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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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MAR 9 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

**COMMENTS OF PACTEL PAGING
IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

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SUMMARY OF PLEADING

Pactel Paging is filing comments in support of various petitions that have been filed seeking partial reconsideration and/or clarification of the recently-adopted rules governing channel exclusivity for certain private carrier paging ("PCP") channels at 929-930 MHz. Report and Order, FCC 93-479, released November 17, 1993.

PacTel has been a strong supporter of the Commission's effort to adopt rules according PCP operators the ability to earn exclusivity, and generally supports the actions the Commission has taken. PacTel agrees, however, with certain of the petitioners who seek modifications of the adopted rules. Specifically, PacTel believes that the Commission should revise the requirements to: (1) provide extended implementation options for incumbent licensees; (2) grant regional exclusivity based on state borders rather than interference contours; and (3) allow regional exclusive licensees to use 3500 watts effective radiated power (E.R.P.).

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To: The Commission

**COMMENTS OF PACTEL PAGING
IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

PacTel Paging ("PacTel"), by its attorneys and pursuant to Public Notice Report No. 1999^{1/}, hereby submits its comments on the Petitions for Reconsideration and/or Clarification filed December 27, 1993 (the "Reconsideration Requests")^{2/} with

^{1/} Mimeo No. 41785, released February 17, 1994. This Public Notice accorded interested parties 15 days from its publication in the Federal Register to comment on the various petitions seeking reconsideration of the action in PR Docket No. 93-35. The publication date in the Federal Register was February 22, 1994. 59 Fed. Reg. 8475.

^{2/} Seven parties filed Petitions for Reconsideration. See Request for Partial Reconsideration of Carl N. Davis dba Afro-American Paging ("Afro-American Paging"); Petition for Partial Reconsideration of American Mobilephone, Inc. ("American Petition"); Petition for Reconsideration and Clarification of First National Paging Company, Inc. ("First (continued...)

reference to the Commission's First Report and Order in PR Docket No. 93.35 (the "Exclusivity Order").^{2/} The following is respectfully shown:

I. BACKGROUND

1. PacTel is a major provider of paging services in the United States and operates both common carrier paging systems licensed under Part 22 of the rules and private carrier paging ("PCP") systems licensee under Part 90 of the Commission's rules.^{4/} PacTel's PCP operations include two wide-area regional systems on 929.8875 MHz and a nationwide system on 929.9375 MHz. PacTel's constructed facilities on these PCP frequencies already serve in excess of 195,000 paging units. PacTel also has been an

^{2/}(...continued)

Page Petition"); Petition for Clarification or Reconsideration of MAP Mobile Communication, Inc. ("MAP"); Petition for Partial Reconsideration or Clarification of Metrocall, Inc. ("Metrocall Petition"); Petition for Reconsideration and Clarification of the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP Petition"); and Petition for Clarification and Reconsideration of Paging Network, Inc. ("PageNet Petition") (collectively "Petitioners").

^{3/} Amendment of the Commission's Rules to Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, FCC 93-479, released November 17, 1993.

^{4/} As a carrier operating both private carrier and common carrier facilities, PacTel is particularly sensitive to the benefit of rule changes that create between these two types of system. The prior PCP regulations that forced the sharing of PCP channels created inefficiencies and deterred effective competition. Consequently, PacTel has been a consistent supporter of rule changes allowing earned exclusivity on PCP channels.

active participant in the rulemaking proceeding which ultimately led to the Exclusivity Order.^{5/} Based upon its PCP operating history and active participation in this proceeding, PacTel has substantial experience to draw upon in commenting on the rules embodied in the Exclusivity Order.

2. PacTel applauds the Commission's efforts to reward licensees with exclusivity provided that they have invested substantial sums of money in their PCP systems. PacTel, however, agrees with certain Petitioners that the Commission's Rules require some modifications in order to better serve the public interest. Specifically, PacTel believes that the Commission should revise the Exclusivity Order to: (1) provide extended implementation options for incumbent licensees; (2) grant regional exclusivity based on state borders rather than interference contours; and (3) allow regional exclusive licensees

^{5/} PacTel strongly supported the Commission's efforts to revise the rules to promote use of the 929 PCP frequencies through exclusivity grants to licensees who construct the required number of base stations.

to use 3500 watts effective radiated power (E.R.P.).^{6/} PacTel addresses each of these points in separate sections below.

II. EXTENDED IMPLEMENTATION SCHEDULES
FOR GRANDFATHERED INCUMBENT
LICENSEES SERVE THE PUBLIC INTEREST

3. The Exclusivity Order establishes a slow growth option for PCP systems of more than 30 transmitters allowing up to three years to complete construction based upon a showing of need and adequate financial ability.^{7/} However, by footnote reference^{8/} the Commission indicates that this slow growth option

^{6/} Afro-American Paging suggests that the Commission adopt more lenient rules regarding placement of transmitters for local system exclusivity. PacTel suggests that the facts presented in the Afro-American Paging Petition may be more appropriately addressed by waiver rather than by rule change. In addition, MAP's proposals can probably be addressed by NABER in the coordination process, rather than by rule change. Finally, PacTel notes that the request by PageNet and First National Paging for clarification of the exclusivity compliance deadline has already been satisfied by the Commission's Public Notice, DA 94-35, released January 10, 1994, indicating that the 8 month deadline for demonstrating compliance will run from the issuance of a public notice announcing the exclusivity grant.

^{7/} Exclusivity Order, para. 22; see also proposed rule section 90.496.

^{8/} The Commission itself did not advance any rationale for limiting extended implementation schedules to new applicants. The only mention of limiting applicability of slow growth status is the cryptic footnote 43 which reads in full:

The slow-growth option will be limited to new applications only. We will not grant requests to extend the construction period for grandfathered licenses.

is available to new applicants only, and not to grandfathered licensees.^{9/}

4. Several Petitioners recommend that the Commission extend the slow growth option to grandfathered incumbent licensees.^{10/} The particular relief requested falls into two categories. Some urge the Commission to grant incumbents additional time to build out extensive systems. Others ask the Commission to permit licensees to meet initial construction deadlines by using multiple-frequency transmitters, provided that a transition to dedicated transmitters takes place in a reasonable time.^{11/} PacTel supports both requests for relief, but with slightly altered financial showing requirements.

5. As the Petitioners' point out, denying extended implementation schedules for incumbent licensees does not serve the public interest because (1) the need for such a restriction is not supported by the record of the proceeding;^{12/} (2) the Commission has failed to offer a reasoned analysis of the need

^{9/} Exclusivity Order, note 43.

^{10/} See American Petition at 4-7, APCP Petition at 3-10, First National Petition at 3-5, Metrocall Petition at 5-14, PageNet Petition at 5-6.

^{11/} PacTel has filed a waiver with the Commission seeking a transition period to convert from the use of multiple-frequency transmitters to dedicated transmitters. See Request of PacTel Paging for a Waiver of Section 90.495(A)(5) to Allow PacTel Paging to Transition to Dedicated Transmitters filed December 23, 1993. If the Commission elects to provide the relief requested by rule change, the PacTel waiver request will become moot.

^{12/} See American Petition at 4-6, APCP Petition at 4-6, and Metrocall Petition at 11-12.

for such a restriction;^{13/} (3) the restriction will not reduce speculative activities;^{14/} and (4) serious service providers are unfairly prejudiced vis a vis latecomers to the PCP market.^{15/} As is set forth in greater detail below, PacTel largely agrees with these comments.

6. The Notice of Proposed Rulemaking in this proceeding did not propose that incumbent licensees would be denied extended implementation authority. Most incumbent licensees, including PacTel, presumed that they would have the same ability to seek extended implementation authority as new licensees.^{16/} As far as PacTel can discern, none of the commenters in the proceeding advanced any substantial public interest arguments in favor of denying extended implementation to existing licensees. Nor did the Commission itself offer any reasoned explanation for limiting extended implementation authority solely to new applicants.^{17/} Consequently, PacTel

^{13/} See American Petition at 6, APCP Petition at 3-4, and Metrocall Petition at 6-9.

^{14/} See APCP Petition at 9-10.

^{15/} See American Petition at 4-6, APCP Petition at p. 4-5, and 6-8, and Metrocall Petition at 11-12.

^{16/} The proposed rules also did not prohibit licensees from counting multi-frequency facilities toward the construction requirements on each discrete frequency in operation. PacTel and many other grandfathered licensees believed, therefore, that the Commission would sanction this practice and allow multi-frequency facilities to be counted on more than one frequency so long as the frequencies had different coverage areas, such as nationwide and regional.

^{17/} See APCP Petition at 9-10.

urges the Commission to eliminate the restriction on the basis that it is without record support.

7. The only rationale that PacTel can imagine may have driven the Commission to restrict grandfathered licensees from seeking slow growth status is a desire to penalize insincere applicants who may have filed speculative applications during the pendency of the rule changes. If this was the Commission's reasoning, PacTel urges reconsideration for several reasons. First, a review of the list of licensees seeking grandfathered status for extensive regional and nationwide systems indicates that it is populated mainly by substantial carriers with established records of public service. Consequently, a blanket prohibition on slow growth for incumbents works primarily to the detriment of legitimate operators, not speculators.

8. Second, the slow growth option has built-in safeguards that can serve to deter granting relief to speculators. Extended implementation is not automatic, but rather is premised on an adequate showing of public need, a reasonable construction timetable and a demonstration of financial capacity.^{18/} Strict scrutiny of these individualized showings will provide a better mechanism for weeding out speculators than will a blanket prohibition on slow growth options for incumbents.

9. Finally, the Commission imposed a cutoff date for grandfathered licensees that tolled in advance of the sunshine

^{18/} See proposed rule section 90.496.

period for the Exclusivity Order, thereby limiting the ability of applicants to file applications knowing that the rules were about to change.^{19/} In view of this well-considered cut-off date, the need for further protections against speculation in the form of a restriction on slow growth for incumbents is reduced.

10. As some Petitioners' point out, the current slow growth rules accord unfair preferences to new applicants who do not have an established track record with respect to service to the public.^{20/} Many of those who are eligible as grandfathered licensees have already expended substantial amounts of money constructing extensive PCP systems which demonstrates beyond doubt that they are not speculators. For example, PacTel has expended in excess of \$9 million to construct its PCP systems which represents an amount in excess of the performance bond required of new licensees. Notably, in other Commission proceedings, such as PR Docket No. 89-553 respecting the 900 MHz SMR service, the Commission proposed adopting rules which favor incumbents over existing licensees.^{21/} Here, PacTel does not

^{19/} The Exclusivity Order was adopted at a public meeting on October 21, 1993. The cut-off date for grandfathered applicants was specified as October 14, 1993, which corresponded to the release of the sunshine agenda.

^{20/} See Metrocall Petition at 7-8.

^{21/} See Notice of Further Proposed Rulemaking in PR Docket 89-553 (released February 12, 1993). PacTel does not support the extent to which the Commission in 900 MHz SMR NPRM granted incumbent valuable rights to acquire additional spectrum without competition for new licensees. That is not the case here where incumbents are seeking only to garner exclusivity for the frequencies which they already have licensed. A right already granted 900 MHz SMR licensees.

advocate a regulatory scheme tilted in favor of incumbent licensees. PacTel merely seeks a level playing field that allows all applicants, grandfathered and new, the opportunity to build their system over an extended period of time.

11. In sum, PacTel recommends that grandfathered licensees be accorded extended implementation options in two respects. Incumbents seeking additional time to construct authorized facilities should be allowed to do so upon making an appropriate showing under rule section 90.496(a), including the requirement that they post a bond for any unconstructed facilities.^{22/} Incumbents who have constructed their systems on a timely basis utilizing multiple-frequency transmitters, and who have implemented service to the public throughout the requisite geographic dispersion area, should be accorded a transition period of two years to convert their systems to the use of dedicated transmitters while retaining exclusivity, with no bond required.^{23/}

^{22/} The licensee should get credit toward the bond requirement of \$20,000 per constructed transmitter or actual out of pocket expenditures, whichever is greater. In this manner, a lesser bond would be required of licensees who are further along in implementing their systems.

^{23/} In PacTel's view, the construction of a system meeting the geographic dispersion criteria and the implementation of service to the public is a sufficient indicator of the seriousness of an operator's intent to justify a brief transition period from the use of multiple-frequency transmitters to dedicated transmitters without a bond requirement.

III. THE PUBLIC INTEREST WOULD BE SERVED BY ADOPTING STATE BOUNDARIES FOR REGIONAL EXCLUSIVITY

12. Several Petitioners ask the Commission to utilize state borders rather than interference contours to define the protected areas for exclusive regional systems.^{24/} PacTel strongly concurs with these requests.

13. The Petitioners properly note that the adoption of state borders will serve the public interest by (i) creating incentives for licensees to design systems that meet subscriber's needs as opposed to generating the greatest geographic coverage,^{25/} (ii) promoting a stable licensing environment that is easy to administer and does not consume valuable Commission resources,^{26/} and (iii) ensuring rapid expansion of areas by allowing licensees to initiate service without the possibility of competing applications.^{27/}

14. The public interest is served by incenting licensees to build facilities that satisfy discernible market demands rather than encouraging systems to be designed to protect geographic area to satisfy regulatory protection criteria. Under the existing rules for regional systems, a licensee is only granted exclusivity in an area surrounding the actual

^{24/} See APCP Petition at 10-17, and PageNet Petition at 6.

^{25/} See APCP Petition at 12.

^{26/} See APCP Petition at 13, PageNet Petition at 6.

^{27/} See APCP Petition at 16-17.

transmitters.^{28/} This inevitably will encourage operators to "stake out" territory by licensing and building facilities in every possible area where service may eventually be required by the market.^{29/} A regulatory structure that necessitates protective actions of this nature disserves the public interest because it forces licensees to expend significant amounts of capital to construct facilities which do not have any current market demand.

15. In addition, statewide licensing would minimize the burdens on the Commission and NABER. Under the current regional exclusivity mechanism, applicants, the Commission and NABER would be required to determine whether the geographic area to be covered by a new applicant encroached on a co-channel licensee's interference contour.^{30/} As far as PacTel is aware, neither NABER's nor the Private Radio Bureau's data base systems

^{28/} See Section 90.495(b).

^{29/} This logically follows from the rules. If a regional licensee does not construct facilities in all possible areas where geographic coverage may be needed some time in the future the licensee runs the risk of strike applications. Strike applications are a real possibility under the Commission's proposed system. As set forth in the Commission's Rules, the only time the incumbent licensee is granted a preference for a frequency is when its applications are filed at the same time. See Section 90.495(f). Since an existing licensee will have no notice of a strike application until at least the following day, existing licensees will have no effective mechanism to combat strike applications.

^{30/} See Section 90.495(b).

are designed to make these determinations easily.^{31/} Therefore, any determinations would have to be done on a manual basis which could impede licensing of additional facilities. Such a delay would obviously not serve the public interest.

16. Most important, wide area paging systems are dynamic in nature. Recent trends indicate that customers are constantly seeking to expand their areas of coverage into adjoining territories as population spreads out from major metropolitan areas, and as living and travel patterns change. The utility of a regional system is best assured by a licensing scheme that accords the operator flexibility to expand the system over time to meet subscriber needs. This is reflected in the regulatory emphasis placed in recent agency actions upon service territories based upon Major Trading Areas and Basic Trading Areas rather than individual transmitter site contours. Utilizing state boundaries to define the area of exclusivity is consistent with this recent regulatory trend.

17. Ultimately, the same considerations that encouraged the Commission to grant nationwide exclusivity throughout the whole U.S. rather than limiting the protection to areas surrounding transmitters for a nationwide system argue in

^{31/} The Mobile Service Division of the Common Carrier Bureau has systems capable of making such a determination. However, it has proved to be time-consuming and a source of delay for application processing to be based upon individualized calculations of this nature. As a result, the Mobile Services Division is moving away from regulations of this nature and substituting larger franchise areas in which a licensee has greater licensing flexibility.

favor of using state boundaries as the defined protection area for regional systems. And, by adopting the safeguard of requiring service in each of the top 30 markets as proposed by APCP^{32/}, the Commission can be assured that carriers will only be accorded exclusivity protection throughout states in which they have a significant presence.^{33/}

IV. THE COMMISSION SHOULD ALLOW REGIONAL EXCLUSIVE LICENSEES TO TRANSMIT UP TO 3500 WATTS E.R.P.

18. The rules adopted in the Exclusivity Order permit nationwide exclusive licensees to transmit up to 3500 watts E.R.P.^{34/} while limiting all other licensees to 1000 watts E.R.P. at 1000 feet above average terrain.^{35/} PacTel applauds the Commission's relaxation of the previous power limitations, and concurs with the Petitioners that the Commission did not go far enough.^{36/} Without 3500 watt E.R.P. authority, regional PCP

^{32/} APCP Petition, p. 11.

^{33/} A rule change imposing a new requirement of service to each top 30 market should be accompanied by a transition rule allowing carriers to meet that requirement within 8 months after the initial public notice of their regional area. For example, a carrier who included Illinois in a region based upon transmitters in the state outside of Chicago would have 8 months to establish the requisite 18 transmitters in the top 30 Chicago market.

^{34/} See Section 90.494(g).

^{35/} See Section 90.494(f).

^{36/} See APCP Petition at 17-19, and PageNet Petition at 6.

systems will be at a distinct disadvantage via a vis common carrier paging systems.^{37/}

19. Under the Commission's Rules, 900 MHz common carrier paging licensees are permitted to transmit up to 3500 watts E.R.P. so long as the composite interference contour of the system is not expanded.^{38/} The Commission has also recently adopted a Notice of Proposed Rulemaking proposing to allow all 900 MHz licensees to increase power to 3500 watts E.R.P. so long as such power increase did not cause interference to other co-channel licensees.^{39/} Without the ability to use 3500 watts E.R.P., regional PCP licensees will be at a distinct disadvantage to common carrier paging licensees.

20. As the Commission tentatively concluded in the 3500 Watt NPRM, increased power serves the public interest by permitting licensees to cover larger geographic territories with the same number of paging transmitters.^{40/} In addition, increased power will reduce civic and environmental concerns associated with paging systems by reducing the number of paging transmitters necessary to provide building penetration throughout the geographic coverage area. PacTel suggests that the Commission adopt the tentative rules proposed in the 3500 watt

^{37/} The Commission has a duty under the Omnibus Budget Reconciliation Act of 1993, to conform the rules covering common carrier and private carrier paging services.

^{38/} See Section 22.505(b)(2).

^{39/} 8 FCC Rcd 2796 (1993) (the "3500 Watt NPRM").

^{40/} Id. at ¶6.

NPRM for PCP regional frequencies because those rules will limit the possibility of co-channel interference.

21. The Commission cannot afford to wait to revise the power limits for regional systems in a future proceeding implementing so-called "regulatory parity". Regional PCP carriers are pursuing aggressive build-out schedules and, in some cases, would like to use multiple-frequency transmitters. Since it is technically impossible to use a frequency transmitter for two channels operating at different power levels, the variant power limits for nationwide and regional systems creates serious system implementation problems. The practical effect of the regional system power limit may be to force carriers using frequency-agile transmitters to reduce power on nationwide frequencies to match regional limits, and thereby to deny the public the benefits of the 3500 watts power for nationwide systems the Commission sought to provide.^{41/}

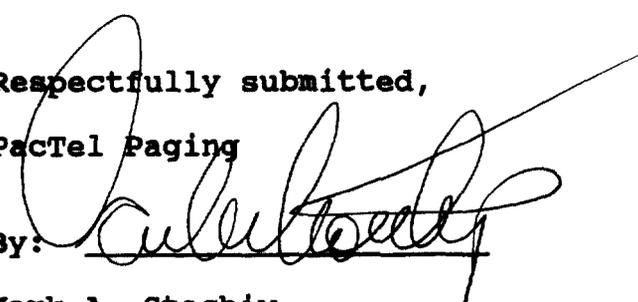
^{41/} Or, carriers may be forced to file regional system power waiver requests that will divert the Commission's resources from other tasks.

V. Conclusion

22. The foregoing premises having been duly considered, PacTel respectfully requests that the Commission expeditiously revise its final rules to reflect their comments.

Respectfully submitted,

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March 9, 1994

CERTIFICATE OF SERVICE

I, Tana Christine Maples, a secretary in the law firm of Bryan Cave, hereby certify that on this 9th day of March, 1994, a copy of the foregoing **COMMENTS OF FACTEL PAGING IN SUPPORT OF PETITIONS FOR RECONSIDERATION** was sent by hand delivery or first-class mail, postage pre-paid to each of the following:

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