

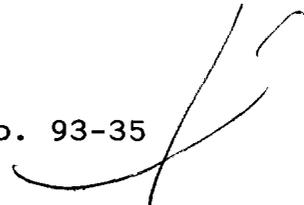
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of: )  
 )  
Amendment of the Commission's )  
Rules To Provide Channel )  
Exclusivity To Qualified Private )  
Paging Systems at 929-930 MHz )

PR Docket No. 93-35  
RM-7986



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To: The Commission

DEC 27 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**METROCALL, INC.**  
**PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION**

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**SUMMARY OF PETITION**

Metrocall's sole concern in this Petition is with footnote 43 of the Order which states as follows: "The slow-growth option will be limited to new applications only. We will not grant requests to extend the construction period for grandfathered licenses." (Order at ¶ 23, n.43).

Metrocall has discussed this reference with many other paging operators, who have uniformly expressed surprise at the implication that legitimate paging operators might not be able to qualify for "slow growth" status under appropriate circumstances. There was no reference in the FCC's original Notice to excluding "incumbent" licensees from the ability to make a good faith request for extended construction periods. To the contrary, Metrocall and other commenters naturally assumed that the FCC would want to encourage those who have already demonstrated a financial commitment to the development of PCP services, to continue to invest in regional or nationwide systems.

Metrocall respectfully requests that the FCC clarify that both "new" and "old" licensees should be eligible to request the slow-growth option. In the alternative, Metrocall requests that the FCC consider appropriate rule waiver requests from those who may need slow growth consideration.

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**PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION**

Metrocall, Inc., through its attorneys, and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby seeks clarification or partial reconsideration of the Commission's Report and Order (the "Order"), in the above-captioned Private Carrier Paging "exclusivity" rulemaking proceeding, FCC 93-479, released November 17, 1993. Specifically, Metrocall respectfully requests that the Commission clarify or reconsider, to the extent necessary, the eligibility criteria for the newly adopted "slow-growth" rules. (Order at ¶¶ 22-24). In support thereof, the following is respectfully shown:

**I. Statement of Interest.**

Metrocall is one of the smallest paging companies in the Nation that offers nationwide service, yet, conversely, it is also one of the only profitable paging companies among the top-20

in the nation. Metrocall currently provides nationwide and wide-area paging services to over 200,000 subscribers from various locations throughout the United States, and continues to expand its PCP and radio common carrier ("RCC") paging services in order to meet the growing public demand for rapid, efficient, and reasonably-priced one-way signalling services.

Metrocall filed comments in this rulemaking proceeding, and has been an active participant in industry and FCC meetings aimed at fashioning PCP exclusivity rules in the public interest. If all of the Order's rules are adopted as proposed, without clarification or modification, they could impede or preclude legitimate paging operators, such as Metrocall, from qualifying for the slow growth option. That unexpected result would cause Metrocall to incur unnecessary and extraordinary network expenses, while placing Metrocall at a competitive disadvantage against "speculative" or "new" applicants.

Metrocall is thus a "party aggrieved," whose interests will be adversely affected if the proposed exclusivity rules are adopted in their present form without clarification or modification. Accordingly, Metrocall has standing to petition the Commission for clarification or reconsideration of its new rules. Northco Microwave, Inc., 1 FCC 2d 350 (1965); see also, Association of Data Processing Service Organizations v. Camp, 397 U.S. 153 (1970).

Moreover, pursuant to Section 403 of the Act, the Commission has discretion to consider the merits of this Petition since the

issues raised are in the public's interest. Barney Enterprises, Inc., 55 FCC 2d 721 (1975). Therefore, Metrocall has standing under the Act, and the Commission has independent authority to consider the issues raised herein.

## II. Summary of Order.

The Order hewed closely in most material respects to the Commission's original Notice of Proposed Rulemaking, which proposed allowing PCP licensees in the 929-930 MHz band to gain channel exclusivity on thirty-five (35) of the forty (40) available channels. The Order adopted a new rule section defining the requirements for exclusivity on a local, regional or nationwide basis. The Order also adopted rules allowing an extended implementation, or "slow-growth", schedule for proposed systems of more than thirty (30) transmitters.

The Commission observed that the vast majority of the parties that took an active role in this rulemaking proceeding supported the proposed exclusivity rules, Metrocall among them. (Order at ¶ 4). Indeed, even those who expressed reservations about the rules did so not because they objected to the Rules per se, but because they objected to the fact that the rules would not presently apply to a wider group of paging operators. (See Order at ¶ 5).

Metrocall strongly supported the Commission's plan to grant exclusivity to PCP licensees, to prevent harmful interference as frequencies become more congested, and to encourage investment in

new technology and growth in paging systems. With one minor exception, Metrocall believes that the rules adopted in the Order accurately reflect the FCC's original intent and the consensus of the vast majority of interested paging operators nationwide.

The FCC's Order is an important regulatory milestone in the development of competitive paging services for the Nation, and the Commission should be justly commended for the speed in which it has adopted these important rule changes. Because of the vast scope of these PCP rule changes, and the dramatic changes that they bring to the "shared" PCP frequency environment, it is to be expected that some of the Order's proposals could be open to conflicting interpretations, or, that some of the proposed rules, in the scrivening, did not emerge precisely in the form expected by the PCP industry. It is in that spirit that Metrocall submits this request for clarification.

### III. Summary of Petition.

Metrocall's sole concern in this Petition is with footnote 43 of the Order which states as follows: "The slow-growth option will be limited to new applications only. We will not grant requests to extend the construction period for grandfathered licenses." (Order at ¶ 23, n.43).

Metrocall has discussed this reference with many other paging operators, who have uniformly expressed surprise at the implication that legitimate paging operators might not be able to qualify for "slow growth" status under appropriate circumstances.

There was no reference in the FCC's original Notice to excluding "incumbent" licensees from the ability to make a good faith request for extended construction periods.

To the contrary, Metrocall and other commenters naturally assumed that the FCC would want to encourage those who have already demonstrated a financial commitment to the development of PCP services, to continue to invest in regional or nationwide systems. The slow growth option would encourage these operators to invest additional time and money into wide-area systems, while providing those investments with some minimal protection from "speculative" PCP application filings for a brief (less than three year) period of time.

It is thus surprising to see that the Order could bar legitimate operators from even requesting slow growth consideration. For these reasons, and others more fully set forth herein, Metrocall respectfully requests that the FCC clarify that both "new" and "old" licensees should be eligible to request the slow-growth option. In the alternative, Metrocall requests that the FCC consider appropriate rule waiver requests from those who may need slow growth consideration.

**IV.        The Slow Growth Option Should Apply to Incumbent Licensees.**

The FCC originally stated that the underlying premise of the PCP exclusivity rules was to promote investment in technology and system expansion. (Notice at ¶ 16). Guided by its experience with SMRS and other private radio services, the FCC opined that a

slow growth option would be "appropriate for PCP services ...." (Id. at ¶ 31). According to the FCC, "applicants seeking to build a system comprised of more than 30 transmitters could be granted up to three years to construct based on a showing of reasonable need for the extension, a detailed construction timetable, and evidence of financial ability to construct the system." (Id.)

The Notice made no reference to any eligibility restrictions on the slow growth option. As far as Metrocall and any other interested parties knew, the FCC intended the slow growth option to be available to anyone who met the aforementioned qualification criteria. But, that is not what the Order says.

Without any explanation or justification, the Order restricted the eligibility criteria for the slow growth option, stating that the slow growth option would be available only to "new" applications. Moreover, the Order stated that the FCC would not grant requests to extend the construction period to "grandfathered licenses." (Order at ¶ 23, n. 43). That eligibility restriction is contrary to the facts which prompted the PCP exclusivity rules, and, the manner in which those restrictions were adopted may be contrary to relevant communications law.

- A. The facts do not support restricting slow growth eligibility to new applicants.

The paradox in footnote 43 is palpable: if that language is strictly construed, then all of the interested parties who helped the FCC craft these rules, and who have already begun to invest

millions of dollars into regional and nationwide paging systems, could risk losing their investments to "new" and unproven applicants if they cannot build these expensive wide-area systems in the usual eight months' time. With the exclusivity rules in place, unscrupulous parties might now have an incentive to "camp" on a legitimate operator's PCP frequency until the legitimate operator reaches the "greenmailer's" part of the country. Then, the "greenmailer" could attempt to extract payments from the operator in exchange for vacating that frequency.<sup>1</sup>

Conversely, the slow growth option allows "new" applicants, with absolutely no proven history of providing PCP services, to hold onto precious PCP spectrum, or merely delay it from being fully utilized, for up to three years so long as they meet the slow growth preconditions.<sup>2</sup> If all PCP operators were equally eligible for slow growth, this would not be an anomaly; but, the Order inexplicably favors unproven applicants and speculators over legitimate operators. This anomaly surely was not addressed

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<sup>1</sup> Paradoxically, when these frequencies were shared, such threats were less likely to be effective. NABER could always coordinate "one stick" speculators onto an alternative frequency, or, the legitimate operator could simply wait till the speculator's license expired before investing in that part of the country.

<sup>2</sup> For example, someone who is not already providing PCP services could well be willing to "speculate" and hoard a PCP channel for the cost of a surety bond, until such time as they could "flip it" to someone who really needs the channel. The rule against assigning unconstructed stations would not prevent such speculators from entering into "management/resale agreements" with legitimate "grandfathered" operators who might need the frequency, but simply can't build it out in eight months' time.

by the FCC or any of the commenters in this rulemaking proceeding, and it is squarely at odds with the objectives this rulemaking sought to achieve.

To ban legitimate operators of large systems from requesting brief extensions of the construction periods, while granting such extensions to unproven applicants, is not consistent with the FCC's intent to encourage PCP operators to invest in the 900 MHz channels. Indeed, the consensus of the comments filed in this proceeding was that the slow growth requirements themselves would be so daunting (one must provide written justification, including cost estimates, a bond, and a construction timetable) that only legitimate paging operators, whether new or old, would be able to meet them. See, e.g., Comments of NABER, PacTel Paging, Celpage, et al.

Metrocall respectfully submits that a more reasonable interpretation of the "slow growth" option is this: while it makes sense for only "new" applicants to be entitled to a full three year extended construction period since those applicants are presumably building from "ground zero," nevertheless, incumbent licensees should also be able to request some proportional extension of their construction periods. For example, if a qualified "regional" licensee has four months remaining on its license construction period when the Order becomes effective, it should be eligible to request up to a two year and four month extension of the construction period for that 70-plus transmitter system, assuming it complies with the slow

growth criteria.

That is not to say that all "eligible" applicants will be able to justify their requests for the "slow growth" option: the Order expressly states that the FCC may determine that only brief extensions will be justified in some cases. (See Order at ¶ 23). Metrocall merely contends that there is no reason why "grandfathered" licensees should be on a less-than-equal footing with "new" applicants with regard to the right to request these extensions.

B. Why existing operators need the slow growth option.

While the Order fails to state any reason why "grandfathered" licensees should not be eligible for the slow growth option, Metrocall can think of many reasons why legitimate paging operators need the slow growth option. Metrocall's own example is pertinent.

Recently, Metrocall determined that many of its subscribers required nationwide or regional coverage extending beyond Metrocall's existing coverage areas. Since the RCC frequencies for which Metrocall was authorized were not available nationwide, Metrocall applied for, and was granted, PCP licenses pursuant to Part 90 of the Commission's Rules. To date, Metrocall has received PCP authorizations for over 800 PCP transmitter sites, and has applied for many more. Obviously, Metrocall qualifies for nationwide exclusivity.

At a cost of millions of dollars, Metrocall has constructed

over 100 PCP transmitters nationwide. Through sharing arrangements with other licensees, which the Rules encourage, Metrocall today provides nationwide PCP services to its subscribers. However, the new Rules do not allow Metrocall to count those shared transmitters as "its own" for purposes of exclusivity (if their owner has done the same).

Consequently, unless Metrocall can request the slow growth option, it faces the following daunting task in the next eight months: Metrocall must buy at least 200 transmitters (at a cost of approximately \$6 million, assuming the equipment can be shipped on time), lease additional site space for each of them (approximately \$500 per month per transmitter per year, that is, \$1.2 million per year, assuming Metrocall can timely find such sites), and hire technicians to work night and day to install these transmitters nationwide in less than eight month's time (assuming it can find such technicians, while so many other PCP licensees struggle to meet the same eight month deadlines). If Metrocall cannot do this, it will forfeit its nationwide exclusivity rights, absent a slow growth option.

Meanwhile, at the end of that eight month time period, someone who has not spent a single dime in the paging industry could apply for and obtain a license to operate on Metrocall's nationwide channel. Frankly, that is absurd. It cannot be genuinely argued that the commenters in this rulemaking proceeding had any warning that this could happen, that the slow growth option would apply only to people who have not invested a

single dime into providing PCP services to the public.

Metrocall simply cannot believe that the Order consciously chose to punish legitimate paging operators for making an early financial commitment to the development of PCP services. Rather, Metrocall submits that the slow growth option should be available to any applicants and licensees that meet the slow growth criteria.

**V. The Eligibility Restriction is Contrary to Law.**

It was naturally assumed by Metrocall and other participants in this proceeding that incumbent operators, as well as "new" applicants (whatever they may be) would be eligible to request the slow growth option. Perhaps somewhere along the line, the FCC changed its mind, and opted to restrict the slow growth eligibility criteria. This agency certainly has broad discretion to change its eligibility criteria in the public's interest if it so desires, but, it cannot lawfully change those criteria without providing an "adequate" explanation for the change. See, e.g., U.S. v. Storer Broadcasting, 351 U.S. 192 (1956).

In this instance, the Order provides no explanation, not even an inadequate one, for restricting slow growth eligibility to "new" applicants. Consequently, that rule change does not comport with fundamental notions of fairness and administrative due process. Id.

As previously stated, most legitimate operators would understand that if they have already begun constructing their

facilities, they would not be entitled to an additional three years' time. Hence, if the FCC's unspoken explanation for the eligibility restriction was to place old and new licensees on an even par, that objective could certainly be met by granting less than three year extensions to "old" licensees, when necessary. Otherwise, there would appear to be no adequate explanation for precluding legitimate operators from requesting the slow growth option.

**VI. The Slow Growth Eligibility Restriction did not Consider the Interests of Legitimate Paging Operators.**

FCC licensing proceedings involve a difficult attempt to achieve the agency's mandate to "provide a fair, efficient, and equitable distribution of radio services" throughout the nation. See 47 U.S.C. § 307(b); Capitol Telephone Co. v. FCC, 498 F.2d 734, 737-39 (D.C.Cir. 1974). To achieve that statutory mandate, the Commission invariably must balance the interests of one group of applicants versus those of another. See Interstate Broadcasting Co. v FCC, 323 F.2d 797 (D.C.Cir. 1963); Democratic Printing Co. v. FCC, 202 F.2d 298 (D.C.Cir. 1952).

Certainly, the Order strove to achieve that difficult balance. The FCC obviously attempted to balance the interests of legitimate paging operators and new PCP applicants on the one hand, against the odious interests of frequency "speculators" and hoarders on the other. Unfortunately, the slow growth eligibility restrictions could be interpreted to leave legitimate

paging operators altogether "out of the balance." The slow growth rule, as adopted in the Order, simply did not address the pressing needs and interests of PCP operators who legitimately require additional time to construct comprehensive wide-area systems.

The Order gives no indication that the Commission ever considered the impact that limiting slow growth to "new" applicants would have on the swift development of nationwide PCP services. For Metrocall at least, that arbitrary restriction will most certainly have an immediate adverse impact on its plans to fund and develop its own nationwide network.

Metrocall thus asks the FCC to reconsider the balance of interests at stake here; this time weighing the interests of legitimate paging operators versus those of new applicants. "Only by such balancing can the Commission reach a legally valid conclusion on the ultimate question of the public interest." Democratic Printing Co. v. FCC, 202 F.2d 298, 301. Upon further consideration, the FCC is bound to find that serious operators such as Metrocall are more likely than "new applicants" to use the slow growth rules for their intended purpose: to promptly bring enhanced PCP services to interested subscribers.

#### VII. Rule Waivers Would be Appropriate.

If the FCC will not reconsider the Order to clarify that incumbent licensees are eligible to request a slow growth option, Metrocall submits that the FCC should consider requests for a

waiver of that restriction, in appropriate circumstances. A waiver of the Rules is justified where "special circumstances" exist that warrant deviation from the general rule. See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Waivers may be granted where "the underlying purpose of the rule will not be served, or will be frustrated, by its application in a particular case, and [ ] grant of the waiver is otherwise in the public interest[.]" See 47 C.F.R. § 22.19(a)(1)(i).

For reasons previously explained, Metrocall submits that the standards for waiver would be met in its case, and that it should be allowed to apply for the slow growth option. The unique circumstances and extraordinary costs entailed in the implementation of Metrocall's nationwide operations, and in similar PCP operations, would justify reasonable extensions of the eight month construction period. Such waivers would substantially expedite the initiation of nationwide and regional paging services to the public, and protect legitimate operators from financial ruin. Such rule waivers would be consistent with the spirit of the exclusivity proceeding, and eminently in the public interest.

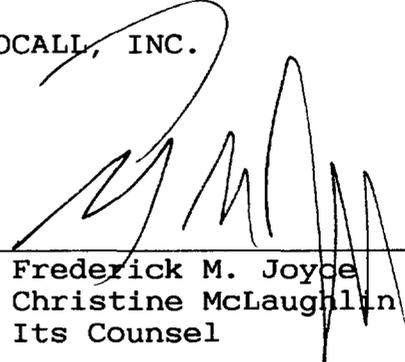
**CONCLUSION**

For all the foregoing reasons, Metrocall respectfully requests that the Commission clarify or reconsider its Order in the PCP exclusivity rulemaking proceedings, to ensure that all legitimate PCP operators may be eligible to request the slow growth option.

Respectfully submitted,

METROCALL, INC.

By:



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**CERTIFICATE OF SERVICE**

I, Tracy Roberts, a secretary in the law firm of Joyce & Jacobs, do hereby certify that on this 6th day of May, 1993, copies of the foregoing Petition for Partial Reconsideration or Clarification were mailed, postage prepaid, to the following:

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---

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