

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Amendment to the Commission's Rules ) WT Docket 95-157  
Regarding a Plan for Sharing ) RM-8643  
the Costs of Microwave Relocation )

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COMMENTS OF THE  
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## SUMMARY

The Commission should (1) shorten the voluntary negotiation period and lengthen the mandatory negotiation period for broadband PCS blocks C-F, and (2) permit microwave incumbents to seek reimbursement in accordance with the cost sharing plan, subject to certain safeguards for reimbursing PCS carriers.

- THE COMMISSION SHOULD SHORTEN THE VOLUNTARY NEGOTIATION PERIOD FOR BROADBAND PCS BLOCKS C-F BECAUSE:
  - As a practical matter, all FCC decisions generally require the balancing of competing, sometimes divergent, interests. Microwave relocation is not unique in this circumstance. Now that the voluntary negotiation period has commenced for the broadband PCS A/B blocks, it is clear that the plan needs additional fine-tuning for blocks C-F.
  - As a legal matter, it is entirely within the Commission's authority to revisit and revise previous decisions in light of unforeseen consequences arising during implementation.
  - Regardless of the stage of negotiations, whether voluntary, mandatory, or involuntary, the incumbent is entitled to prior notice and sufficient recovery of the costs of relocation. Because there is no real harm to the incumbent, shortening the voluntary period raises no valid public interest concerns.
  - On the other hand, delays in the introduction of PCS impose real costs on society. The harm imposed by delay affects consumer welfare, as well as the direct interests of PCS carriers.
- THE COMMISSION SHOULD PERMIT MICROWAVE INCUMBENTS TO PARTICIPATE IN THE COST SHARING PLAN, BUT:
  - There should be certain safeguards imposed on their participation. Incumbents should be limited to the same recovery caps as participating PCS carriers. In addition, their participation should not result in an economic windfall to the incumbent at the expense of the reimbursing PCS carriers.

**TABLE OF CONTENTS**

SUMMARY ..... ii

INTRODUCTION ..... 1

I. THE COMMISSION SHOULD DECREASE THE VOLUNTARY NEGOTIATION PERIOD BY ONE YEAR FOR PCS BLOCKS C-F. .... 3

II. SELF-RELOCATING MICROWAVE INCUMBENTS SHOULD BE PERMITTED TO SEEK REIMBURSEMENT IN ACCORDANCE WITH THE COST SHARING PLAN, SUBJECT TO SAFEGUARDS FOR REIMBURSING PCS CARRIERS. . 7

CONCLUSION ..... 9

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CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA"),<sup>1</sup> hereby submits its Comments in the above-captioned proceeding.<sup>2</sup>

**INTRODUCTION**

CTIA applauds the Commission's efforts to further refine and clarify its microwave relocation rules as proposed in the Notice. The microwave relocation rules, as currently crafted, reflect a careful balancing of the interests of incumbents in a smooth transition to new spectrum and the interests of PCS carriers in a

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<sup>1</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including cellular, personal communications services ("PCS"), enhanced specialized mobile radio, and mobile satellite services.

<sup>2</sup> Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule Making in WT Docket 95-157, RM-8643, FCC 96-196 (released April 30, 1996) ("Notice").

rapid relocation process. Unfortunately, in light of the actions of a few "bad actors" who abuse the regulatory relocation process by demanding improper premiums, the Commission is well-advised in revisiting its previous determinations and striking a more equitable balance between the interests of incumbents and the swift deployment of PCS services.

The Notice raises two issues for further consideration: (1) whether to shorten the voluntary negotiation period for PCS blocks C-F, and (2) whether to adopt its proposal for microwave incumbents to participate in the cost-sharing process, and, if so, under what terms.

In response to the Notice's requests, CTIA strongly favors shortening the voluntary negotiation period for blocks C-F by one year and increasing the mandatory negotiation period accordingly.<sup>3</sup> By so doing, the Commission will ensure the more timely introduction of additional wireless services, without harming the interests of incumbent licensees. Because the Commission's rules at all phases ensure adequate notice and cost recovery for relocating microwave incumbents, incumbents will not suffer undue costs by a shortening of the voluntary period.

Moreover, CTIA supports efforts to permit incumbents who self-relocate to recover their costs in the cost sharing program.

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<sup>3</sup> CTIA also favors imposing a requirement for "good faith" negotiation to commence in the voluntary period under certain circumstances. That is, during the voluntary period, while incumbents are not obligated to commence negotiations, once they do so, both parties should be obligated to conduct all negotiations in "good faith."

CTIA agrees with the Commission, though, that there should be sufficient safeguards in place to ensure that PCS carriers are subject to a fair cost reimbursement scheme.

**I. THE COMMISSION SHOULD DECREASE THE VOLUNTARY NEGOTIATION PERIOD BY ONE YEAR FOR PCS BLOCKS C-F.**

The Notice requests comment on whether to shorten the voluntary negotiation period by one year for blocks C-F.<sup>4</sup> CTIA supports shortening the voluntary negotiations period by one year for blocks C-F.

In adopting the microwave relocation rules, the Commission struck a balance between (1) the interests of PCS providers and other emerging technologies in receiving unfettered, timely access to their 2 GHz frequencies and (2) the interests of incumbent microwave licensees in preventing disruption to their operations and minimizing the economic impact of their relocation.<sup>5</sup> Since its adoption, the Commission has appeared hesitant to significantly amend the core terms of the relocation process, in large part, because it believes that these issues were already carefully considered and all competing interests were weighed.

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<sup>4</sup> Notice at ¶¶ 94-97. The Notice also requested comment upon whether the fact that the C block auction was ongoing required differential treatment with respect to shortening the voluntary period. *Id.* at ¶ 97.

<sup>5</sup> See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Third Report and Order and Memorandum Opinion and Order in ET Docket 92-9, RM-7981, RM-8004, 8 FCC Rcd 6589, ¶ 1 (1993).

Unfortunately, in practice, some "bad actors" are abusing this carefully crafted process and are demanding improper premiums.<sup>6</sup> For this reason, the Commission should provide a fairer balance by limiting the voluntary negotiation period by one year for broadband PCS blocks C-F, as contemplated in the Notice.

While there are several reasons why the Commission should limit the voluntary negotiation period, the most significant are that; (1) there is no underlying harm to the microwave incumbent by such action; and (2) the risks to competition, economic efficiency, and consumer welfare from applying the current scheme to C-F block PCS relocation are very real.

As an initial matter, it is important to note that all Commission decisions generally require the balancing of competing, sometimes divergent, interests. Practically speaking, microwave relocation is not unique in this circumstance. Now that the negotiation process has commenced, it is clear from the

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<sup>6</sup> CTIA has provided significant documentation of the outrageous actions taken by certain incumbents during the course of negotiations in the A and B PCS blocks. See, e.g., Ex parte Letter, with Attachments, to Mr. William F. Caton, Secretary, FCC, from Mr. Robert F. Roche, CTIA, in WT Docket 95-157, RM-8643 (March 1, 1996); Ex parte Letter to Mr. William F. Caton, Secretary, FCC, from Andrea D. Williams, CTIA, in RM-8643 (September 20, 1995); Comments of the Cellular Telecommunications Industry Association in WT Docket 95-157, RM-8643, Exhibit One, (December 1, 1995).

As it is in other situations, the fact that only a small percentage of incumbents are engaging in abusive conduct does not lessen their disruptive impact. Unfortunately, it takes only one bad actor in several key markets to substantially hamper the buildout efforts of many PCS licensees.

experience gained in the A and B block negotiation process that additional fine-tuning is in order. Shortening the voluntary negotiation period should help to curb the improper actions of certain incumbents, particularly with respect to the C-F blocks.

Moreover, as a legal proposition, it is within the Commission's authority and current practice to revisit and revise its rules in recognition of the problems raised in putting a theoretical model into practice.<sup>7</sup> Microwave relocation is no different on this point either. Experience with the negotiation process of the A and B blocks suggests that such change is necessary and useful.

Perhaps most important, there is no harm in speeding up the mandatory negotiation process, only benefits. In all phases of the negotiation process, whether voluntary, mandatory, or involuntary, the rights of incumbents to recover their costs of relocation are preserved. Moreover, they are given timely notice of their obligations during each respective period as well. Thus, assuming an incumbent is acting properly, as most are, they are made whole, even with a shorter voluntary period.

In fact, the only incumbents who will be hurt by a reduction of the voluntary period are a few "bad actors." The notion that

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<sup>7</sup> See, e.g., Geller v. FCC, 610 F2d 973, 979 (D.C. Cir. 1979) ("the agency cannot sidestep a re-examination of particular regulations when abnormal circumstances make that course imperative"); WWHT, Inc. v. FCC, 656 F2d 807, 818-819 (D.C. Cir. 1981) ("an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed").

these "bad actors" should be entitled to delay or "game" the relocation process is not recognized as a protected interest under the Communications Act, nor does the Commission intend it to be.<sup>8</sup> In other words, the Commission's intended result, i.e., to provide a smooth transition for incumbents, is still preserved even with a shorter voluntary negotiation period. In addition, good actors will be sufficiently protected by a shorter voluntary period; if "bad actors" are not, that is irrelevant.

In contrast, delays in the introduction of PCS impose real costs on society in terms of competition, dynamic efficiency, and ultimately consumer welfare. Society, not just PCS providers, benefits by the rapid introduction of additional PCS services. Such benefits include increased competition, which results in lower prices and more choices for consumers. When one factors possible dynamic efficiency losses into the equation, a shorter negotiation period is the correct result.

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<sup>8</sup> See Ass'n of Public-Safety Communications Off'als-Int'al, Inc. v. FCC, 76 F3d 395, at note 5 (D.C. Cir. 1996) (D.C. Circuit upheld FCC's decision to require public safety incumbents to be subject to relocation; "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.")

**II. SELF-RELOCATING MICROWAVE INCUMBENTS SHOULD BE PERMITTED TO SEEK REIMBURSEMENT IN ACCORDANCE WITH THE COST SHARING PLAN, SUBJECT TO SAFEGUARDS FOR REIMBURSING PCS CARRIERS.**

CTIA supports the Commission's proposal to permit self-relocating microwave incumbents to seek reimbursement in accordance with the cost sharing plan.<sup>9</sup> However, as the Commission recognizes, there need to be adequate safeguards imposed upon their ultimate recovery to protect PCS carriers from paying otherwise non-recoverable costs. Microwave incumbents should not be permitted to use the cost recovery mechanisms to gain an economic windfall at the expense of reimbursing PCS carriers.

At a minimum, incumbents should be permitted to seek recovery but subject to the same terms and conditions as applied to other PCS carriers seeking reimbursement. Incumbents would be limited, among other things, to the same recovery caps applicable to other participating PCS carriers seeking reimbursement.<sup>10</sup> In other words, like other PCS carriers, incumbents should be entitled to full reimbursement up to, but not greater than, the caps. Moreover, the obligations of a PCS licensee to reimburse an incumbent should only arise with respect to those links for

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<sup>9</sup> Notice at ¶ 99.

<sup>10</sup> Under the current plan, PCS carriers are limited to a cap of \$250,000 per link, with an additional \$150,000 if a new or modified tower is required. Moreover, PCS carriers can seek full recovery, up to the cap, if they relocate non-interfering links that are either fully outside their market area or their licensed frequency band. Notice at ¶ 74 and Appendix A.

which their systems impose an interference problem using the proximity threshold test.<sup>11</sup>

By providing clear limitations on recovery at the outset, the Commission ensures that incumbents at all times have adequate information about the efficacy of self-relocation. Moreover, such caps should also create an incentive on the part of incumbents to minimize their relocation costs.

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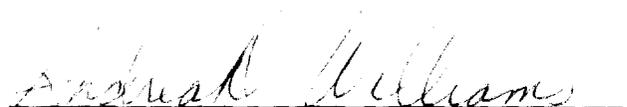
<sup>11</sup> See Notice at Appendix A, ¶¶ 32-34.

**CONCLUSION**

For these reasons, CTIA respectfully requests that the Commission (1) reduce the voluntary negotiation period between PCS providers and incumbent microwave licensees by one year for PCS blocks C-F, and (2) permit incumbents to participate in the cost sharing plan, subject to certain safeguards for reimbursing PCS carriers.

Respectfully Submitted,

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