The existing framework was developed with extensive input from the incumbents, the PCS industry and Congress. UTC believes that there is no need to disrupt this carefully-tailored framework simply to satisfy the financial desires of the commercial PCS licensees.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

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Dated: November 30, 1995

CERTIFICATE OF SERVICE

I Kim B. Winborne a secretary of UTC, *The Telecommunications Association*, hereby certify that I have caused to be sent, by hand-delivery, on this 30th day of November 1995, a copy of the foregoing to each of the following:

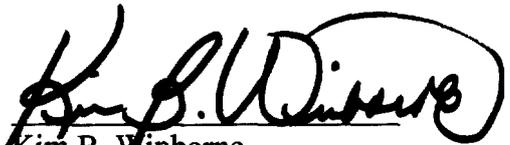
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