

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

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

To: The Commission

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PETITION FOR RECONSIDERATION

Small Business in Telecommunications (SBT), by its attorneys, respectfully requests reconsideration of the Commission's First Report and Order (FRO), _____ FCC Rcd. _____ (FCC 96-196 Released April 30, 1996) in the above captioned matter. In support of its position, SBT shows the following.

The voting membership of SBT is comprised solely of small businesses primarily engaged in telecommunications. Many members of SBT are licensees of 2 GHz microwave systems which are subject to frequency relocation by the emerging technologies of the Personal Communications Service. SBT had not yet been formed at the time that comment was appropriate in the instant docket proceeding. Accordingly, it was not possible for SBT to have participated at any earlier stage in this proceeding. Now, however, SBT is prepared to speak in the interests of licensees of 2 GHz microwave systems.

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Comparable Facilities

SBT agrees that the Commission adopted a sound basis for determining whether the PCS licensee had offered comparable facilities, that is, that the Commission will consider communications throughput, system reliability, and operating costs. However, the Commission erred substantially in defining or applying two of those three factors.

Communications Throughput

The Commission determined that "if analog facilities are being replaced with analog facilities, the PCS licensee will be required to provide the incumbent with an equivalent number of 4 kHz voice channels", FRO at para. 28. But, contradictorily, the Commission concluded that "during the involuntary period, PCS licensees will only be required to provide incumbents with enough throughput to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system", FRO at para. 29. The Commission erred in two respects in allowing less-than-comparable systems to be deemed comparable.

The Commission's Form 402 and Form 494 applications request information concerning system loading over a ten year period. It would be manifestly unfair to hold, partway through a microwave station's initial license period, that less than the loading which the licensee had projected to the tenth year of system operation was all that the licensee was entitled to retain, merely because it had not yet had time to achieve full loading. At the least, the Commission should require the PCS licensee to provide a system which will allow the microwave licensee to meet its ten year loading plan.

Many microwave systems are highly subject to seasonal loading factors. In agricultural areas, in particular, system occupancy will vary greatly over the course of a year as the planting, growing, harvesting, and idle seasons pass. Many other businesses, such as the concrete pouring business, the maritime products industry, and recreational enterprises, all of which may be users of 2 GHz microwave systems, are seasonal in nature. It would be manifestly unfair to allow a PCS licensee to impair the throughput capacity of a microwave system to less than the peak need which the microwave licensee can reasonably expect.

Defining throughput in terms of the throughput on any certain day would require many microwave licensees to make additional, later investments to restore their facilities to their initial capacity, which would be contrary to the Commission's stated goal of ensuring "that incumbents are no worse off than they would be if relocation were not required," FRO at para. 32. Further, reducing the capacity of a system to that which was demonstrated on some date certain would inevitably increase the amount of the Commission's scarce administrative resources that would be consumed by the need of microwave licensees to file applications later to modify their systems to reach, once again, their original throughput capacity.

Microwave facilities typically stay in place for long periods of time. It would not be fair to the microwave licensee to measure throughput at any arbitrary time, at the convenience of the PCS operator. To avoid unfairness to the microwave licensee and to itself, the Commission should reconsider its action and require the PCS licensee to provide, at the least, a system which

has sufficient throughput to match the capacity projected by the microwave licensee's most recently filed application.

Reliability

The Commission made a fundamental error in deciding that it "will not require the system designer to build the radio link portion of the system to a higher reliability than that of the other components of the system," FRO at para. 30. The Commission's decision is contradictory to methods for determining system reliability and would improperly lower the microwave system's reliability.

The Commission's decision included a hypothetical system which had a radio link reliability of 99.9999 percent, but an overall reliability of only 99.999 percent because of limited battery back-up power.¹ The Commission decided that the PCS licensee need provide the microwave licensee with a radio link which was 99.999 percent reliable, but no better. What the Commission's decision failed to take into account is that the hypothetical system could not have achieved a reliability of 99.999 percent were it not for the radio link reliability of 99.9999 percent. "When parts are assembled essentially in series, the system reliability is determined from the product of its component parts," H.W. SAMS & CO., INC., REFERENCE DATA FOR RADIO ENGINEERS (1979) §43-25. All other factors being equal, replacing a radio link with one

¹ The reliability of the back-up battery was not stated.

which has a lower reliability will not, under any circumstances, allow the overall system reliability to be maintained.

There was no basis for the Commission's allowing the PCS licensee to degrade the overall reliability of a relocated microwave system below that of the incumbent system. The Commission should require the PCS licensee to provide the microwave licensee with a replacement system which will afford no less overall reliability than the incumbent 2 GHz system. If the same overall reliability can be achieved with a radio link of lower reliability, for example, by using better back-up power than the incumbent system used, then SBT would have no objection, but the Commission erred in allowing the PCS licensee to reduce the reliability of the replacement radio link to the level of the overall incumbent system in every instance.

Transaction Expenses

SBT agrees with the Commission that "incumbents should be reimbursed only for legitimate and prudent transaction expenses that are directly attributable to an involuntary relocation, subject to a cap of two percent of the 'hard' costs involved," FRO at para. 42. But, the Commission was in error in determining that "PCS licensees are not required to pay incumbents for internal resources devoted to the relocation process, because such expenses are difficult to determine and would be too hard for a PCS licensee to verify," *id.* The major cost to be borne directly by small businesses involved in frequency relocation is the time of its management and technical personnel. Management must plan and supervise the execution of the relocation plan and technical personnel must either perform the equipment installations,

adjustments, and removals or oversee and proof the work on behalf of the microwave licensee. Most businesses keep time records for their personnel and it would not require any great effort either to calculate or to verify the cost of internal resources consumed by the microwave licensee, solely to the benefit of the PCS licensee.

To the extent that the consumption of internal resources cannot be calculated or demonstrated to a third-party, then the microwave licensee may have to absorb those expenses, in the same way as it absorbs the inevitable costs of inappropriate telephone calls and "inventory shrinkage". To the extent that the consumption of internal resources can be documented, however, they should be compensated by the PCS licensee. At the very least, the incumbent should be allowed to provide the PCS licensee with an up-front estimate of the costs of his 'internal resources', before the proceeding begins, with an understanding that his final *documented* costs will not exceed that amount by more than ten percent.

To require the microwave licensee to take any action, whatsoever, beyond turning off its transmitters, without requiring the PCS licensee to compensate the microwave licensee fully for the work would appear to violate the Fifth Amendment prohibition of the taking of property without just compensation. SBT respectfully submits that the Commission should not require the microwave licensee to work for the benefit of the PCS licensee without mandating full, just compensation for the microwave licensee.²

² In addition, SBT is concerned that the Commission seems to be ruling on this issue in favor of the PCS licensees, virtually all of whom are *de facto* large businesses, to the detriment of the incumbents, many of which are small businesses.

The Supreme Court has previously decided that:

[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. . . . Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

Forcing a microwave operator to perform work on behalf of the PCS licensee constitutes as much a taking of the operator's property as if the Commission had permitted the PCS licensee to install equipment on the microwave operator's premises. As the Court stated, "the government does not have unlimited power to redefine property rights," the Commission does not have the authority to transform the microwave operator's private property interest in his employee's time into public property without just compensation, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982), *see also*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 15, 164 (1980), wherein the Court stated, " a State, by *ipse dixit*, may not transform private property into public property without compensation."

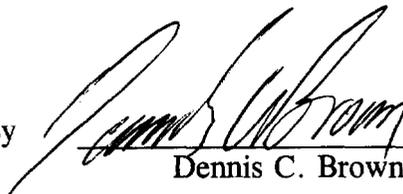
Additionally, it is beyond doubt that allowing a PCS operator to benefit by and through the expense of the microwave licensee, without any concurrent remuneration, would result in an unjust enrichment of the PCS licensee. As the Commission is fully aware, nothing in its previous Order in this or related proceedings would have suggested that auction winners of occupied spectrum would not be required to provide full compensation for the efforts of

licensees who are required to cooperate in relocation. Accordingly, this portion of the Commission's Order results in an unexpected, unjustified windfall to auction winners, to the detriment of microwave licensees and, indeed, to the public. The public's injury arises out of the federal government's failure to collect at auction any increase in bid prices which might have occurred if bidders had been given notice of the reduction in anticipated costs to PCS licensees from the Commission's most recent, and somewhat belated, provision of relief to PCS licensees.

Conclusion

For all the foregoing reasons, SBT respectfully requests that the Commission reconsider its First Report and Order and modify its actions, as requested.

Respectfully submitted,
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