

DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

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
RM-7986

To: The Commission

**COMMENTS ON
PETITIONS FOR RECONSIDERATION**

ARCH COMMUNICATIONS GROUP, INC.

Carl W. Northrop
E. Ashton Johnston

Its Attorneys

BRYAN CAVE
700 Thirteenth Street, N.W.
Suite 700
Washington, D.C. 20005-3960
(202) 508-6000

March 9, 1994

No. of Copies rec'd
List A B C D E

A 4

TABLE OF CONTENTS

Summary	ii
I. Preliminary Statement.	2
II. The Commission Should Adopt a Transition Period For Converting to Dedicated Transmitters.	5
III. The Slow-Growth Option Should Be Available to Grandfathered Systems	9
IV. Regional Exclusivity Should Be Based Upon State Boundaries.	11
V. Regional Power Limits Should Be Increased	13
VI. Conclusion.	15

SUMMARY

Arch Communications Group, Inc. ("Arch") herein comments on the seven petitions for reconsideration and/or clarification of the Commission's Report and Order in Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz ("Exclusivity Order").

Although Arch strongly supports most of the rules adopted in the Exclusivity Order, Arch favors several modifications proposed in the Petitions that will serve the public interest. First, the Commission should adopt a transition period during which incumbent licensees may convert existing systems utilizing multi-frequency transmitters to the use of dedicated transmitters while retaining exclusivity. Second, the Commission should extend the "slow growth" option to incumbent licensees and, in certain circumstances, waive the obligation to provide a performance bond or place in an escrow account an amount equal to the construction cost estimate. Third, the Commission should amend its regional PCP system exclusivity eligibility criteria to permit operators to achieve regional exclusivity on a statewide, rather than a protected contour basis. Finally, the Commission should increase the power level for regional systems to 3500 watts.

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

To: The Commission

**COMMENTS ON
PETITIONS FOR RECONSIDERATION**

Arch Communications Group, Inc., on its own behalf and on behalf of its affiliated licensee companies,^{1/} by its attorneys and pursuant to Section 1.429(f) of the Commission's rules and the Commission's Public Notice, Report No. 1999, released February 17, 1994, hereby submits its comments on the petitions for reconsideration and/or clarification (collectively, the "Petitions")^{2/} of the Commission's Report and Order in Amendment of the Commission's Rules to Provide Channel

^{1/} The affiliates of Arch include Arch Capitol District, Inc., Arch Southeast Communications, Inc., Arch Michigan, Inc. and Arch Connecticut Valley, Inc., each of which have filed for private carrier paging licenses.

^{2/} Seven parties filed petitions: Carl N. Davis d/b/a Afro-American Paging ("Davis"); American Mobilephone, Inc. ("AMI"); First National Paging Company, Inc. ("First National"); MAP Mobile Communications, Inc. ("MAP"); Metrocall, Inc. ("Metrocall"); the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP/NABER"); and Paging Network, Inc. ("PageNet").

Exclusivity to Qualified Private Paging Systems at 929-930 MHz
("Exclusivity Order").^{3/} The following is respectfully shown:

I. Preliminary Statement

1. Arch, through its affiliated companies, provides private carrier paging ("PCP"), common carrier paging, common carrier mobile and Specialized Mobile Radio services to the public. Arch is a publicly held company and enjoys a status as one of the fastest growing providers of mobile radio services in the country, currently serving approximately 280,000 paging units. The range of the Arch PCP operations includes local systems, regional systems, and more recently, nationwide systems.^{4/} In pursuing its business activities, Arch has been an active participant in Commission proceedings involving PCP licensing issues, including the notice and comment proceeding that resulted in the Exclusivity Order.^{5/} Subsequent to the adoption of the rules governing exclusivity, Arch has submitted grandfathered system exclusivity requests to NABER, which it understands have been forwarded to the Commission with favorable recommendations, for both nationwide and regional systems. Arch has requested exclusivity with respect to one nationwide

^{3/} 8 FCC Rcd 8318, FCC 93-479, released November 17, 1993.

^{4/} Arch has responded to the growing number of its customers desiring wide-area and nationwide service by developing a national paging system utilizing private carrier channels.

^{5/} See Comments and Reply Comments of Arch Communications Group, Inc. in PR Docket No. 93-35.

system,^{6/} and discrete regional systems in a southeastern region,^{7/} a western region,^{8/} a northeastern region,^{9/} and a central region.^{10/}

^{6/} Arch's nationwide system is on the frequency 929.8375 MHz. The authorizations for this system that meet the cut-off date for grandfathered status include 502 sites in 72 of the top 100 markets and 40 of the top 50 markets. The qualifying sites include a minimum of 4 markets within each of the 7 Regional Bell Operating Company regions.

^{7/} Arch's Southeastern Region has been defined to include Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia. This system is on the frequency 929.3625 MHz, and includes 266 sites as of the cut-off date for grandfathered status. This defined region includes 4 of the top 30 markets (Miami, Atlanta, Tampa and New Orleans) and a minimum of 6 sites are specified for each of these major markets.

^{8/} Arch's Western Region consists of Arkansas, Arizona, California, Colorado, Kansas, New Mexico, Nevada, Oklahoma, Texas and Utah. This system is on the frequency 929.3625 MHz, and includes 143 sites that meet the cut-off date for grandfathered status. These include sites within 7 of the top 30 markets including Los Angeles, San Francisco, Dallas, San Diego, Denver and Phoenix, with a minimum number of transmitters in each to qualify for local exclusivity.

^{9/} Arch's Northeastern Region consists of Connecticut, District of Columbia, Massachusetts, Maryland, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Virginia and Vermont. This system operates on 929.8875 MHz, and includes 109 sites that meet the cut-off date for grandfathered status. This system includes sites within 6 of the top 30 markets including New York, Philadelphia, Boston, Pittsburgh, Baltimore and Buffalo, each with a sufficient number of sites to qualify for local exclusivity.

^{10/} Arch's Central Region consists of Iowa, Illinois, Indiana, Michigan, Minnesota, Ohio, South Dakota and Wisconsin. This system operates on the frequency 929.8875 MHz. This regional system includes 101 sites within 7 of the top 30 markets (Chicago, Detroit, Minneapolis, Cleveland, Milwaukee, Cincinnati and Indianapolis), each with a sufficient number of transmitters to qualify for local exclusivity.

2. The Exclusivity Order enables PCP operators to earn the right to the exclusive use of certain PCP channels based upon a showing that the carrier has placed specified minimum numbers of transmitters in service on a particular frequency throughout the service territory for which exclusivity is sought. Incumbent carriers may qualify for exclusivity based on licenses granted or applications filed prior to October 14, 1993.^{11/} As specified in the Commission's recent Public Notice,^{12/} incumbents who request exclusivity based on grandfathered licenses or applications are accorded eight months following issuance of a public notice conditionally designating the incumbent's system as exclusive to demonstrate that they have constructed a qualifying system (the "Compliance Deadline").^{13/}

3. Although Arch strongly supports most of the rules adopted in the Exclusivity Order, Arch favors several modifications that have been proposed in the Petitions. First, the Commission should adopt a transition period during which incumbent licensees may convert existing systems utilizing multi-frequency transmitters to the use of dedicated transmitters while

^{11/} Exclusivity Order, paras. 29-31.

^{12/} DA 94-35, released January 10, 1994.

^{13/} According to the Commission, any license granted based on an application filed before October 14, 1993, will be treated as an incumbent license entitled to grandfathered status. 8 FCC Rcd at 8329 n.64.

retaining exclusivity.^{14/} Second, the Commission should extend the "slow growth" option to incumbent licensees and, in certain circumstances, waive the obligation to provide a performance bond or place in an escrow account an amount equal to the construction cost estimate. Third, the Commission should amend its regional PCP system exclusivity eligibility criteria to permit operators to achieve regional exclusivity on a statewide, rather than a protected contour basis. Finally, the Commission should increase the power level for regional systems to 3500 watts. These positions are discussed in greater detail below.

II. The Commission Should Adopt a Transition Period For Converting to Dedicated Transmitters

4. In the Exclusivity Order, the Commission adopted a rule provision that allows a licensee utilizing a multi-frequency transmitter to count that transmitter toward exclusivity on only one channel.^{15/} As several parties affected by this provision have noted, the rule produces harsh results for incumbent

^{14/} Arch has requested a waiver seeking this relief in its own case. If the rules are changed to accord a transition period to all similarly situated carriers, the waiver would become moot. See discussion, infra, at para. 7.

^{15/} 47 C.F.R. § 90.495(a)(5) provides:

Frequency-agile transmitters may be counted no more than once for the purposes of this section. A licensee using frequency-agile transmitters may qualify for exclusivity on a second frequency by constructing twice the number of transmitters required to obtain exclusivity on a single frequency, provided all other requirements of this section are met.

licensees who already have made a significant investment in technology-efficient multi-frequency transmitters because it provides no transition period for their conversion to dedicated transmitters.

5. In their Petitions, both APCP/NABER and PageNet seek the adoption of a specific rule granting grandfathered licensees a two-year period during which they may maintain exclusivity while converting existing multi-frequency transmitters to dedicated transmitters. To date, two PCP operators, including Arch, also have requested waivers of Section 90.494(a)(5).^{16/} Arch strongly supports the adoption of a two-year conversion period, as proposed by PageNet and as requested by Arch in its waiver request.

6. Based upon authorized PCP stations and applications pending before the FCC on or before October 14, 1993, Arch has requested exclusivity with respect to one nationwide system and four discrete regional systems.^{17/} Arch is in the process of constructing these systems and would have a sufficient number of transmitters in service by the Compliance

^{16/} See Public Notice, Report No. 1999, released February 17, 1994. Specifically, Arch has requested a temporary waiver of Section 90.495(a)(5) to allow it a two-year period to convert its nationwide and regional PCP systems from the use of multi-frequency transmitters to the use of dedicated transmitters while retaining exclusivity for its systems under the Exclusivity Order. Arch has implemented an aggressive program that will enable it to convert a sufficient number of sites from the use of multi-frequency transmitters to dedicated transmitters within a two-year period to meet the requirements of the new rules.

^{17/} See notes 6-10, supra.

Deadline to qualify for exclusivity were it entitled to count multi-frequency transmitters toward the requirements. However, the transition to a system utilizing dedicated transmitters will require a period of time extending beyond the initial exclusivity Compliance Deadline.

7. Arch has determined, based upon its deployment plan, that in order to qualify for exclusivity for its nationwide system and four regional systems, it will be required to install 584 dedicated transmitters.^{18/} Arch has identified three factors which limit its ability to make the transition to dedicated transmitters in less than two years. First, Arch must take delivery on the necessary equipment. Arch has been advised by its equipment supplier that the company cannot meet Arch's transmitter requirements within the normal deadline established by the Exclusivity Order. Obviously, it would be unfair for Arch to lose its ability to secure exclusivity on its operating systems due to the inability of its equipment manufacturer to meet the delivery timetables. Second, Arch typically handles the construction of its paging facilities utilizing a combination of in-house technical personnel and outside contractors; however, there is a scarcity of high-calibre outside personnel resources to complete a construction project of this magnitude. Finally, unpredictable conditions such as extreme weather and other

^{18/} Substantial progress towards the implementation of the Arch systems already has been made. To date, 117 dedicated transmitters have been placed in service, at a cost to Arch of \$5.2 million.

natural phenomena already have interfered with Arch's construction program, and can have a domino effect on construction timetables when an implementation program as broad as Arch's PCP construction is involved. Based on the Petitions of APCP/NABER and PageNet, it appears that the factors identified by Arch as necessitating a meaningful conversion period are common among PCP service providers.^{19/} Consequently, it appears to make sense for the Commission to grant Arch the relief it is seeking by rule change rather than by waiver.

8. The public interest will be served by adopting the proposed modification. The major objectives of the exclusivity and construction requirements -- assuring that frequencies are dedicated to public service and not "warehoused," and that carriers have a sufficient investment in their system infrastructure to guarantee a seriousness of purpose -- will be satisfied by establishing for qualified incumbent licensees a period during which they may convert to dedicated transmitters, as required by the new Section 90.495(a)(5), while retaining exclusivity. Moreover, adoption of a specific conversion rule will conserve Commission resources that would otherwise be used to process waiver requests.

^{19/} See APCP/NABER Petition for Reconsideration and Clarification at 5-10; PageNet Petition for Clarification and Reconsideration at 5-6.

**III. The Slow-Growth Option Should
Be Available to Grandfathered Systems**

9. In the Exclusivity Order, the Commission adopted a mechanism by which applicants proposing a system of more than 30 transmitters may request an extension of the eight-month construction requirement. Slow-growth system applicants may be granted up to three years extension based upon a demonstration that additional construction time is necessary and reasonable; furthermore, the applicant must establish an escrow account, or obtain a performance bond, in the amount of the estimated cost of construction.^{20/} However, the Commission indicated, in a brief footnote reference that contained no elaboration, that incumbent licensees seeking grandfathered exclusivity were not eligible for the slow growth option.^{21/}

10. In Arch's view, incumbent licensees should be eligible to seek slow growth status, as has been suggested by a majority of the petitioners.^{22/} Not surprisingly, carriers who qualify for exclusivity based upon grandfathered facilities are among the most active PCP service providers, and are in the process of building out some of the most extensive systems. As such, these carriers would seem to be perfect candidates for

^{20/} 47 C.F.R. § 90.496; see Exclusivity Order at para. 23.

^{21/} See Exclusivity Order, note 43.

^{22/} See Petition for Partial Reconsideration of AMI at 4-7; Petition for Reconsideration and Clarification of First National at 3-5; Petition for Partial Reconsideration or Clarification of Metrocall at 5-10; Petition for Reconsideration and Clarification of APCP/NABER at 3-10.

extended implementation schedules. It seems manifestly unfair to accord the benefit of slow growth status to latecomers to this frequency band, while denying it to innovators who were among the first to implement wide-scale PCP systems. A level playing field is called for.^{23/}

11. Arch notes that the grant of an extended implementation period is not automatic, but rather must be based upon an adequate construction timetable, financial plan, and public interest showing. Thus, the Commission will retain the ability to review individual circumstances to assure that incumbents seeking slow growth status are sincere operators with a bona fide intention of implementing the services for which they seek exclusivity protection.

12. Arch generally supports the Commission's decision to require applicants to make an adequate financial showing in seeking slow-growth status. However, the requirement that an applicant obtain a performance bond or place in escrow an amount equal to the estimated construction cost as a condition to receiving additional time, should not apply to operators that have in operation, by the Compliance Deadline, a system utilizing multiple-frequency transmitters that meets the geographic dispersion and transmitter count requirements and, thus, complies with the exclusivity eligibility criteria but for the multi-

^{23/} Arch notes that anyone eligible to file for PCP frequencies after October 14, 1993, also was eligible to file before that date. So, all had an equal opportunity to take the steps necessary to qualify for "grandfathered" exclusivity rights.

frequency transmitter rule. The operator of such a system already has indicated sufficiently the seriousness of its intent and the depth of its financial resources.^{24/} Imposing an additional restriction on the operator's capital is unduly burdensome and disservices the public interest.

IV. Regional Exclusivity Should Be Based Upon State Boundaries

13. New Section 90.495(a)(2), adopted in the Exclusivity Order, provides that in order to gain channel exclusivity within a defined regional area, a licensee must have 70 transmitters located in up to 12 adjacent states, and, in the top-30 markets, enough transmitters to achieve "local" exclusivity in that market (i.e., construction of at least 6 contiguous transmitters).^{25/} Two petitioners requested modification of this rule provision. APCP/NABER proposed that the Commission permit an operator to achieve regional exclusivity on a statewide, rather than a local area basis, based on a showing that it has one transmitter in service in the state, and, in states with a top-30 market, that it has in place by the

^{24/} Arch agrees with Metrocall, which recognizes that the requirements for slow-growth authority already are such that "only legitimate paging operators, whether old or new, would be able to meet them." Metrocall Petition for Partial Reconsideration or Clarification at 8. Although Arch otherwise agrees with APCP/NABER's Petition to the extent it discusses the need for creating a conversion period for multi-frequency transmitters, Arch does not agree with APCP/NABER that the bond requirement is necessary for qualified incumbent licensees. See APCP/NABER Petition at 10.

^{25/} 47 C.F.R. § 495(a)(2).

construction deadline the necessary transmitters required to obtain exclusivity in that state.^{26/} PageNet supports APCP/NABER's proposal, noting that such an approach will foster the truly regional systems envisioned by the Commission.^{27/}

14. Arch strongly supports these reconsideration requests. A twelve-state regional system is more akin to a nationwide system than to a local system, and should be accorded protection on a similar basis. Just as the Commission has accorded a nationwide licensee exclusivity throughout the entire country, and not just in the area surrounding initial transmitters, the Commission should adopt a statewide licensing scheme for regional systems operating on an exclusive basis.

15. The key public interest consideration in this matter is the extent to which wide-area paging systems must evolve over time to meet expanding and changing customer needs. Large dynamic systems of this nature require room to grow. In the absence of a regulatory scheme that provides flexibility for geographic expansion, carriers will be forced to "stake out" future service territories through application filings and skeletal system construction. This imposes unnecessary burdens on the carriers and the Commission.

16. Arch recognizes the logic of NABER's proposal that a carrier only be granted exclusivity throughout an entire state

^{26/} See APCP/NABER Petition for Reconsideration and Clarification at 10-17.

^{27/} See PageNet Petition for Clarification and Reconsideration at 6.

if service is provided to every top-30 market in that state. Arch generally supports this requirement, provided that an adequate transition rule is adopted. Special attention must be paid to those circumstances in which two top-30 markets are in close proximity to one another (e.g., Baltimore/Washington; San Francisco/San Jose).^{28/} And, if the Commission imposes any new requirement to secure statewide exclusivity, incumbents should be allowed to satisfy that requirement with any authorized facility constructed before the Compliance Deadline.^{29/}

V. Regional Power Limits Should Be Increased

17. Arch supports one further change in the rules. The Commission has increased the power levels for nationwide frequencies to 3500 watts ERP.^{30/} The same considerations that support this change for nationwide systems argue in favor of a similar power level for regional systems. Parity with common carrier systems will be promoted, and service to the public will be improved, if regional systems operate at a higher power. And,

^{28/} Arch does not think that a carrier should be obligated to put six separate transmitters in each of these proximate top 30 markets in order to be deemed to be providing service in them.

^{29/} For example, if a carrier meets the requirements for statewide exclusivity in a particular state except for the need to construct additional transmitters in a top-30 market, it should be allowed to satisfy that requirement by building the necessary transmitters at an authorized site before the Compliance Deadline, regardless of whether the application for that site was on file before October 14, 1993.

^{30/} Exclusivity Order, para. 18.

because of the geographic breadth of regional systems, interference does not present a significant problem.^{31/}

18. Allowing nationwide and regional systems to operate at equivalent power levels also will facilitate the use of cost-efficient frequency-agile transmitters in the early stages of system deployment. It is not technically feasible to share a transmitter between frequencies that are operating at a common location at variant powers. Carriers -- and the public -- might be forced to forego the operating benefits of higher power levels if operators are forced to reduce power on their nationwide sites to permit facility sharing with a regional channel.

19. Since Arch and others are in the midst of aggressive PCP facility build-out programs, it is important for this power discrepancy to be resolved by the Commission as soon as possible.

^{31/} Arch recognizes that there would be a restriction on the use of high powered transmitters at the border of regional systems if there was a co-channel licensee in the area entitled to protection.

VI. Conclusion

WHEREFORE, the foregoing premises duly considered, Arch respectfully requests that the Commission amend the rules adopted in the Exclusivity Order in accordance with these comments.

Respectfully submitted,

ARCH COMMUNICATIONS GROUP, INC.

By:



Carl W. Northrop
E. Ashton Johnston

Its Attorneys
BRYAN CAVE
700 Thirteenth Street, N.W.
Suite 700
Washington, D.C. 20005-3960
(202) 508-6000

March 9, 1994

CERTIFICATE OF SERVICE

I, Sondra Renee Rich, hereby certify that I have this 9th day of March, 1994, caused copies of the foregoing Comments of Arch Communications, Inc. on Petitions for Reconsideration to be delivered, by first-class United States mail, postage prepaid, to the following:

- * Reed Hundt, Chairman
Stop Code 0101
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554
- * Commissioner James H. Quello
Stop Code 0106
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554
- * Commissioner Andrew C. Barrett
Stop Code 0103
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554
- * Ralph A. Haller
Private Radio Bureau
Federal Communication Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554
- * Beverly G. Baker
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554
- * David L. Furth
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554
- * Rosalind K. Allen
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

* By hand.

David E. Weisman
Meyer, Faller, Weisman
and Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015

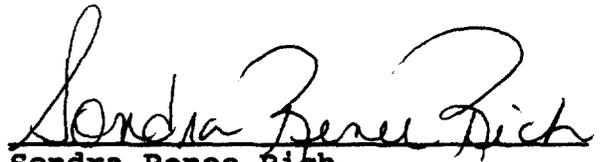
Frederick M. Joyce
Christine McLaughlin
Joyce & Jacobs
2300 M Street, N.W.
Suite 130
Washington, D.C. 20037

Garry Morrison
MAP Mobile Communications, Inc.
840 Greenbrier Circle, Suite 202
Chesapeake, Virginia 23320

Judith St. Ledger-Roty
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Paul C. Besozzi
Besozzi, Gavin & Craven
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036

David J. Kaufman
Scott C. Cinnamon
Brown, Nietert & Kaufman
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036


Sondra Renee Rich