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

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**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, files this opposition to several petitions for reconsideration of the Commission's First Report and Order<sup>1</sup> (the "R&O") filed by the Association of American Railroads ("AAR"), UTC, Tenneco Energy, American Petroleum Institute ("API"), and APCO. All of these parties essentially assert that the Commission should permit microwave incumbents to extract more money for relocation and expend more time holding up the Commission's 2 GHz band-clearing plan. Years ago, the Commission found and the D.C. Circuit affirmed that the public interest is better served by using the 2 GHz band for commercial broadband PCS; it is now past due for the microwave incumbents to move to other portions of the spectrum so that competitive commercial mobile services can be introduced expeditiously.

The petitions filed by microwave incumbents are the latest episode in their incessant haggling both at the Commission and in the negotiating process. Omnipoint specifically objects below to many of the incumbents' proposals. Omnipoint also generally objects to the petitions because they represent a basic inability of some members of the microwave incumbent

<sup>1</sup> Amendment to 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, WT Dkt. No. 95-157, RM-8643, FCC 96-196, 61 Fed. Reg. 29679 (June 12, 1996).

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community to accept that the public interest is better served if they would promptly negotiate to clear the 2 GHz band in an expeditious and economical manner.

**I. INCUMBENTS' CLAIMS FOR MORE MONEY SHOULD BE REJECTED**

Incumbents propose several further changes to the Commission's rules in order to ensure themselves more compensation in the relocation process. The Commission should not adopt any of these proposals, for the reasons discussed below.

*A. The Ten-Year Sunset of Reimbursement Rights Should be Maintained*

Several petitioners ask the Commission to eliminate the rule limiting reimbursement rights to ten years. R&O at ¶ 65; 47 C.F.R. § 101.79. Instead, these petitioners would prefer that incumbents hold onto their rights to relocation reimbursement indefinitely. Petition of AAR at 12; Petition of UTC at 5; Petition of Tenneco at 9; Petition of API at 6; Petition of APCO at 7-8. Adoption of these proposals would permit microwave incumbents to continue to stall and demand exorbitant premiums in perpetuity. The ten-year sunset period, however, provides microwave incumbents with incentive to relocate and negotiate more quickly (although a shorter than 10-year sunset period would further promote expeditious relocation).

More importantly, the ten-year sunset period ending on April 4, 2005 is an integral part of the Commission's commitment to re-allocate the 2 GHz spectrum for commercial use. The Commission reached its decision to re-allocate the spectrum for commercial mobile use over three years ago<sup>2</sup> and, by April 4, 2005, the incumbents will have had over 12 years notice that they must relocate to other parts of the spectrum. In furtherance of that transition, the Commission has allocated specific alternative spectrum for fixed microwave use,<sup>3</sup> and has even provided for an overly generous ten-year plan by which they may be richly rewarded (during the

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<sup>2</sup> First Report and Order, ET Dkt. No. 92-9, 7 FCC Rcd. 6886 (1993).

<sup>3</sup> Second Report and Order, ET Dkt. No. 92-9, 8 FCC Rcd. 6495 (1993).

voluntary and mandatory periods) and then reimbursed (during the involuntary period) for the transition. However, those transitional mechanisms should not overtake the Commission's fundamental policy decision that the 2 GHz spectrum will be transitioned to commercial mobile use. Setting an outer limit of ten years for reimbursement rights ensures that the transitional mechanisms work *with* the Commission's band-clearing objectives, and not against that policy.

*B. The Cap on Consultants' Fees Should Not Be Increased*

Several petitioners argue that the Commission improperly imposed a two-percent cap on the amount of incumbents' consultant fees that can be reimbursed during the mandatory relocation period. Petition of APCO at 2-7; Petition of API at 8-9; Petition of Tenneco at 11-12; Petition of AAR at 9-11. They also argue that consultants' fees incurred during the voluntary and mandatory period should be reimbursed even when PCS operators must later relocate the incumbent involuntarily. These arguments fail to rebut the Commission's sensible limits on the abuses that can and do occur concerning microwave consultants' fees; the limits the Commission imposed in the R&O help to counterbalance those abuses.

Without a two-percent cap, there is seemingly no limit on what incumbents and their zealous consultants would be willing to charge PCS operators as a transactional cost. While the incumbents argue that the Commission could impose a vague limit that such costs must be "legitimate and prudent" (*see, e.g.*, Petition of AAR at 10), PCS operators would be left with very little recourse to enforce such a limit and, most likely, consultants would simply overcharge just below the limit that would force a PCS operator to resort to FCC protection. Such a rule would encourage rampant abuse. As a consequence, it would also discourage PCS operators from negotiating with the incumbents' consultants who would have no incentive to reach an expeditious and economical result. A readily ascertainable limit, on the other hand, encourages consultants to facilitate, and not draw out, the relocation process. A set limit is also more fair to subsequent PCS licensees, that were not a part of the relocation negotiation process, who will be required to pay years later for a portion of those fees. At that time, it will likely be difficult or

impossible for the subsequent PCS licensee (especially a small business with limited resources) to determine if the consultants' fees were, in fact, "legitimate and prudent."

Limiting the recovery of consultants' fees to the voluntary and mandatory negotiation period also prevents abuse and delay. Otherwise, an incumbent and especially its consultant have little incentive to resolve a relocation dispute during the voluntary and mandatory periods.

*C. The Block C Installment Payment Provisions Should Be Maintained*

Tenneco asks for the Commission to eliminate the installment payment provisions for Block C licensees that pay into the relocation reimbursement program. Petition of Tenneco at 5. Tenneco objects to the entrepreneur's band payment provisions because the relocater (either a Block A or B PCS licensee or a microwave incumbent that self-relocates) must wait for the entrepreneur to pay. Omnipoint urges the Commission to look beyond Tenneco's parochial interest in cash-on-the-barrelhead from small business PCS licensees.

As the Commission has explained many times, PCS entrepreneurs face extreme hardship in obtaining the necessary capital to build out and operate a competitive and independent mobile system. Fifth Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 5532, 5572-73 ¶ 96 (1994) ("because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services"); Sixth Report and Order, PP Dkt. No. 93-253, 11 FCC Rcd. 136, ¶ 1 (1995). While Omnipoint supports the Commission's plan for equitable allocation of the costs of microwave relocation among all affected PCS licensees, this goal does not in any way trump the Commission's statutory mandate to encourage the competitive entry of small business PCS operators. *See, e.g.*, 47 U.S.C. §§ 257, 309(j)(4)(D).

Moreover, Tenneco's assertion that the entrepreneur installment plan somehow discourages Block A or B licensees from relocating microwave links is belied by the fact that many Block A and B licensees filed in support of the installment plan. See R&O, Appendix 1 at ¶ 41, n. 402. In fact, no Block A or B licensee objected to the installment plan proposal in the comment process, nor did Tenneco. It appears now that as Tenneco may gain rights under the reimbursement scheme as a self-relocator, it suddenly finds that the Commission's PCS entrepreneur-band policies stand between it and the relocators' money. If Tenneco finds that it cannot support the policy for small businesses in PCS, or that it cannot even wait for its money from small businesses like other relocators and like the federal government, then it need not engage in reimbursed self-relocation. In short, there is no reason for the Commission to reverse itself and add to the financial burdens of entrepreneur-band licensees simply for the convenience of a huge multi-national company like Tenneco.

*D. PCS Operators Should Not Be Forced To Reimburse A Microwave Incumbent Operating on A Secondary Basis*

AAR and Tenneco assert that the Commission should impose a reimbursement obligation on a PCS licensee when the incumbent would have caused interference with the PCS operator's base station. Petition of AAR at 13; Petition of Tenneco at 4-5. Both parties acknowledge that the Commission's rules currently provide for reimbursement rights when a PCS operator causes interference to a microwave incumbent, *i.e.*, when operation of both the PCS and microwave systems causes mutual interference and the incumbent holds co-primary status. AAR's and Tenneco's position is difficult to discern. However, if AAR and Tenneco mean that an incumbent should be entitled to reimbursement rights even when it no longer has co-primary status (*i.e.*, it has secondary status), then Omnipoint opposes this position. As such, AAR's and Tenneco's position is largely a reiteration of each party's separate request to eliminate the ten-year sunset provision, and it should be rejected for the same reasons stated above.

Further, the Commission explained in the R&O (at ¶ 89) that "PCS licensees are under no obligation to pay to relocate secondary links that exist within their market area and frequency block." AAR and Tenneco have offered no reason to disturb this eminently sensible decision; a licensee with primary status does not subject its use of the licensed spectrum, or owe an obligation for relocation, to a licensee with secondary status.

## **II. REPLACEMENT SYSTEMS DO NOT NEED TO BE SUPERIOR SYSTEMS**

Microwave incumbents challenge the Commission's rules on what constitutes a comparable replacement system during the involuntary relocation period. First, they claim that a replacement system with throughput capacity meeting the incumbent's needs at the time of relocation is not enough; incumbents assert that they are entitled to a replacement system equal to or better than the full capacity of the 2 GHz system even when the incumbent did not use its system to full capacity. Petition of AAR at 7; Petition of API at 6-8; Petition of UTC at 2-5; Petition of Tenneco at 8-9. Second, AAR also objects to the Commission's rule that overall reliability of the replacement system must be equal to or better than the 2 GHz system, 47 C.F.R. § 101.75(b)(2); AAR claims a right to a replacement system in which the reliability of each *component* is equal to or better than each similar *component* in the 2 GHz system. Petition of AAR at 8-9.

In effect, microwave incumbents do not want a replacement system at all. They want to profit in the form of a superior replacement system, even in the involuntary relocation period, for the mere fact that they stand in the way of the rapid introduction of PCS. By demanding throughput at levels that they were not operating at in 2 GHz, the incumbents want for the Commission to force the PCS industry to reimburse them for levels of use of the 2 GHz spectrum that never existed. Further, by insisting that the "overall reliability" standard is inadequate, and that each component must be better than or equal to the one it replaces, incumbents request that the Commission ensure them a replacement system with superior overall reliability than their existing system. At least during the involuntary relocation period, incumbents have no right to a

surplusage simply because they have refused to relocate during either the voluntary or mandatory negotiation periods.

### CONCLUSION

Omnipoint objects to the petitions for reconsideration filed by microwave incumbents and their trade associations. The petitions raise arguments that have already been presented, considered, and rejected in the Commission's R&O and reflect a basic intransigence toward the Commission's well-established decision to expeditiously re-allocate the 2 GHz spectrum. For the reasons stated above, these petitions should be denied.

Respectfully submitted,

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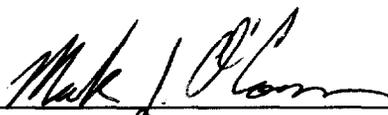
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