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Before the

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services	)	CC Docket No. 93-2

To: The Commission

COMMENTS OF TELECOM SERVICES GROUP, INC.

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SUMMARY

Telecom Services Group, Inc. ("Telecom"), is the licensee of over 300 PPMS stations providing service along its backbone located between Philadelphia and San Francisco. The provision of long distance service, utilizing PPMS facilities, is highly vulnerable to interference because interference to one station can break a transmission chain extending over thousands of miles. Thus, Telecom believes the conservative approach proposed by the Commission in this rulemaking is not only in the public interest, but also it is required by the mandate of Section 316 of the Communications Act.

There are a number of other proposed changes in Part 21 set forth in the N.P.R.M. which Telecom believes are not in the public interest. Telecom believes that the self policing world of PPMS carriers would be thrown into chaos if the frequency coordination process was incomplete. It would become so if there were no record that a PPMS authorized station had actually been constructed. Telecom has no concern with filing FCC Form 494A because it fulfills this function. If Form 494A is to be eliminated, then Section 21.100(d) should be amended to require that the process of frequency coordination be completed by requiring that a supplemental coordination notice be sent advising that construction has been completed.

Telecom believes that FCC Form 430 serves the public interest. To require that information as to the legal qualifications of an applicant be refiled every time a carrier

files a 494 for a new station or modification of an existing station would place a heavy burden on the applicant and the FCC's processes.

Six months to construct is simply too short. Many jurisdictions will not process a building permit application for a new tower until the FCC has issued an authorization. That process can add months of delay before construction can be completed.

Thus, while there are a number of requirements in part 21 which create an unnecessary burden and should be eliminated, most of the rules in Part 21 serve a valid function and should not be eliminated.

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COMMENTS OF TELECOM SERVICES GROUP, INC.

Telecom Services Group, Inc., ("Telecom")[1] by its attorneys hereby respectfully submits its comments in response to the Notice of Proposed Rulemaking ("N.P.R.M.") in the above captioned proceeding. In regard thereto it is stated as follows:

I. The Commission Must Prevent Interference In Compliance With Section 316 Of The Communications Act

As the Commission is well aware, for decades Point-to-Point Microwave Radio Service ("PPMS") stations have formed the nucleus of the long distance common carrier industry in the United States. While in the last decade fiber optic transmission systems have supplemented PPMS systems, there still exists hundreds of millions of dollars of PPMS plant. This PPMS plant provides common carrier service not only to businesses and residents throughout the United States, but is also the very heart of the National Defense Communication Network.

In the entire world of spectrum which the Commission allocates for various uses, none is more vulnerable to the problem of interference than those used to provide long distance

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[1] Formerly, Communications Transmission, Inc.

PPMS service. There is attached hereto a map showing the Telecom network. This network contains over 4500 route miles with over 300 PPMS stations. The majority of these stations operate in the six (6) GHz frequency band. The six GHz frequencies pursuant to 47 CFR § 21.700, are only available to PPMS applicants who are either existing or proposed common carriers.

This six (6) GHz band is the frequency band of choice for the provision of long distance microwave service. The six (6) GHz band permits spacing between stations of about 25 miles and permits large channel capacity. However, since there are only eight (8) frequency pairs in the band 5925-6425 MHz (47 CFR § 21.701(a)) carriers providing such long distance service utilizing these frequencies have little redundancy. Telecom knows well from actual experience that if interference is caused anywhere along its backbone stations it can result in interference to the operation of the entire backbone.

The N.P.R.M. proposes to create a system of protection on one hand while simultaneously proposing to relax existing regulation to such a degree as to raise serious questions as to whether the proposed rules could be in violation of Section 316 of the Communications Act of 1934, as amended (47 USC § 316). The Communications Act virtually guarantees a PPMS licensee freedom from modification of its license as a result of interference caused by a new PPMS station.[2] While common carriers are regulated in their operation by Title II of the Communications Act, they are also regulated pursuant to Title III

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[2] See, FCC v. NBC, Inc. (KOIA), 319 US 239 (1943) ("KOIA")

which encompasses "provisions relating to radio". Section 3(h) of the Communications Act (47 USC § 153(h)) makes clear that it makes no difference whether a common carrier is providing service by wire or by radio, because in either case it is a common carrier service. Title III of the Communications Act establishes certain mandates upon the FCC, i.e., things that the Commission "shall" do. As the Court of Appeals for the District of Columbia circuit recently reminded us "shall ... is the language of command" and, as such, the statute is not open to the FCC's construction, nor is the FCC given any discretion to forbear from enforcing it.[3]

Pursuant to Section 316 of the Communications Act (47 USC § 316), the Commission may modify an existing station license only upon first making the determination that such modification will promote the public interest, convenience and necessity. Further, pursuant to Section 316, such modification is permitted only after the licensee has been specifically notified of the proposed modification and given reasonable opportunity to protest. As the Supreme Court held in KOIA for the commission to issue a permit to an applicant which will result in the creation of interference to a station of an existing licensee, without providing the protection set forth in Section 316 of the Communications Act, would be a violation of the Act. It is with these general principals in mind that Telecom's comments regarding the proposed amendment of Part 21 are focused.

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[3] American Telephone and Telegraph Company v. FCC, Slip Op. No. 92-1053 (DC Cir. November 13, 1992) at pp. 15-17.

II. The Commission's Conservative View Of Permitting Prior PPMS Construction Is A Correct One

Telecom fully agrees with the Commission's conservative approach to permitting prior construction.[4] Very applicable in the world of microwave is the doctrine of the weakest link in the chain. When a PPMS licensee such as Telecom, has thousands of miles of right-of-way constructed along a single backbone, not only the backbone, but all its spurs are vulnerable, should a single station on the backbone be put off the air through interference. This is true with any carrier which does not have a large amount of redundant circuits available to it. Thus, Telecom wholly endorses the realistic and conservative approach set forth in pars. 3-13 of the N.P.R.M.

Even in the case that an applicant can meet the conditions of proposed Section 21.43(c)(2)(1), Telecom suggests that there be added certain additional safeguards. While proposed rule 21.43(c)(4) places a PPMS applicant on notice that is subject to risk of its capital investment should the application not be granted, if it does construct prior to receipt of authority, out of an abundance of caution Telecom suggests that the instructions to proposed FCC Form 494 be modified to contain a similar advisory. Under current Common Carrier Bureau policy, where an applicant seeks a waiver of Section 319 of Communications Act proposing pre-permit construction, that applicant is required to specify in its request that it recognizes that it is at risk and

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[4] For a concise history of the Congress' concerns in this regard see the Commission's decision in Patten Communications Corp., 81 FCC 2d. 336 (1980).

will not claim equity as the basis for justifying a grant. Telecom submits that where an applicant files a FCC Form 494 for a new PPMS station, intending to construct pursuant to the criteria of Section 21.43(c)(4), that in an exhibit to that application, the applicant notify the Commission it is fully aware of the requirement of this rule, and that it is building at its own risk.

III. The Elimination of FCC Form 494(a) Is Not In The Public Interest

With the adoption of the requirement that applicants follow the process of frequency coordination, the PPMS industry became largely self-policing. Prior to that filing a PPMS application was largely a system of trial and error, i.e., file an application and see if anyone filed a petition to deny. If so, then see if the problem could be resolved by an amendment. This system resulted in both a burden on FCC process and delay in the carriers' being able to fulfill its customers needs.

However, it is to be remembered that frequency coordination is itself a three part process. The frequency coordination notice is merely an expression of intent to file an application with the FCC. For many, many reasons such as inability to clear the entire proposed PPMS system some applications are never actually filed. Then even when the FCC issues a conditional license for a variety of reasons, the station may never be built. It is the filing of the Form 494A that completes the notification cycle. Without the 494A filing the system of self policing

through frequency coordination will soon be eroded to the point of becoming useless.

However, the Commission proposes to eliminate FCC Form 494(a).[5] In that event, Telecom submits there must be some method to determine whether a PPMS station, in fact, has been built. The Commission does not have the staff to determine this is a fact. Thus, if FCC Form 494(a) were eliminated the Commission would be left in the position of simply presuming that construction had been completed. While the Commission's rules require that a PPMS applicant complete the process of frequency coordination prior to filing FCC Form 494, there is nothing in the Commission's rules that require the permittee to notify the frequency coordinator that construction has been completed. As the Commission is well aware not only in the PPMS world, but in the broadcast industry and the private radio industry, the Commission annually issues hundreds of permits authorizing construction which is never completed. If there is not some orderly process by which the fact of completion of construction can be readily ascertained, the entire frequency coordination process soon will be destroyed. Presently Form 494(a) fulfills that need. Telecom does not find it a burden to file Form 494(a) and pay the fee, because it knows that all other PPMS licensees must do the same. Under the existing system the industry can

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[5] Since there is a $155 filing fee and very little work involved in processing FCC Form 494(a), as distinguished from a Form 494, it would appear that maintaining Form 494(a) is not a burden on the Commission's process.

deal in hard facts and not mere presumptions as to what frequencies are being used, where and by whom.

If the Commission determines to eliminate Form 494(a), then Telecom respectfully submits that the Commission should simultaneously modify Section 21.100(d) of the Commission's rules (47 CFR § 21.100(d)), to require that a PPMS applicant not only frequency coordinate its application prior to filing, but that the applicant also frequency coordinate to notify all affected parties that construction has been completed. A copy of such notice should be filed with the Commission for association with the station's files.

Telecom has from time to time occurred interference from newly constructed stations and found it difficult to identify the culprit. Even where the culprit is identified, it is not a simple task to stop the interference. Many PPMS stations are built by contractors. Who is actually responsible for the building of the PPMS station cannot be readily ascertained from the FCC filing. While the application requires identification of the Radio Station Maintenance Center it does not require the applicant to identify, with specificity, the name, telephone number or other method to be able to quickly reach a responsible official of an applicant should interference occur. It is Telecom's experience that it is in construction that interference occurs, e.g., incorrect polarity is sometimes used. In the absence of being able to promptly contact a responsible official of a conditional licensee such interference can exist for days.

To this end Telecom submits that: (a) 47 CFR § 21.100(d) be amended to include a requirement that a frequency coordination notice include the name, telephone number or any other means of contacting a responsible official of an applicant and (b) FCC Form 494 also contain similar information.

IV. Allowing Six Months to Construct Is Unreasonable

Six months may be a realistic time to construct in circumstances where the number of PPMS stations involved is very small. However, it is Telecom's experience that six months is totally unrealistic in dealing with a large amount of PPMS construction. For example, when Telecom constructed the PPMS facilities between El Paso, Texas and Los Angeles, California that construction involved over 70 stations at a cost of many, many millions of dollars. When such large sums are involved, a prerequisite to financing by either the manufacturer, lenders or both is the ascertainment of the fact that the Commission's authorizations are "final orders", i.e., that they are no longer subject to administrative or judicial review. It is normally at least two months subsequent to a grant of a permit before it becomes a "final order" in the legal sense. The mere fact that it has been granted does not make it a "final order". To become a "final order", the fact that the application has been granted must be noted on an FCC public notice. This generally is at least a week or more subsequent to the grant. Then, pursuant to the Commission's rules, that action does not become a "final order" until 40 days after the public notice, in accordance with

Section 1.101 - 1.108 of the Commission's rules. (47 CRF §§ 1.101 -1.108)[6]

In many cases, construction of a PPMS station requires receipt of a local building permit. It is Telecom's experience that since such stations are generally permitted as an exception in zoning the local authorities will not issue a building permit to construct until the applicant for the building permit can show that the FCC has issued a conditional license.

This then starts a local process of consideration of the building application. First comes the public notice and possible hearing process. Since the construction of a tower with red and white marking and a flashing light is sometimes opposed, even if the opposition is without merit, securing receipt of a building permit can take months. Until the Building permit is received construction of the PPMS station cannot commence. If it is part of a chain of PPMS stations none of them will be built if all of them cannot be built.

It is in the interest of a carrier, such as Telecom to turn capital expenditure into a positive revenue stream as soon as possible. However, it was the reality that to go from FCC conditional license to local building permits, and getting equipment specially constructed by the manufacturer to meet the special needs of the project that made 18 months a reasonable period. Six months is not enough. Therefore, it will probably

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[6] It is for this same reason that a "final order" authorizing a transfer of control or assignment of license must exist before funds will become available from lenders that Telecom submits that 60 days to close is proper rather than 45.

result in the FCC's being inundated with applications for extension of time. Telecom respectfully submits that while it is in its interest to construct as quickly as possible, it is not in anyone's interest for the FCC to allow so little time to construct that extensions must be requested. The 18 month period to construct should be retained.

V. Other Matters

There is an old expression that one should not throw out the baby with the bath water. In the spirit of eliminating unnecessary rules, the Commission appears to be considering adding unnecessary rules. What the Commission is proposing to do in adopting new Form 494 and the rules proposed in this N.P.R.M. is to recreate the very problems that the Commission successfully eliminated during the 1970's and 1980's in its administration of the ever growing PPMS industry. In the early 1960's PPMS applications were filed on FCC Form 401 which was adopted by the Commission, not for PPMS applicants, but rather for radio common carrier ("RCC") applications. A great deal of the information called for in FCC Form 401 was predicated on the concept that the applicant was filing for a single RCC radio station to serve a particular community. Thus, FCC Form 401 treated the applicant as having to submit no information which would be filed again and again, as is done by PPMS carriers such as Telecom which has over 300 stations.

As a result of years of experience the Commission recognized that it was a waste of Commission process to apply the redundant

requirement of submitting the same information of a PPMS applicant, who may propose to build hundreds of stations, as that required of an RCC applicant who proposed only one station. To this end, the Commission adopted FCC Form 430. That gave to the Commission all the essential information regarding the legal qualifications of the applicant and eliminated the necessity that this information be filed again and again with each application. Now it appears that all the Commission is proposing to do in the N.P.R.M. is to eliminate Form 430 application and require each applicant to return to the burdensome filing practice that an applicant resubmit with every application all the material that was previously required on old FCC Form 401.[7]

This concept imposes not only an unnecessary burden on an applicant, but a heavy burden on the Commission's processing staff. Telecom submits that FCC Form 430 is a tremendous contribution to expediting FCC process by eliminating what is nothing more than repeatedly filing redundant information. The information became redundant because once the applicant had shown, that it was legally qualified to be a Commission licensee to require that this information be resubmitted with every microwave application to construct a new facility or modifying an

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[7] It is to be noted that proposed Section 21.11(a) does not use either the term "substantial" or "material" change. Thus, as written every time Telecom added a new PPMS station it would have to file a 494 application for each of its 300 existing stations, because as a result of the filing the list of stations submitted in response to question 29(h) would result in a "change of licensee qualification information."

existing one is simply an unnecessary burden. Therefore, Telecom urges that proposed FCC Form 430 be retained.[8]

VI. Elimination of Filing of Unnecessary Information

Proposed FCC Form 494 contains many questions originally contained in old Form 401 which were relevant in considering the qualification of an RCC applicant, but were totally irrelevant as to a PPMS' applicant. In the world of RCC common carrier communications, the Commission had established a "need" test, i.e., an applicant who had an RCC station in a market could not receive an additional frequency until it had shown that at least 55% of its capacity had already been utilized, and that there were additional customers who it could not serve unless it had an additional channel. To this end the Commission required that any applicant in utilizing Form 401, list all its stations. The Telecom network has over 300 PPMS stations. There is no logical reason for the FCC to carry over this requirement to submit in each application a list of hundreds and hundreds of PPMS stations since the common carrier rules have no multiple ownership or duopoly restrictions. Since question 29(i) identifies any situation involving an applicants character qualifications, a list of all licenses held adds nothing but burden on the applicant and the FCC's staff.

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[8] It is to be noted that question 29A in the proposed form 494 refers to a transferee. This is obviously a typographical error because the correct term should be either filer or applicant.

Old FCC Form 401 required the submission of Articles of Incorporation and Bylaws. The Mass Media Bureau in its updated application Form 301 simply requires that an applicant that is a corporation, identify the state of incorporation and the date in which its articles of incorporation were issued. Securing a certified copy of Articles of Incorporation is an expensive and time consuming task. Unless there is a question of control involved the Bylaws of a corporation are meaningless. Thus, adopting into proposed FCC Form 494 the ancient reporting requirements of FCC Form 401 merely places an undue burden upon applicants and adds to the Commission files a great number of documents which are totally irrelevant to the public interest considerations involved in the grant of a PPMS proposal.

While it might be useful for the Commission to have in a single file a list of all the PPMS station's licensed to a carrier, Question 8 of FCC Form 430 requires a submission of this information on an annual basis. Question 29(h) of proposed Form 494 requires a submission of this information on a per application basis. A complete list of all the station's in the PPMS service held by Telecom subsidiaries as printed out is in excess of 20 pages. Telecom has no problem submitting such a list in its annual Form 430 filing. Telecom sees nothing in fulfilling the public interest in requiring that such a list be presented every time an application for a new or modified PPMS facility be filed with the Commission.

It is to be noted that FCC Form 494 question 21 requires the submission of frequency coordination information where the

applicant seeks a license for a temporary fixed station. Telecom's subsidiaries have temporary fixed blanket licenses for every PPMS frequency to be used anywhere along the Telecom network on a secondary user basis, i.e., non-interfering. It is used for a variety of purposes such as forming a bridge where a storm has brought down a tower. Since Telecom has no way to anticipate where it will use the temporary fixed stations it is impossible to frequency coordinate them prior to filing. This requirement should be eliminated.

VII. Revised FCC Form 705

In this regard Telecom urges that the FCC adopt a form similar to the Mass Media Bureau's Form 316 - short form application for pro forma assignment of license or transfer of control. Since the same processing considerations are not involved it is unfair to require an applicant for a pro forma transfer to pay the same filing fee as that of a transfer or assignment to a new group.

The Commission should also take this opportunity to clarify its filing requirements in regard to new Form 705. As read literally, the instructions to Form 705 would require Telecom to file over 600 copies (2 per station) of Form 705. The proper number of copies of Form 705 to file in the case where there are many stations held by the transferor or assignor should be clarified to avoid unnecessary burden on both the FCC's process and the applicant.

VIII. Conclusion

While Telecom supports the conservative pre-construction approach taken in the N.P.R.M., it opposes other changes. The world of long distance service using PPMS stations is a very organized one. Elimination of FCC Forms 494A and 430 will change organized structure into chaos, and thus is not in the public interest.

Respectfully submitted,

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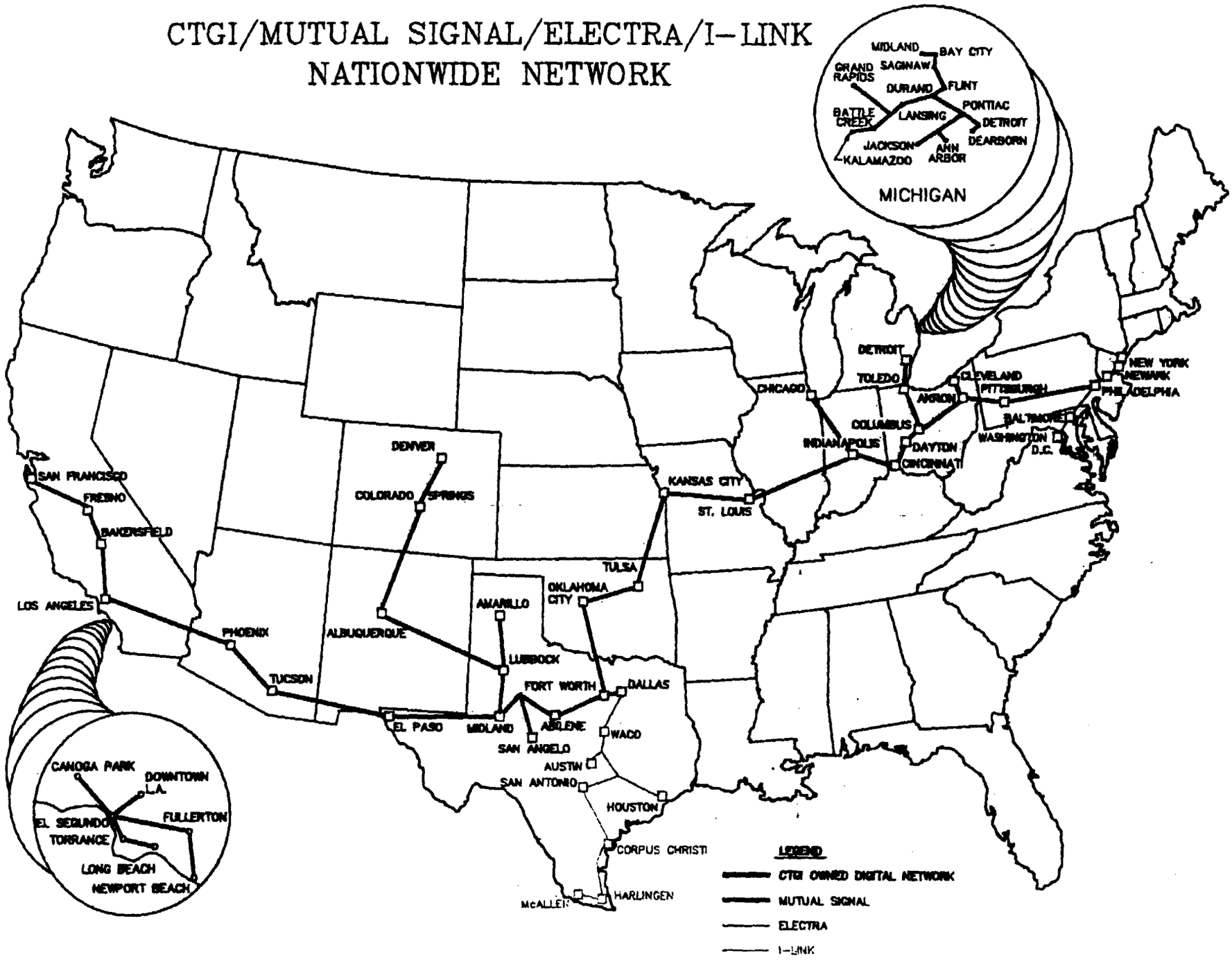
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