State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet. (NGVD)	
				Existing	Modified
			Just upstream of Cedar Street	None	*988
			Approximately 1,200 feet upstream of Cedar Street.	None	*990
		Golf Course Tributary	Just upstream of easternmost corporate limits.	None	*973
			Just upstream of U.S. Route 77	None	*980
			Just upstream of Seventh Street	None	*992
			Just downstream of 15th Street	None	*1,018
		Golf Course Lake Tributary.	At confluence with Golf Course Tributary	None	*995
			Just upstream of Quail Creek Road	None	*1,001
		Brookwood Park Tributary	At confluence with Golf Course Tributary	None	*978
			Just upstream of U.S. Route 77	None	*997
			Just upstream of Seventh Street	None	*1,009
			Just upstream of Ninth Street	None	*1,019
		Wills Lake Tributary	Approximately 600 feet upstream of the confluence with Cow Creek.	None	*980
			Just downstream of U.S. Route 64	None	*986

Maps are available for inspection at 732 Delaware, Perry, Oklahoma.

Send comments to The Honorable G. L. Hollingsworth, Mayor, City of Perry, 622 Cedar Street, Perry, Oklahoma 73077.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: October 24, 1995.

Richard T. Moore,

Associate Director for Mitigation.

[FR Doc. 95–27083 Filed 10–31–95; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[WT Docket No. 95–157; RM–8643; FCC 95–426]

Plan for Sharing the Costs of Relocation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission adopted a *Notice of Proposed Rule Making* (''*Notice*''), proposing a plan for sharing the costs of relocating microwave facilities operating in the 1850 to 1990 MHz (''2 GHz'') band. The Commission's proposal would establish a system whereby Personal Communications Services (''PCS'') licensees that incur costs to relocate microwave links outside of their assigned licensing areas or spectrum blocks would receive reimbursement for a portion of those costs from other PCS licensees that benefit from the resulting clearance of the spectrum. In addition to cost-sharing issues, the Commission asks for comment on whether to clarify certain other aspects of the Commission's microwave relocation rules. Specifically, the Commission seeks comment on whether to clarify the definition of ''good faith'' negotiations, which are required during the mandatory negotiation period; whether to clarify the definition of ''comparable'' facilities, which must be provided to microwave incumbents by PCS licensees who seek involuntary relocation; whether to clarify the rules that allow relocated microwave licensees a 12-month trial period to ensure their new facilities are comparable; whether to continue to grant microwave applications for primary status in the 2 GHz band; and whether to place a time limit on a PCS licensee's obligation to provide comparable facilities. Also, the Commission stated that, as of the date the *Notice* was adopted, it would grant primary status applications only for minor modifications that would not add to the relocation costs of PCS licensees.

DATES: Comments must be filed on or before November 30, 1995, and reply comments must be filed on or before December 21, 1995.

ADDRESSES: Federal Communications Commission, 1919 M Street NW., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Linda I. Kinney, (202) 418–0620, Wireless Telecommunications Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Notice*, adopted on October 12, 1995, and released on October 13, 1995. The complete text of this *Notice* is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 239, 1919 M Street NW., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857–3800, 2100 M Street NW., Suite 140, Washington, D.C. 20037.

I. Background

In the *First Report and Order and Third Notice of Proposed Rule Making* in ET Docket No. 92–9, 57 FR 49020 (October 29, 1992) (''*ET First Report and Order*''), the Commission reallocated the 1850–1990, 2110–2150, and 2160–2200 MHz bands from private and common carrier fixed microwave services to emerging technology services. The Commission also established procedures for 2 GHz microwave incumbents to be cleared off of emerging technology spectrum and relocated to available frequencies in higher bands. The *ET First Report and Order* set forth a regulatory framework that encourages incumbents to negotiate voluntary relocation agreements with emerging technology licensees or manufacturers of unlicensed devices when frequencies used by the incumbent are needed to implement the emerging technology. The *ET First Report and Order* also stated that, should voluntary relocation negotiations fail, the emerging technology licensee could request mandatory relocation of the existing facility, provided that the emerging technology service provider pays the cost of relocating the incumbent to a comparable facility.

In the Commission's 1993 *Third Report and Order and Memorandum Opinion and Order* in ET Docket No. 92–9, 58 FR 46547 (September 2, 1993) (''*ET Third Report and Order*''), as

modified on reconsideration by the Commission's 1994 *Memorandum Opinion and Order,* 59 FR 19642 (April 25, 1994) (''*ET Memorandum Opinion and Order*''), the Commission established additional details of the transition plan to enable emerging technology providers to relocate incumbent facilities to other spectrum. The relocation process now in effect consists of two periods that must expire before an emerging technology licensee may proceed to request involuntary relocation. The first is a fixed two year period for voluntary negotiations (three years for public safety incumbents, *e.g.*, police, fire, and emergency medical), during which the emerging technology providers and microwave licensees may negotiate any mutually acceptable relocation agreement. If no agreement is reached during the voluntary negotiation period, the emerging technology licensee may initiate a one-year mandatory negotiation period—or two-year mandatory period if the incumbent is a public safety licensee—during which the parties are required to negotiate in good faith. Should the parties fail to reach an agreement during the mandatory negotiation period, the emerging technology provider may request involuntary relocation of the existing facility. After relocation, the microwave incumbent is entitled to a one-year trial period to determine whether the facilities are comparable. If the relocated incumbent can demonstrate that the new facilities are not comparable to the former facilities, the emerging technology licensee must remedy the defects or pay to relocate the microwave licensee back to its former or an equivalent 2 GHz frequency.

Because of the pattern of use of the 1850–1990 MHz band by microwave incumbents, the relocation burden on each PCS licensee is not necessarily limited to microwave links within its spectrum block and licensing area. Some spectrum blocks assigned to microwave incumbents overlap with one or more PCS blocks. Also, incumbents' receivers may be susceptible to adjacent or co-channel interference from PCS licensees in more than one PCS spectrum block. In order to clear a particular spectrum block for unrestricted PCS use, a PCS licensee may be required to relocate links in other licensing areas or on other spectrum blocks that would otherwise cause or receive interference.

On May 5, 1995, Pacific Bell Mobile Services filed a Petition for Rulemaking (''PacBell Petition'') that proposed a detailed cost-sharing plan in which PCS licensees on all blocks, licensed and unlicensed, would share in the cost of relocating microwave stations. On May 16, 1995, the Commission requested comments on PacBell's proposal. Initial comments were due on June 15, 1995 and replies were due June 30, 1995. The Commission's cost-sharing proposal is based on PacBell's Petition, as modified by the Personal Communications Industry Association (hereinafter referred to as the ''PCIA consensus proposal'').

II. Notice of Proposed Rule Making

A. Cost-Sharing Proposal

The Commission tentatively concludes that the public interest is served by requiring PCS licensees that benefit from the relocation of a microwave link to contribute to the costs of that relocation. Under the Commission's current rules, the PCS licensee that relocates microwave links (hereinafter referred to as the ''PCS relocator'') has no right to reimbursement if a PCS licensee relocates a microwave link that encumbers another PCS licensee's authorized frequencies or is located in another licensee's territory. Any form of cost-sharing that occurs must be by private, voluntary negotiation. Although affected PCS entities may be able to identify each other and negotiate a joint relocation agreement, parties benefitting from a relocation may not be in a position to reach such an agreement before one of the parties must move the link of its own business reasons. In addition, prior to the licensing of the C, D, E, and F blocks, informal cost sharing of relocation expenses that benefit these blocks in impossible because the licensees for these blocks are unknown. As a result, existing PCS licensees may be hesitant to move links unilaterally without some assurance that future competitors who benefit from the relocation will pay a share of the cost.

The Commission believes that adoption of a mandatory cost-sharing plan would significantly enhance the speed of relocation by reducing the ''free rider'' problem and creating incentives for PCS licensees to negotiate system-wide relocation agreements with microwave incumbents. This would in turn result in faster deployment of PCS and delivery of service to the public. The Commission also tentatively concludes that the PCIA consensus proposals, with a few modifications, offers a practical and equitable approach to allocating the costs of relocation. The mechanics of the plan are set forth in more detail below. The Commission seeks comment on the advantages and disadvantages of adopting mandatory cost-sharing and on the specifics of this proposal.

1. Mechanics of the Cost-Sharing Plan

The Cost-Sharing Formula. Under PCIA's consensus proposal, PCS licensees would be entitled to reimbursement based on a cost-sharing formula. The formula is derived by amortizing the cost of relocating a particular microwave link over a ten-year period. As PCS licensees enter the market, their share of relocation costs is adjusted to reflect the total number of PCS licensees that benefit and the relative time of market entry. The proposed formula is:

$$R_N = \frac{C}{N} \times \frac{\left[120 - \left(T_N - T_1\right)\right]}{120}$$

R equals the amount of reimbursement.

C equals the amount paid to relocate the link.

N equals the next PCS licensee that would interfere with the link. (The PCS relocator is denominated as N=1. After the link is relocated, the next PCS provider that would interfere would be 2, as so on.)

T_N equals T_1 plus the number of months that have passed since the relocator obtained its reimbursement rights.

T_1 equals the month that the first PCS licensee obtained rights to reimbursement (as denoted by the numerical abbreviation for each month, *i.e.*, March=3).

The Commission tentatively concludes that the above formula provides an effective and straightforward means of determining a subsequent licensee's reimbursement obligation. The Commission also tentatively agrees with PCIA that a PCS relocator should be entitled to full reimbursement for relocating links with both endpoints outside of its licensed service area, subject to the reimbursement cap (discussed in further detail below). Such links are unlikely to interfere with the relocator's system, and are easy to identify for purposes of administering the cost-sharing plan. The Commission requests comment on its proposal and any alternatives.

Expenses Already Incurred. The Commission tentatively concludes that PCS licensees should be permitted to seek reimbursement for any relocation costs incurred after the voluntary negotiation period began for A and B block broadband PCS licensees on April 5, 1995. Once the new rules are effective, a clearinghouse would be established (as discussed in further detail below), and receipts from

expenses already incurred would be submitted to the clearinghouse for accounting purposes. This would allow those PCS licensees, which have already relocated or are in the process of relocating microwave systems, to receive the same reimbursement benefit as other PCS licensees that relocate microwave systems after any rule change. The Commission seeks comment on this proposal.

Compensable Costs. Relocation costs can be divided roughly into the following two categories: the actual cost of relocating a microwave incumbent to comparable facilities, and payments above the cost of providing comparable facilities, referred to as ''premium payments.'' The Commission tentatively concludes that premium payments should not be reimbursable, because such payments are likely to be paid by PCS licensees to accelerate relocation so that they can be the first licensee in the market area to offer PCS services. The Commission does not believe later that market entrants should be required to contribute to premium payments, because they have not received the corresponding advantage of being first to market. The Commission therefore proposes to limit the calculation of reimbursable costs under the formula to actual relocation costs. Actual relocation costs would include such items as: radio terminal equipment (TX and/or RX—antenna, necessary feed lines, MUX/Modems); towers and/or modifications; back-up power equipment; monitoring or control equipment; engineering costs (design/path survey); installation; systems testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment (vendor required); spare equipment; project management; prior coordination notification under Section 21.100(d) of the Commission's rules, 47 CFR 21.100(d); site lease renegotiation; required antenna upgrades for interference control; power plant upgrade (if required); electrical grounding systems; Heating Ventilation and Air Conditioning (HVAC) (if required); alternate transport equipment; and leased facilities. The Commission requests comment on this proposal, and on any additional types of costs that commenters believe should be eligible for reimbursement.

Length of Obligation. The Commission tentatively concludes that the cost-sharing plan should sunset for all PCS licensees ten years after the date that voluntary negotiations commenced for A and B block licensees, which means that cost-sharing would cease on April 4, 2005. The Commission believes that it is important to set a date certain on which the clearinghouse will be dissolved, and adopt a cost-sharing plan with the fewest possible variables so that it will be easy to administer. The Commission also believes that this time period is sufficient for all licensees (including those in the C, D, E, and F blocks, which will be licensed in the near future) to complete most relocation agreements. This ten-year period also roughly coincides with the initial PCS license terms and the ten-year depreciation period under the proposed formula. To the extent that some obligations would have extended beyond this date under the formula, the Commission believes that the limited benefit that licensees would receive is outweighed by the cost of maintaining a clearinghouse beyond the ten-year period. The Commission seeks comment on this proposal.

Reimbursement Cap. The Commission tentatively concludes that a cap on the amount subject to reimbursement under the cost-sharing formula is appropriate, because it protects future PCS licensees—who have no opportunity to participate in the negotiations—from being required to contribute to excessive relocation expenses. The Commission also tentatively concludes that a cap will not force microwave licensees to contribute to the cost of their own relocation, because a cap on the amount subject to reimbursement does not limit payments to microwave incumbents. If a cap is imposed, the Commission believes that the amount should be sufficient to cover the average cost of relocating a link. While this may require the initial PCS relocator to bear more of the cost in cases where relocation expenses are unusually high, setting the cap at a higher level could shift the burden unfairly to subsequent licensees in many more cases. Therefore, the Commission tentatively concludes that a $250,000 per link cap (plus $150,000 if a tower is required) is appropriate. This amount has the consensus support of PCS commenters as an accurate approximation of the likely cost of relocating most microwave stations. In addition, UTAM has estimated that relocation costs will average $200,000 per link to cover the same distance as an existing single microwave link. The Commission requests comment on this proposal.

2. Cost-Sharing Obligation

Creation of Reimbursement Rights. The Commission tentatively concludes that the PCS relocator should obtain some form of rights for which it would be entitled to reimbursement. The Commission proposes that, once a PCS licensee and a microwave incumbent have signed an agreement that provides for the relocation of a specified number of microwave links, the parties would submit the relocation agreement to a clearinghouse. On the date that the relocation agreement is submitted, the clearinghouse would replace the name of the microwave incumbent with the name of the PCS relocator in a database maintained for the purpose of determining reimbursement. As of that date, the PCS relocator would become the holder of ''reimbursement rights'' for all links covered by the relocation agreement. When a subsequent PCS licensee begins the prior coordination notice (''PCN'') process required by Section 21.100(d) of the Commission's rules, 47 CFR 21.100(d), that licensee would also contact the clearinghouse to determine whether any PCS relocators hold reimbursement rights for the channel over which it intends to transmit.

The Commission tentatively concludes that the creation of reimbursement rights—which are separate, distinct, and unaffiliated with the underlying microwave license—are preferable to the concept of transferring the microwave incumbent's ''interference'' rights as proposed by PCIA. First, the Commission believes that it is important for the microwave incumbent to retain all of its rights under its original authorization until its new system is in place. Second, any transfer of rights relating to a license (even if only partial rights are being transferred) would require Commission approval under Section 310(d) of the Communications Act, as amended. Thus, under PCIA's proposal, the microwave incumbent would be required to request permission from the Commission to transfer its interference rights to a PCS licensee. The PCS licensee could not obtain the interference rights until the Commission has acted. The Commission believes that such a procedure would be time consuming and administratively cumbersome. Third, the interference rights would have to exist independently from the microwave license, so that they would not be cancelled at the same time the microwave incumbent returns its 2 GHz license to the Commission. The Commission seeks comment on the creation of reimbursement rights.

Another alternative would be for the microwave licensee to assign its microwave license to the PCS licensee under Section 94.47 of the Commission's rules, 47 CFR 94.47, as part of a relocation agreement. The assignment would require Commission

approval, but would effectively transfer the incumbent's entire license to the PCS licensee. The difficulty with this approach is that under Section 94.53 of the Commission's rules, 47 CFR 94.53, the microwave license must be cancelled if the facility has been non-operational for a year. Because the PCS licensee would not operate a microwave system, a mechanism would be required that enables the PCS licensee to exercise its rights after the microwave facility has become non-operational. The Commission seeks comment on the above options and any alternatives.

Definition of Interference. To ascertain whether subsequent licensees are obligated to make a payment under the proposed plan, the Commission must decide what standard will be used to determine interference, and what type of interference (*e.g.,* co-channel, adjacent channel) triggers a cost-sharing obligation. The Commission tentatively concludes that the Telecommunications Industry Association (''TIA'') Bulletin 10–F is an appropriate standard for determining interference for purposes of the cost-sharing plan. TIA Bulletin 10–F is already the standard used to determine PCS-to-microwave interference.

The Commission also notes, however, that the procedures set forth in TIA Bulletin 10–F permit the use of different propagation models and allow alternative technical parameters to be employed. Therefore, TIA Bulletin 10–F may not provide a clear standard for determining interference in some situations. Thus, the Commission seeks comment on whether the application of Bulletin 10–F should be limited in scope for reimbursement purposes to the minimum coordination distance equations. Under this approach, reimbursement would be required for all facilities within the calculated coordination zone from the PCS base station, rather than basing the requirement on the more complex and variable computations of potential interference. The Commission tentatively concludes that use of these minimum coordination distance equations would simplify administration of the test for determining whether a cost-sharing obligation exists, and would reduce the number of disputes that may otherwise arise over whether interference would have occurred if the link were still operational. The Commission requests comment on whether any of the other standard equations of TIA Bulletin 10–F may be applied more easily for purposes of cost-sharing. The Commission also seeks comment on whether there is a more appropriate industry-accepted standard for determining interference.

The Commission also notes that incumbent microwave licensees generally employ receivers with ''receiving bandwidths'' that significantly exceed the authorized bandwidth of the associated transmitter. Accordingly, microwave receivers generally require protection over a frequency range twice as large as the transmission bandwidth (*i.e.,* a microwave station with a 5 MHz transmit bandwidth would require protection within a 10 MHz band to protect its corresponding receive station). For purposes of determining a reimbursement obligation, however, the Commission proposes to consider only interference that occurs co-channel to the transmit and receive bandwidth of the incumbent microwave licensee. For reimbursement and cost-sharing purposes only, the Commission proposes that a 5 MHz bandwidth transmit microwave station would receive only 5 MHz protection for its receive stations (rather than the 10 MHz adjacent channel protection it would typically require to protect its receive station). Excluding adjacent channel interference for purposes of cost-sharing will serve to simplify administration of the cost-sharing plan by providing more certainty in determining when a reimbursement obligation exists. Also, it would reduce the number of receive stations that would be calculated to receive interference, thereby limiting the number of situations under which reimbursement is required. The Commission seeks comment on this proposal and any alternatives. The Commission also requests comment on whether adjacent channel interference (*i.e.,* 5 MHz transmit and 10 MHz receive protection) should be included for purposes of determining a reimbursement obligation.

With respect to the type of interference that should trigger a cost-sharing obligation, the Commission tentatively concludes that a two-part test should be adopted for determining whether reimbursement is required. Thus, a subsequent licensee would be required to reimburse the PCS relocator only if (1) The subsequent PCS licensee's system would have caused co-channel interference to the link that was relocated, and (2) at least one endpoint of the former link was located within the subsequent PCS licensee's authorized market area. The Commission requests comment on whether reimbursement should also be required if the link that is relocated would have caused adjacent-channel interference to the subsequent licensee, and whether it would be difficult to determine if adjacent-channel interference would have occurred.

Payment Issues. The Commission tentatively concludes that a PCS licensee should be required to pay under the cost-sharing formula at the time that its operations would have caused interference with the relocated link. The Commission also tentatively concludes that a PCS licensee's reimbursement obligation should be determined at the time frequency coordination is required. Thus, the Commission proposes that PCS licensees contact the clearinghouse to determine reimbursement obligations prior to initiating service, although payment would not be due in full until the date that the PCS licensee commences commercial operations. The Commission seeks comment on these proposals.

In addition, the Commission tentatively concludes that PCS licensees that are allowed to pay for their licenses in installments under the Commission's designated entity rules should have the same option available to them with respect to payments under the cost-sharing formula. The Commission also tentatively concludes that the installment payment option should be extended to the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (''UTAM''). Allowing cost-sharing payments to be made in installments will significantly ease the burden of cost-sharing for these entities. The Commission further proposes that the specific terms of the installment payment mechanism, including the treatment of principal and interest, would be the same as those applicable to the licensee's auction payments described above. Thus, if a licensee is entitled to pay its winning bid in quarterly installments over ten years, with interest-only payments for the first year, it would pay relocation costs under the same formula. Because UTAM receives its funding in small increments over an extended period of time, the Commission tentatively concludes that UTAM should qualify for the most favorable installment payment plan available to small businesses with gross revenues of $40 million or less. UTAM would therefore be permitted to make its payments on the same terms as the C Block small businesses (*i.e.,* using installments, at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted, and requiring that payments include interest only for the first six years with payments of principal and interest amortized over the remaining four years of the license term). The Commission

seeks comment on whether the repayment schedules and interest rates that it adopted for repaying auction bids are appropriate for cost-sharing purposes.

3. Role of Clearinghouse

The Commission tentatively concludes that if the proposed cost-sharing plan is adopted, it should be administered by an industry-supported clearinghouse. The Commission believes an industry-supported clearinghouse is preferable to having the cost-sharing plan administered by the Commission for several reasons. First, administration of the plan by the Commission would be a significant drain on the Commission's administrative resources. Second, the Commission believes that the PCS industry has the capability and the incentive to support an industry clearinghouse. The Commission does not propose at this time to designate any particular organization as the clearinghouse, but seeks comment on the criteria it should use for designating a clearinghouse, and on whether it should be an existing organization or a new entity created for this purpose. The Commission also seeks comment on how the clearinghouse would be funded. One possibility would be for PCS licensees who seek reimbursement under the cost-sharing plan to pay an administrative fee to the clearinghouse for each relocated link that is potentially compensable under the plan. The Commission believes that any fees assessed should be tied to the actual administrative costs of operating the clearinghouse. The Commission seeks comment on the appropriate fee level, as well as on any possible alternative approaches to funding the clearinghouse.

PCS licensees that seek reimbursement under the formula would be required to submit all applicable data, including contracts, to the clearinghouse, which would open a file for each relocation. The clearinghouse would then determine whether operation by the new PCS licensee would have caused interference to a relocated microwave facility, based on TIA Bulletin 10–F. If interference would have occurred, the clearinghouse would notify the new licensee of its reimbursement share under the formula. The Commission seeks comment regarding potential confidentiality issues with respect to information submitted to the clearinghouse. The Commission believes that specific information regarding relocation costs will need to be available to parties that wish to verify the accuracy of the clearinghouse's reimbursement calculations. The Commission also believes that an open flow of information is important to the smooth administration of the cost-sharing plan, which in turn is likely to facilitate productive negotiations between PCS licensees and microwave incumbents. Finally, the Commission believes that confidentiality issues should be resolved by PCS and microwave licensees rather than by the Commission. The Commission therefore seeks comment on the extent to which the cost-sharing proposal can accommodate the confidentiality concerns of the parties.

4. Dispute Resolution Under the Cost-Sharing Plan

The Commission tentatively concludes that disputes arising out of the cost-sharing plan (*i.e.*, disputes over the amount of reimbursement required, etc.) should be brought, in the first instance, to the clearinghouse for resolution. To the extent that disputes cannot be resolved by the clearinghouse, the Commission encourages parties to use expedited alternative dispute resolution procedures (''ADR''), such as binding arbitration, mediation, or other ADR techniques. The Commission seeks comment on this proposal and on any other mechanisms that would expedite resolution of these disputes, should they arise. The Commission also seeks comment on whether parties should be required to submit independent appraisals of valuations to the clearinghouse at the time such disputes are brought to the clearinghouse for resolution. In addition, the Commission seeks comment on whether failure to comply with cost-sharing obligations should be taken into consideration by the Commission when deciding on renewal and/or transfer of control or assignment applications.

B. Relocation Guidelines

1. Good Faith Requirement During Mandatory Negotiations

If a relocation agreement is not reached during the voluntary negotiation period, the Commission stated in the *ET Third Report and Order* that the PCS licensee may initiate a mandatory negotiation period, during which the parties are required to negotiate in good faith. The Commission believes that clarification of the term ''good faith'' will facilitate negotiations and help reduce the number of disputes that may arise over varying interpretations of what constitutes good faith. The Commission tentatively concludes that, for purposes of the mandatory period, an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities (defined in further detail below) constitutes a ''good faith'' offer. Likewise, an incumbent that accepts such an offer presumably would be acting in good faith; whereas, failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Comparable facilities, as explained below, would be limited to the actual costs associated with providing a replacement system, and would exclude any expenses (*e.g.*, consultant fees) incurred by the incumbent without securing the approval in advance from the PCS relocator. The Commission seeks comment on this proposal. The Commission also seeks comment on the appropriate penalty to impose on a licensee that does not act in good faith.

2. Comparable Facilities

The Commission continues to believe that the current negotiation process is the most appropriate means for determining comparability of the existing and replacement facilities. The Commission believes that, in the vast majority of cases, this procedure provides parties with the necessary flexibility to negotiate terms for determining comparability that are mutually agreeable to all parties without the need for government intervention or mandate. Nonetheless, the Commission recognizes that because comparability is such a key concept of the Commission's rules, some clarification of the responsibilities and obligations of the parties with regard to comparability would be helpful. Accordingly, the Commission proposes to clarify the factors that it will use to determine when a facility is comparable, *i.e.*, equal to or superior to the fixed microwave facility it is replacing.

The Commission previously stated in the *ET Third Report and Order* that to determine comparability it will consider, *inter alia*, system reliability, capability, speed, bandwidth, throughput, overall efficiency, bands authorized for such services, and interference protection. The Commission notes, however, that many of these factors are inter-related and that equivalency in each and every one of these factors is not necessary for comparability. The Commission therefore now proposes to clarify that the three main factors it will use to determine when a facility is comparable are: *communications throughput*, *system reliability*, and *operating cost*. A replacement facility will be presumed

comparable if the new system's communications throughput and reliability are equal to or greater than that of the system to be replaced, and the operating costs of the replacement system are equal to or less than those of the existing system. This will ensure that incumbent users will perceive no qualitative difference between the original and replacement facilities.

For the purpose of determining comparability, the Commission proposes to define communications throughput as the amount of information transferred within the system for a given amount of time. For digital systems this is measured in bits per second (''bps''), and for analog systems the throughput is measured by the number of voice and or data channels. The Commission proposes to define system reliability as the amount of time information is accurately transferred within the system. The reliability of a system is a function of equipment failures (*e.g.*, transmitters, feed lines, antennas, receivers, battery back-up power, etc.), the availability of the frequency channel due to propagation characteristic (*e.g.*, frequency, terrain, atmospheric conditions, radio-frequency noise, etc.), and equipment sensitivity. For digital systems this would be measured by the percent of time the bit error rate (''ber'') exceeds a desired value, and for analog transmissions this would be measured by the percent of time that the received carrier-to-noise ratio exceeds the receiver threshold. The Commission proposes to define operating cost as the cost to operate and maintain the microwave system. For the purpose of defining comparable systems, the Commission proposes to assume that the operating cost of all microwave systems are the same provided that they contain the same number of links. The Commission also proposes to consider facilities comparable in cases where the specific increased costs associated with the replacement facilities (*e.g.*, additional tower and associated radio equipment requirements, additional rents, or land acquisition costs) are paid by the party relocating the facility, or the existing microwave operator is fully compensated for those increased costs. The Commission proposes that any recurring costs be limited to a single ten-year license term. The Commission seeks comment on these definitions.

The Commission recognizes that comparable replacement facilities can be provided by ''trading-off'' system parameters. For example, communications throughput may be increased by using equipment with a more efficient modulation technique, and system reliability may be improved by using better equipment, by adding redundancy in system design (*e.g.*, multiple receive antennas) or by providing additional coding, such as forward error correction. Therefore, a system designer may take advantage of these system ''trade-offs'' to provide comparable facilities.

The Commission also proposes to clarify that the obligation to provide comparable facilities under involuntary relocation requires a PCS licensee to pay the cost of relocating only the specific microwave links in the incumbent's system that must be moved to prevent harmful interference by the PCS licensee's system. While the Commission expects that PCS licensees may voluntarily undertake to relocate entire microwave systems that include non-interfering links outside the PCS licensee's particular service area, it does not regard this as a requirement under involuntary relocation. With respect to those links that do cause interference, however, PCS licensees must provide incumbents with a seamless transition from the old facilities to the replacement facilities. Thus, it may be both more efficient and more cost-effective in many instances for the parties to move all of the links in a system at once rather than to relocate them piecemeal. The Commission seeks comment on this analysis. The Commission also tentatively concludes that comparable facilities would be limited to the actual costs associated with providing a replacement system (*e.g.*, equipment, engineering expenses). The Commission proposes to exclude extraneous expenses, such as fees for attorneys and consultants that are hired by the incumbent without the advance approval of the PCS relocator. The Commission considers such extraneous expenses to be ''premium payments'' that are not reimbursable after the voluntary negotiation period has concluded. The Commission seeks comment on its proposal and any alternatives.

In assessing comparability, the Commission also seeks comment on how to account for technological disparities between old and new microwave equipment. In many cases, microwave incumbents may seek to replace old 2 GHz analog technology with new digital technology on the relocated channel. The Commission encourages such agreements, but it does not regard PCS licensees as being required to replace existing analog with digital equipment when an acceptable analog solution exists. Thus, the cost obligation of the PCS licensee would be the minimum cost the incumbent would incur if it sought to replace but not upgrade its system. The Commission seeks comment on this proposal and on any alternatives.

The Commission also seeks comment on whether and how depreciation of equipment and facilities should be taken into account.

Furthermore, the Commission seeks comment on whether additional information about the value of an incumbent's current system and the anticipated costs of relocation would also help to facilitate negotiations. For example, the Commission could require that two independent cost estimates—prepared by third parties not associated or otherwise affiliated with either the incumbent licensee or the PCS provider—be filed with the Commission by parties that have not reached an agreement within one year after the commencement of the voluntary negotiation period (April 4, 1996 for A and B block licensees). The Commission seeks comment on whether it should require the parties to submit such cost estimates during the voluntary negotiation period. The Commission also seeks comment on what procedures should be used if the microwave incumbent and the PCS licensee cannot agree on a third party to prepare the independent cost estimate.

3. Public Safety Certification

In the *ET Third Report and Order*, the Commission identified the select group of public service licensees that warrant special protection (*e.g.*, an extended voluntary negotiation period). The Commission tentatively concludes the PCS licensees should have a readily available means of confirming a microwave licensee's public safety status. Thus, the Commission proposes that a public safety licensee should be required to establish: (1) that it is eligible in the Police Radio, Fire Radio, or Emergency Medical, or Special Emergency Radio Services, (2) that it is a licensee in one or more of these services, and (3) that the majority of communications carried on the facilities involve safety of life and property. Under the Commission's proposal, if the incumbent fails to provide the PCS licensee with the requisite documentation, the PCS licensee may presume that special treatment is inapplicable to the incumbent. The Commission seeks comment on this proposal.

C. Twelve-Month Trial Period

Section 94.59(e) of the Commission's rules, 47 CFR 94.59(e), provides a twelve-month period for relocated microwave incumbents to test their new

facilities. The purpose of the twelve-month trial period is to ensure that microwave incumbents have a full opportunity to test their new systems under real-world operating conditions and to obtain redress from the PCS licensee if the new system does not perform comparably to the old system or pursuant to agreed-upon terms. The Commission proposes that this period should commence at the time that the microwave licensee begins operations on its new system. The Commission also tentatively concludes that microwave licensees that have retained their 2 GHz authorizations during the twelve-month trial period should surrender them at the conclusion of that period.

Moreover, the Commission does not believe that microwave licensees are required to retain their 2 GHz licenses through the trial period in order to retain their rights to relocation and comparable facilities. Section 94.59 of the Commission's rules, 47 CFR 94.59, provide that, if the new facility is found not to be comparable during the trial period, the PCS licensee must either cure the problem, restore the incumbent to its original frequency, or pay to relocate it to an equivalent 2 GHz frequency. In the Commission's view, all of these rights reside with the incumbent as a function of the Commission's relocation rules, regardless of whether the incumbent has previously surrendered its license. The Commission therefore proposes to clarify its rules to indicate that a microwave license may surrender its license as part of a relocation agreement without prejudice to its rights under the Commission's relocation rules. The Commission requests comment on this proposal.

D. Licensing Issues

1. Interim Licensing

As a general matter, the Commission tentatively concludes that allowing additional primary site grants in the 2 GHz band now that relocation negotiations are ongoing will unnecessarily impede negotiations and may add to the relocation obligations of PCS licensees. Nevertheless, the Commission recognizes that some minor technical changes to existing microwave facilities may be necessary for incumbents' continued operations. The Commission does not believe, however, that these minor technical modifications will significantly increase the cost to a PCS licensee of relocating a particular link.

To the extent practicable the Commission proposes to continue applying the current rules governing primary and secondary status to modification and minor extension applications pending as of the adoption date of the *Notice.* While the rulemaking proceeding is pending, the Commission will continue to accept applications for primary status, however it will process only minor modifications that would not add to the relocation costs of PCS licensees. Thus, while the rulemaking proceeding is pending, the Commission will grant primary status applications for the following limited number of technical changes: decreases in power, minor changes in antenna height, minor coordinate corrections (up to two seconds), reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and changes in equipment. Any other modifications will be permitted only on a secondary basis, unless a special showing of need justified primary status and the incumbent is able to establish that the modification would not add to the relocation costs of PCS licensees. In addition, the Commission will carefully scrutinize any applications for transfer of control or assignment to establish that its microwave relocation procedures are not being abused, and that the public interest would be served by the grant.

As of the adoption date of its new rules, the Commission proposes to grant all other modifications and extensions solely on a secondary basis (with the exception of the minor technical changes listed above). Secondary operations may not cause interference to operations authorized on a primary basis, and they are not protected from interference form primary operations. The Commission believes that granting secondary site authorizations serves the public interest, because it balances existing licensees' need to expand their systems with the goal of minimizing the number of microwave links that PCS licensees must relocate. The Commission seeks comment on this proposal.

2. Secondary Status After Ten Years

Section 94.59(c) of the Commission's rules, 47 CFR 94.59(c), states that the Commission will amend the operation license of the fixed microwave operator to secondary status only if the emerging technology service entity provides that 2 GHz incumbent with comparable facilities. The Commission tentatively concludes that microwave incumbents should not retain primary status indefinitely on spectrum licensed for emerging technology services. Thus, the Commission proposes that microwave incumbents that are still operating in the 1850–1990 MHz band on April 4, 2005, should be made secondary on that date. This date coincides with the date that the clearinghouse would be dissolved and provides adequate time for completion of microwave relocation. The Commission seeks comments on whether there should be some time limit placed on the emerging technology provider's obligation to provide comparable facilities.

III. Procedural Matters and Ordering Clauses

A. Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Notice.* Written public comments are requested on the IRFA.

Reason for Action: This rulemaking proceeding was initiated to secure comment on a proposal for sharing costs among broadband PCS licensees that will relocate 2 GHz point-to-point microwave licensees currently operating on the spectrum blocks allocated for PCS. This proposal would promote the efficient relocation of microwave licensees by encouraging PCS licensees to relocate entire microwave systems, rather than individual microwave links, thus bringing PCS services to the public in an efficient manner. The Commission has also proposed to clarify the terms ''comparable facilities'' and ''good faith'' negotiations, to clarify some aspects of the twelve-month trial period after relocation, and has proposed to grant all microwave applications for modifications and extensions solely on a secondary basis (with the exception of the minor technical changes listed in the *Notice*).

Objectives: The Commission's objective is to require PCS licensees that benefit from the relocation of a microwave link to contribute to the costs of that relocation. A cost-sharing plan is necessary to enhance the speed of relocation and provide an incentive to PCS licensees to negotiate system-wide relocation agreements with microwave incumbents. This action would result in faster deployment of PCS and delivery of service to the public.

Legal Basis: The proposed action is authorized under the Communications Act, Sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), 332, as amended.

Reporting, Recordkeeping, and Other Compliance Requirements: Under the proposal contained in the *Notice,* PCS

licensees that relocate microwave systems would be required to document the relocation costs paid and report them to a central clearinghouse. Later PCS market entrants would then be required to file Prior Coordination Notices with the clearinghouse and, if necessary, reimburse the initial relocating PCS licensee on a *pro rata* basis.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: This proposal would benefit small microwave incumbents by encouraging PCS licensees to relocate entire microwave systems, rather than individual links that interfere with the PCS licensee's operations. Microwave licensees would therefore begin operations on their new channels in an expedited fashion. The 2 GHz fixed microwave bands support a number of industries that provide vital services to the public. The Commission is committed to ensuring that the incumbents' services are not disrupted and that the economic impact of this proceeding on the incumbents is minimal. The Commission must further take into consideration that not all of the incumbent licensees are large businesses, particularly in the bands above 2 GHz, and that many of the licensees are local government entities that are not funded through rate regulation. The Commission believes that this proceeding would further the Commission's policy of encouraging voluntary agreements to relocate fixed microwave facilities to other bands during the two-year period. After evaluating comments filed in response to the *Notice*, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The Commission has reduced burdens wherever possible. The regulatory burdens the Commission has retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. The Commission will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

IRFA Comments: The Commission requests written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines set forth in the *Notice.*

B. Paperwork Reduction Act

The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Dates. Written comments on information collection requirements should be submitted on or before January 2, 1996. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed, you should advise the contact person listed below as soon as possible.

Address. Direct all comments to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554, or via Internet to dconway@fcc.gov; and Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th St., N.W., Washington, DC 20503, or via Internet to fain__t@al.eop.gov.

Further Information. For further information contact Dorothy Conway, (202) 418–0217, or via Internet at dconway@fcc.gov.

Supplementary Information:

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

Type of Review: New collection.

Respondents: Personal Communications Service licensees that relocate existing microwave operators, and subsequent Personal Communications Service applicants potentially benefitted by such relocation.

Number of Respondents: Approximately 2,000.

Estimated Time Per Response: 15 minutes for each of approximately 2,000 respondents to photocopy and mail information; 40 hours for an existing or newly-created industry representative to establish and operate clearinghouse.

Total Annual Burden: Approximately 540 hours.

Needs and Uses: The Commission recently initiated a proceeding proposing a plan for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHz band, which has been allocated for use by broadband Personal Communications Services. Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *Notice of Proposed Rule Making,* adopted October 12, 1995. The Commission's *Notice* would establish a mechanism whereby PCS licensees that incur costs to relocate microwave links would receive reimbursement for a portion of those costs from other PCS licensees that also benefit from the resulting clearance of the spectrum.

The *Notice* proposes that once a PCS licensee and a microwave incumbent have signed an agreement with respect to relocation of the microwave licensee, the parties would submit the relocation agreement to an industry-supported clearinghouse. The clearinghouse would maintain a computer database for the purpose of determining the appropriate amount of reimbursement owed to the relocator PCS licensees by subsequent PCS licensees who are benefitted by the relocation. When a subsequent PCS licensee begins the prior coordination notice process already required by Section 21.100(d) of the Commission's rules (*i.e.* proposed frequency usage must be prior coordinated with existing users and previously filed applicants in the area), that licensee would also contact the clearinghouse to determine whether any PCS relocators hold reimbursement rights for the channel over which it intends to transmit. The clearinghouse would then determine whether operation by the new PCS licensee would have caused interference to a relocated microwave facility. If so, the clearinghouse would notify the new licensee of its reimbursement share under a predetermined formula.

Thus, the *Notice* tentatively concludes that if the proposed cost-sharing plan is adopted, it should be administered by an industry-supported clearinghouse rather than by the Commission. PCS licensees that seek reimbursement would be required to submit all applicable data, including contracts, to the clearinghouse. To the extent that disputes cannot be resolved by the clearinghouse, the *Notice* proposes to encourage parties to use expedited alternative dispute resolution

procedures such as binding arbitration, mediation or other techniques. The *Notice* seeks comment on the criteria the Commission should use in designating a clearinghouse, and on how the clearinghouse would be funded. The *Notice* suggests that one funding possibility might be for PCS licensees seeking reimbursement under the cost-sharing plan to pay an administrative fee to the clearinghouse.

The legal authority for this proposed information collection includes 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), 303(r) and 332. The information collection would not affect any FCC Forms. The proposed collection would increase minimally the burden on PCS licensees that relocate existing microwave licensees and on future PCS applicants that might have benefited from the relocation by requiring them to file already-existing paperwork with an industry-supported clearinghouse.

C. Ex Parte Rules—Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules, 47 CFR 1.1202, 1.1203, and 1.1206(a).

D. Comment Period

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before November 30, 1995, and reply comments on or before December 21, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. A copy of all comments should also be filed with the Commission's copy contractor, ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857–3800.

E. Authority

The proposed action is authorized under the Communications Act, Sections 4(i), 7, 303(c), 303(f), 303(g), 303(r), and 332, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r), 332, as amended.

F. Ordering Clause

It is ordered that, as of the adoption date of the *Notice*, the Commission will continue to accept microwave applications for primary status in the 2 GHz band, however the Commission will process only minor modifications that would not add to the relocation costs of PCS licensees, as described in this *Notice*. This constitutes a procedural change which is not subject to the notice and comment and 30-day effective date requirements of the Administrative Procedure Act. *See Neighborhood TV Co., Inc.* v. *FCC*, 742 F.2d 629 (D.C. Cir. 1984); *Buckeye Cablevision Inc.* v. *United States*, 438 F.2d 948 (6th Cir. 1971). In any event, good cause exists under 5 U.S.C. Section 553(b)(3)(B) and (d)(3), because additional primary site grants in the 2 GHz band will unnecessarily impede the purpose of the current relocation rules and any new relocation rules adopted in this proceeding.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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