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BEFORE THE

Federal Communications Commission

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Federal Communications Commission
Office of Secretary

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In the Matter of)

Amendment to the Commission's)
Rules Regarding a Plan for Sharing)
the Costs of Microwave Relocation)

WT Docket No. 95-157

To: The Commission

**REPLY
OF THE
AMERICAN PETROLEUM INSTITUTE
TO OPPOSITIONS TO ITS
PETITION FOR RECONSIDERATION**

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 Reply to Oppositions to its Petition for Reconsideration 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/} For the reasons expressed below, API believes that the Oppositions filed on May 20, 1997 by the Personal Communications Industry Association ("PCIA"), Pacific Bell Mobile Services ("PBMS") and UTAM, Inc. ("UTAM") are without merit and should be rejected by the Commission.

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^{1/} 62 Fed. Reg. 12752 (March 18, 1997).

REPLY

1. In its Petition for Reconsideration ("Petition"), API pointed out that certain aspects of the Commission's new cost-sharing rules fail to treat microwave incumbents and Personal Communications Service ("PCS") relocators in an even-handed manner and will, in many instances, serve to deprive incumbents of reimbursement to which they should be entitled.^{2/} To ensure that the cost-sharing rules are more fairly applied, API urged the Commission to: (1) allow self-relocating incumbents to be eligible for reimbursement for all relocation expenses incurred after April 5, 1995; (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.

^{2/} Many of the same concerns expressed in API's Petition were presented in the Petitions for Reconsideration of South Carolina Public Service ("SCPS") and UTC, The Telecommunications Association ("UTC") and in the subsequently-filed Comments of UTC and Southern Company.

2. The Oppositions to API's Petition essentially argue that provisions such as depreciation and the preclusion of retrospective cost-recovery by self-relocating incumbents are necessary to prevent incumbents from taking unfair advantage of the cost-sharing process. The Commission should not countenance this attempt by PCS interests to obscure the reality of the relocation process and the cost-sharing rules. The cap on reimbursement and the requirement for an independent cost appraisal (provisions which incumbents have not challenged) guarantee that the reimbursement of self-relocating incumbents will -- at most -- be equal to the actual costs of relocating to comparable facilities. At issue here are rule provisions or limitations that, by contrast, go far beyond the stated goal of preventing cost abuses by incumbents; indeed, they ensure that self-relocating incumbents will receive less than full recovery (or, in some instances, no recovery whatsoever), thereby resulting in the unjust enrichment of PCS licensees.

A. Like PCS Relocators, Self-Relocating Incumbents Should be Eligible for Reimbursement for Costs Incurred Since April 5, 1995

3. PCIA claims that retrospective cost-recovery is inappropriate in the context of self-relocating incumbents because, "if an incumbent chose to relocate a link [during the voluntary period], it was either because it received reasonable compensation from a PCS entity or because it chose to do so for independent business reasons." PCIA

Opposition at 5.^{3/} This simply is not the case. As demonstrated by the Comments of Southern Company, some incumbents have self-relocated portions of their systems prior to the effective date of the new rules in order to minimize disruption stemming from the relocation through agreement with PCS licensees of other links in the same system. In such instances, the relocation is not driven by "independent business reasons," but is instead the direct result of the reallocation of the 2 GHz band to PCS. Moreover, it is precisely this type of prompt, system-wide relocation that the new cost-sharing rules are intended to promote. As PCS licensees receive a real and direct benefit from such self-relocations (i.e., the clearing of their spectrum), regardless of when the self-relocations occurred, they should be required to reimburse the incumbents for their reasonable relocation costs.

4. PCS interests also are concerned that there will be no independent third-party verification of the costs of relocations that occurred prior to the effective date of the cost-sharing rules because they believe the incumbent's 2 GHz equipment will already have been removed.^{4/} API is aware, however, of a number of microwave incumbents who

^{3/} PBMS and UTAM raise similar contentions. See PBMS Opposition at 4 (any self-relocations prior to Second R&O "were done for independent business reasons that overrode the need for guaranteed compensation"); UTAM at 4 ("a self-relocating incumbent has relocated for reasons independent of PCS deployment").

^{4/} See Opposition of PCIA at 5; Opposition of PBMS at 4.

have incurred self-relocation costs prior to May 1997, but who have yet to decommission their 2 GHz systems as they are still in the process of testing the replacement equipment. Further, even if there are instances where the 2 GHz equipment is no longer available, self-relocating incumbents should be given the opportunity to present other objective evidence (such as invoices or specifications for the original equipment) to the party that is performing the independent appraisal.

5. The Oppositions simply do not present any legitimate reasons for denying retrospective cost recovery to incumbent self-relocators. Such incumbents merely ask to be treated in the same manner as PCS relocators, who were given retrospective reimbursement rights upon the adoption of the First Report and Order in this proceeding.

B. Recovery for Transitions to Leased Services Should be Permitted

6. In objecting to API's request that incumbents who self-relocate to leased facilities be allowed to participate in cost-sharing, PCIA and UTAM argue that: (1) such incumbents likely are relocating for independent business reasons; and (2) the third-party appraisal of the price of a comparable system will be less reliable in such instances. Opposition of PCIA at 8-9; Opposition of UTAM at 5-6. Both of these purported rationales fail to withstand even cursory scrutiny.

7. To begin with, an incumbent may self-relocate to leased facilities because it knows that it ultimately will be required to clear the 2 GHz band and it has been offered what it believes to be an advantageous arrangement for the provision of leased services. Such a conversion to leased services should not be considered part of an independent business plan, as it would not have occurred when it did absent the impending obligation to relocate. In any event, the motivation of an incumbent in clearing the 2 GHz band has no bearing on the right of that incumbent -- as set forth in the Commission's rules and decisions -- to receive reimbursement for its relocation costs.

8. With respect to the amount of reimbursement that incumbents who self-relocate to leased facilities would be eligible to receive, API believes that it should be based on the actual cost of the leased facilities through the "sunset" of the relocation rules. API agrees with PCIA, however, that such reimbursable costs should not be allowed to exceed the value of a comparable replacement system. Accordingly, where the leased facilities are more expensive than a comparable replacement system, PCS licensees will be no worse off as a result of the ability of incumbents to convert to leased services because the PCS licensees would only be required to reimburse the incumbent for the price of a comparable replacement system; where, on the other hand, the transition to leased facilities is less expensive than a comparable system, PCS licensees would actually be better off than if the incumbent were compelled to purchase a replacement

system in order to be eligible for reimbursement. While it is true that any measurement of the costs of a replacement system would be only a best estimate, that typically will be the case even where incumbents self-relocate to their own (non-leased) facilities, due to the fact that the value of system upgrades will have to be discounted.^{5/} The requirement for an independent third-party appraisal will ensure that all estimates are determined in a fair and unbiased manner.

C. The Depreciation of Cost-Sharing Rights is Inappropriate in the Context of Self-Relocating Incumbents

9. The Petitions for Reconsideration of API, UTC and SCPS clearly set forth the reasons why the cost-sharing rights of incumbent self-relocators should not be subject to depreciation. Most significantly, the Petitions explain that incumbent self-relocators are equivalent in every relevant respect to PCS licensees that relocate microwave links entirely outside their licensed geographic areas or spectrum blocks and that the Commission properly has determined that the reimbursement rights of such PCS relocators are not subject to depreciation. In opposing this reasoning, PCS interests essentially reiterate their position that measures such as depreciation are necessary to provide incumbents with an incentive to minimize costs. See Opposition of PCIA at 5-8;

^{5/} Particularly where an incumbent's system has been upgraded from analog to digital equipment, there will necessarily be some imprecision in assessing the value of "comparable facilities."

Opposition of PBMS at 2-3; Opposition of UTAM at 4-5. They also seek to perpetuate the illusion that incumbent self-relocation is an entirely voluntary measure that bestows great advantages upon incumbents, with little corresponding benefit to PCS licensees.

See id.

10. Given the cap on reimbursement, the third-party appraisal requirement and the uncertainty of future recovery, API fails to understand how microwave incumbents will be able to abuse the cost-sharing process. Self-relocating incumbents already are subject to greater safeguards than PCS relocators as a result of the obligation to obtain an independent third-party appraisal. Applying a depreciation factor as well will undermine the Commission's basic goal of providing displaced 2 GHz incumbents with full compensation for their relocation costs and will deter some incumbents from relocating their own systems. This, in turn, will cause unnecessary disruption to microwave operations and will delay the deployment of PCS in some areas. PCS licensees stand to benefit immeasurably from the prompt clearing of their spectrum through incumbent self-relocation; allowing them to avoid paying full compensation for such relocations will penalize microwave incumbents while unjustly enriching PCS licensees.

11. API and UTC also requested in their Petitions that the Commission clarify that, even if depreciation is to be applied to the reimbursement rights of self-relocating

incumbents, the variable "N" in the cost-sharing formula should equal 1 (and not 2) for the first PCS licensee determined to have a cost-sharing obligation to the incumbent self-relocator. In other words, depreciation should (if applied at all) be factored in only through the variable "T" (i.e., the "time" factor) and not the variable "N." Otherwise, incumbents would be required to pay at least as great a share -- and sometimes more -- of their relocation costs than any PCS licensee and would never receive an amount that even closely approximates full recovery. The PCS entities do not address this issue in their Oppositions. Accordingly, the position of API and UTC stands unrefuted in the record and should be adopted by the Commission.

CONCLUSION

12. The apparent concerns of certain PCS interests regarding potential cost abuses and the motivation of incumbents for self-relocating are entirely unfounded. As explained above, the reimbursement cap, independent third-party appraisal requirement and the risk of ultimately receiving no reimbursement (due to the possible failure of a potentially interfering PCS licensee to deploy its system prior to the sunset date), provide more than adequate incentive for incumbents to contain their self-relocation costs. Additionally, the relocation framework often places microwave incumbents in a situation where the self-relocation of remaining links in a system that has been partially relocated

by PCS licensees is not truly voluntary but is, instead, an operational necessity. Under these circumstances, PCS entities should not be permitted to derive the benefits of incumbent self-relocation without paying their fair share of the costs.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patt Meyer, a secretary in the law firm of Keller and Heckman LLP, do hereby certify that a copy of the foregoing REPLY OF THE AMERICAN PETROLEUM INSTITUTE TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION has been served this 30th day of May, 1997, by mailing U.S. First Class, postage prepaid, to the following:

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