

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL
FILE

In the Matter of)
)
Amendment of Section 90.75 (c)(10))
of the Commission's Rules and)
Regulations to Permit Private)
Carrier Paging Licensees to)
Provide Service to Individuals)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RULE MAKING
OF THE
ASSOCIATION FOR PRIVATE CARRIER PAGING SECTION
OF THE
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

Respectfully submitted,

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SUMMARY

The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP") respectfully submits a Petition for Rule Making which seeks to amend Section 90.75(c)(10) of the Commission's Rules to permit Private Carrier Paging ("PCP") systems operating on paging-only frequencies to provide service to individuals.

APCP believes that circumstances now exist that make it appropriate for the Commission to expand the definition of eligible users of PCP service to include individuals. Such a rule change is justified for the following reasons: (1) the change in the market distribution of pagers (as well as other communication devices) has created a need for an easing of regulatory burdens to facilitate sales; (2) the increased use of pagers and growth of evolving "personal communications" by users of mobile communications in both commerce and in daily life is needed in order to allow PCP systems to grow and compete in a changing environment; and (3) current eligibility restrictions on PCPs have been and continue to be used in an anti-competitive manner by competitor and state regulatory commissions.

The expansion of eligibility to include individuals would ease the current regulatory burden placed upon PCP licensees which use resellers as an additional means of distribution. PCP licensees face a continuing liability problem, particularly in cases where the reseller breaches the applicable agreement and sells a paging unit to an ineligible individual. In addition, an individual may

purchase a paging unit and falsify on the verification statement his or her intention to use the unit for a "business purpose".

Although the Commission specified in Docket No. 89-45 that individuals who need pagers for business purposes are eligible as end users on PCP systems, the practical reality of PCP operations means that such users are frequently unable to obtain service from a PCP operator. In this regard, complaints by competing RCC paging operators that a PCP system is serving ineligible users (even though such users fit squarely within the Commission interpretation of its eligibility rule) have led to a hesitancy by a number of PCP operators to provide service to "business individuals". Expansion of eligibility to include individuals would eliminate the continuing efforts of some local radio common carriers to undermine the competitive alternative service offered by PCP operator.

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AND EDUCATIONAL RADIO, INC.

The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP") by its attorneys, respectfully submits, pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. §1.401, a Petition for Rule Making which seeks to amend Section 90.75(c)(10) of the Commission's Rules to permit Private Carrier Paging ("PCP") systems operating on paging-only frequencies to provide service to individuals. In support thereof, the following is shown:

I. BACKGROUND

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of license in the private land mobile radio services.

In 1989, the Association for Private Carrier Paging ("APCP") was established by Private Carrier Paging ("PCP") providers under

the auspice of NABER. Since that time, the Association expanded its membership to over 200 companies. This group has been actively involved in a variety of Commission proceedings, including filing Comments in PR Docket No. 88-548 (Frequency Coordination) and PR Docket No. 89-552 (Allocation of 220 MHz). APCP has developed committees which have met with Commission officials on several occasions to discuss issues of importance to APCP, and APCP committees are currently exploring means by which paging systems can more efficiently share the scarce spectrum made available for private carrier paging.

In January, 1991, the Commission amended its rules to expand eligibility and shared use criteria for Private Land Mobile frequencies.¹ In the proceeding, the Commission addressed the following issues: (i) whether to expand eligibility for private carrier operations on two-way channels below 800 MHz; (ii) whether to allow private carriers operating in the Business Radio Service to serve all Part 90 eligibles rather than only Business Radio Service eligibles; and (iii) whether to permit private carrier paging providers licensed on paging-only channels in the Business Radio Service below 800 MHz and on the private carrier paging channels at 900 MHz to serve individuals and the Federal Government.

After review of over 500 Comments and Reply Comments submitted in the proceeding, the Commission declined to expand eligibility for private carrier operations on two-way channels below 800 MHz.

¹Report and Order, PR Docket No. 89-45, 68 RR 2d 1069 (1991).

The Commission cited the overriding spectrum management issue for not adopting these proposals and encouraged ineligible end users to seek other available options that employ less crowded frequencies, including SMR services.

However, the Commission did adopt the proposal which permits PCP licensees to provide one-way paging communications to persons eligible for licensing under Subparts B,C,D and E of Part 90, and not merely to Business Radio Service eligibles. Furthermore, the Commission amended its rules to permit licensees of paging-only channels in the Business Radio Service and licensees on PCP channels in the 929-930 MHz band to provide service to representatives of Federal Government agencies.

II. ELIGIBILITY TO SUBSCRIBE TO PCP SERVICES SHOULD INCLUDE INDIVIDUALS

In amending its rules to expand eligibility and shared use criteria for Private Land Mobile frequencies, the Commission declined to expand PCP service to individuals. The Commission, nonetheless, recognized that "individuals who need pagers for business purposes, as opposed to individuals who are simply members of the general public with no business requirements for pagers, are eligible in their own right under current rules..."²

APCP believes that circumstances now extent that make it appropriate for the Commission to expand the definition of eligible users of PCP service to include individuals. Such a rule change is justified for the following reasons: (1) the change in the

²Report and Order, PR Docket No. 89-45, 68 RR 2d 1069, fn. 22 (1991).

market distribution of pagers (as well as other communication devices) has created a need for an easing of regulatory burdens to facilitate sales; (2) the increased use of pagers and growth of evolving "personal communications" by users of mobile communications in both commerce and in daily life is needed in order to allow PCP systems to grow and compete in a changing environment; and (3) current eligibility restrictions on PCPs have been and continue to be used in an anti-competitive manner by competitor and state regulatory commissions.³

A. The Increasing Demand for Use of Pagers and Mobile Communications in both Commerce and for Personal Communication Use Necessitates a Lifting of the Restrictions on Eligibility

The changing manner in which mobile communication equipment is being marketed and sold emphasizes the increased use of pagers by all facets of the population. Paging services have become commodities with businesses and customers both demanding ready access to paging services. This ready access requirement has spawned multiple means of product and several means of distribution not previously relied on by paging carriers. A pager may be sold

³The Commission may want to also clarify in conjunction with this proceeding, the application of the permissible communications rules under Section 90.405(a)(2). NABER believes that the Commission's Rules regarding permissible communications do not apply to PCP systems. Specifically, the Section restricts communications to activities which make the licensee eligible for its authorization or, in the case of a shared station, the activities which make the shared users eligible. On PCP systems, the licensee generally makes little use of the system, and the system is not shared for purposes of Section 90.179 of the Commission's Rules. Notice of Proposed Rule Making, PR Docket No. 92-78, 57 FR 20069 (May 11, 1992) at footnote 38. However, in the event the Commission is not in agreement with this interpretation, Section 90.179 of the Rules will need to be modified as well.

today by specialty electronic retailers or, just as likely, by a multi-purpose retailer, who stocks pagers as easily as men's or women's clothing.

Pagers which were once solely used by a select member of businesses are now used in all facets of commerce as well as by an increasing number of people in the conduct of the "business" of their daily lives. The Commission is currently considering amending its rules to establish new personal communication services⁴, which would significantly increase the options available to individual communications users. The expansion of PCP services as requested herein would continue the present Commission policy of providing additional communications alternatives and services to land mobile users, including individuals. Such proceedings and developments in the mobile communications industry unequivocally justify and demonstrate the need to expand PCP eligibility.

The expansion of eligibility to include individuals would ease the current regulatory burden placed upon PCP licensees which use resellers as an additional means of distribution. Currently, it is a common practice in the paging industry for PCP licensees to sell large numbers of paging "numbers" to resellers, which subsequently sell paging units to eligible users pursuant to the terms of reseller agreements. The typical reseller agreement customarily includes specific language which provides that the reseller agrees not to sell paging units to ineligible users. Such an agreement may also require the reseller to obtain a signed

⁴Gen. Docket No. 90-314 69 RR 2d 1551 (1990).

eligibility verification from the user. However, PCP licensees face a continuing liability problem, particularly in cases where the reseller breaches the applicable agreement and sells a paging unit to an ineligible individual. In addition, an individual may purchase a paging unit and falsify on the verification statement his or her intention to use the unit for a "business purpose". For example, a purchaser of a paging unit may initially certify to a reseller his intention to use the unit for a business purpose. The user could conceivably cease business activity and continue receiving paging service. In each case, the PCP licensee remains solely responsible for complying with FCC rules and regulations and can be penalized for violations, even though the PCP licensee has little ability to prevent such abuses.

Further, the manner in which most PCP systems operate (selling bulk numbers to resellers which then approach customers) means that PCP operators do not always have direct control over which customers actually get on the system, despite any efforts the operator may take to ensure that resellers only enter agreements with eligible users. In addition, since many companies which are eligible for service on the system purchase numerous units for their employees, the PCP operator may not always know to whom the eligible company has distributed the pagers.

A prudent PCP licensee may simply refuse to sell a "number" where a question exists regarding the eligibility of a user, rather than risk jeopardizing the PCP license. This result clearly does not promote efficient spectrum utilization and deprives an

otherwise eligible user of needed service. The expansion of PCP service to individuals would eliminate the practical regulatory burden on both PCP licensees and resellers of distinguishing between individuals who are purchasing pagers for a business purpose and those who are not and who are therefore ineligible users.

B. Current Eligibility Restrictions on PCPs Have Been and Continue to be Used in an Anti-Competitive Manner and Create Unnecessary Regulatory Burdens

Although the Commission specified in Docket No. 89-45 that individuals who need pagers for business purposes are eligible as end users on PCP systems, the practical reality of PCP operations means that such users are frequently unable to obtain service from a PCP operator. In this regard, complaints by competing RCC paging operators that a PCP system is serving ineligible users (even though such users fit squarely within the Commission interpretation of its eligibility rule) have led to a hesitancy by a number of PCP operators to provide service to "business individuals". The threat of having to defend at a significant legal cost the unfounded allegations made by some competitors creates a "chilling effect" on PCP operators and equipment retailers, deterring the provision of desirable and lawful service. Expansion of eligibility to include individuals would eliminate the continuing efforts of some local radio common carriers to undermine the competitive alternative service offered by PCP operator.⁵ Such a proposed rule change would thereby stop one of the tools by which common carrier

⁵See, for example, American Teltronix, 65 RR 2d 338 (1988).

paging operations have sought to impose barriers to PCP competition.

C. Expansion of Eligibility to Individuals on PCPs would be Consistent with Commission Policy in Similar Private Carrier Services

Expansion of eligibility to individuals would effectuate the Commission's recognized goal of providing as many communication service options to potential users as possible.⁶ The Commission has already recognized, in other proceedings, the need and desirability of increasing communications alternatives and services for individuals. In February, 1988, as part of its action in PR Docket No. 86-404, the Commission extended eligibility for Specialized Mobile Radio systems ("SMRs") to individuals and the Federal Government in order to increase the availability of communications options and to enhance spectrum efficiency.⁷

In PR Docket No. 86-404, the Commission recognized the small percentage of potential users which were not otherwise eligible for service, and the Commission took the step of expanding eligibility in order to increase service options for potential users as well as easing regulatory burdens for system operators. Presently, individuals may obtain service from common carrier providers. However, common carrier providers, by virtue of their common carrier status, may not be able or permitted to meet specialized

⁶See, Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838, 1047 (1988), wherein the Commission stated that in "Section 331(a)(3) Congress specifically provided that the private radio services should be accessible to the largest feasible number of users."

⁷Id.

requirements of certain customers.⁸ The proposed rule change will increase the service options for such customers.

PCP operators merit change in the eligibility restriction for the same technical and policy considerations based on which the Commission has eliminated end user eligibility restriction for SMR customers. Similar to SMR base station licensees, the PCP operator retains control over its system and the customers which use the System. Expansion of eligibility on PCPs should not undermine the availability of spectrum for users on a PCP. PCP operators are not required to provide their service to any party that is eligible. Consistent with the Commission's intent as a private carrier the PCP licensee may make individualized decisions to include or exclude a particular user or class of users if the operator does not choose to serve such person or groups. Accordingly, lifting the current restriction on PCP eligibility should not cause spectrum shortages nor a deterioration in the quality of communications.

The Commission found in PR Docket 86-404 that the expansion of eligibility was consistent with Section 331(a)(3) of the Communications Act, wherein Congress provided that the private radio services should be accessible to the largest feasible number of users.⁹ The rule change proposed by APCP in this proceeding is consistent with Congress' stated goal.

⁸Id. at para. 33.

⁹Id.

Expansion of eligibility as proposed by NABER will not affect the legal status of PCP systems. Because PCP licensees do not resell interconnected telephone service, they are not common carriers under Section 331(c)(1) of the Act, regardless of who their customers are. Their private carrier status is not affected by an expansion of end users eligibility.

The legislative history of the Communications Amendments Act of 1982 indicates that the reference to "eligible users" in the general definition of the private land mobile service in Section 3(gg) was not intended to restrict the Commission's authority to expand eligibility. On the contrary, Congress specifically recognized the Commission's broad discretion to add to and modify the services that could be provided to private radio licensees.¹⁰

Similar to the expansion of end user eligibility for SMR Systems, expansion of eligibility as requested should encourage more intensive use of the spectrum. Any additional users which would be added to a PCP system under the new rule will not add a significant amount of air time to a PCP system. Further, the ability to utilize a PCP system will be important for customers in more remote markets, where service options are limited. "The public interest is disserved in these markets when those with mobile communications requirements have limited options while spectrum is idle because of restrictions in our Rules against serving individual users."¹¹

¹⁰Id. (emphasis in original).

¹¹Id.

III. CONCLUSION

WHEREFORE, the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission adopt a Notice of Proposed Rule Making and amend Section 90.75(c)(10) of the rules consistent with this Petition.

Respectfully submitted,

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