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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
)
Competitive Bidding)

PP Docket 93-253

PETITION FOR PARTIAL RECONSIDERATION

**The Personal Communications
Industry Association (PCIA)**

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SUMMARY

The Personal Communications Industry Association ("PCIA") hereby respectfully requests partial reconsideration of the transfer disclosure requirements adopted by the Commission in order to monitor and deter unjust enrichment in those services where licenses are issued through the random selection process. PCIA believes that the transfer disclosure requirements recently adopted by the Commission are unnecessarily overbroad and may thwart legitimate business transactions.

PCIA, whose membership includes cellular and paging operators as well as potential providers of other personal communications services ("PCS"), has long advocated the adoption of strict and effective anti-speculation rules for cellular and PCS licensing. PCIA members, like the Commission, have firsthand experience with the problems generated by speculation in the cellular industry. Accordingly, PCIA has consistently pursued the adoption of stringent rules designed to prevent speculative behavior in the cellular service, and has continued those efforts in the context of the Commission's PCS deliberations.

Given this perspective, PCIA nonetheless believes that the recently adopted transfer disclosure rules are overly broad. The new policies admittedly would require transfer and assignment applicants to comply with burdensome filing requirements. Under the policies adopted by the Commission, these burdens would apply even in circumstances where unjust enrichment and speculation are not likely to be of concern. To tailor the transfer disclosure requirements to the abusive conduct Congress sought to

curtail in directing the Commission to prescribe transfer disclosures and antitrafficking restrictions, PCIA suggests that the application of the requirements should be more narrowly defined in the following respects:

- To limit the applicability of the transfer disclosure requirements to situations where the authorized facilities have not been constructed or have been constructed and operational only for some limited period of time;
- To clarify that the transfer disclosure requirements do not apply to transfers that are merely *pro forma* in nature; and
- To exclude paging control channels.

In all these circumstances, concerns about speculation are likely to be very remote.

These modifications accordingly would ensure that the Commission's rules attain their objective in a meaningful fashion without imposing undue burdens on licensees.

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PETITION FOR PARTIAL RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Personal Communications Industry Association ("PCIA") hereby respectfully requests partial reconsideration of the Federal Communications Commission's *First Report and Order*, adopted February 3, 1994, in the above-captioned proceeding.¹ PCIA generally applauds the Commission's effort to devise rules and policies that will deter speculation, unjust enrichment, and other forms of abuse that have hindered the efficient operation of the lottery process. PCIA suggests, however, that the rule changes adopted in the *First Report and Order* are overbroad, soliciting unnecessary information, and consequently may thwart legitimate business transactions.

PCIA, whose membership includes cellular and paging operators as well as potential providers of other personal communications services ("PCS"), has long

¹ Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253 (Feb. 3, 1994) (First Report and Order) [hereinafter "*First Report and Order*"]. A summary of the *First Report and Order* was published at 59 Fed. Reg. 9100 (Feb. 25, 1994).

advocated the adoption of strict and effective anti-speculation rules for cellular and PCS licensing. PCIA's own members have confronted the problems stemming from the submission of hundreds and hundreds of speculative cellular applications.

As the Commission's records document, many cellular service applicants submitted applications with no intention of ever providing service to the public but with only the hope of winning the lottery and making a quick, highly remunerative sale. As a result, the costs of service for legitimate operators were sharply increased. Service to the public was substantially delayed in many areas of the country.

PCIA pursued adoption of more stringent rules designed to prevent such speculative behavior in the cellular service, and has continued those efforts in the context of the Commission's PCS deliberations. PCIA firmly believes that the public interest is best served by deterring and preventing speculative filings in the cellular, paging, and PCS contexts.

At the same time, PCIA believes that the recently adopted transfer application disclosure rules are overly broad. The new policies would require transfer and assignment applicants to comply with burdensome filing requirements even in circumstances where unjust enrichment and speculation are not likely to be matters of concern. The application of the disclosure requirements should be more narrowly defined in the following respects:

- to limit the applicability of the transfer disclosure requirements to situations where the authorized facilities have not been constructed or have been constructed and operational only for some limited period of time;

- to clarify that the transfer disclosure requirements do not apply to transfers that are merely *pro forma* in nature; and
- to exclude paging control channels from the application of the disclosure requirements.

PCIA submits that the adoption of these measures will strike the appropriate balance between Congress's intent in directing the Commission to prevent unjust enrichment in the lottery context, the need to ensure that lotteries are conducted in a manner consistent with the public interest, and licensees' ability to structure legitimate business transactions.

I. APPROPRIATE TRANSFER DISCLOSURE REQUIREMENTS WILL AID IN CONTROLLING UNJUST ENRICHMENT AND DETERRING SPECULATIVE BEHAVIOR

The *First Report and Order* in this docket was issued in response to a Congressional directive that amended Section 309(i) of the Communications Act² to require the Commission, within 180 days of enactment of the Budget Act, to "prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of . . . [random selection procedures]."³ In the *First Report and Order*, the Commission adopted rule changes requiring all applicants for voluntary transfer of

² Section 309(i) authorizes the Commission to resolve mutually exclusive license applications through the use of a system of random selection.

³ 47 U.S.C. § 309(i)(1)(C).

control or assignment of license acquired through a Commission lottery to file, along with the transfer application, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of the license.⁴ In addition, the Commission directed that "[t]his information should include not only a monetary purchase price, but also any future, contingent, in-kind or other consideration such as management or consulting contracts either with or without an option to purchase and below-market financing mechanisms."⁵

Section 309(i)(1)(C) was adopted as part of the sweeping regulatory changes authorizing the Commission to use competitive bidding to award licenses for use of the radio spectrum. Section 309(i)(1)(C) is patterned after a similar provision in new Section 309(j), the statutory section that governs the Commission's competitive bidding authority.⁶ The legislative history accompanying Sections 309(j) and (i) indicates that Congress anticipates that the use of competitive bidding will largely "obviate the need for antitrafficking restrictions."⁷ The Commission nevertheless is directed to:

⁴ *First Report and Order* at ¶¶ 13-14. The Commission amended the following rules to reflect this requirement: 47 C.F.R. §§ 1.924, 21.38, 22.39, 90.153, 94.47, and 95.821.

⁵ *First Report and Order* at ¶ 14.

⁶ Specifically, Section 309(j)(4)(E) directs the Commission to require such transfer disclosures, antitrafficking restrictions, and payment schedules as may be necessary to prevent unjust enrichment in the context of licenses issued through the competitive bidding process.

⁷ H.R. Rep. No. 111, 103rd Cong., 1st Sess. at 257 (1993).

(1) monitor transfers involving licenses issued through the competitive bidding process and "impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment;"⁸ (2) if necessary, adopt antitrafficking restrictions to ensure that Congress's goal of making licenses available to certain designated entities on a preferential basis is not frustrated by the improper sale of these licenses in the aftermarket;⁹ and (3) adopt rules requiring disclosure of financial information at the time of sale of a license in order to guarantee that, in those limited circumstances where licenses continue to be issued via lottery, "the churning and profiteering that has characterized lotteries" does not continue, thereby undermining the licensing process.¹⁰

The purpose of the transfer disclosure rules, according to the Commission, is "to prevent unjust enrichment" in connection with licenses awarded by lottery.¹¹ The Commission in turn defines "unjust enrichment" as equivalent to "speculation" and as referring to "the transfer of a license acquired by lottery for substantial profit prior to providing service to the public."¹² Under Section 22.40 of the Rules, the Commission traditionally has examined certain types of license transfers for evidence of

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 259.

¹¹ *First Report and Order* at ¶ 1.

¹² *Id.* at n.4.

"trafficking." This rule section specifically permits the Commission to seek evidence that "the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service."¹³

As discussed above, PCIA has long been a proponent of effective safeguards to prevent speculative behavior in the mobile services industry. The association accordingly supports adoption of all worthwhile steps that will curtail abuse of the Commission's lottery processes. At the same time, PCIA is cognizant of the need to minimize the imposition of unnecessary regulatory burdens on its members.

The Commission must recognize that the new rules do impose substantial burdens. Applicants subject to its terms must collect, copy, and microfiche additional documents. In addition, it may be necessary to undertake an allocation of the purchase price in cases where that ordinarily would not be done. Finally, many applicants will need to prepare and file a request for confidential treatment to avoid having to disclose important competitive and proprietary business information.

While these burdens may be appropriate where speculative behavior is a valid concern, they are unnecessary in circumstances where unjust enrichment is a remote or non-existent possibility. For reasons described in succeeding sections, there is no reason to impose the new rules on transfers or assignments involving:

- constructed and operational facilities;
- *pro forma* restructurings; or

¹³ 47 C.F.R. § 22.40(a)(2)(i).

- paging control channels awarded by lottery.

II. THE TRANSFER DISCLOSURE REQUIREMENTS SHOULD NOT BE APPLIED TO TRANSFERS INVOLVING CONSTRUCTED, OPERATIONAL FACILITIES

In a number of services, the Commission has existing rules designed to prevent unjust enrichment resulting from the types of transfers that Congress sought to curtail in adopting Section 309(i)(1)(C). Significantly, these rules apply only to transfers involving unbuilt facilities or transfers involving facilities that have been built or operational for such a short period of time that there is reason to suspect that the license was procured solely for speculative reasons.¹⁴ Where a licensee has proceeded to construct the authorized facilities and initiated service to the public, concerns about unjust enrichment are greatly diminished. Moreover, as noted above, the Commission's definition of unjust enrichment articulated in this proceeding is focused on unbuilt facilities.

Nevertheless, the transfer disclosure requirements set forth in the *First Report and Order* are not linked to transfers involving unconstructed facilities, but rather

¹⁴ See, e.g., 47 C.F.R. § 22.40 (governing applications to transfer cellular construction permits and licenses); 47 C.F.R. § 21.39 (governing applications to transfer MultiPoint Distribution Service construction permits); 47 C.F.R. § 90.609(b) (governing transfers of unconstructed authorizations for private radio systems above 800 MHz); 47 C.F.R. § 94.47 (governing transfers and assignments of station authorizations in the Private Operational-Fixed Microwave Service); 47 C.F.R. § 95.819 (governing transfers of authorizations in the Interactive Video and Data Service); 47 C.F.R. § 73.3597 (governing applications to transfer broadcast authorizations).

encompass all licenses ever issued via lottery. In applying disclosure requirements to transfers where there is virtually no reason to suspect an illegitimate, speculative motive, the rules adopted in the *First Report and Order* bear no relationship to their underlying purpose and impose unnecessary, burdensome requirements on parties to legitimate business transactions. To avoid this result, PCIA suggests that the transfer disclosure rules be modified to state that they apply only to transfers involving unconstructed or nonoperational facilities, or facilities that have been constructed and operational for an insufficient period of time to eliminate antitrafficking concerns.¹⁵ In addition, the Commission could retain the authority and discretion to require a transferor or assignor to make a showing that it is not engaged in impermissible

¹⁵ For example, the Commission's rules governing the transfer or assignment of cellular licenses require Commission approval for transfers involving licenses issued through comparative hearings only if the associated facilities have been operational for less than a year. 47 C.F.R. § 22.40(a)(1). In cases where the first construction authorization or first license for a particular cellular system was awarded as the result of a comparative renewal proceeding, the authorization generally may not be assigned or transferred for a period of three years from the date that service was initiated. 47 C.F.R. § 22.40(b)(2). Section 22.920(c) of the Commission's Rules, 47 C.F.R. § 22.920(c), prohibits the assignment or transfer of an authorization for an unserved cellular area prior to the licensee providing service for one year. Similarly, applications to transfer broadcast licenses will generally be set for hearing only if the station involved has been operated on-air by the current licensee for less than one year. 47 C.F.R. § 73.3597(a). Likewise, cable operators generally may not transfer a controlling ownership interest in a cable system within a three-year period following either the acquisition or initial construction of the cable system by the cable operator in question. 47 C.F.R. § 76.502(a).

trafficking, similar to that required at the Commission's discretion in the Part 22 context.¹⁶

III. THE TRANSFER DISCLOSURE REQUIREMENTS SHOULD NOT APPLY TO TRANSFERS THAT ARE *PRO FORMA* IN NATURE

PCIA also requests the Commission to clarify that the transfer disclosure requirements do not apply to transfers that are *pro forma* in nature. Although the broadcast service is the only service under the Commission's rules that specifically delineates those transfers that are considered to be *pro forma*,¹⁷ it is generally understood that *pro forma* transactions are those that involve sales, assignments, and transfers to purchasers, assignees or transferees controlled by, controlling or under

¹⁶ The transfer disclosure requirements adopted in the *First Report and Order* are also unworkable from two other perspectives. First, contracts for the transfer or assignment of a paging system generally do not delineate the purchase price for each individual station. Consequently, it will be impossible to document the consideration attendant with each license. Second, in addition to the burden needlessly placed upon licensees by overly broad disclosure requirements, the huge volume of filings documenting transactions in which there is virtually no potential for speculative trafficking will greatly impede Commission efforts to exercise effectively and efficiently its oversight responsibilities. The Commission lacks both the expertise and the resources to examine all contracts involving the transfer or assignment of lotteried facilities to determine whether issues of unjust enrichment are present. Both of these concerns underscore the need to tailor the required disclosures to cases in which the Commission has reason to suspect abusive conduct. Limiting the requirement to transfers involving unconstructed facilities or facilities that have been constructed and in operation only for a short period of time would help eliminate these problems.

¹⁷ See 47 C.F.R. § 73.3540(f).

common control with the seller, assignor or transferor.¹⁸ This includes, for example, a transfer from a shareholder to a corporation owned or controlled by the shareholder, an assignment from a corporation to its individual shareholders, or a transfer between a parent corporation and its wholly-owned subsidiary.¹⁹ Transfers that are merely *pro forma* are ordinarily excluded from the Commission's rules restricting the transfers and assignments of licenses because profiteering is not an issue in transfers between affiliated entities.²⁰ Similarly here, there is no reason to impose the transfer disclosure requirements in the case of transfers and assignments that are merely *pro forma*. Accordingly, PCIA requests the Commission to clarify that the transfer disclosure rules adopted in the *First Report and Order* do not apply to *pro forma* transfers and assignments.

¹⁸ See, e.g., Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, 8 FCC Rcd 6828, 6838 (1993).

¹⁹ *Id.*

²⁰ See, e.g., 47 C.F.R. § 22.40(a).

IV. THE COMMISSION SHOULD MODIFY THE TRANSFER DISCLOSURE REQUIREMENTS TO MAKE PLAIN THAT THEY DO NOT APPLY TO TRANSFERS INVOLVING PAGING CONTROL CHANNELS

Finally, PCIA requests the Commission to modify the transfer disclosure requirements to clarify that they do not apply to paging control channels.²¹ Although control channels are generally operated on a shared basis, some may have been awarded via lottery.²² Significantly, control channels are not part of the licensee's main system, nor are they used to transmit communications. Furthermore, there is no evidence of trafficking among control channel licenses. Indeed, no market for the sale of individual control channels exists. As such, it is unreasonable to require licensees of paging systems to document and disclose the terms of a proposed transfer simply because the system may contain control channels that were issued via lottery. Accordingly, PCIA requests the Commission to modify the transfer disclosure requirements to clarify that they do not apply to paging control channels.

²¹ Control channels are point-to-multipoint frequencies that are used to tie together the base stations in a paging system so that a page can be simultaneously transmitted to each base station.

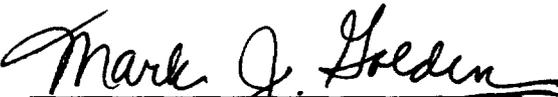
²² See Flexible Allocation of Frequencies in the Domestic Public Land Mobile Radio Service for Paging and Other Services, CC Docket No. 87-120, 5 FCC Rcd 6199 (1990) (Order on Reconsideration of Second Report and Order, Part I) (concluding that mutually exclusive applications for paging control channels in the 470-512 MHz band will be resolved via random selection).

V. CONCLUSION

For the foregoing reasons, PCIA respectfully requests Commission reconsideration and clarification of the transfer disclosure requirement adopted in the *First Report and Order* in this docket. Adoption of these modifications will serve the public interest by ensuring that the transfer disclosure requirements are imposed only as appropriate, thereby assisting the Commission in deterring unjust enrichment while minimizing the burden on parties to legitimate business transactions.

Respectfully submitted,

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