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Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-38

In the Matter of

Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals — RM-8017

REPORT AND ORDER

Adopted: June 24, 1993; Released: July 16, 1993

By the Commission:

I. INTRODUCTION

1. In this *Report and Order,* we amend Part 90 of our rules to allow private carrier paging (PCP) licensees to provide service to individuals for non-business purposes.[1] This action eliminates an unnecessary regulatory restriction on the service options offered by PCP licensees. It will promote competition in the paging industry, thereby increasing the variety and quality of services available to individual paging customers.

II. BACKGROUND

2. Part 90 of our rules currently authorizes PCP licensees to offer commercial paging services to end users who are themselves eligible for licensing under Part 90 and to the federal government. Because Part 90 eligibility is limited to businesses, state and local government agencies, public safety organizations, and other defined entities, private individuals who do not qualify as business licensees are not eligible for a Part 90 license, and therefore are not allowed to obtain paging service from a PCP system. The effect of this rule is to prevent individuals seeking paging service for a non-business purpose from obtaining that service from a private carrier.

3. On February 23, 1993, we adopted a *Notice of Proposed Rule Making* in this proceeding, in which we proposed to allow PCP licensees to provide paging service to individuals as well as other currently eligible users.[2] The *Notice* was based on a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) and endorsed by several supporting commenters.[3] In the *Notice,* we discussed the fact that in a prior proceeding, we had partially relaxed our PCP eligibility rules but had elected not to extend PCP user eligibility to include individuals.[4] Based on the NABER petition and supporting comments, however, we decided to revisit this decision in light of recent, rapid growth in demand for paging services.[5]

4. We received eleven comments and five reply comments in response to the *Notice.*[6] The proposal is supported by most commenters, including NABER, Telocator, American Paging, PacTel Paging, PageMart, PageNet, and several other private paging operators (some of whom are also common carrier paging providers). These parties generally agree that the prohibition on service to individuals arbitrarily restricts consumer choice, inhibits competition, and serves no positive purpose.[7] The only opposition to the proposal comes from certain radio common carriers (RCCs) who contend that it will give lightly regulated PCP licensees an unfair advantage over more heavily regulated RCC licensees.[8] BellSouth argues that we cannot proceed unless we address this regulatory imbalance,[9] while Radio Call proposes that we link changes in our PCP rules to the relaxation of certain common carrier regulations.[10] Finally, Radiofone opposes the proposal under any circumstances, claiming that it goes beyond our legal authority and would undermine common carrier paging.[11]

III. DISCUSSION

5. In the *Notice,* we cited three factors in favor of allowing PCP licensees to serve individuals. First, individual users would benefit from being able to choose between private and common carrier paging alternatives, just as other eligible users do presently.[12] Second, by eliminating the need for PCP licensees to screen customers and impose restrictions on resale, the rule change would make PCP

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[1] As used herein, "PCP" encompasses private carrier paging service at 929-930 MHz, governed by Part 90, Subpart P, as well as service by Business Radio licensees on various paging-only frequencies below 900 MHz, governed by Part 90, Subpart D. Although Subpart D does not refer specifically to "private carrier" paging, Business Radio licensees under Subpart D and private carrier licensees under Subpart P are authorized to provide commercial paging service to identical categories of eligible users. *Compare* 47 C.F.R. §§ 90.75(c)(10) *and* 90.494(a).

[2] Notice of Proposed Rule Making, PR Docket No. 93-38, 8 FCC Rcd 1716 (1993) (*Notice*).

[3] Petition for Rule Making, RM-8017, filed June 14, 1992; *see also,* Rep. No. 1897, June 23, 1992. Comments in support of the petition were filed by PageNet, PageMart, PacTel Paging, and Telocator. No oppositions to the petition were submitted.

[4] *Notice* at paras. 5-6. *See* Report and Order, Amendment of Part 90 of the Commission's Rules to Expand Eligibility and Shared Use Criteria in the Private Land Mobile Services, PR Docket No. 89-45, 6 FCC Rcd 542 (1991).

[5] *Notice* at paras. 7, 13.

[6] A list of commenting parties is set forth in Appendix B.

[7] *See, e.g.,* PacTel Paging Comments at 2-3, PageMart Comments at 7-11, PageNet Comments at 4-5.

[8] Some supporters of the proposal also raise the issue of regulatory disparity between RCCs and PCPs, but call for the issue to be addressed in a future rule making. Telocator Comments at 4 n.7, PacTel Paging Reply Comments at 2-3.

[9] BellSouth Comments at 6-9.

[10] Radio Call Comments at 2-3. Radio Call "does not oppose" the proposal, provided we concurrently relax our common carrier rules in two areas: (1) by allowing common carrier licensees to obtain additional frequencies without a usage showing, and (2) by granting automatic operational authority to common carrier applicants based on an expedited frequency coordination procedure.

[11] Radiofone Reply Comments at 3-12.

[12] *Notice* at paras. 8-9.

service more widely available and more competitive, particularly in the rapidly-growing retail paging market.[13] Finally, because current paging technology can readily accommodate additional users on existing PCP systems without degradation of service, we perceived no public interest benefit to retaining the existing rule.[14]

6. The comments strongly support our tentative conclusions in the *Notice*. As many commenters note, the demand for paging services has grown dramatically in the past few years and is continuing to climb.[15] Increasingly, this demand is fueled by individual users with non-business as well as business needs for paging service.[16] Because PCP service to individuals is restricted, however, individual paging users are limited to the service options obtainable from a common carrier. In some instances, these options may be sufficient, but the comments indicate that individual users can only benefit from having additional choices. PageMart, for example, notes that non-business individuals seeking nationwide paging service have only three RCCs to choose from, and that RCCs have limited flexibility to switch users from nationwide to local service.[17] Similarly, PageNet contends that RCCs may be unable to keep up with demand for service by individuals in congested markets.[18] In our view, these comments confirm the desirability of increasing the service options available to individual users.

7. The comments also confirm the beneficial impact of our proposal on the ability of PCP licensees to compete. The existing rule, according to most commenters, imposes a disadvantage on PCPs seeking to obtain customers. As Pass Word observes, it is virtually impossible for a PCP licensee to screen customers who may use pagers for both business and non-business purposes, yet failure to do so may result in liability.[19] Pager One and PageMart note that eligibility restrictions have hampered PCP efforts to market their services to individual customers -- including individual business users already eligible under our rules prior to this *Order* -- through major retail outlets.[20] Retail sales of pagers currently account for approximately 20% of the paging market, and many analysts expect this percentage to double within a few years.[21] Thus, eliminating the existing rule will promote greater competition among service providers in a major portion of the paging market.

8. Finally, virtually all commenters agree with our analysis that the restriction on PCP service to individuals serves no useful purpose. As PacTel Paging points out, most individuals seeking paging service do not distinguish between business and personal use, but are simply seeking high-quality service to meet all of their paging needs.[22] PagerOne notes that because of the inconsistency between our paging rules and our SMR rules, which allow service to individuals, it can provide SMR service to individual customers but may not offer those same customers paging service.[23] Even the proposal's opponents appear to concede that the rule is not needed to protect against problems such as frequency overuse or degradation of signal quality.

9. Only one commenter, Radiofone, contends that the existing rule serves a public interest purpose: to protect consumers. Radiofone argues that individual paging customers are not sophisticated enough to deal "on an equal footing" with "unregulated" PCP licensees, and will therefore be victimized by "scams," substandard products, and poor service unless their service options are provided exclusively by common carriers that have been "adjudged by the state to be reputable."[24] We find this argument unpersuasive. To begin with, Radiofone offers no evidence to support its dire predictions of consumer abuse by PCP licensees, nor do we perceive any such evidence in the record. In fact, we believe the primary impact of the existing rule has not been to protect consumers from unscrupulous practices, but to prevent numerous reputable PCP licensees (many of whom also provide common carrier paging service) from offering useful services that would benefit consumers. The comments also demonstrate that where RCC and PCP service providers presently compete for business customers, both have tended to provide better-quality service at lower cost.[25] We are confident that allowing PCPs and RCCs to compete for individual customers will yield similar benefits.[26]

10. For the foregoing reasons, we conclude that the public interest would be served by allowing PCP licensees to serve individuals as well as other eligible users. As noted above, however, some RCC commenters argue that by taking this step, we are contributing to the "blurring" of the distinction between private and common carrier paging. According to Radiofone, this action subverts the common carrier provisions of the Communications Act and is therefore illegal.[27] BellSouth and Radio Call do not go so far, but contend that our action leaves so little practical difference between PCPs and RCCs that we should expand this proceeding to address the issue of disparities between private and common carrier regulation.[28] As discussed below, we are not persuaded by either argument.

11. First, our action is fully consistent with the Communications Act, notwithstanding Radiofone's arguments to the contrary. The basic premise of Radiofone's argument is that Congress intended private land mobile service, as defined in Section 332 of the Act, to be limited to special classes of users, and that any paging licensee who provides service to "all comers" must therefore be regulated as a

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[13] *Id.* at paras. 10-11.
[14] *Id.* at para. 12.
[15] *See, e.g.*, PageMart Comments at 8. According to the Economics and Management Consultants International study cited by PageMart, there were approximately 14 million paging subscribers at the end of 1992, with a projected annual growth rate of 19 percent in 1993.
[16] *See, e.g.*, PageMart Comments at 9, Telocator Comments at 2. Industry analysts estimate that approximately one-fifth of all paging units are now being used for non-business purposes.
[17] PageMart Comments at 6.
[18] PageNet Comments at 6-7.
[19] Pass Word Comments at 2.
[20] Pager One Comments at 1, PageMart Comments at 10.
[21] *See* PacTel Paging Comments at 2, PageMart Comments at 9, PageNet Comments at 9.
[22] PacTel Paging Comments at 3.
[23] Pager One Comments at 1.
[24] Radiofone Reply Comments at 14-15.
[25] As PageMart points out, no carrier has more than a 12 percent share of the paging market, and competition is increasing. The result has been that while overall industry revenues have grown, the cost of paging service to the customer has fallen steadily. PageMart Comments at 4-5.
[26] We also note that the absence of common carrier regulation does not deprive the Commission or the states of the ability to protect consumers from fraud or abusive practices should they occur.
[27] Radiofone Reply Comments at 8-13.
[28] BellSouth Comments at 8-9, Radio Call Comments at 2.

common carrier.[29] These arguments have been addressed in several prior Commission decisions, particularly our *Report and Order* in PR Docket No. 86-404 allowing SMR licensees to provide service to individuals.[30] In that proceeding, we thoroughly reviewed the legislative history of Section 332 and concluded that private carriers may serve individuals as well as other eligible users without any change to their legal status.[31] The same principles that guided our SMR decision are equally applicable here.

12. Second, we reaffirm our conclusion, stated in the *Notice*,[32] that the issues of regulatory parity raised by BellSouth and Radio Call are beyond the scope of this proceeding. While this *Order* does narrow a previously existing distinction between PCPs and RCCs, it does not make them indistinguishable,[33] nor does it require us to examine every remaining distinction before we can take action. In taking this step, we do not rule out the possibility of further addressing the relationship between PCPs and RCCs in a future proceeding as circumstances warrant.[34] Moreover, if BellSouth, Radio Call, or others wish to propose specific regulatory changes to eliminate alleged inequities in our paging rules, they are free to do so by a separate petition for rule making. These considerations are not sufficient, however, to justify delaying the implementation of this *Order*.

13. We are therefore adopting the amended rule as it was proposed in the *Notice*. PacTel Paging requests that we revise the rule text to state that PCP licensees operating on non-commercial "Pool 1" frequencies pursuant to Section 90.494(g) may serve individuals.[35] We consider such a revision unnecessary because this contingency is covered by the rule as drafted. Prior to this *Order*, there was no suggestion that our PCP user eligibility rules varied based on whether a PCP licensee was using a designated commercial frequency or a non-commercial frequency assigned under our inter-category sharing rule. The present rule change also makes no such distinction. To the contrary, it is our intent in adopting this *Order*, which we believe is expressed in the amended text, that *all* PCP licensees be allowed to serve individuals as well as other eligible users regardless of the frequency on which they are operating.

IV. CONCLUSION

14. In our view, allowing PCP systems to provide service to individuals serves the public interest by eliminating an unnecessary regulatory restriction, increasing the alternatives in paging services available to consumers, and promoting improved technology and increased efficiency through competition. For the foregoing reasons, we adopt the proposal set forth in our *Notice*.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

15. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

A. Need and purpose of this action.

16. This *Report and Order* amends Part 90 of the Commission's rules to allow private carrier paging systems to provide service to individuals. This change will extend the benefits of private radio communications service to a greater number of users by providing additional service options, and will also increase spectral efficiency by allowing for competition, which spurs technological innovation. This action is intended to remove unnecessary restrictions on the ability of private radio licensees to provide their services.

B. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis.

17. There were no comments addressed to our Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered and rejected.

18. No significant alternatives were considered.

VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), Part 90 of the Commission's Rules, 47 CFR Part 90, IS AMENDED as set forth in Appendix A below.[36]

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[29] Radiofone Reply Comments at 5-6.

[30] Report and Order, Amendment of Part 90, Subparts M and S of the Commission's Rules, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

[31] *Id.* at paras. 24-25. Private carriers are, of course, subject to the restriction that they not resell interconnected telephone service for a profit. This *Order* does not remove that restriction, and PCP licensees must continue to abide by it.

[32] *Notice* at para. 12 n.25.

[33] In addition to this rule making, Radiofone claims that our pending proposal to commence exclusive licensing of 900 MHz PCP channels seeks to remove the "last" practical distinction between private and common carrier paging. Radiofone Reply Comments at 3. *See* Notice of Proposed Rule Making, Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, 8 FCC Rcd 2227 (1993) (*PCP Exclusivity Notice*). In fact, our PCP proposal imposes rigorous conditions for PCPs to qualify for exclusivity, whereas exclusivity for RCCs is automatic. Moreover, even if the proposal is adopted, many PCP licensees will continue to operate on shared frequencies.

[34] We note that the budget reconciliation bill now pending in Congress contains amendatory language to the Communications Act that could modify the distinction between common and private carriage in the land mobile services. We cannot be certain what impact, if any, this legislation would have on private paging licensees in general, or on those who choose to serve individual customers in particular. In our view, however, it is premature to address the legislation's impact unless and until it is enacted, at which point we can take appropriate action if necessary.

[35] PacTel Paging Comments at 4-5. Pool 1 frequencies are primarily set aside for licensees operating internal, non-commercial paging systems. *See* 47 CFR § 90.494(a). Neither our existing eligibility rules nor this *Order* are intended to apply to such licensees, who are prohibited from providing commercial service of any kind. Pursuant to Section 90.494(g), however, PCP licensees may provide commercial service on unoccupied Pool 1 frequencies if there is no available Pool 2 frequency in the area.

[36] In our pending rule making on PCP exclusivity, we have proposed additional revisions to Section 90.494 that would move the user eligibility provision to a new Section 90.494(c). *See PCP Exclusivity Notice*, Appendix A. Should we adopt our exclusivity proposal, the amendment adopted by this *Order* will be incorporated into Section 90.494(c).

20. IT IS FURTHER ORDERED that this *Report and Order* will be effective thirty days after publication in the *Federal Register*.

21. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

22. For further information regarding this *Report and Order*, contact David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile radio services

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 and 332, unless otherwise noted.

2. Section 90.75 is amended by revising paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service

(c) * * *

(10) This frequency is assigned only for one-way paging communications to mobile receivers. Only A1D, A2D, A3E, F1D, F2D, F3E, or G3E emissions may be authorized. Licensees may provide one-way paging communications on this frequency to individuals, persons eligible for licensing under subparts B, C, D, or E of this part, and representatives of Federal Government agencies.

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3. Section 90.494(a) is amended by revising the third sentence of footnote 1 to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

(a) * * *

[1] * * *

Frequencies listed in Pool 2 are available only for shared use by private carrier paging (PCP) licensees in providing one-way paging communications to individuals, persons eligible for licensing under subparts B, C, D, or E of this part, and representatives of Federal Government agencies.

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APPENDIX B

LIST OF COMMENTING PARTIES

Comments

American Paging
BellSouth
First National Paging
NABER
PacTel Paging
PageMart
PageNet
Pager One
Pass Word
Radio Call
Telocator

Reply Comments

American Paging
NABER
PacTel Paging
PageMart
Radiofone