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O'CONNOR & HANNAN
ATTORNEYS AT LAW

SUITE 800
1919 PENNSYLVANIA AVENUE N.W.
WASHINGTON, D.C. 20006-3483
(202) 887-1400
FAX (202) 466-2198

MINNEAPOLIS OFFICE
3800 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402-2254
(612) 341-3800
FAX (612) 343-1256

MADRID OFFICE
LA RINCONADA, 6, 3°
28023 MADRID, SPAIN
(011) 341 575-0944
(011) 341 357-2251
FAX (011) 341 577-0759

AUDREY P. RASMUSSEN

June 22, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: In the Matter of CC Docket No. 92-115

Dear Mr. Caton:

Transmitted herewith, on behalf of Paging Partners, L.P., are microfiche copies of Comments filed on June 20, 1994 in the above-referenced matter.

This filing is made pursuant to §22.6 of the Commission's Rules.

If there are any questions in connection with this matter, please direct them to this office.

Very truly yours,

Audrey P. Rasmussen

APR:gln
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	CC Docket No. 92-115
Revision of Part 22 of the Commission's	)	
Rules Governing the Public Mobile Services	)	

COMMENTS

Paging Partners Corporation ("Paging Partners"), a Delaware Corporation, submits these its Comments on the Further Notice of Proposed Rulemaking, FCC 94-102, in the above referenced matter released May 20, 1994.

Introduction

Paging Partners Corporation operates paging facilities on 931.7875 MHz in the New York metropolitan area and in portions of five states (New York, New Jersey, Connecticut, Pennsylvania and Delaware).

In this filing, Paging Partners comments only upon the proposal affecting the 931 MHz applications. Paging Partners has had 931 MHz applications pending since 1990 for Baltimore, Maryland and Washington, D.C. and 931 MHz applications for an additional frequency pending since 1991 in Connecticut, New York, Pennsylvania and Delaware.[1/] It has been engaged in extensive litigation before the FCC in connection with alleged irregularities in a settlement in the

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1/ These applications were filed in and or amended to the name of Paging Partners, L.P. The FCC has recently approved, under FCC File No. 24640-CD-AL-94, an assignment of existing licenses to Paging Partners Corporation, the successor in interest to Paging Partners, L.P. All pending applications are in the process of being amended to show Paging Partners Corporation as the applicant, pursuant to §22.23(c)(4) of the Commission's Rules.

New York 900 MHz lottery proceeding as outlined in FCC Letter 63500-DHS dated June 24, 1992.

Background

On May 20, 1994, the Commission released its Further Notice of Proposed Rulemaking ("Further Notice") in connection with the Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115. In the Further Notice, the Commission presented proposals affecting cellular service as well as proposals affecting Public Land Mobile Services, in particular, 931 MHz applications. In connection with the latter, the Commission proposes to consolidate all pending applications with applications that have been granted, denied or dismissed and are being litigated. In addition, the Commission proposes that these applicants specify a frequency in amendments to the applications. The applications will be placed on Public Notice and subject to the 30 day Petition to Deny and 60 day mutually exclusive application procedures. The Commission also proposed that the amended applications and newly filed application that are mutually exclusive be considered together as a processing group and that they be subject to the competitive bidding process. Finally, the Commission proposed that an additional location of an existing 931 MHz frequency will be considered to be an initial application if it is more than 1.6 miles from any existing facility.

Paging Partners submits comments on the Commission's proposal in three respects: the retroactive elimination of the first come, first served policy for previously filed applications; institution of competitive bidding for pending applications; and restriction of existing frequency applications to 1.6 miles from an existing station.

Discussion

1. New Procedures Should Not Be Applied Retroactively

Paging Partners commends the Commission on its efforts to deal with the confusion and delay currently existing in connection with the processing of 931 MHz paging applications. The suggested procedures for future filings have merit and are a step in the right direction. However,

the proposed application of these new procedures retroactively raises significant legal and equitable issues. See, for example, Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 471-472 (1988), in which the Supreme Court stated that "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." The Supreme Court went on to state that the statutory grant of rulemaking authority will not be understood to provide the power to promulgate retroactive rules unless Congress provides the power "in express terms." Here. it could be argued that Sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. 154(i) and 303(r), the legal basis for the proposed rule making in CC Docket No. 92-115, do not provide these express terms and thus any retroactive rules would provide opportunities for challenges to the proposed rules.

Applications pending at least as of the date of the Further Notice of Proposed Rulemaking, May 20, 1994, should be disposed of pursuant to rules in existence at the time that the applications were filed. Fundamental fairness dictates this. In particular, in Paging Partners' case where it has pending applications which go back to 1990 and 1991, it would be severely prejudiced if the proposed new rules were applied retroactively to its long pending applications. Paging Partners has raised questions in petitions before the Commission concerning irregularities in the process applicable to a 931 MHz lottery in the New York City area, Lottery Notice, Mimeo 3642, Released July 17, 1989. Specifically, Paging Partners alleges that the FCC did not follow its own rules and policy when it assigned a frequency in the settlement which was not available at the time of the lottery. The issues raised in that proceeding by Paging Partners and others should be promptly addressed and decided under the then applicable Rules and Regulations so that the deck can be cleared for the badly needed revisions in connection with the 931 MHz applications.

Elimination of the first come, first served policy is unfair to applicants who had filed with the possibility of being first in line to receive an available 931 MHz frequency. Under the existing rules, an applicant had to search for available frequencies and track the FCC Public

Notices to be able to file at the appropriate time. For example, Paging Partners filed for a frequency in 1991 after the Commission announced in its Public Notice the termination of an authorization of a 931 MHz frequency at various locations in the Northeast. Although this effort was time-consuming, it was necessitated by the FCC Rules and policy enunciated in Paging Systems-DPLMRS, Mimeo No. 4395, released May 24, 1984. At this point, approximately 700 applicants have played by those Rules. If the Commission now, retroactively, applies a different set of rules to these applicants, it would be grossly unfair to those who have waited for years for the Commission to resolve the 931 MHz problem which is no fault of the applicants. Belatedly, the Commission now states at Page 7, Footnote 18 in the Further Notice that Paging Systems-DPLMRS was not published in the Federal Register and thus, if it established new or modified procedures, it was not binding. However, it did not so qualify the Public Notice when it voiced its policy in the Court of Appeals in 1989. O.R. Estman, Inc. d/b/a Satellite Paging v. FCC, No. 89-1486 (D.C. Cir. August, 1989) nor did it qualify this Public Notice in response to Order on Reconsideration, 5 FCC Rcd. 7423 (1990). Even assuming arguendo that the Public Notice was not binding, the parties relied on it and as Paging Partners continued to point out in its referenced litigation, the Administrative Procedure Act ("APA"), 5 U.S.C. Section 551 et seq. requires that the Commission act consistently.

The Commission, in its Further Notice, states at page 8, Footnote 14, that "We believe that the public interest...outweighs any potential unfairness to pending 931 MHz applicants," citing Storer Broadcasting v. FCC, 351 U.S. 192 (1956); Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F. 2d 1289 (1989). However, both of these cases refer only to one applicant. In the present case, 700 applicants, who had applied under the previous rules, are affected. To consolidate all of these into one filing group at this late date not only is unfair but raises issues regarding the credibility of the Commission and thus, is not in the public interest. Paging submits that the Commission should not change the Rules retroactively to affect applications filed four or five years ago.

2. **Institution of Competitive Bidding for Pending Applications**

Paging Partners also opposes competitive bidding for the pre- July 26, 1993 pending 931 MHz applications for the same reasons that it stated above. Equity, particularly in cases where applications were filed *in 1990,* requires that the Commission follow the procedures in place at that time. The Commission should not penalize the pending applicants by imposing procedures which the applicants had no notice of, when they filed.

The Commission looks to Section 6002(e) of the Budget Act as the legal basis for proposing the competitive bidding process, stating that Congress gave them the discretion to use the lottery procedure instead of the competitive bidding procedures. Obviously, the Congress understood that in cases such as these, equity requires a resolution other than retroactivity applying bidding procedures to legally complex situations such as this.

Nevertheless, while the Commission indicates that there are some 700 pending applications for 931 MHz licenses, only a small percentage of these would be involved in situations such as Paging Partners where petitions for reconsideration are pending. Generally, where the only issue in connection with pending applications is whether they should be subject to a lottery or the competitive abidding process, the question of retroactivity becomes less acute. Certainly, mutually exclusive applications accepted after July 26, 1993, subject to final rules concerning modifications, could be selected by competitive bidding since all were on notice that this was a real likelihood for applications filed after July 26, 1993. Upon disposition of the above-referenced pending litigation, a lottery for the mutually exclusive applications, as determined by the previous Rules, should promptly be implemented for the pre-July 26, 1993 filings so that the pending backlog could be eliminated.

3. **Mileage Reatrictions on existing frequency applications**

Finally, Paging Partners submits comments on the Commission's proposed mileage restrictions on applications for additional locations on existing frequencies. The Commission has always recognized that for purposes of providing wide-area paging service, co-channel facilities

are required. See Lottery Selection Among Applications, 57 RR 2d 427, 437 (1984). In order for a licensee to efficiently and economically expand a wide-area system, a common frequency must be used at all locations. Id. Thus, frequencies for wide-area paging service are not fungible. Imposing such a small distance for expansion would increase the existing provider to increased susceptibility to mutually exclusive applications. In precedent, the Mobile Services Division has stated that it is its policy to grant a preference to an existing licensee who already has the use of the requested frequency in other areas. See John D. Word, 7 FCC Rcd 3201, (1992). That precedent came from an understanding of the nature of wide-area paging and the necessity to build enough transmitter sites on the same frequency to provide adequate coverage.

Paging Partners submits that applications for additional sites should not be considered to be applications for new frequencies if they are more than 1.6 miles from an existing station. To build out a frequency in a certain area, implementation of such a proposal would require either needless expense in constructing a multitude of transmitters each 1.6 miles apart or provide opportunities for mutually exclusive applications at every turn. Thus, while Paging Partners could support the concept of a limitation on mileage for additional transmitter sites, it opposes the 1.6 mile restriction. A more realistic mileage restriction would be more than 20 miles from an existing transmitter. Using that distance requirement, an existing carrier, who is already providing service in the area, would not have to risk a mutually exclusive situation every time it filed for an additional transmitter site beyond 1.6 miles.

Conclusion

Paging Partners respectfullly requests that the Commission take these comments into consideration when revising the Part 22 Rules.

Respectfully submitted,

PAGING PARTNERS CORPORATION

By: _____
David L. Hill
Audrey P. Rasmussen
Its Attorneys

O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 887-1400

Dated: June 20, 1994

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Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

o An oversize page or document (such as a map) which was too large to be scanned into the RIPS system.

o Microfilm, microform, certain photographs or videotape.

o Other materials which, for one reason or another, could not be scanned into the RIPS system.

The actual document, page(s) or materials may be reviewed by contacting an Information Technician. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician.