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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

The Association of Public-Safety Communications Officials-International, Inc. ("APCO"), by its attorneys, hereby submits the following Petition for Partial Reconsideration of the Commission's First Report and Order, FCC 96-196 (released April 30, 1996) (hereinafter "First Report and Order"), in the above-captioned proceeding.

APCO is the nation's oldest and largest public safety communications organization, with over 12,000 worldwide members involved in the management and operation of police, fire, emergency medical, forestry-conservation, highway maintenance, disaster relief, and other public safety communications facilities. Many of these facilities are 2 GHz microwave systems licensed to state and local governments that provide the backbone for critical public safety mobile radio communications systems. APCO has participated in all stages of this and other related proceedings regarding the 2 GHz microwave bands.

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For the most part, in the First Report and Order, the Commission wisely chose not to make any significant changes in the overall structure and operation of the microwave relocation rules. However, two changes were made which represent major departures from the basic principle governing the relocation process that the PCS licensee, and not the microwave incumbent, should pay all relocation costs. The two new provisions adopted by the Commission: (1) place an arbitrary and unreasonably low cap on external engineering, legal and consulting fees that can be recovered in the event of involuntary relocation (i.e., after the expiration of the voluntary and mandatory negotiation periods);<sup>1/</sup> and (2) add a "sunset" rule that will require incumbents still in the 2 GHz band after 2005 to pay all relocation costs.<sup>2/</sup> APCO seeks reconsideration of those two provisions

For the public safety licensee, this "now you see it, now you don't" approach to the relocation process is a serious breach of faith. Public safety microwave incumbents were made subject to forced relocation from the 2 GHz band on the express condition that all expenses related to the relocation would be reimbursed by the PCS licensee seeking relocation. Responding to Congressional concerns regarding the potential adverse financial impact of the relocation rules on public, tax supported entities, for example,

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<sup>1/</sup> First Report and Order, at ¶¶ 39-43.

<sup>2/</sup> First Report and Order, at ¶ 11.

Chairman Reed Hundt reassured the Senate Appropriations Committee that public safety licensees:

would not have to pay any costs whatsoever associated with the move. New equipment and all other costs would be paid for by the new PCS commercial entity.<sup>3/</sup>

In responding to further written inquiries from the Committee, the full Commission also assured Congress that new PCS licensees would bear the entire cost of relocating a publicly-owned microwave system. In the words of the Commission, its plan:

Guarantee[d] payment of all relocation costs. Relocation costs include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.<sup>4/</sup>

Now, the Commission has modified its rules in a manner that will require some public safety incumbents to pay a significant portion, if not all, of the cost of relocation. This abrupt reversal of policy should not be permitted to stand.

**I. THE LIMITS ON REIMBURSEMENT DURING INVOLUNTARY RELOCATION OF "TRANSACTION COSTS" INCURRED BY PUBLIC SAFETY INCUMBENTS IS ARBITRARY AND UNREASONABLE.**

The Commission's two percent cap on reimbursement of external expenses during the involuntary period directly contradicts the Commission's prior commitment that all

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<sup>3/</sup> Hearings Before the Senate Committee on Appropriations on H.R. 4603, "Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations," 103d Cong., 2d Sess., S. Hrg. 103-795 (Apr. 28, 1994) ("Senate Hearing"), at 814.

<sup>4/</sup> Id. at 838; see also Memorandum Opinion and Order in ET Docket 92-9, 9 FCC Rcd 1943, 1948 (1994), ¶35.

direct and indirect costs of relocation would be reimbursed. Furthermore, it is a completely arbitrary cap plucked from thin air which ignores the realities of microwave relocation. Microwave incumbents, especially small public safety agencies, must often rely upon outside engineers, attorneys and consultants to ensure that the relocation plan proposed by the PCS licensees will meet their communications requirements, that the relocation agreement adequately protects their rights, and that the "cutover" to the new system will be accomplished with little or no disruption to public safety communications.

This is particularly important where the PCS licensee is attempting to complete the relocation as quickly and inexpensively as possible. For example, the undersigned counsel is aware of situation in which it was necessary for the public safety agency to retain outside consulting engineering services to review the adequacy of the switch-over plan proposed by the PCS licensee due to concerns over its feasibility. The agency's consultant identified flaws in a PCS licensee's relocation plan which, if not corrected, could have led to a failure of the agency's public safety communications network during the switchover.

The Commission chose the two percent cap without any apparent basis in the record, other than a citation to a comment from a single microwave licensee (Cox & Smith) suggesting that \$5,000 per link would be sufficient. That may be true for Cox & Smith. However, the reality is that

the total cost of necessary external services varies greatly for each relocation, and will very often exceed two percent of the equipment cost and/or \$5,000, especially for smaller systems. For an incumbent lacking in-house expertise, external engineering costs alone can be over \$20,000.

Moreover, there is little, if any, relationship between the cost of external experts and either the number of microwave paths at issue or the total cost of the relocation project. Rather, the costs tends to be a function of the complexity of the incumbent's entire microwave network, the quality and depth of the plan prepared by the PCS licensee, and the degree to which the incumbent has in-house expertise at its disposal (most small public safety agencies have little or none). Thus, the total external costs related to a two-path system relocation could be just as high as those for a six-path system relocation. A per path limit on reimbursement simply does not provide a fair measure of what may constitute a reasonable amount of expenditures for these types of services.

The arbitrary cap approach which the Commission has adopted also has the potential for placing incumbent microwave licensees at a serious and unfair disadvantage in the negotiating process. Under the new rules, not only is reimbursement limited to two percent of the cost of relocation, but the incumbent's outside consulting costs incurred in the voluntary and/or mandatory negotiating periods are excluded from reimbursement in the event no

agreement is reached and the involuntary relocation process is invoked. This places an incumbent microwave licensee unable to negotiate a satisfactory relocation agreement because the PCS licensee is not proceeding in good faith in a "hobson's choice." The incumbent in that situation must either accept an unreasonable agreement which does not satisfy its basic communications requirements or enter into the involuntary period knowing that none of the costs incurred to date will be reimbursed.

While this may speed the relocation process, the speed is achieved at the expense of the Commission's basic commitment that the costs of relocation will be borne by the PCS licensee. In effect, this stilted approach wrongly assumes that it is only the incumbent microwave licensee who will exercise bad faith in the voluntary and mandatory negotiating periods. Indeed, if anything, the approach will encourage the PCS licensee to proceed in less than good faith in a difficult negotiation, knowing that the incumbent microwave user will be penalized in the involuntary relocation period for its refusal to accept an unsatisfactory offer. At the minimum, this penalty approach should be applied only where it is established that the incumbent microwave user has been guilty of bad faith negotiations in the mandatory period.

Furthermore, incumbents should also be allowed to obtain reimbursement in the event of involuntary relocation for all reasonable internal expenses directly related to the

relocation. Again, it makes no sense to discriminate against the incumbent microwave systems in this fashion. Many large counties and states maintain "internal services" or "general services" departments with extensive engineering capability for which the "customer" agencies within the county or state must pay out its budget. Why should an incumbent who utilizes internal engineering expertise be treated differently than an incumbent that retains an outside expert?

For these reasons, APCO urges that the Commission eliminate the two percent cap on non-equipment reimbursement in the involuntary relocation period. If there is to be any cap, it can rationally be no more than the reasonable and prudent costs incurred by the public safety agency. Any other standard, particularly one based on a set percentage, is inherently arbitrary and unfair to the incumbent microwave licensee. A set percentage standard simply cannot take in account the multiple of variable factors that may arise in a particular case, particularly the fact that external expenses may constitute a higher percentage of the cost of relocation for small microwave networks than for large microwave networks.

**II. THE TEN YEAR "SUNSET" IMPOSES UNDUE HARDSHIP ON CERTAIN PUBLIC SAFETY INCUMBENTS.**

APCO opposes the ten year sunset imposed by the Commission as it will cause some public safety agencies to unfairly bear the entire cost of relocation. The Commission seems to believe that ten years is reasonable based on two

faulty assumptions: that microwave equipment would need to be replaced within ten years in any event, and that there is no incremental cost to moving to higher frequency bands.

In fact, it is not unusual for microwave systems to remain in place for 15 to 30 years, if not longer.<sup>5/</sup> Therefore, many microwave systems now in place would not normally be replaced until long after 2005. The Commission's sunset rules will force public safety incumbents to replace equipment prematurely, and at taxpayer expense.

Furthermore, the cost of moving from 2 GHz to 6 GHz is far higher than the cost of simply replacing old 2 GHz equipment with new 2 GHz equipment. This is especially the case in remote, rural areas where many current 2 GHz microwave paths are too long to be accommodated in higher frequency bands without the use of repeaters. Adding those repeater sites, assuming that they are even available, will add considerable cost to the replacement of the 2 GHz system. As the State of California has further explained,

In addition to the cost of purchasing radios, antennas, towers, baseband equipment, and other peripheral equipment for this new intermediate facility (at a cost of \$300,000 or more), there is also the cost of developing the new facility. A building must be provided. A new road may be required to gain access to the site. Commercial power may have to be brought into the site or an

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<sup>5/</sup> See Comments of State of California in ET Docket 95-18 (May 16, 1996) ("The State of California has for many years operated its microwave system based upon a 15-20 year replacement cycle...."); Comments of Minnesota Department of Transportation in ET Docket 95-18 (May 6, 1996) ("30 year equipment life cycles are not uncommon for [2 GHz] systems").

alternative power source identified and implemented....Furthermore, development of a new site pre-supposes that such development will be permitted. Environmental concerns about the physical and aesthetic aspects of the facility have stopped many projects in past years.<sup>5/</sup>

Even if path lengths need not be shortened, towers may need to be upgraded or replaced to accept the higher loads created by 6 GHz antennas. Incumbents forced to relocate from the 2 GHz band after 2005 should not be required to pay these additional costs.

**CONCLUSION**

Therefore, for the reasons discussed above, the Commission should eliminate its limits on reimbursed expenses during involuntary relocation and its ten-year sunset provisions.

Respectfully submitted,

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<sup>5/</sup> Id.