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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
	)	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service	)	CC Docket No. 94-46 RM 8367
	)	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	)	CC Docket No. 93-116

PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

Ameritech Mobile Services, Inc. (Ameritech) hereby requests partial reconsideration of the Commission's Report and Order in the Rewrite of Part 22 proceeding. While Ameritech applauds much of the streamlining which the new rules accomplish, it is concerned that the retroactive auction policy will severely and unnecessarily disrupt the processing of dozens of 931 MHz applications which Ameritech has pending. Moreover, the proposal to allow newcomers to file mutually exclusive applications against applications which have been on Public Notice and pending for several months is inconsistent with the Administrative Procedures Act and the requirements of administrative fairness. The Commission listed the applications on Public Notice with frequency and location. Therefore, any interested parties had full and fair opportunity to file a competing proposal (either frequency-specific or non-specific), even under the current 931 MHz processing rules. The Commission's decision to allow newcomers to file on top of these pending proposals, and to subject all pending applications to its proposed amendment process, will delay service to the public for several months, if not longer. This is particularly adverse to the public interest where carriers like Ameritech are attempting to extend coverage to locations in its wide area coverage, where propagation problems and/or customer demand requires prompt implementation of service.

When rules are applied retroactively, the mischief to be created by this retroactive application must be balanced against the policy objectives to be achieved. Moreover, the Commission is required to consider less disruptive alternatives in adopting new rules. With regard to the retroactive auction policy for 931 MHz paging, the Commission should give serious consideration to at least two less disruptive alternatives, which would cause far fewer problems in processing pending applications and speeding service to the public. These alternatives are: processing all applications received through December 31, 1994, under the existing rules, applying the auction/hearing rule only to those applications which are identified as being mutually exclusive as a result of this processing. Any applications filed after January 1, 1995 would be processed with these 1994 filings only if the new applications are mutually exclusive, and were received within the cut-off period started by Public Notice of the first mutually exclusive filing. A second approach would be to require amendment of pending applications, but to hold applicants expressing a preference to their preferred frequency, unless resolving a frequency conflict. New, mutually exclusive applications would not be accepted unless received within the cutoff period started by the 1994 pending applications. The new auction/hearing rules would be used to resolve mutually exclusive situations. Applications filed before December 31, 1994 which did not express a preference for a frequency would be given the next available frequency after preferenced frequencies are awarded; if there are more applicants than channels, an auction and/or hearing would be held.

Ameritech also seeks reconsideration of the Commission's action classifying as an "initial application" any application which would relocate a transmitter more than two kilometers. This action ignores the record in this proceeding, which established that alternative transmitter sites are not always available within two kilometers of the original site, especially due to zoning regulations and state and federal laws protecting historic districts, wildlife areas, national parks, etc. Moreover, if the transmitter must be relocated because of a propagation problem, a relocation of more than two kilometers may be needed to cure the problem. Under the new rules, a loss of site, propagation problems, or other circumstance beyond the licensee's control could result in a loss of existing service to the public, if the relocation application is thrown into an auction. This is inconsistent with the legislative intent that existing services not be disrupted by auction (as evidenced by the exemption for renewal and modification applications). The Commission has failed to address these facts in the record, and the significant public interest issues raised thereby. The Commission should adopt a 16-mile standard instead, since this

separation approximates the 50 percent contour overlap rule used consistently throughout Part 22.

Ameritech also seeks reconsideration of the following aspects of the Commission's Report and Order in this proceeding:

- First come, first served licensing should not be used between competing modification applications. Instead, a hearing should be designated between the existing licensees, so that the Commission can evaluate which modification proposal would best serve the public interest.

- A 60-day cut-off period should be retained, because a 30 day period does not afford adequate time to receive and review the Public Notices; evaluate potential competing applications; prepare the legal and engineering portions of a responsive application; microfiche the application; and deliver it to the Commission's lockbox.

- The fill-in transmitter rule should be modified to allow 931 MHz licensees to fill-in coverage gaps on a permissive basis, so long as no competing applications could be filed to serve the new area, given the Commission's minimum mileage separations. This would give licensees flexibility in resolving "doughnut" situations.

- The Commission should clarify new Rule Section 22.121(d), to indicate that a voluntary cancellation of an authorization will not trigger the one-year moratorium on filing an application for the same frequency in the same geographic area. This revision would conform Section 22.121(d) with the text of the Report and Order.

- The Commission should modify the new "service to the public" requirement, to extend the one-year commencement of service period if a licensee has timely constructed, advertised, and stands ready to provide service, but has not been able to find a customer. Otherwise, new services and service to rural areas will be discouraged.

- The Commission should allow shared use of Part 22 transmitters, since this will achieve economies of scale, speed service to the public, and assist start-up businesses who may not otherwise be able to afford entry into the telecommunications industry.

- The Commission should clarify its settlement conference procedures, to ensure that applicants are treated fairly and that applications are not erroneously dismissed.

- The Commission should clarify its interference protection requirements (Rule Section 22.132(a)(7))and its height-power exemption rule (Section 22.535(d)).

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, Ameritech Mobile Services, Inc. (Ameritech) hereby requests partial reconsideration of the rule changes adopted in the Commission's above-captioned Report and Order, Mimeo No. FCC 94-201, 59 Fed. Reg. 59502 (November 17, 1994) (hereinafter "Report and Order"). Ameritech applauds most of the changes adopted by the Commission, in its effort to streamline and update Part 22 of its rules. However, as explained below, certain rule changes will create undue hardships for both the industry and the public, and will hinder the rapid and efficient provision of telecommunications services. With regard to certain other matters, Ameritech requests clarification, so that the industry can ensure its compliance with the relevant rules.

I. The Commission Should Adopt A More Effective and Less Onerous Alternative to its 931 MHz Application Processing Scheme

A. The Commission's Retroactive Auction Policy is Arbitrary and Capricious.

Ameritech respectfully submits that the Commission's new 931 MHz application processing procedures constitute an arbitrary retroactive application of the Commission's Rules. These rules require that all applications pending as of January 1, 1995 (the effective date of the Part 22 rewrite) be amended within 60 days of the effective date of the Commission's Rules, to specify a particular frequency. The Commission will then allow newcomers to file mutually exclusive proposals on top of these filings, even though many of the amended applications have been pending for several months. As a result, many applications that would have been granted expeditiously under the current rules will now be thrown into an auction with parties that slept on their rights when the applications were originally filed. And even those applications which are "protected" (due to the close proximity of the applicants' existing co-channel facilities) will be subject to a delay of several months, while the Commission sorts through the amendments and new filings.

It is well settled that the retroactive application of administrative rules and policies is looked upon with disfavor by the Courts. See e.g. Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature."). The Commission has likewise recognized that retroactive application of its rules can be inappropriate. See First Report and Order, ET Docket No. 93-266, 9 FCC Rcd 605, 610 (1994). It is respectfully submitted that the Commission has identified no public interest goal that would be satisfied by retroactively applying this new regulatory scheme in the manner proposed. In particular, there is absolutely no justification for allowing newcomers to file competing proposals against applicants who were diligent in prosecuting their filings under the current rules.

In adopting its 931 MHz band application processing procedures, the Commission, despite wide-spread industry objections, failed to explain why pending applications for the 931 MHz paging band facilities must (i) be amended and (ii) be treated as newly filed, subject to competitive applications, when there is already in place a mechanism for determining whether even "unrestricted" 931 MHz paging band applications are mutually exclusive.

It is well settled that while the Commission may adopt rules which affect an applicant's ability to successfully prosecute its application, the Commission must ensure that there is a rational public interest determination to justify the new requirements. U.S. v. Storer Broadcasting Company, 351 U.S. 192 (1956); Yakima Valley Cablevision, 794 F. 2d at 745-46 (Decision to retroactively apply new policy of deferring franchise-fee issues to the courts is subject to review under the arbitrary and capricious standard, which requires agency modifying an existing rule or policy to supply a reasoned analysis for the change). The Commission's failure to provide a supportable rationale in the Report and Order for allowing new filings, and rejecting alternative proposals set forth in the record of this proceeding, and instead adopting the disruptive policy of requiring protected applicants to be subjected, once again, to competing applications, is arbitrary and capricious. Yakima Valley Cablevision, 794 F. 2d 745-46; Telocator Network of America v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982) (An agency must address significant comments made in the rulemaking proceeding, taking into consideration reasonably obvious alternative rules. The agency is to explain its reasons for rejecting any proffered alternatives in sufficient detail to allow judicial review of the decision.).

The Commission retroactively applied new rules or policies in Storer Broadcasting Company, supra, (wherein the Commission implemented ownership restrictions in the broadcast services, thereby resulting in the dismissal of a pending application without a formal hearing) and Hispanic Information and Telecommunications Network v. FCC, 865 F. 2d 1289 (D.C. Cir. 1989) (wherein the Commission adopted rules giving local applicants for ITFS facilities a preference over non-local applicants, but provided a mechanism for non-local applicants to

amend applications to all local entity in order to receive the preference). In those cases, the Commission had adopted a substantive public policy goal to be accomplished by modifying applicant qualification criteria. Applicants were given an opportunity to comply with the new substantive criteria. In the case at hand, the Commission has not found that applicant qualifications must be changed because of an overriding public policy change. Instead, the policy changes are merely procedural, i.e., how to implement a change to frequency-specific licensing in 931 MHz, and how to implement auctions. Neither procedural goal requires that a windfall should be given to parties that slept on their rights after currently pending applications were placed on public notice. The pending 931 MHz applications were listed on Public Notice as accepted for filing, which notice includes the preferred frequency and location. Thus, other interested parties were given full notice and opportunity to file a competing proposal, and could have even specified a preference for the same frequency. In cases where the applicant has asked for the next available 931 MHz channel without restriction, interested parties were put on notice that they risked losing an opportunity to obtain any 931 MHz frequency in the geographic area listed on the public notice, if they failed to file within 60 days and the last available channel was then awarded.

Changing the rules midstream, to require that pending applications be amended and subjected to treatment as newly filed, violates the Commission's long established cut-off policy. The purpose of this policy is to provide for early consolidation of competing applications without disruption by later filings, in order to ensure a timely and orderly processing. See Ranger v. FCC, 294 F. 2d 240 (D.C. Cir. 1961); Domestic Public Land Mobile Radio Service, Docket No. 19905, 60 FCC 2d 549, 551 (1976). These goals serve the Commission's ultimate public policy of promptly bringing needed service to the public. The several months' delay inherent in implementing the Commission's retroactive application procedures will only serve to undermine these very goals.

When implementing regulations or policies and procedures with retroactive application, the Commission must balance the "mischief" caused such retroactive application against the "salutary" or beneficial effects, if any; reviewing courts, in turn, must critically review these factors on appeal to ensure that competing considerations have been properly balanced. Yakima Valley Cablevision, 794 F.2d at 745-46. See Securities and Exchange Commission v. Chenery, 332 U.S. 194, 203 (1947). The Report and Order is devoid of any rationale for the Commission's action, even though numerous commentors in this proceeding opposed the Commission's harsh policy.[1] Moreover, the commentors in this proceeding provided the Commission with numerous less restrictive alternatives, none of which appear to have been given serious consideration. Thus, the Commission's application processing policy, with respect to pending 931 MHz paging applications, is arbitrary and capricious.

B. The Commission Must Consider Less Restrictive Alternatives.

As discussed above, an agency must consider less restrictive alternatives to a proposed rule. See Telocator Network of America; supra; Las Crucas TV Cable v. FCC, 645 F.2d 1041, 1049 (D.C. Cir. 1981). In the instant proceeding, a number of commentors urged the Commission to adopt less burdensome procedures for processing 931 MHz paging band applications, suggesting instead that pending applications be processed under the rules that were in effect at the time the applications were filed up to a particular cutoff date. The pending applications would thereby not be subjected to the major amendment process, and a windfall would not be bestowed on newcomers.[2] Moreover, delay would be avoided. Other comments suggested variations to the Commission's proposal, but were likewise opposed to allowing newcomers to file mutually exclusive proposals.

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[1] See e.g., Comments of ProNet, Inc. at 1; Personal Communications Industry Association (PCIA) at 5-6; Metrocall, Inc. at 3.

[2] See Comments of Premiere Page at 7-9; Metrocall, Inc. at 4; Alpha Express at 12-13.

In a similar vein, Ameritech submits that either of the following two alternatives will ease the regulatory burden of the Commission's new policy and will speed service to the public, without the ill effects of allowing new applications.

> (i) The Commission should continue processing all applications to grant that were received as of December 31, 1994 under the rules in effect at the time the applications were filed. If any application is mutually exclusive, because there are more applications for 931 MHz channels in a particular area than available channels, the Commission could then hold an auction or a hearing, as appropriate. In essence, the Commission would "clear the decks" of all applications which can be routinely processed, thereby avoiding delay and maintaining administrative fairness. Applications which cannot be routinely granted could be processed under the new rules, but would not be subject to new competing applications.
>
> (ii) Alternatively, the Commission could require that all applications pending as of December 31, 1994, be amended to specify a frequency. However, applications which expressed a preference for a particular frequency would be held to that frequency, unless an amendment was necessary to resolve a frequency dispute (e.g., the frequency was no longer available).[3] An amendment which either specified the preferred frequency or resolved a frequency conflict (without creating a new one) would not cause the application to be treated as newly filed. Applications that did not request a particular channel would be given superior rights over any applicant that filed more than 60 days after the application was listed on Public Notice, as accepted for filing. A protected "unrestricted application" could be assigned the next available channel (following award of the channels for which a preference was expressed), even if such assignment would ultimately preclude the grant of an application filed after January 1, 1995, since the new applicant would have been on notice of the unrestricted application's filing.[4]

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[3] A review of the Commission's weekly Public Notices reveals that the vast majority of applications for facilities in the 931 MHz paging band request a particular frequency, and the frequency requests are included in the Public Notice listing the applications as accepted for filing. These applications generally provide full engineering, including co-channel searches. Thus, the Commission has in place a de facto frequency specific 931 MHz processing scheme, which would allow the vast majority of currently pending 931 MHz applications to be promptly granted.

[4] If an application filed after January 1, 1995 has specified a particular frequency because it proposes to expand or modify an existing system on that frequency, then the Commission can hold that channel for the new applicant, so long as other frequencies are available for incumbent applicants who specified "931 MHz unrestricted." However, if there are not enough channels available for protected applicants, the new application must be dismissed. This result is fair, since the filer knew of the risk that all available 931 MHz channels would be exhausted.

Under this second alternative, if more than one applicant filed within sixty days of each other, expressing a preference for the same frequency, then these applicants can either resolve the mutual exclusivity by having one of them amend to another available frequency; or there would be an auction between the applicants for the same channel. Under either alternative, if applications are pending for an unspecified 931 MHz frequency, and as a result there are more applicants than there are available channels, then the Commission would designate an auction among all applicants that are in this mutually exclusive situation. Each applicant would be allowed to bid for one 931 MHz channel, without regard to the specific frequency. At the end of the auction, the Commission would take the highest bidders and award each of them their preferred frequency wherever possible. Applications for a specific 931 MHz frequency which would not be available to the other auction participants because of the proximity of the applicants' existing co-channel facilities would not be drawn into the auction.

These options will allow the Commission to efficiently convert its processing scheme to require new applicants to specify their frequency selection without jeopardizing the rights of those pending applications who filed before the new rules were in place. Once those "grandfathered" applications have been processed as described above, the Commission would then be able to process the applications filed after January 1, 1995, under the new regulatory scheme.

Ameritech respectfully submits that adopting either of these alternative options will avoid the several months' delay that carriers will experience, either in providing or improving service to the public, if all of the pending 931 MHz band paging applications must first be amended, subjected to newly filed competing applications, and possible auctions. On balance, the advantages of completing the processing of those pending applications under one of the above alternatives, and the mischief which could be caused by the adopted rule, far outweigh any benefits associated with this proposal.

II. The Definition of "Modification Application" Should Use a 50% Overlap Test

The Commission has adopted Rule Section 22.541(c)(2), which classifies a proposal to implement a 931 MHz facility as an application for an "initial" license, if the new location is more than two kilometers (1.2 miles) from the applicant's existing station. This definition was adopted without adequate justification, over the well reasoned and virtually unanimous opposition of the industry.[5] As noted in Ameritech's June 20, 1994 comments in this proceeding, the 1.2 mile standard is unduly restrictive, especially for relocation of authorized facilities, and is adverse to the public interest. Applicants often find that, by the time their application has been granted, the antenna site is no longer available because, e.g., the tower has become too crowded, or another user has established an operation which would cause intermodulation interference. Under these circumstances, the licensee must find a new site, and it is not always possible to locate a suitable antenna structure within two kilometers. Zoning restrictions, United States Forest Service regulations, terrain considerations (such as the presence of lakes, swamps, or other obstructions), or a sheer lack of alternative structures may prevent such a short relocation. Moreover, the relocation may be necessitated by the discovery that operation at the original site results in propagation problems, because of insufficient elevation, or the proximity of natural or man-made obstructions. In this instance, operation less than 1.2 miles from the original site may not cure the propagation problem.

However, licensees are generally able to accomplish their coverage needs, and/or cure any propagation problems, from sites which are within several miles of the original antenna structure. Under the Commission's proposed rule, an existing licensee who is forced to abandon a site may find that it is thrown into an auction for a new site more than two kilometers away. If this auction is lost, the licensee may find a hole in its coverage, despite having been diligent in applying to serve this area. If the interloping auction winner can

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[5] See Report and Order, supra at p. 46 n. 177.

successfully establish a facility in the middle of a regional 931 MHz system, a valuable wide-area paging service will have been disrupted. Indeed, this opportunity may encourage competitors to abuse the system, by intentionally filing mutually exclusive applications designed more to disrupt a competing licensee than to provide service to the public.

Accordingly, Ameritech's June 20, 1994 Comments urged the Commission to revise its proposed rule, to classify a "modification" application as one which overlaps the authorized reliable service area contour by at least 50%. Because 931 MHz paging facilities have an assumed service area radius of 20 miles, any relocation of 16 miles (26 kilometers) or less would meet this 50% overlap requirement.[6] Most commentors urged a similar revision to the rule proposed.[7]

A 50% overlap requirement (or any of the other suggested alternatives) would be more consistent with the realities of site availability than the two kilometer standard, as discussed above. The Commission has already used the 50% overlap rule as a measure of whether an applicant proposes a new service area, rather than an additional channel for an already existing service area. See current Rule Section 22.16(b)(2) ("Applications are considered to be requesting initial channels if less than 50% of the proposed reliable service area contour overlaps an existing contour"); see also current Rule Section 22.16(e) (classifying an application as a "fill-in" modification rather than an initial license proposal, if there is at least 50% service contour overlap with another facility on the same frequency); see also Rule Section

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[6] The 50% overlap mark actually occurs at a distance of 16.3 miles, or 26.23 kilometers. See Attachment A hereto. The 16 mile/26 kilometer measure is thus conservative, and simpler to administer.

[7] See Comments of CompComm at p. 6 (26 km/16.2 mile standard); Source One Wireless, Inc. at pp. 2-3 (20 miles); Paging Partners at pp. 5-6 (20 miles); Priority Communications, Inc. at p. 4 (40 miles); Skytel at pp. 12-15 (40 miles); McCaw Cellular Communications, Inc. Reply Comments at p. 10 (40 miles); SMR Systems, Inc. at p. 5 (40 miles); Metrocall, Inc. at p. 8 (non-overlapping service areas).

22.525(f).[8]

The Commission has adopted the two kilometer standard despite the above showing by the industry, and its own observation that any modification applications subject to auctions should be limited to those "so different in kind or so large in scope and scale" as to effectively constitute applications for new services. Second Report and Order, 9 FCC Rcd 2348, 2355 (1994); see Report and Order at para. 103. The Commission's only justification for doing so is its statement that "we believe that the two kilometer distance should allow a licensee who loses its transmitter site to find another one nearby." Report and Order at para. 105. This conclusion is not supported by the record or grounded in fact; and violates the requirements for the Commission to provide a reasoned explanation of its actions.

An agency must provide a reasoned explanation for an adopted rule. The Court of Appeals for the District of Columbia Circuit clarified this requirement in Western Coal Traffic League v. United States, 677 F.2d 915, 927 (D.C. Cir. 1982), as follows:

> "In particular, a reasoned explanation for agency action must be based on a consideration of relevant factors, see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. at 416, 91 S. Ct. at 823, providing reasons that do not contravene 'ascertainable legislative intent.' See Environmental Defense Fund v. Costle, 657 F.2d, 275, 283 (D.C. Cir. 1981). Furthermore, an agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal. See Alabama Power Company v. Costle, 636 F.2d 323, 384-85 (D.C. Cir. 1979); PPG Industries, Inc. v. Costle, 630 F.2d 462, 467 (6th Cir. 1980)." Id.

It is respectfully submitted that the Report and Order fails to provide a reasoned explanation for adopting the two kilometer standard. The simple statement that "we believe that the two kilometer distance should allow a licensee who loses its transmitter site to find

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[8] Current Rule Section 22.525(f) uses the 50% overlap standard to determine whether a paging application below 931 MHz is to be considered amended by a subsequent paging proposal. For the 931 MHz band, Rule Section 22.525(e) provides that a 931 MHz paging application will be amended by a subsequent filing for a paging proposal less than 40 miles away.

another one nearby," amounts to a mere unsupported conclusion. This conclusion ignores "vital comments regarding relevant factors," including the possible unavailability of alternative sites within two kilometers; zoning restrictions; federal protections and use restrictions; and the fact that an antenna located within two kilometers of the original site may not cure propagation problems. No rebuttal is provided for these points. "It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational -- must demonstrate that a reasonable person upon consideration of all the points urged pro and con would conclude that it was a reasonable response to a problem that the agency was charged with solving." Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992). The fundamental purpose of the responsive statement requirement is to show that the agency "has indeed considered all significant points articulated by the public." National Resources Defense Council v. U.S.E.P.A., 859 F.2d 156, 188 (D.C. Cir. 1988). The agency's statement must be "sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted." Amoco Oil Co. v. E.P.A., 501 F.2d 722, 739 (D.C. Cir. 1974). If judicial review is to serve its purpose, the agency statement must enable the court to "see what major issues of policy were ventilated and why the agency reacted to them as it did." General Telephone Co. of Southwest v. U.S., 449 F.2d 846, 862 (5th Cir. 1971). The two kilometer rule is neither rational, nor supported by a consideration of all of the points urged pro and con.

Moreover, the two kilometer rule contravenes "ascertainable legislative intent." Western Coal, supra, 677 F.2d at 927. The auction legislation expressly exempted renewal and modification applications from the scope of auction procedures. This action was clearly intended to prevent disruption of existing services. However, under the two kilometer rule, an existing licensee may find that it must discontinue service because of a loss of site or propagation problem, because it must move more than two kilometers, and thereby be drawn into an auction which it may ultimately lose. Therefore, the two kilometer rule should be

modified, since the Commission's action failed to address the major issues of policy raised with regard to the rule; failed to explain why the Commission responded to these issues as it did; and because the rule ultimately adopted contravenes the statutory objectives that the rule must serve. See Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir. 1987); National Wildlife Federation v. Costle, 629 F.2d 118, 134 (D.C. Cir. 1980).[9] The Commission must adopt a reasonable interpretation of the term "modification applications," which will not defeat the purposes of the legislation. See Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977). "In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used." Id. (citing Jones v. Liberty Glass Co., 332 U.S. 524, 531, 68 S. Ct. 229, 233 (1947)). The term "modification application" has always included applications for service areas which significantly overlap the existing service contour. 50 percent has been the Commission's own measure of when this overlap is significant.

III. Incumbent Licensees Should Be Given Notice and Opportunity To File Where A Competitor's Modification Application will Affect its System.

Ameritech also opposes the Commission's adoption of "first come, first served" licensing for mutually exclusive modification applications. An existing paging system grows based on the demands of its customers. Therefore, it is not always possible for a licensee to know far in advance exactly where its next transmitters must be established. Moreover, budgetary constraints and the Commission's construction requirements can prevent a licensee from implementing its entire planned coverage all at once. Therefore, a licensee must be given an opportunity to respond to competing co-channel applications, which may forever deprive it

[9] The Commission may be concerned that a 16 mile or greater standard would allow "creeping" system growth (i.e., where a licensee extends coverage into new areas by applying piecemeal for a series of transmitters spaced 16 miles apart from each other). The Commission can avoid this result by providing that expansion applications must be within 16 miles of a co-channel facility authorized to the applicant prior to January 1, 1995, in order to be considered a "modification application."

of the opportunity to expand coverage to a particular area where its subscribers travel.

The licensing scheme adopted by the Commission recognizes that a hearing is warranted when the two applicants are both existing licensees seeking to modify their systems. However, they restrict the availability of such hearing rights to that rare situation where the two existing applicants happen to file their application on the same day. Where the issues raised by competing modification applications are important enough to warrant a hearing, the right to such hearing should not turn on coincidental filing dates. Instead, an existing licensee should be able to learn of modification proposals by a competitor that will affect its ability to modify its system in a manner needed to ensure continued reliable service to its customers, and should be able to file a competing proposal to implement such modifications. Indeed, another government agency, the Office of Advocacy for the Small Business Administration (OASBA) opposes the first-come, first-served licensing concept, because it will disadvantage small businesses that cannot afford to implement all of their modifications at once. See Report and Order at para. 10; OASBA Comments at pp. 10-12. In the case of new systems, an auction procedure will properly decide who places the highest value on the spectrum. However, in the case of modification applications, where important services are already being provided to the public, the merits of each competing modification proposal should be considered in detail. First-come, first-served licensing for modification applications vis-a-vis other modification applications throws this process to chance, and will disadvantage small businesses, who will not be able to preemptively apply for and construct all modifications they may conceivably need in the future in response to the new rule. Id. at para. 12.

IV. The 60 Day Cutoff Period Should be Retained

The Report and Order (at para. 12) adopted a 30 day "cut off" period for 931 MHz paging applications which are mutually exclusive. It is respectfully submitted that the current 60 day cutoff period generally applicable to Part 22 filings should be retained, since licensees who obtain the Commission's Public Notices through normal channels may not become aware

of the filing of an application in their area of interest until several days have passed from the issuance of the Public Notice.[10] As Ameritech demonstrated in its Comments (at p. 6), 30 days may not allow sufficient time to receive and review the Public Notice; assess the impact of one or more filings on an existing co-channel system; locate one or more suitable antenna sites for competing proposals and obtain reasonable assurance of site availability (as required by new Rule Section 22.115); prepare the engineering and legal portions of competing applications; microfiche these applications as required by the Commission's rules; and forward the applications to the Commission's lockbox in Pittsburgh. Receiving the public notices by mail can take up to a week, even on the East Coast; requesting and receiving an engineering analysis can easily take two or more weeks; having counsel or a consultant prepare and forward the application for signature can take another two weeks or longer; two or three days is needed for microfiching; and additional time is needed to deliver the application to Pittsburgh. Thus, even if a licensee immediately focuses on a competing proposal, it may not be able to respond in time. If a few days pass before the licensee can review the notices, this task will be nearly impossible. This shortened timetable is particularly burdensome for smaller licensees, who may not be in a position to expedite all phases of the process. However, even larger licensees such as Ameritech may have difficulty filing a responsive application in a timely fashion, given the myriad of FCC and other regulatory deadlines faced by their personnel.

In addition to these requirements, it is often desirable to contact the co-channel applicant to determine whether an intercarrier agreement can be reached that will render competing proposals unnecessary, a process which takes even more time. For these reasons, and for the benefit of administrative simplicity, the Commission should apply the same 60 day cut off period to 931 MHz paging applications as it applies to other frequency bands.

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[10] A recent test by Postal Service auditors found that mail service in the District of Columbia is the worst in the nation, with only 60.6% of the mail being delivered in a timely fashion. "Improving Service Falls Short of Goals, Expectations," Washington Post, December 11, 1994, p. A-1, A-10.

The Commission's only reply to the above showing is its comment that "we believe that a 30 day cutoff period is sufficient to allow all qualified applicants to file." Report and Order, supra at para. 12. Again, this conclusion is unsupported, fails to address the facts and issues raised in the record, and thus lacks a rational basis.

V. The "Fill-In" Transmitter Rule Should Recognize The Realities of 931 MHz Licensing.

New Rule Section 22.165(d)(1) provides that an additional 931 MHz transmitter can be implemented without prior FCC approval so long as the proposed service area and interfering contour are totally encompassed by existing co-channel service area and interference contours. In its comments (at pp. 2-4), Ameritech requested that this rule be expanded to clarify that 931 MHz transmitters can be implemented on a permissive basis, so long as the composite interference contour is not exceeded and no other potential co-channel applicant is deprived of an opportunity to file an application.

This proposal was advanced because licensees often find that their coverage priorities lead to systems which include rings of transmitters, creating "doughnuts" of overlapping service contours, each with a "hole" in the middle. This hole can be a radius of a few miles, or several miles. Because the service area contour of the facility covering the "hole" would not be totally encompassed within the station's existing service contour, licensees are currently required to file an application for prior approval (and await a grant several months later), before the fill-in facility can be implemented. For bands below 931 MHz, there is some arguable justification for this requirement, because potential co-channel applicants can often increase or decrease their proposed reliable service area and interference contours as necessary to apply for a facility in the "hole," without causing harmful interference to the existing licensee. If not for the application requirement, these applicants may be deprived of an opportunity to file for the unserved area. On the other hand, 931 MHz facilities are subject to a strict co-channel separation of at least 70 miles from the transmitter site. See current Rule Section 22.501(g)(3)(i), new Rule Section 22.537(f). Therefore, unless the unserved area in

the doughnut situation is so large that a competing applicant could provide the required 70 mile separation to all of the existing licensee's co-channel facilities, the unserved area is not a filing opportunity for the competing applicant. Under such circumstances, the public interest would clearly be served by allowing the existing licensee to fill in the coverage hole on a permissive basis, thereby avoiding a substantial delay in improved coverage to the system's public subscribers.

This suggestion was discussed with the staff of the Mobile Services Division before the issuance of the Further Notice of Proposed Rulemaking in this proceeding, and the staff recommended that it be raised in CC Docket No. 92-115 once the comment window opened. However, the Report and Order fails to address the proposal, despite its obvious relevance to a comprehensive rewrite of the rules governing 931 MHz paging. Because of the importance of being able to flexibly respond to minor gaps in coverage, and the harmful and unnecessary delay associated with having to obtain prior regulatory approval in order to fill in such gaps, Ameritech repeats its proposal herein.

The duty to respond to significant comments finds a statutory basis in the notice and comment procedures required by the Administrative Procedures Act, for "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." Alabama Power Company v. Costle, 636 F.2d 323, 384 (D.C. Cir. 1979) (citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977)). In this instance, Ameritech's proposal would constitute a significant improvement in flexibility for 931 MHz licensees, with no apparent disadvantages. The receptiveness of the Mobile Services Division staff to this idea when originally broached leads Ameritech to believe that this suggestion in its June 20, 1994 comments was inadvertently overlooked.

Accordingly, the Commission should amend its rules to allow the establishment of a 931 MHz fill-in transmitter upon a showing (or certification) that the proposed facility will not deprive any other entity of an opportunity to apply for co-channel facilities that would meet the

Commission's required 70 mile separation.[11] This standard would be consistent with the Commission's intent to implement more flexible and streamlined licensing procedures, and thereby facilitate better service to the public. See Notice of Proposed Rulemaking, 7 FCC Rcd 3658 (1992), at para. 4.

VI. The Commission Should Clarify Rule Section 22.121(d)

The Report and Order adopted (as Rule Section 22.121(d)) a one year moratorium on the filing of applications for the same frequency (or in the case of 931 MHz, the same frequency band) within the same geographic area of an authorization which the applicant allowed to lapse. This rule has been adopted to discourage warehousing and encourage construction of facilities. See Report and Order at p. A-10. The Commission indicates, at p. A-11, that the rule "does not apply to situations where the licensee submits an authorization for cancellation. It applies only to situations where the authorization automatically terminates." However, the wording of Rule Section 22.121(d) contradicts this statement, by providing that the one year moratorium will apply "if an authorization is voluntarily cancelled or automatically terminated. . . " (Emphasis added.) The Commission staff has informally indicated that this wording of the rule was an inadvertent oversight, which will be corrected. Out of an abundance of caution, Ameritech hereby formally requests that the Commission make this clarification. The proposed one year moratorium, in the case of voluntary cancellations, would severely hamper the ability of existing licensees to build out their wide-area systems. It provides no exceptions for licensees who did not construct a particular authorization for perfectly legitimate reasons, including loss of site, discovery of propagation problems, or changes in customer coverage demands. Moreover, when an authorization is voluntarily cancelled, it is promptly placed on public notice as cancelled by the Commission, thereby

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[11] By defining this rule change in terms of the competing applicants' opportunity to file, the Commission would also allow incumbent licensees to fill in "harbors" or indentations on the outer edge of their composite contour.

notifying any other potentially interested party of the availability of the channel (to the extent that it becomes available). Therefore, there is no justification for enforcing the one year moratorium in the case of a voluntary cancellation.[12]

VII. The Commission Should Modify Its "Service to the Public" Requirements.

New Rule Section 22.142 clarifies the requirement for commencing service to the public, by providing that "stations must begin providing service to subscribers no later than the date of required commencement of service specified on the authorization." The adoption of this requirement is designed to prevent warehousing of frequencies, which is certainly a permissible objective. However, this requirement must contain an exception, so that bona fide licensees will not be penalized if they timely construct a facility, advertise its service, and stand ready to place any interested customer on the system. Otherwise, new services will be discouraged, because of the risk that an investment will be wasted if a customer cannot be found in time to meet the one year deadline. This will create a particular hardship for small, start-up businesses, as well as innovative services which may not be immediately accepted by the public. At a minimum, the Commission should clarify that the above showing would justify an extension of time to commence service to the public. This would allow the Commission to examine the individual circumstances of the applicant and ensure that it is not intentionally warehousing spectrum. The Commission should likewise clarify that these grounds will justify an extension of the discontinuance of operation period, if a licensee loses subscribers for a

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[12] The Commission may also want to take this opportunity to clarify that the restrictions on changes in effective radiated power and antenna height above average terrain embodied in Rule Section 22.123(e)(4) apply only in the case of control or repeater facilities. This rule section classifies as "major" any filing which requests "an authorization that would increase the effective radiated power or antenna height above average terrain in any azimuth from an existing fixed transmitter authorized to the filer." Again, the Commission staff has informally confirmed that it will interpret the term "existing fixed transmitter" to mean only a control/repeater facility, under the new definition of the term "fixed transmitter" adopted by the Report and Order. It would benefit the industry to clarify that this rule provision will not restrict permissive modifications to fixed base stations, where the increase in effective radiated power and/or antenna height above average terrain is offset by other modifications which keep the resulting service area and interference contours within the existing contours.

period of more than 90 days. Otherwise, new services and services to less populated areas will be at risk, to the detriment of the public. Moreover, this rule will preclude operation by stations that provide service on a seasonal basis only (e.g., in mountainous areas that are closed for the winter), or which primarily serve roamers.

VIII. The Commission Should Continue to Allow Shared Use of Transmitters.

In response to valid industry concerns, the Commission appropriately declined to adopt its original proposal to prohibit the use of multifrequency transmitters. The Commission took this action because it agreed with commentors that many multifrequency transmitter uses have legitimate public interest goals that on balance outweigh the risk of warehousing. See Report and Order at para. 44. The Commission also revised its rules to allow the use of Part 22 transmitters for both common carrier and non-common carrier services. Id. at para. 64-70. However, almost as an aside, the Commission prohibited two different licensees from sharing the same transmitter. As justification, the Commission indicated that "we are concerned that the shared use of the same transmitter by two different licensees may raise questions regarding the control and responsibility for the transmitter. We are also concerned about the broader service disruptions that outages of shared transmitters would cause." Id. at para. 71. It is respectfully submitted that this ruling is unsupported by the record, and would be adverse to the public interest.

The very justifications for allowing the use of the same transmitter for both common carrier and non-common carrier services, and the use of multifrequency transmitters in general, support the sharing of transmitters by two different licensees. In particular, transmitter sharing by two licensees "will promote economic efficiencies by reducing their costs of constructing and operating facilities" during that period when air time is available for both licensees' traffic. Id. at para. 67. "The savings resulting from utilizing existing transmitters will allow [each licensee] to offer lower prices to their subscribers." Id. "These licensees will also be able to institute competitive services at the locations of the existing transmitters earlier than they

otherwise could." Id. at para. 68. Moreover, "the competitiveness of the paging industry provides assurance that service to existing paging customers will not suffer." Id. at para. 69. The use of store-and-forward mechanisms will allow two different licensees to provide reliable services to their respective customers, at greatly reduced costs, until such time as higher traffic levels warrant the construction of separate transmitters.

The Commission's concern that shared use of the transmitter by two different licensees will raise questions of control and responsibility for the transmitter is unfounded. The sharing of transmitters is a long established practice in the community repeater service authorized by Part 90, and the Commission has made it abundantly clear that each and every licensee having access to the transmitter is responsible for its proper operation. Indeed, the Commission has fined several dozen licensees for the same violation by a single community repeater transmitter.[13] Moreover, transmitter sharing is an established practice under Part 22, especially in those areas where "guard band" and other paging licensees were encouraged by the Commission to reach settlements in contested licensing proceedings. Many of these licensees entered into time-sharing agreements, where the most economical mode of operation is a shared transmitter. In this regard, the Report and Order seems to contradict itself. In discussing the permissibility of multichannel transmitters (MCTs), the Commission cites to the usefulness of MCTs in "facilitating the sharing of channels under timesharing agreements." Id. at para. 43. This seems to contemplate that licensees with timesharing agreements will do the very thing that paragraph 71 seems to prohibit.

With regard to the Commission's concern about "broader service disruptions" in the event of an outage, the service disruption will be no broader than when an MCT used by the same licensee experiences an outage. In either case, two services will be simultaneously disrupted. As with any paging or other common carrier radio service, there are measures

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[13] See News Release, "23 NAL's for $8,000 issued for failure to light antenna tower," Mimeo No. 22336, released March 20, 1992.

(including the use of hot standby transmitters) which can minimize the risk of such outages. The acknowledged competitiveness of the paging industry (id. at para. 69) makes it unnecessary for the Commission to regulate this aspect of operation. Accordingly, the Commission should eliminate its prohibition on transmitter sharing by different licensees.

IX. The Commission Should Clarify its Settlement Conference Procedures

New Rule Section 22.135 imposes an obligation on licensees to participate in settlement negotiations with respect to any litigation involving Part 22 licenses. While this is certainly a laudable objective, the current wording of Rule Section 22.135 is vague, and several points require clarification. First, the Commission should clarify that parties to the settlement negotiations are not required to reach a settlement. There may be instances where one party is well within its rights, and the other party is in the wrong. The first licensee should not be forced to compromise its position in this instance. The Commission should also clarify that in providing notice of a settlement conference, it will accept alternative dates and locations from the parties in order to find a mutually acceptable time and place for the negotiation. Finally, the Commission should confirm that it will not dismiss an application or pleading for failure to attend a settlement conference, unless the Commission has verified that the absent party was indeed aware of the scheduled conference. This can be accomplished by telephone call, certified mail and other reliable measures. Vital license rights should not be jeopardized by a mere procedural oversight, especially if non-receipt of the notice was due to circumstances beyond the control of the licensee or applicant (such as lost mail, intervening address change, or other innocent circumstances).

X. The Commission Should Clarify its Application Dismissal Procedures, to Account for Alternative Means of Resolving Border Interference

New Rule Section 22.128(e)(3) allows the Commission to dismiss applications, where a particular channel is not available due to an unfavorable response from a foreign government pursuant to applicable international agreements. The Commission indicates that this rule section is designed to allowed the dismissal of an application, after reasonable efforts to obtain