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April 18, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: WT Docket No. 95-157

Dear Mr. Caton:

In accordance with Section 1.1206 (a) (2) of the Commission's Rules, 47 C.F.R. § 1.1206 (a) (2) (1991), this is to notify the Commission that on April 17, 1996, Mark Golden and I, on behalf of the Personal Communications Industry Association ("PCIA"), met with Suzanne Toller.

The purpose of this meeting was to discuss the PCIA clearinghouse proposal and other issues in the cost sharing proceeding. The subjects discussed are fully reflected in the enclosed materials, which were left with Ms. Toller. Should you have any questions regarding the matter, please call me.

Respectfully submitted,

Robert J. Butler

RJB:daj
Enclosures
cc: Ms. Suzanne Toller (w/o enclosures)

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U.S. COURT OF APPEALS REJECTS INCUMBENTS' RIGHTS TO PREMIUM PAYMENTS FOR RELOCATION

The U.S. Court of Appeals for the District of Columbia Circuit has squarely rejected the proposition that microwave incumbents in the pending relocation docket (WT Docket No. 95-157, RM-8643) are entitled to extract "'premium' payments" or "compensation in excess of relocation costs" from PCS licensees. APCO Reply Comments at 4-5 (filed Jan. 11, 1996); see also UTAM Reply Comments at 11-13 (filed Jan. 11, 1996); PCIA Comments at 2-7 (filed Nov. 30, 1995) (detailing abuses of voluntary negotiation periods). The decision in Association of Public-Safety Communications Officials-International, Inc. v. FCC, No. 95-1104 (Feb. 16, 1996) (Exhibit A) ("APCO") upheld the Commission's decision to permit the mandatory relocation of public safety incumbents. The Court's decision addressed a critical issue in the pending docket:

- Any purported injury suffered from lost premiums is not judicially "cognizable." Slip Op. at n.5.
- "While the petitioners [APCO] undoubtedly have a significant financial interest in protecting the ability to exact such payments, their loss of rent-seeking potential is hardly a cognizable injury for consideration either by the FCC or by this court since their place on the spectrum was originally derived from a grant from the government." Slip Op. at n.5.

Further, at oral argument, the Court raised a number of broader concerns about the use of premiums.

- The Court opined that the Commission "would be reversed in a heartbeat" if it accepted the argument that incumbents are entitled to premium payments. Transcript at 10 (Exhibit B).

- The Court questioned the statutory basis for premiums. Transcript at 8.

- The Court likewise specifically rejected the notion that premium payments could be in the public interest. "Now that's [the premium payment's] called a monopoly rent . . . . Which . . . the FCC would not be, in my judgment entitled to award them . . . . It wouldn't be in the public interest." Transcript at 26-27

The FCC should act swiftly to ensure that the transition rules governing relocation of microwave systems from the 2 GHz band may not be exploited for individual parties' private gain. As the D.C. Circuit pointed out, such exploitation is not contemplated by statute, is contrary to the public interest, and distorts and delays deployment of PCS. The Commission cannot have intended such a result, and cannot reasonably permit it to persist.

PCS CONCERNS REGARDING CONTINUED SECONDARY LICENSING OF MICROWAVE OPERATIONS IN THE 2 GHZ BAND

During the recent rulemaking proceedings on Microwave Relocation Cost Sharing, several PCS interests, including PCIA, UTAM, AT&T Wireless, and PCS Primeco, L.P., requested that the Commission discontinue allowing any primary or secondary licensing of microwave operations in the 2 GHz band. See, e.g., Comments of AT&T Wireless, WT Docket No. 95-157 at 13 (filed Nov. 30, 1995)(stating that there should be no additional primary or secondary licenses granted to microwave operators); Comments of PCS Primeco, L.P., WT Docket No. 95-157 at 19 (filed Nov. 30, 1995)(emphasizing the potential for interference to PCS operations from secondary microwave licensees). Secondary licensing of microwave operations in the 2 GHz band poses risks of interference to PCS licensees in that band. As PCS operations continue to expand, secondary microwave operations will be more likely to cause interference to and suffer interference from PCS licensees.

PCS interests are concerned because some entities have suggested that applicable statutes and FCC rules could be interpreted to entitle secondary microwave licensees to certain "process," including the right to a hearing, prior to the Commission's issuing a cease and desist order or revoking their licenses because of interference to PCS operations. Any such delay in removing harmful interference to ongoing PCS operations could be detrimental to the development of these new services. Moreover, even if interfering operations could be shut down quickly, any requirement for additional formal proceedings could impose unnecessary costs on PCS licensees.

We note that Section 94.101 of 47 C.F.R. requires that radiation of a microwave transmitter "be suspended immediately upon notification by the Commission of a deviation from the technical requirements of the station authorization when such deviation causes harmful interference to another licensee." The FCC has confirmed that such a provision would deny a licensee the right to a prior hearing and, in the context of low power television has stated that "a secondary service [causing interference to primary services] . . . can be compelled without a hearing to leave the air until the problem is resolved." In re Application of Womens Media Investors of Dallas, MM Docket No. 84-659, 6-7 (June 29, 1984). In support of this conclusion, the Commission cited Section 74.703, which like Section 94.101 requires a station licensee to discontinue operation if interference is being caused by spurious emissions from the station.[1]

Notwithstanding these provisions, it has been suggested that notice and a hearing may still be required for a formal cease and desist order or the revocation of a microwave license under the Communications Act.[2] Section 312 of the Act,

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[1] Although Section 94.101 is similar to Section 74.703, it is unclear whether causing interference to PCS operations through the normal operation of a microwave link would be a "deviation from the technical requirements of the station authorization." If not, the link could be operating properly within its licensed frequencies but still causing interference, and Section 94.101 might be argued to be inapplicable.

[2] In In the Matter of Amendment of the Rules with Respect to Hours of Operations of Standard Broadcast Stations, Memorandum Opinion and Order, 10 FCC2d 283, 308 (1967), the FCC said it could terminate a PSA without a hearing.

(continued...)

47 U.S.C. § 312, provides that the Commission may revoke any station license "for willful or repeated failure to operate substantially as set forth in the license." However, before the Commission can revoke a license or issue a cease and desist order, it must give notice and the opportunity for a hearing to the licensee. 47 U.S.C. § 312(a)(3); 5 U.S.C. 558(c). These rights are embodied in the FCC's rules as follows:

- Except in cases of willfulness or where the public health, interest, or safety requires, the licensee is entitled to written notice of the violation and ten days in which to respond. 47 C.F.R. § 1.89.

- If it appears that a station license should be revoked and/or that a cease and desist order should be issued, the FCC will issue an order directing the licensee to show cause why a cease or desist order or order of revocation should not be issued and will call upon the licensee to appear before the Commission at a hearing. The hearing must be not less than thirty days after the order is received by the licensee, except in cases involving the safety of life and property in which case the hearing may be held in less than thirty days. 47 C.F.R. § 1.91.

It remains subject to debate whether the decisions and rule provisions discussed above override these requirements in some or all respects.

For example, in view of the FCC's broad construction of "willfulness," if a secondary microwave licensee in the 2 GHz band were causing interference to a PCS licensee and 47 C.F.R. § 1.89 were applicable, the FCC would likely not be required to give notice of a violation to the microwave licensee. The licensee's intentional

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[2](...continued)
However, there the FCC relied on 47 C.F.R. § 73.99(f) [now § 73.99(h)(i)], which specifically states that notice and the right to a hearing is not required to suspend, modify, or withdraw the right to operate. No comparable provision exists in Part 94.

operation of the link causing interference would probably constitute willful action under the FCC's definition.[3] But, the removal of the notice requirement would have no impact on any hearing that might otherwise be required under the Act.

It follows that, even if a secondary licensee was not entitled to a Section 1.89 notice, and even if its operations could be shut down in the interim, it might still claim to be entitled to a hearing under Section 1.91 in which the burden of proof would be on the Commission before the license could be revoked or a cease and desist order could be issued. See 47 U.S.C. § 312(d). If such a claim were upheld, it could burden the PCS licensee with the need to compile evidence and assist the FCC in proving that the microwave licensee was causing interference to the PCS operations. It would clearly be contrary to FCC policy to impose such unnecessary costs on PCS licensees.

In sum, the uncertainties surrounding the hearing rights of secondary microwave licensees in the 2 GHz band require clarification. PCS licensees are concerned not only with the potential interference to their operations, but also with the possibility that there could be a substantial delay in stopping such interference if hearings are required

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[3] Willfulness is defined in Section 312(f)(1) as "the conscious and deliberate commission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act. . . ." The FCC clarified this standard in Midwest Radio-Television Inc., 1 RR2d (P&F) 491, 495 (1963), stating that willfully "does not require a showing that the licensee knew he was acting wrongfully; it requires only that the Commission establish that the licensee knew that he was doing the act in question -- in short, that the acts were not accidental (such as brushing against a power knob or switch)." See also Letter to Lawrence J. Movshin, Esq. from Richard M. Smith, Chief, Field Operations Bureau, 7 FCC Rcd 3162 (1992).

and that PCS licensees will be responsible for the costs of providing formal proof of the problems they are experiencing in such hearings. Moreover, allowing new secondary licensing when PCS operations are continuing to expand will result in microwave licensees spending considerable sums to construct systems which will likely have to be shut down in the near future. Therefore, the Commission should reconsider its decision to continue allowing additional secondary licensing of microwave operations in the PCS band.

COST SHARING AND MICROWAVE RELOCATION ISSUES

PCIA Cost Sharing Issues

- The costs of tower modifications as well as tower construction should be included in the separate $150,000 per link tower cost cap.

- The costs of analog to digital conversions during the voluntary negotiation period, subject to the $250,000 cap, should be deemed reimbursable cost sharing expenses. During the mandatory period, such costs would not be reimbursable.

- In the cost sharing formula, T_1 should be the date of relocation as determined in the relocation agreement, rather than a uniform date for all relocators.

- T_N, the date subsequent PCS providers enter the market, should be calculated by adding two months to the PCN date.

- To determine cost sharing obligations, PCIA supports the use of the Proximity Threshold suggested by several commenters rather than TIA Bulletin 10F.

- A PCS entity should always be entitled to 100% reimbursement up to the cap for relocating a link outside its spectrum block.

- When a PCS entity relocates an incumbent who was completely within the PCS entity's spectrum block and with one endpoint in the PCS entity's market area, the PCS entity should receive reimbursement (up to the cap) for 50% of the link relocation costs.

- PCIA should serve as the industry clearinghouse to administer the cost sharing plan.

PCIA Microwave Relocation Issues

- The FCC should eliminate the voluntary negotiation period for all incumbents. If not, then the good faith negotiation requirement should be applied to that two-year period.

- Good faith negotiations during the mandatory period should be defined as an offer by a PCS provider and acceptance by an incumbent of comparable facilities.

- The definition of comparable facilities should be based on technical factors which can be objectively measured such that, for example, a system comparable to a 2 GHz analog system could be a 6 GHz analog system.

- Comparable facilities should be limited to the actual costs of relocation and should not include consultant or legal fees not authorized by the PCS provider.

- Parties unable to conclude negotiations within one year after the start of the voluntary negotiation period (if the Commission maintains voluntary periods) should be required to file two independent cost estimates of a comparable system with the FCC to help resolve differences.

- PCS providers should only be required to relocate links which would suffer interference from their PCS operations.

- The FCC should not allow any additional primary or secondary licensing of microwave operations in the 2 GHz band.

- PCS providers should be permitted to initiate the voluntary relocation period (if it is maintained) for incumbents outside the A and B blocks by sending a letter that notifies them of the PCS provider's desire to begin relocation negotiations.

- At the start of the twelve-month test period, an incumbent's authorization should return to the FCC, and at the end of the twelve-month test period, the FCC should make an announcement that the license has been terminated.

- Incumbents who choose to relocate their own systems in exchange for a cash payment should not be entitled to the twelve-month test period since the PCS provider will have no input into the construction of the relocated link and will be unable to resolve any difficulties. Other incumbents should be permitted to waive the test period by contract.

- PCS providers should not be required to hold a relocated incumbent's spectrum in reserve, but should be required to guarantee the incumbent a comparable replacement system. Holding such spectrum in reserve will delay the deployment of PCS systems for at least a full year.

- Incumbents should be required to verify their public safety status to PCS providers if they want to take advantage of the extended negotiation periods. In addition, the definition of public safety entities entitled to extended relocation schedules should be limited to those cases where substantially all of a licensee's communications are related to the protection of life and property.

- All incumbent microwave operations remaining in the 2 GHz band as of April 4, 2005 should be converted to secondary status.

PCS MICROWAVE RELOCATION
COST SHARING CLEARINGHOUSE

THE FCC SHOULD TENTATIVELY DESIGNATE PCIA AS THE SECTION 332 FREQUENCY COORDINATOR FOR MICROWAVE RELOCATION COST SHARING

- Unless a clearinghouse can be established and put into operation soon, the Commission's goals in the cost sharing proceeding will not be realized and the rapid development of broadband PCS will be severely hampered.

- In order to maximize the efficiencies and coordination benefits of cost sharing, a single entity will be necessary to administer the cost sharing process.

- Establishment of an industry managed and supported clearinghouse to oversee the cost sharing mechanism will permit PCS providers to tailor the process to best meet their needs. It will also ensure that the burdens of overseeing the cost sharing proposal are borne by the industry rather than the FCC.

- PCIA is uniquely qualified to serve as the clearinghouse:

  -- As an international trade association, PCIA has experience in all areas of wireless services and has virtually every major wireless communications carrier and manufacturer as a member, including the majority of PCS licensees.

  -- PCIA is already familiar with the microwave relocation rules through its having been involved in the development of the PCS and microwave relocation rules from the very beginning of those proceedings. The Association's five-year old Broadband PCS Membership Section has been actively working with the Commission and its members to address the many difficult issues arising out of that process. Indeed, PCIA created the cost sharing concept and introduced it into the current regulatory proceeding.

  -- PCIA also has a record of fair and impartial administration and a long history of working with many differing wireless industry sectors to achieve consensus across a wide range of issues.

  -- PCIA is the largest FCC-designated frequency coordinator, processing over 30,000 applications for frequency assignments annually. PCIA has a highly trained staff, including fifteen full-time coordinators who are supported by several management information systems specialists. In addition, PCIA has an advanced electronic delivery system which would

allow clearinghouse participants to file and receive their reports electronically.

- As a result of its frequency coordinator activities, PCIA clearly understands and has proven ability to meet the need for confidentiality and impartiality for the clearinghouse.

- PCIA is the only entity that has stepped forward to assume the role of the clearinghouse.

- Therefore, the FCC should tentatively designate PCIA to administer the clearinghouse, subject to submission and Commission approval of a funding and operating plan.

PCIA HAS PUT SIGNIFICANT EFFORT INTO DEVELOPING THE FUNCTIONS AND STRUCTURE OF THE CLEARINGHOUSE

- The PCS industry, including PCIA members and non-member PCS interests, have been working since May 1995 to develop a sound clearinghouse proposal that will facilitate the relocation process. (See Attachment A)

- The non-profit clearinghouse would be governed by a Clearinghouse Council made up of PCS industry members.

- The clearinghouse would have its own staff members, including a Clearinghouse Manager, but would take advantage of PCIA's existing coordination expertise and staffing to save costs.

- The clearinghouse would utilize PCIA's existing database system. PCIA has already identified a programmer who is familiar with PCIA's system and will develop the software necessary for the clearinghouse on an expedited basis. If tentative designation of the clearinghouse is granted in the April order, PCIA believes initial software development can be completed in a maximum of four months.

- Through intensive efforts involving PCIA's professional, legal, MIS, and coordination staff and key technical and business planners from PCS companies, PCIA has developed the procedures necessary for the clearinghouse to facilitate the relocation and cost sharing processes:

- The database will be created from information submitted in a standardized format by the relocating entity at the time it seeks reimbursement rights.

- Based on the FCC's rules, the clearinghouse will identify PCS interests which will be liable for cost sharing and/or reimbursement.

- Once activation of a subsequent PCS system results in identification of a cost sharing obligation (the "trigger" mechanism), the clearinghouse will notify the obligated PCS entity within 10 business days. At the same time, it will notify the relocator that a PCS entity has been identified as a cost sharing participant. The clearinghouse will require the relocator to provide the following information to the cost sharing participant: contact name; address; telephone and facsimile numbers; equipment and tower costs; cost sharing obligations; payment due date; and other information as required. All clearinghouse participants will be required to designate primary and secondary contacts for the purpose of receiving clearinghouse mailings.

- PCS entities, excluding entrepreneur licensees and UTAM, must make full payment of cost sharing obligations within 60 calendar days of notification. Entrepreneurs and UTAM must make their initial installment payment within 60 days of notification of a cost sharing obligation.

- A PCS entity which disagrees with its cost sharing obligation will be required to notify the clearinghouse within 30 calendar days after notification of that obligation. Disputes will be referred to mediation or arbitration, consistent with FCC guidelines for alternative dispute resolution.

- A relocator will notify the clearinghouse upon receipt of cost sharing payments within 10 business days. This information will be recorded in the database for reporting and tracking purposes.

- The clearinghouse will update the database as reimbursement rights are transferred.

- Parties signing private cost sharing agreements can participate in the clearinghouse for any cost sharing obligations not covered by their private agreements.

-- The information contained in the clearinghouse will be safeguarded and treated as confidential. It will be released only to cost sharing entities which require such information in support of their cost sharing obligations, as appropriate. The clearinghouse will be required to execute a non-disclosure agreement with all participating entities.

PCIA HAS DEVELOPED A PROPOSED BUDGET FOR THE CLEARINGHOUSE AND HAS SECURED FUNDING COMMITMENTS FROM EIGHT PCS LICENSEES

- PCIA has developed a budget for the costs of administering the cost sharing process. PCIA estimates that the operating expenses would be approximately $1.1 million for the first year. In addition to the continuing costs, such as salaries, rent, and other operating costs, this estimate includes significant start-up costs for software development, hardware and software capital expenditures, legal fees, and other one-time costs. PCIA has estimated that expenses in future years would decrease dramatically with a budget of $803,000 in Year 2, $710,000 in Year 3, $535,000 in Year 4, and $467,000 in Year 5. At the end of the fifth year, PCIA would then reevaluate expenses and revenues.

- Administration costs would be paid through a transaction fee charged to clearinghouse participants of $2000.

- Until transaction fees can support the administrative costs, PCIA has obtained commitments from 8 PCS licensees to provide initial funding: APC, APT, BellSouth, Cox, Omnipoint, Pacific Bell Mobile Services, PCS PrimeCo, and Sprint Telecom Ventures and PhillieCo. As the source of upfront funding, PCS licensees have a strong incentive to develop a plan that ensures the lowest possible costs for a successful implementation of the clearinghouse.

- Initial funding will be repaid through credits against transaction fees.

- For its cost calculations, PCIA has assumed that the Proximity or "Rectangle" Method will be adopted by the Commission for determining cost sharing obligations. If the FCC adopts TIA Bulletin 10 as the standard, costs could increase by up to $1 million as a result of the increased difficulty in determining which parties have cost sharing obligations.

- The clearinghouse will be dissolved when FCC cost sharing obligations are terminated and all initial funding has been repaid.

ATTACHMENT A

PCIA Meetings Studying Cost Sharing Issues

May 11, 1995
August 29-30, 1995
September 14-15, 1995
October 3, 1995
October 12, 1995
October 30, 1995
November 8, 1995
December 6-7, 1995

January 24, 1996
February 1, 1996
February 6, 1996
February 20-21, 1996
March 15, 1996

Participants in Process for At Least One Meeting

Ameritech
APC
APT
BellSouth Personal Communications, Inc.
Cox
GTE PCS
McCaw Cellular
MCI
Omnipoint
PCS PrimeCo
Powertel
SBMS
Sprint Telecom Ventures
Western Wireless PBMS

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 2, 1996 Decided February 16, 1996

No. 95-1104

ASSOCIATION OF PUBLIC-SAFETY COMMUNICATIONS OFFICIALS-INTERNATIONAL, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

UTAM, INC., ET AL.,
INTERVENORS

On Petition for Review of an Order of the Federal Communications Commission

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John Lane, Jr. argued the cause for petitioner, with whom *Ramsey L. Woodworth* and *Robert M. Gurss* were on the briefs.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James M. Carr, Counsel, Federal Communications Commission, argued the cause for respondents, with whom *William E. Kennard*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel and *John E. Ingle*, Deputy Associate General Counsel, were on the brief.

Ray M. Senkowski and *Clifford M. Sloan* were on the brief for intervenors UTAM, Inc. and Personal Communications Industry Association. *Robert J. Butler, Jim O. Llewellyn, John F. Beasley, Lewis A. Tollin, Michael D. Sullivan* and *William B. Barfield* entered appearances.

Before: EDWARDS, *Chief Judge*, WALD and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Over the past several years, the Federal Communications Commission ("FCC" or "Commission") has attempted to devise a plan to allocate spectrum to promote the development of emerging wireless telecommunications technologies without unduly disrupting the services currently utilizing spectrum space. This case involves a challenge to one aspect of the Commission's allocation plan, which has set aside a specific portion of the spectrum for the new technologies, and provided rules for effectuating the relocation of many of the fixed microwave licensees currently occupying the reserved bands. In 1992, the Commission adopted a set of rules requiring current non-public-safety occupants of the newly-designated emerging technologies bands to relocate to other spectrum if an emerging technology licensee needed their current spectrum space, but exempting public safety organizations from this relocation requirement. The Association of Public-Safety Communications Officials ("APSCO") now seeks review of a *subsequent* order in which the FCC rescinded the public safety exemption, and thereby subjected public safety organizations, along with all the other fixed microwave licensees, to the risk of mandatory relocation.

Because we find that the Commission based its change in policy on reasoned decisionmaking supported by evidence in the record, we deny APSCO's petition for review.

I. BACKGROUND

In an initial decision not challenged by the petitioners here, the Commission in 1992 proposed to set aside most of the 1850–2200 MHz frequency bands ("reserved bands") of the spectrum for the use of emerging technologies, including Personal Communications Services ("PCS").[1] The reserved bands, however, were already occupied by various fixed microwave licensees, including many public safety organizations. In order to make room in the reserved bands for the new services, the FCC proposed a program providing for the relocation of the current occupants of the band to fully comparable facilities on other spectrum.

In October 1992, the FCC adopted rules governing the transition of the reserved band from its current fixed microwave use to its new emerging technologies use. *See First Report & Order and Third Notice of Proposed Rulemaking*, 7 F.C.C.R. 6886 (1992) ("First Order"). In August 1993, the Commission adopted a new set of rules further clarifying the transition process established in the First Order. *See Third Report & Order and Memorandum Opinion & Order*, 8 F.C.C.R. 6589 (1993) ("Third Order").[2] Under the transition plan described in these two orders, a current fixed microwave occupant and a new emerging technology licensee would engage in voluntary negotiations for a set period of time,[3]

[1] PCS, a new form of public mobile service which encompasses a broad range of wireless radio communications services, makes up a significant portion of the current emerging technologies market. *Unlicensed* PCS apparently cannot operate successfully unless all other spectrum users relocate from the bands allocated for the new service. *Licensed* PCS, on the other hand, apparently can – to some extent—share spectrum space with others. The extent to which such spectrum-sharing will prove successful involves technical predictions central to this dispute.

[2] The *Second Report & Order*, 8 F.C.C.R. 6495 (1993), is not relevant to this proceeding.

[3] In its First Order, the Commission solicited comments on the appropriate length of the transition period the FCC should adopt. 7 F.C.C.R. at 6891. In its Third Order, the Commission adopted a

after which the new licensee could initiate a mandatory negotiation period culminating in the forced relocation of the current occupant to other spectrum. In order to force the microwave licensee to move, however, the new occupant would have to assume all costs for the move, and would have to build and test the comparable new facility. First Order, 7 F.C.C.R. at 6890.

Even though this transition plan contained stringent safeguards to protect the interests of *all* incumbent licensees, the FCC originally took the extra step of providing an exemption which shielded public safety services from any mandatory relocation. The public safety exemption incorporated in the first order, 7 F.C.C.R. at 6891, and reaffirmed in the third order, 8 F.C.C.R. at 6590, would have allowed the exempted facilities to continue operating indefinitely in the emerging technologies band on a co-primary, non-interference basis (meaning that each licensee was under an obligation to avoid interfering with the other). The FCC explained that the public safety exemption grew out of the Commission's hesitation to impose on public safety services "the economic and extraordinary procedural burdens, such as requirements for studies and multiple levels of approvals" that might accompany relocation. Third Order, F.C.C.R. at 6610.

In response to the Third Order, the FCC received nine petitions for reconsideration, which it addressed in a 1994 opinion. *Memorandum Opinion & Order*, 9 F.C.C.R. 1943 (1994) ("Opinion" or "First Opinion"). In addition to addressing the petitions it received, the FCC, on its own motion, reconsidered the public safety exemption and ordered its repeal. *Id.* at 1947. Despite the decision to revoke the

transition plan that required an emerging technology licensee to engage in a two-year voluntary negotiation period with the fixed microwave service before instituting the one-year mandatory period. 8 F.C.C.R. at 6595.

Because of inherent differences between licensed and unlicensed PCS, however, the Commission only provided a one-year negotiation period for incumbent fixed microwave facilities operating in spectrum allocated for *unlicensed* devices. *Id.* at 6598.

public safety exemption, the Commission reiterated its belief "that certain public safety entities warrant special consideration because previously they have been excluded from involuntary relocation and because of the sensitive nature of their communications." *Id.* at 1947–48. In place of the exemption, therefore, the new order established an extended negotiation period for public safety licensees consisting of a four-year voluntary negotiation period followed by a one-year mandatory negotiation. *Id.* at 1948.[4]

The opinion explains that this new plan accommodates the conflicting needs to clear the spectrum for emerging technologies and to protect the integrity of emergency services. In addition to the extended negotiation period, public safety licensees will enjoy the same safeguards available to all microwave licensees currently operating in the reserved bands: first, the emerging technology licensee must pay *all* costs associated with the incumbent's relocation (including engineering, equipment and site costs, FCC fees, and any reasonable additional costs); second, the relocation facilities must be fully comparable to the ones being replaced; third, the new licensee must complete all activities, including testing, necessary to operate the new system before relocation; and fourth, if the new facilities in practice prove not to be equivalent in every respect to the old ones, the public safety operation may relocate back to its original facilities within one year and remain there until complete equivalency (or better) is attained. *Id.* The Commission concluded that this policy "will not disadvantage incumbent public safety operations required to relocate," and will "ensure that essential safety of life and property communications services are not disrupted." *Id.*

Several groups, including APSCO, petitioned the Commission to reconsider the decision to eliminate the public safety

[4] In a later opinion, the Commission modified the negotiation period for public safety facilities by shortening the voluntary period to three years and extending the mandatory period to two years (maintaining a five-year cumulative period). *Second Memorandum Opinion & Order*, 9 F.C.C.R. 7797, 7802 (1994).

exemption. The FCC addressed each of the petitioners' concerns in its Second Memorandum Opinion and Order denying the petition for reconsideration. *See Second Memorandum Opinion & Order*, 9 F.C.C.R. 7797 (1994) ("Second Opinion"). The Commission restated its position from the first opinion that the revocation of the exemption had resulted from the Commission's realization that it had previously underestimated the difficulty of spectrum-sharing and the problems that could result from a rule which allowed public safety operators to remain in the reserved bands indefinitely. *Id.* at 7797. The FCC reported that, based on information in the record, the Commission had ultimately determined that "it would be in the public interest to subject all incumbent facilities, including those used for public safety, to mandatory relocation if an emerging technology provider requires the spectrum used by the incumbent." *Id.*

APSCO now petitions this court for review of the FCC's revocation of the public safety exemption, arguing that the Commission's about-face on this issue was arbitrary and unreasonable, and did not rest upon a reasoned analysis of the record.

II. Discussion

When an agency acts to rescind a standard it previously adopted, a reviewing court will subject that rescission to the same level of scrutiny applicable to the agency's original promulgation. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) ("*State Farm*"); *Telecommunications Research & Action Center v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986). But if the agency has offered a reasoned explanation for its choice between competing approaches supported by the record, the court is not free to substitute its judgment for that of the agency. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970) ("[W]here there is substantial evidence supporting each result it is the agency's choice that governs."). Thus, the petitioners here must do more than raise a doubt about the ultimate wisdom of the Commission's

decision to repeal the public safety exemption; rather, APSCO must demonstrate that the revocation is unsupported by the record.

At the heart of petitioners' argument is the claim that the FCC's decision to revoke the public safety exemption did not rely on any new studies or technological data that had become available since the time of the initial rulemaking. Because the information available to the Commission in 1992 "did not require the relocation of all public safety licensees," APSCO claims that "this old information similarly provided no basis for the Commission's abrupt change in policy" reflected in the 1994 opinions. Petitioners' Brief at 20. There is a fundamental flaw in APSCO's argument, however; petitioners' claim assumes that if the record does not *require* a certain result, neither can it *support* that result. The petitioners have misunderstood the Commission's burden. The FCC need not demonstrate that it has made the *only* acceptable decision, but rather that it has based its decision on a reasoned analysis supported by the evidence before the Commission. Particularly where, as here, an agency issues a regulation reflecting reasoned predictions about technical issues, logic suggests that the record may well contain evidence sufficient to support more than one possible outcome. *See, e.g., Greater Boston*, 444 F.2d at 853.

Thus we will affirm the FCC's order if we find that the Commission has offered a reasoned analysis for its ultimate decision to revoke the public safety exemption, and that the proffered analysis is supported by evidence in the record. After reviewing the record, we conclude that the Commission has adequately explained its change in policy, and therefore that its new policy deserves deference.

The Commission, in its second opinion, refers to specific studies in the record that support the decision to subject public safety providers, along with other fixed microwave licensees, to the possibility of forced relocation. Second Opinion, 9 F.C.C.R. at 7800. Specifically, the Commission cites studies submitted by Cox Enterprises, Inc. ("Cox"), and by American Personal Communications ("APC"), regarding

spectrum congestion and its impact on the implementation of emerging technologies. *Id.* For example, the Commission points out that the Cox and APC studies showed that in certain major metropolitan areas, the public safety entities that would have enjoyed the original exemption constitute a large percentage of the incumbent services, and that in some of these cities, the deployment of PCS would likely be impossible if the exemption remained in force. *See id.* at 7799, 7800. The second opinion also refers to two other comments received by the FCC (from American Mobile Satellite Corporation ("AMSC") and the Personal Communications Industry Association ("PCIA")) noting that the public safety exemption could render the allocated frequency inadequate for PCS deployment. *Id.* at 7799. Additionally, the Commission cites to comments submitted by Apple Computer, Inc. ("Apple"), and UTAM, Inc. ("UTAM"), concluding that "PCS and, especially, unlicensed nomadic PCS, cannot share spectrum with fixed microwave facilities." *Id.*

After reviewing the comments in the record supporting the change in policy, the Commission offered the following explanation of its rationale:

> In view of the evidence that the introduction of new communications services that will benefit the public could be precluded unless clear spectrum can be obtained, and that relocation can be accomplished reliably, we continue to believe that it is in the public interest to require all incumbents to relocate if their spectrum is required for new services using emerging technologies.

Id. at 7801. The FCC also noted that the new plan provides ample safeguards to ensure that public safety operations will not be curtailed by any forced relocation. *Id.* In fact, the provisions guaranteeing that no incumbent will be required to move until the new PCS licensee builds, tests, and assumes all costs for fully comparable facilities for the incumbent, renders debatable the petitioners' claim that public safety providers are significantly injured by the new policy. Although forced negotiation and relocation will undoubtedly generate considerable hassle for an unwilling incumbent, the

Commission points out that the end result—brand new facilities fully paid for by a PCS licensee—will often leave the incumbent better off after relocation.[5]

Arguing further that the Commission has not adequately explained its rationale in this case, petitioners point out that in the past we have conditioned our deference to agency decisionmaking with the caveat that "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." Petitioners' Brief at 16 (citing *Greater Boston*, 444 F.2d at 852). APSCO alleges that the Commission must offer more than a "barebones incantation" of its conclusion, *id.* (citing *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) ("*ACT*")), and that in this case, the Commission has failed to do so.

In light of the Commission's reasoned explanation for its change in policy, supported by specific references to the record discussed above, petitioners' reliance on *ACT* misses

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[5] We note, as developed at oral argument, that the revocation of the initial exception may cause public safety organizations to suffer an additional injury that may *not* be cognizable by this court. Under the original program exempting public safety providers from forced relocation, the petitioners would likely have enjoyed substantial leverage in their voluntary negotiations with PCS providers. Any PCS licensee whose services can only operate in clear spectrum would be forced to pay extraordinary costs, or "rents," to the incumbent, since the PCS operator's license could be rendered virtually useless by an incumbent's refusal to relocate voluntarily. While the petitioners undoubtedly have a significant financial interest in protecting the ability to exact such payments, their loss of rent-seeking potential is hardly a cognizable injury for consideration either by the FCC or by this court since their place on the spectrum was originally derived from a grant from the government.

In fact, the Commission's reference to comments submitted by UTAM expressing concern that the exemption would allow public safety providers to exact payments above and beyond the actual cost of relocation, *see* First Opinion, 9 F.C.C.R. at 1947, adds further support to our finding that the Commission based its ultimate decision on evidence in the record.

the mark. In *ACT*, the FCC had attempted to explain its termination of commercialization guidelines for children's television merely by stating that the rescission of the guidelines was consistent with deregulation of the industry at large. However, the original guidelines had been expressly justified by a finding that the marketplace could not adequately function when children made up the audience, and the Commission had not attempted to explain its sudden affirmation of "what had theretofore been an unthinkable bureaucratic conclusion." 821 F.2d at 746. Moreover, we suggested in *ACT* that the FCC *could have* adequately justified its decision by finding, for example, "that present levels of children's programming are inadequate; that additional commercialization is necessary to provide greater diversity in children's programming; or that increased levels of children's television commercialization pose no threat to the public interest." *Id.*

In this case, to the contrary, the Commission has expressly found that "it is in the public interest to subject all incumbent fixed microwave facilities, including public safety licensees, to mandatory relocation" and that emerging technologies services "may be precluded or severely limited in some areas unless public safety licensees relocate." Second Opinion, 9 F.C.C.R. at 7799. Whether or not these conclusions reflect *unassailable* analysis on the part of the Commission, the FCC has adequately articulated a *reasoned* analysis based on studies and comments submitted during the rulemaking process.

As a final challenge, APSCO argues that the Commission's alleged failure to consider other, less drastic, alternatives to the exemption's repeal rendered the decision arbitrary and unreasonable. Petitioners' Brief at 27–28. As the Commission correctly notes, however, "the fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational." *Loyola University v. FCC*, 670 F.2d 1222, 1227 (D.C. Cir. 1982). Additionally, the FCC in this case *did* clearly address the alternatives that had been raised during the comment periods. The opinion explains that the FCC considered and rejected the proposals that

depended on spectrum-sharing between incumbent microwave services and new emerging technology services. The fact that the Commission might not have addressed and rejected every conceivable approach to the challenge of making room for emerging technologies does not render its decision invalid.

Because the FCC has adequately explained its determination that public safety services occupying the reserved bands of the spectrum should be subject to mandatory relocation provisions, we hereby deny APSCO's petition for review of the Commission's order.

So ordered.

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * *

ASSOCIATION OF PUBLIC SAFETY COMMUNICATIONS OFFICIALS-INTERNATIONAL, INC.,	)	
Petitioner,	)	
v.	)	No. 95-1104
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,	)	
Respondent.	)	

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Washington, D. C.
February 2, 1996

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

- -X

ASSOCIATION OF PUBLIC SAFETY COMMUNICATION OFFICIALS-- INTERNATIONAL, INC.,

Petitioner,

v. : No. 95-1104

FEDERAL COMMUNICATIONS COMMISSION, ET AL,

Respondent.

- -X

Friday, February 2, 1996

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 9:50 a.m.

BEFORE:

CHIEF JUDGE EDWARDS, CIRCUIT JUDGES WALD AND SILBERMAN

COURT OF APPEALS FOR THE D.C. CIRCUIT

APPEARANCES:

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C O N T E N T S

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1 P R O C E E D I N G S

2 THE CLERK: No. 95-1104, Association of Public

3 Safety Communications Officials--International, Inc.,

4 Petitioner v. Federal Communication Commission, et al,

5 Respondent.

6 ORAL ARGUMENT OF JOHN D. LANE, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. LANE: Good morning, Your Honor.

9 I'm appearing here on behalf of the Petitioner.

10 This FCC case involving the reallocation of a large block of

11 frequencies, and probably the most valuable--largest and

12 probably the most valuable allocation proceeding that the

13 Commission has ever faced. It's a particularly difficult

14 one because it wasn't a new spectrum involved in this case

15 but it was a spectrum that was encumbered by a number of

16 licensees that occupied the spectrum, some of which, in the

17 parties that I represent here, were very important Public

18 Safety facilities throughout the United States.

19 The Commission, back in 1990, issued a policy

20 statement that they were going to try and clear out a block

21 of spectrum for new technologies. They put their staff to

22 work to try and identify an appropriate block of spectrum

23 and also where the present incumbents might be able to be

24 relocated. And in early 1991, the staff came out with their

25 complete study and the Commission immediately instituted a