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May 21, 1996

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The Honorable Michael G. Oxley
Vice Chairman
Subcommittee on Telecommunications and Finance
U.S. House of Representatives
2233 Rayburn House Office Building
Washington, DC 20515-3604

Dear Mr. Vice Chairman:

Thank you for your letter of April 24, 1996, regarding the Commission's microwave relocation proceeding, WT Docket No. 95-157. In your letter, you express concern regarding the behavior of some incumbents in the 2 GHz band during the voluntary negotiation period that is now underway for the PCS "A" and "B" blocks. You suggest that the Commission impose an obligation on the parties to negotiate in good faith during this period.

Our existing microwave relocation rules provide that during the voluntary negotiation period, parties are encouraged but not required to negotiate the terms of relocation. Following the expiration of this fixed period, PCS licensees may initiate a one-year mandatory negotiation period, during which time the parties are required to negotiate in good faith. After the expiration of the mandatory negotiation period, involuntary relocation may be sought by the PCS licensee, provided such licensee pays the costs of relocating the incumbent to comparable facilities.

The Commission adopted this framework in 1993 after receiving extensive input from all interested parties and from a number of interested members of Congress. The framework was designed to balance carefully the needs of PCS licensees for early access to spectrum with those of microwave incumbents for a smooth and seamless transition to new facilities in higher spectrum bands. We concluded that a process that relied primarily on voluntary negotiations would provide the best balance between ensuring orderly and fair relocation of incumbents and the national interest of facilitating the development of new technologies and services.

In WT Docket No. 95-157, the Commission considered whether to make certain modifications and clarifications to the microwave relocation rules. The record in this proceeding shows that in the vast majority of cases PCS licensees and incumbents are successfully negotiating fair and equitable relocation agreements. There is, however, evidence that in a small number of cases, incumbents have declined to negotiate during the voluntary negotiation period or have demanded premiums substantially in excess of the cost of relocation.

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On April 25, 1996, the Commission adopted a *Report and Order and Further Notice of Proposed Rule Making* in the microwave relocation docket. The amendments and rule clarifications adopted in the *Report and Order* are designed to add certainty to the relocation process and encourage early, efficient, and equitable relocation of incumbent licensees. Attached for your convenience is a copy of the press release summarizing the decisions made. The Commission took a number of significant steps to encourage voluntary relocation, including:

- Adoption of a cost-sharing plan to encourage system-wide relocation of incumbents.

- Requiring incumbents to provide access to their facilities during the voluntary period to facilitate independent estimates of relocation costs.

- Clarifying that incumbents who do not enter into relocation agreements during the voluntary or mandatory negotiation periods are only entitled to replacement of interfering links with comparable facilities, not to equipment upgrades or full-system replacement.

The *Report and Order* does not, however, change the voluntary nature of the initial negotiation period. Although some commenters did suggest such an approach, the Commission was concerned about fundamentally altering the relocation rules upon which both sides had relied in entering into negotiations. The PCS "A" and "B" block licensees were on notice of the existing rules when they commenced bidding for their licenses, and therefore were fully capable of factoring in the potential cost of relocation under the rules into their bidding. To change our rules governing voluntary negotiations while such negotiations are ongoing could in fact undermine negotiations and lead to future uncertainty about the consistent application of the Commission's rules. The Commission did, however, seek comment on whether the voluntary and mandatory negotiation periods should be modified for PCS licensees and incumbents who have not yet commenced voluntary negotiations. While I cannot prejudge the Commission's final decision on this alternative, I can assure you that we will carefully consider the views stated in your letter in reaching our conclusions.

Thank you for your inquiry.

Sincerely,

Reed E. Hundt
Chairman

Enclosure

cc: Commercial Wireless Division
DFurth
j:/congress/9602019

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

Report No. DC 96-38 ACTION IN DOCKET CASE April 25, 1996

FCC ADOPTS PROPOSALS TO ENCOURAGE RAPID PCS DEPLOYMENT THROUGH MODIFICATION OF MICROWAVE RELOCATION RULES, ADOPTION OF COST-SHARING PLAN (WT Docket No. 95-157)

The Commission today adopted a *Report and Order and Further Notice of Proposed Rule Making* in the Microwave Relocation proceeding that will promote the deployment of broadband Personal Communications Services (PCS). The Order adopted today:

-- Amends and clarifies the Commission's microwave relocation rules to encourage rapid negotiation of voluntary relocation agreements and to clarify the rights of PCS licensees and microwave incumbents in the event they do not reach voluntary relocation agreements.

-- Adopts a cost-sharing plan that will provide incentives for early relocation of multi-link microwave systems by A- and B-block PCS licensees, which will result in band-clearing benefits to future PCS licensees in other blocks.

By adopting this Order, the Commission seeks to expedite the clearing of the 2 GHz band and the introduction of PCS to the public, while at the same time ensuring that relocation does not cause disruption to service. The amendments and clarifications adopted today will promote an efficient and equitable relocation process, which minimizes transaction costs and maximizes benefits for all parties, including incumbents, PCS licensees, and the public.

Background

The Commission previously allocated the 1850-1990, 2110-2150, and 2160-2200 MHz bands to emerging technology services, including PCS, and established procedures for PCS licensees to relocate incumbent licensees in the private and common carrier fixed microwave services out of these bands. The relocation process consists of a two-year voluntary negotiation period (three years for public safety incumbents) and a one-year mandatory negotiation period (two years for public safety), after which the incumbent becomes subject to involuntary relocation provided that the PCS licensee pays for comparable facilities.

Summary of Cost-Sharing Plan

In this Report & Order, the Commission substantially adopts the cost-sharing plan proposed in the *Notice of Proposed Rule Making* in this docket, adopted October 12, 1995. The cost-sharing plan will promote the relocation of entire microwave systems at once, which benefits microwave incumbents, and it will distribute relocation costs more equitably among PCS licensees. The plan is conditioned on approval of one or more entities to administer the cost-sharing clearinghouse.

The basic operation of the plan is as follows: Before any PCS licensee turns on its system, it is required to send a Prior Coordination Notification (PCN) to the clearinghouse administrator. The clearinghouse administrator will then determine whether a reimbursement obligation is owed, using an objective test. If the PCS licensee is required to contribute to another licensee's relocation expenses, the clearinghouse will notify the licensee of the exact amount of its reimbursement obligation, according to a formula prescribed by the Commission. In general, the later a PCS licensee enters the market, the lower its payment obligation under the cost-sharing plan. (See attached chart.)

Summary of Relocation Rule Changes

In this Report & Order, the Commission:

- requires that the incumbent allow the PCS licensee access to its facilities one year into the voluntary period so that an independent third party can estimate the cost to relocate the incumbent to comparable facilities;

- clarifies the obligations of the parties to negotiate in good faith during the mandatory negotiation period. Specifically, the Commission will: (1) consider common law principles when interpreting the obligation to negotiate in good faith, (2) require the parties to share pertinent information, (3) place the burden on the party alleging bad faith to provide the Commission with cost estimates for comparable facilities, and (4) consider the following factors when evaluating claims of failure to negotiate in good faith: efforts to obtain estimates of the actual cost of relocating the incumbent to comparable facilities, whether either party has withheld information, the type of premium requested, if any, and the proportionality of premiums requested to actual relocation costs;

- clarifies the nature of "comparable facilities" that must be provided by the PCS licensee if it seeks involuntary relocation of an incumbent. Specifically, a facility will be deemed "comparable" if it is equivalent with respect to (1) communications throughput, (2) system reliability and (3) operating costs;

- limits compensation to incumbents for increased recurring costs associated with the replacement facilities to a five-year time period during an involuntary relocation and limits reimbursement of incumbents' transactional costs during an involuntary relocation to two percent of the "hard costs" involved;

• clarifies that the twelve-month trial period in our rules applies only if an involuntary relocation occurs. Therefore, if the parties decide that a trial period should be established for relocations that occur during the voluntary or mandatory period, the trial period must be provided for in the contract;

• requires that public safety licensees self-certify that they meet the criteria for extended negotiation periods;

• adopts the Commission's proposal to "sunset" the relocation obligations of PCS licensees in the year 2005, but does not adopt proposal to convert all remaining microwave incumbents to secondary status at that time; requires PCS licensees to give six months' notice before commencing operation that would interfere with a microwave link for which relocation was not negotiated; after the notice period has expired the incumbent will be required to turn its 2 GHz license back into the Commission.

Summary of Further Notice of Proposed Rulemaking

The Commission also seeks comment on:

■ whether microwave incumbents should be permitted to seek reimbursement for relocation expenses from PCS licensees through participation in the cost-sharing plan; and

■ whether the Commission should adjust the negotiation period by shortening the voluntary negotiation period by one year, and lengthening the mandatory negotiation period by one year, for PCS licensees in the D, E and F blocks. Comment is also sought on whether or not this adjustment should be made for the C block.

Interim Licensing Policy

Finally, the Order adopts the Commission's interim licensing policy for 2 GHz microwave systems, which permits a grant of primary status only for the following limited number of minor technical changes: decreases in power, minor changes in antenna height, minor location changes (up to two seconds), any data correction which does not involve a change in the location of the existing facility, reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and changes in equipment; all other modifications will be permitted only on a secondary basis, unless (1) the incumbent affirmatively justifies primary status, and (2) the incumbent establishes that the modification would not add to the relocation costs of PCS licensees.

Action by the Commission April 25, 1996 by Report & Order and Further Notice of Proposed Rule Making (FCC 96-196). Chairman Hundt, Commissioners Quello, Ness, and Chong, with Chairman Hundt and Commissioner Quello issuing statements.

News Media Contact: Kara Palamaras at (202) 418-0654
Wireless Telecommunications Bureau contact: Linda Kinney at (202) 418-0620

Separate Statement
of
Commissioner James H. Quello

April 25, 1996

Re:*Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WTB Docket No. 95 - 157; RM - 8643*

This *Report and Order and Further Notice of Proposed Rule Making* clarifies some aspects of the relocation rules applicable when emerging technologies displace incumbent licensees. In the instant matter, the microwave relocation rules continue to be the most controversial part of our PCS regulatory scheme. Although the majority of the negotiations are proceeding as intended, in several instances the negotiation process has broken down. These disputes appear to be more than "hard ball" negotiations; they appear to be instances of "gaming" some unintended ambiguities in the rules. We, therefore, adopt some "fine-tuning" of this Commission's relocation rules to clarify this Commission's intent.

First and foremost, we adopt a cost sharing plan that will facilitate the relocation of the microwave incumbents and the roll-out of PCS, with detriment to neither. I do not want this significant achievement to get lost in the minutiae of wrangling over legal terms of art in this contentious proceeding. Indeed, the proposal for a cost sharing mechanism was the basis for opening this rule making. The focus should be on achieving the overarching goal of the relocation rules, *viz.*, to provide comparable facilities to the incumbents that are paid for by the new entrants. This process must be based on verifiable data for actual costs of demonstrably comparable facilities. The microwave incumbents are to be made whole. They were to be no worse off after the relocation than before. That is, their communications system should have the same (i.e., "comparable") performance criteria. These amendments reiterate that this Commission will not tolerate instances of over-reaching by permitting demands for more than comparable facilities.

I noted at the NPRM stage that the virtue of the relocation procedures -- their inherent flexibility -- can also be the source of some difficulties. That is always the situation when the Commission correctly decides to rely on negotiations between the parties rather than heavy-handed governmental intrusion into what should be private contractual matters. This Commission wisely built in this give-and-take to accommodate the needs of both the displaced incumbents and the new entrants. While I believe that some fine-tuning is in order, I want to reiterate my support for the relocation procedures and urge the parties to negotiate forthrightly.

I find it somewhat surprising that we would need to explicitly require our licensees, whether they are incumbents or new entrants, to negotiate in good faith. I believe that good faith behavior is required at all times. Some negotiations, however, have floundered significantly. These instances, although a minority, nevertheless threaten the rapid and rational deployment of PCS. Therefore, in addition to more explicitly defining such terms as "comparable facilities" my colleagues also wish to define what constitutes "good faith." I myself believe that this definition will at best be proven superfluous once the other elements of the *Further Notice* are in place. These will assist the parties in achieving a fair result that fulfills our goal to facilitate emerging technologies by refocusing the negotiation on the fundamental issue of determining the actual costs of relocating the interfering microwave links.

MICHAEL G. OXLEY
4TH DISTRICT, OHIO

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Congress of the United States
House of Representatives
Washington, DC 20515-3504

April 24, 1996

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The Honorable Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Chairman Hundt:

I urge you in the context of the Commission's October 12, 1995, Notice of Proposed Rulemaking dealing with microwave relocation issues, or other rulemaking, to take action to assure that good faith negotiations be undertaken by all parties to microwave relocation negotiations affecting the 2 GHz band.

It has come to my attention that some microwave incumbents are "gaming" the current relocation rules to the detriment of emerging technologies. Since there is no "good faith" standard in place for the so-called voluntary negotiation period, some incumbents are attempting to leverage their incumbency into expensive windfalls for themselves, or simply are refusing to negotiate during the voluntary period. I believe the Commission has the authority to deal with this problem in the current rulemaking.

Although the pending NPRM attempts to redress some of the problems and unintentional ambiguities under the current rules with respect to cost-sharing and the good faith standard during the mandatory negotiation period, I believe that requiring good faith obligation on all parties during the voluntary negotiation period, consistent with all applicable rules and regulations, is equitable and sound public policy. Such action will establish minimum ground rules to assure that negotiations proceed without unnecessary delay, thus bringing the full benefits of PCS technology to American consumers at the earliest possible date.

Yours truly,

Michael G. Oxley, M.C.
Fourth Ohio District

MGO/bf