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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

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SUMMARY

Although API strongly supports the Commission's recent decision to allow microwave incumbents who relocate their own facilities to obtain reimbursement through the cost-sharing plan, API believes that certain aspects of the new cost-sharing rules will not provide incumbents with adequate (or, in some cases, any) reimbursement of their relocation costs. The Commission's rules also fail, in certain significant respects, to treat self-relocating incumbents in the same manner as comparably-situated initial Personal Communications Service ("PCS") relocators.

To begin with, the Commission's exclusion from the cost-sharing plan of microwave incumbents who self-relocate prior to the effective date of the Commission's new rules would unfairly punish those incumbents who acted quickly to clear their spectrum in the reasonable expectation that they ultimately would be entitled to recover their relocation costs. Given that the Commission has permitted retrospective cost recovery by initial PCS relocators, the same rights should be extended to incumbent self-relocators. In addition, the Commission should amend its rules so as to allow participation in the cost-sharing plan by incumbents who convert to leased services, rather than relocating to

new microwave facilities. This measure would encourage the prompt clearing of 2 GHz spectrum, while providing incumbents with more flexibility to choose the type of replacement services that best meet their needs.

API also urges the Commission to reconsider its decision to depreciate the cost-sharing rights of self-relocating incumbents. Such incumbents are equivalent in all relevant respects to PCS licensees who have relocated links entirely outside their licensed service areas and frequency blocks: i.e., they had no obligation under the Commission's rules to relocate the links for which they are seeking recovery under the cost-sharing plan. As the cost-sharing rights of such PCS licensees are not subject to depreciation, the same should be true of the cost-sharing rights of self-relocating incumbents.

Finally, API asks the Commission to clarify that when the cost-sharing formula is applied to self-relocating microwave incumbents, the variable "N" in the formula should equal 1 for the first PCS licensee that is determined to have a cost-sharing obligation to the incumbent, 2 for the second such PCS licensee, and so on. Otherwise, the potential recovery of incumbents through cost-sharing would

be dramatically and inappropriately reduced, thereby deterring them from initiating self-relocations.

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The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Petition for Reconsideration and Clarification ("Petition") of certain rule amendments adopted by the Commission on February 13, 1997 in its Second Report and Order ("Second R&O") in the above-referenced proceeding.[1/] Specifically, API urges the Commission to: (1) allow participation in the cost-sharing plan by microwave incumbents who relocated their own facilities prior to the adoption of the Second R&O or who self-relocate during the interim period between the adoption

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[1/] 62 Fed. Reg. 12752 (March 18, 1997).

of the new rules and their effective date; (2) permit recovery under the cost-sharing plan by self-relocating incumbents who select leased services in lieu of replacement microwave facilities; (3) reconsider its decision to depreciate the amount of reimbursement that self-relocating microwave incumbents are entitled to receive under the cost-sharing formula; and (4) clarify that when the cost-sharing formula is applied to self-relocating microwave incumbents, the variable "N" in the formula should be assigned the value of 1 for the first PCS licensee that has a cost-sharing obligation to the incumbent.

I. PRELIMINARY STATEMENT

1. API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing and transportation of petroleum, petroleum products and natural gas. API's Telecommunications Committee is supported and sustained by licensees that are authorized by the Commission to operate, among other telecommunications systems, point-to-point and point-to-multipoint facilities in the Private Operational-Fixed Microwave Service ("POFS").

2. Accordingly, the Committee has participated in all of the Commission's major rule making proceedings addressing private microwave use of the spectrum, including nearly every phase of the Commission's Docket Nos. 90-314 and 92-9, which led to the adoption of reaccommodation provisions for those POFS licensees required to vacate their assignments to make way for PCS providers. API also has been actively involved in the above-captioned proceeding to establish a cost-sharing mechanism to allocate more fairly the costs of relocating microwave incumbents to alternative spectrum.

II. PETITION FOR RECONSIDERATION AND CLARIFICATION

3. The American Petroleum Institute ("API") applauds the Commission's decision to allow microwave incumbents who relocate their own microwave links to obtain reimbursement from subsequent Personal Communications Service ("PCS") licensees who benefit from the clearing of the spectrum. As API noted in its Comments in support of this proposal, participation by self-relocating incumbents in the Commission's PCS cost-sharing plan will provide for a more equitable distribution of relocation costs, encourage system-wide relocation of incumbent microwave systems and, as a result, foster the prompt deployment of PCS.

4. Several aspects of the Commission's decision, however, threaten to undermine the attainment of these worthy goals. In particular, and as further described below, if the Commission were to apply the cost-sharing plan to self-relocating incumbents in the manner contemplated by the Second R&O, many of these incumbents would receive inadequate compensation. In fact, some would receive no compensation whatsoever. Such a result would be directly at odds with the Commission's commitment to ensuring that incumbents receive full reimbursement for relocation to comparable facilities and could, therefore, actually serve to discourage self-relocation. The Commission's approach also violates basic precepts of fairness in that it fails, in certain respects, to treat self-relocating incumbents and similarly-situated PCS relocators in an evenhanded manner. Accordingly, API submits this Petition to request that the Commission fine-tune its cost-sharing rules so as to rectify these deficiencies.

A. Microwave Incumbents Who Complete Self-Relocation Before the Commission's New Rules Take Effect Should be Allowed to Participate in Cost-Sharing

5. The new rules adopted by the Commission to implement its Second R&O provide that for a self-relocating incumbent to be eligible for reimbursement under the cost-

sharing plan, it must submit documentation of the relocation to the clearinghouse within ten business days of the date that relocation occurs. 47 C.F.R. § 22.245(a). Neither the Commission's amended rules nor the Second R&O addresses whether incumbents who complete self-relocation more than ten days before the new rules were adopted and/or will take effect may participate in the cost-sharing plan.[2/] Such incumbents would include those who, for example, executed relocation agreements with A or B Block PCS licensees during the early stages of the voluntary negotiation period for some, but not all, of the links in their systems and self-relocated the links operating in the remaining PCS blocks in order to achieve system-wide relocations.

6. API believes that the exclusion from the cost-sharing plan of such self-relocating incumbents would be both illogical and unfair. In short, it would have the anomalous result of punishing those microwave incumbents who are, at least arguably, <u>most</u> worthy of reimbursement, <u>i.e.</u>, incumbents who quickly and voluntarily cleared their

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[2/] The Commission also has not specified how the date of relocation is to be determined for purposes of calculating the deadline for microwave incumbents to submit their documentation to the cost-sharing clearinghouse. For instance, is it the date that the subject microwave links are decommissioned, the date that the replacement facilities are fully implemented, or perhaps some other date? API asks the Commission for clarification on this question.

spectrum to make way for PCS. Due to their laudable efforts to expedite and facilitate the relocation process, these self-relocators will be placed in a worse position than other microwave incumbents. Had they instead deferred relocation until the Commission officially declared them eligible for cost-sharing or even waited to be relocated by a PCS licensee, they would have been entitled to reimbursement. There is no reason why such incumbents should be required to bear all of the costs associated with their replacement facilities.

7. Moreover, the exclusion of early self-relocating incumbents from the cost-sharing plan would be flatly inconsistent with the Commission's treatment of PCS relocators. When the Commission adopted the cost-sharing plan for PCS licensees in April 1996, it concluded that "PCS licensees who have already relocated microwave links should receive the same reimbursement benefit as those PCS licensees who relocate microwave systems after adoption of the cost-sharing plan." First Report and Order, WT Docket No. 95-157 (April 25, 1996) (hereinafter, "First R&O"), at Appendix A, ¶ 23. Accordingly, the Commission's cost-sharing rules provide that a PCS relocator may obtain reimbursement for all relocation expenses incurred since April 5, 1995 (the date that the voluntary negotiation

period began for A and B Block PCS licensees). 47 C.F.R. § 24.245(b).

8. To ensure equitable treatment and fair compensation, self-relocating incumbents also should be entitled to reimbursement for all relocation expenses incurred since April 5, 1995.[3/] This temporal limitation would preclude recovery by microwave incumbents whose self-relocations preceded or were unrelated to the reallocation of the 1850-1990 MHz ("2 GHz") band to PCS, while allowing reimbursement to those incumbents who are subject to displacement.

B. Self-Relocating Microwave Incumbents Who Convert to Leased Services Should be Eligible for Compensation Under the Cost-Sharing Plan.

9. In lieu of building and operating new facilities, some microwave incumbents subject to the Commission's relocation rules have opted to replace their 2 GHz facilities with services leased from commercial providers.

[3/] At the very least, recovery should be permitted for expenses incurred since April 25, 1996 -- the date that the Commission initially proposed to allow self-relocating incumbents to participate in the cost-sharing plan. Since that time, some incumbents may have relocated their own systems in the reasonable expectation that the Commission's proposal ultimately would be adopted and, as in the context of PCS relocators, applied retrospectively.

Some of these incumbents voluntarily have initiated this transition (or "self-relocated") to leased services, rather than waiting to reach agreement with a PCS licensee. Because reimbursement under the cost-sharing plan is limited to the actual costs of relocating to "comparable facilities," such incumbents apparently are ineligible to participate in cost-sharing.

10. API believes that incumbents who "self-relocate" to leased services should be eligible for reimbursement under the cost-sharing plan. Otherwise, it will be in the interests of such incumbents to delay relocation until an appropriate reimbursement agreement is reached with a PCS provider. By allowing these incumbents to participate in cost-sharing, the Commission would not only be encouraging the prompt clearing of 2 GHz spectrum for PCS, but also would be making it more feasible for incumbents to choose the service that meets their future requirements.[4/]

[4/] The amount of reimbursement to be received by incumbents who convert to leased services could be determined in a number of ways. For instance, it could be based on a calculation of the net present value of the incumbent's lease payments through the "sunset" date of April 5, 2005, subject to the $250,000 reimbursement cap. Alternatively, an approximation of what it would have cost to relocate to comparable facilities could be employed.

C. The Cost-Sharing Rights of Self-Relocating Incumbents Should Not be Subject to Depreciation.

11. API argued in its Comments that the amount of reimbursement that a self-relocating incumbent is entitled to receive under the cost-sharing formula should not be reduced over time. As API pointed out, this depreciation policy makes sense in the context of a PCS licensee who relocates a link which is in its service area or frequency block, as such a PCS relocator directly benefits from the relocation. However, the Commission has recognized that:

> when a PCS provider relocates a link wholly outside its service area and/or spectrum block -- which would entitle it to full reimbursement of compensable costs up to the cap -- . . . <u>such reimbursement should not be depreciated under the cost-sharing plan</u>.

<u>First R&O</u>, at Appendix A, ¶ 17 (emphasis added). Similarly, because microwave incumbents are entitled to full reimbursement of their relocation costs, their recovery under the cost-sharing plan should not be subject to depreciation.

12. Notwithstanding the foregoing, the Commission concludes in its Second R&O that "the cost-sharing formula, when applied to microwave incumbents, should include

depreciation." Second R&O, at ¶ 27. In support of this decision, the Commission contends that: (1) a microwave incumbent who voluntarily relocates itself may obtain benefits it would not realize if it waited to be relocated by a PCS licensee (e.g., more control over the relocation process and reduced uncertainty); and (2) depreciation creates an incentive for the relocator to minimize costs.

13. Significantly, however, the Commission fails to explain why it has chosen to treat incumbent self-relocators differently from PCS providers who relocate non-interfering links. Indeed, the rationales offered by the Commission for depreciating the reimbursement rights of self-relocating incumbents apply equally well to PCS providers who relocate links wholly outside their service areas or spectrum blocks: these PCS providers benefit from the relocation of non-interfering links (for example, through the prompt execution of relocation agreements by microwave incumbents), and depreciation would create an incentive for them to minimize relocation payments. Nonetheless, the Commission has determined that such PCS relocators are entitled to full reimbursement and that depreciating their compensation would provide them with an incentive simply to wait "in the hope that other PCS entities will relocate these links." First R&O, at Appendix A, ¶ 17.

14. The Commission's failure to apply this same basic logic to self-relocating incumbents is unjustifiable. The reimbursement cap of $250,000 per link and the requirement that self-relocators provide an independent third-party appraisal of their relocation costs already create more than an adequate incentive for these incumbents to control their costs. Depreciating the cost-sharing rights of microwave incumbents will serve only to: (1) deny incumbents their rightful recovery and; (2) strip away the incentive of incumbents to self-relocate, thereby defeating the very purpose of allowing them to participate in the cost-sharing plan.

D. The Variable "N" in the Cost-Sharing Formula Should Equal One for the First PCS Licensee that Would Have Interfered with the Self-Relocated Link

15. As a final matter, API strongly urges the Commission to clarify that when it determined that the cost-sharing rights of self-relocating incumbents under the cost-sharing plan would be subject to depreciation, it was referring to depreciation through the variable "T_m" in the cost-sharing formula, rather than the variable "N." The variable "T_m" serves to reduce the amount of reimbursement owed by a subsequent-entrant PCS licensee for each month that passes before the PCS licensee opts to deploy its

system. Before this depreciation factor is applied, however, the total costs of relocation are divided by "N," which is defined as "the number of PCS licensees that would have interfered with the link." 47 C.F.R. § 24.243(c). Accordingly, this variable should be assigned a value of 1 for the first PCS licensee that is determined to owe reimbursement to a self-relocating microwave incumbent (rather than a value of 2, as in the application of the formula to an initial PCS relocator), a value of 2 for the second PCS licensee, and so on. Otherwise, the maximum reimbursement that an incumbent ever could receive under the cost-sharing plan from the first (and perhaps, only) interfering PCS licensee would be one-half of its relocation costs. Such a result would make a mockery of the basic right of microwave incumbents to receive full compensation for their relocation costs and likely would deter all potential microwave self-relocations.

III. CONCLUSION

16. The Commission's decision to allow self-relocating microwave incumbents to obtain reimbursement through cost-sharing will not be beneficial to either incumbents or PCS licensees unless incumbents are provided with adequate incentive to self-relocate. The exclusion from the cost-

sharing plan of incumbents who convert to leased services and the depreciation of incumbents' reimbursement would deter, rather than encourage, self-relocation in many instances. Additionally, the Commission should rectify its cost-sharing policies regarding depreciation and the recovery of costs incurred prior to the effective date of the cost-sharing rules to ensure that self-relocating incumbents are treated in the same manner as similarly-situated PCS relocators.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Petition for Reconsideration and Clarification and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

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