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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)	
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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
)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Massachusetts-Connecticut Mobile Telephone Company, Mobile Radio Communications, Inc., and Radiofone, Inc. (hereinafter "the Part 22 Licensees"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petition the Commission to reconsider various aspects of the rule changes adopted in its above-captioned Report and Order, Mimeo No. FCC 94-201, 59 Fed. Reg. 59502 (November 17, 1994) (hereinafter "Report and Order"). As explained below, certain rule changes will create unnecessary burdens for Part 22 licensees, which will hinder their ability to provide service to the public. All of the petitioners are currently licensees under Part 22 of the Commission's Rules whose interests would be adversely affected unless reconsideration is granted, as herein requested.

I. The Commission's Policy For Processing 931 MHz Applications is Arbitrary and Capricious.

The Commission has adopted rules which require that all 931 MHz paging applications pending as of January 1, 1995 be amended within 60 days of the effective date of the

Commission's Rules, to specify a particular frequency. The Commission will then accept mutually exclusive proposals for a 60-day period. As a result, many applications that have been pending for months, and which are otherwise ripe for grant, will be significantly delayed (and perhaps even subject to auction).

It is well settled that the retroactive application of administrative rules and policies is looked upon with disfavor by the Courts. See e.g., Bowen v. Georgetown University Hospital, 488 U.S. 208 (1988) (Retroactivity is not favored in law); 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). The Commission has identified no public policy that would be served by retroactively applying this new regulatory scheme. More importantly, there is no justification for allowing the filing of competing proposals by applicants who were not diligent in filing when currently pending applications were originally on public notice.

The record in this proceeding almost unanimously opposed the retroactive licensing scheme. Despite that, the Commission has failed to explain why pending applications for the 931 MHz paging band facilities must be amended and 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.

The Commission may adopt rules which affect an applicant's ability to successfully prosecute its application. However, 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, *supra*, 794 F. 2d at 745-46. The Commission's failure to provide any rationale in the Report and Order (FCC 94-201) for 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. See Yakima Valley Cablevision, *supra*, 794 F. 2d 745-46. In Telocator Network of America v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982) the Court of Appeals for the District of Columbia Circuit found that an agency must address significant comments made in the rulemaking proceeding, taking into consideration reasonably obvious alternative rules. The agency must explain its reasons for rejecting any proffered alternatives in sufficient detail to allow judicial review of the decision. *Id.*

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 for non-local applicants to amend applications to a local entity in order to receive the preference). In those cases, the Commission had adopted a public policy 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 rule changes are procedural. They will govern how to implement a change to frequency-specific licensing in 931 MHz, and how to implement auctions. Neither goal requires that parties who failed to file an application the first time should be given a second opportunity to file mutually exclusive applications. The pending 931 MHz applications were listed on Public Notice with the preferred frequency and location. Thus, other interested parties were given full notice and opportunity to file a competing proposal. In cases where the applicant has asked for the "931 MHz unrestricted", 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 did not file within 60 days.

When implementing retroactive rules, the Commission must balance the mischief caused such retroactive application against the salutary effects, if any. 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 does not offer a reasoned basis for the Commission's action, even though numerous commentors in this proceeding opposed the Commission's harsh policy. See, e.g., Comments of ProNet, Inc. at 1; Personal Communications Industry Association (PCIA) at 5-6; Metrocall, Inc. at 3.

Several commentors suggested less burdensome procedures for processing 931 MHz paging band applications, urging 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. See Comments of Premiere Page at 7-9; Metrocall at 4; Alpha Express at 12-13. Other commentors suggested variations to the Commission's proposal, but the vast majority were opposed to the unfairness of allowing newcomers to file mutually exclusive proposals.

The petitioners agree that the Commission should continue processing all applications to grant that were received as of December 31, 1994 under the existing rules. If any application is mutually exclusive, because there are more applicants than channels in a particular area, the Commission could then hold an auction. This would result in the routine grant of the vast majority of pending applications, most of which will not be subject to auction because they are filling in existing co-channel systems, or are for areas where several clear channels remain. Even those pre-January 1, 1995 applications which are mutually exclusive and are processed under the new rules should not be subject to new competing applications. Once pre-January 1, 1995 applications have been processed, the Commission would be able to process subsequent applications under the new rules.

This approach would avoid substantial delay in bringing service to the public, and would treat pending applicants with fairness. The advantages of completing the processing of those pending applications under the existing rules and the problems caused by the Commission's proposal outweigh any benefits associated with retroactive rules.

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

The Commission has adopted an unduly restrictive definition of the term "modification application." In particular, Rule Section 22.541(c)(2) 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 over the strong opposition of the industry.¹ The 1.2-mile standard unnecessarily restricts modifications to existing systems, especially relocations of existing (or previously authorized) facilities. Grantees often find that by the time its application has been granted, the authorized antenna site is no longer available. Even after a facility is constructed, the site may be lost through no fault of the licensee. Under these circumstances, the licensee must find a new site; and it is not always possible to find a suitable antenna structure as close as 1.2 miles away. Zoning restrictions, federal and state regulations, or the remoteness of the area may prevent the licensee from securing alternative tower space nearby. Moreover, the relocation may be necessitated by propagation considerations, in which case a site less than 1.2 miles from the original site may not cure the problem.

Under the Commission's proposed rule, an existing licensee who is forced to abandon a site may find that it is dragged into an auction for a new site more than two kilometers away. If this auction is lost, the licensee may have to curtail service to existing customers, which is clearly adverse to the public interest. Competitors may even improperly file mutually exclusive applications which are designed solely to force an auction.

¹ See Report and Order, supra at p. 46 n. 177.

Several commentors 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%. See Comments of CompComm at p. 6 (26 km/16.2 mile standard); Ameritech Mobile Services, Inc. (26 km/16 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).

A 50% overlap requirement (or any of the other suggested alternatives) would better reflect the realities of site availability. 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 47 C.F.R. § 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 47 C.F.R. § 22.16(e) (50% "fill-in" rule).

The Commission itself has stated that the only modification applications subject to auctions should be those "so different in kind or so large in scope and scale" that they constitute applications for new services. Second Report and Order, 9 FCC Rcd 2348, 2355 (1994); see Report and Order at para. 103. A 1.2 mile change clearly falls short of this mark. The proposed 50% standard would clearly be more appropriate.

An agency must provide a reasoned explanation for an adopted rule. Western Coal Traffic League v. United States, 677 F.2d 915, 927 (D.C. Cir. 1982). The Commission's only reason for its action is a statement, without any seeming justification, 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. An agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate

rebuttal. Id. [citations omitted].

The Report and Order's above quoted statement does not constitute a reasoned explanation for adopting the 1.2-mile/2-kilometer standard. This statement 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. The statement accompanying the promulgation of a rule must show that it is rational, by demonstrating that a reasonable person upon consideration of all the points urged, pro and con, would conclude that it was a reasonable response to the problem faced by the agency. See Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992). The 1.2-mile/2-kilometer rule is not a reasonable response, in light of the record before the Commission.

The new rule also violates "ascertainable legislative intent" of the auction legislation. See Western Coal, supra, 677 F.2d at 927. The auction provision of the Omnibus Budget Reconciliation Act of 1993 exempted renewal and modification applications from auctions. This action was clearly intended to prevent disruption of existing services. However, under the new rule, an existing licensee may have to discontinue service because it loses an auction for a relocation or fill-in application. The Commission failed to address these major issues raised on the record, and failed to explain why the Commission responded to these issues as it did. Because the new rule contravenes the statutory objectives to be served, it is void. See Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (D.C. Cir. 1987).

If the Commission is concerned that a 50% overlap standard would allow piecemeal system growth (i.e., where a licensee extends coverage into new areas by applying over time for a series of transmitters spaced 16 miles apart from each other), it can provide that expansion applications must be within, e.g., 16 or 20 miles of a co-channel facility authorized to the applicant prior to January 1, 1995, in order to be considered a "modification application." This would constitute a less drastic alternative which the Commission should consider.

III. The 60-Day Cutoff Period Should be Retained.

The Report and Order (at para. 12) reduces the "cut off" period for mutually exclusive 931 MHz paging applications from 60 to 30 days. The Commission states that "we believe that a 30-day cutoff period is sufficient to allow all qualified applicants to file." Report and Order, at para. 12. However, 30 days is not enough time to receive the Public Notice; review the notice for applications which may affect your operations; find antenna sites and obtain reasonable assurance of site availability for a competing application; prepare the application(s); microfiche the application(s); and file the application(s) at the Commission's lockbox bank in Pittsburgh. Receiving the public notices by mail can take several days. Thus, even if a licensee is prompt in reviewing the notices, it may not be able to respond in time. This shortened cut-off window is another burden for small businesses, which have already been saddled with the costs of filing fees, microfiche, user fees, and courier costs for the Pittsburgh filings. This additional burden contravenes the policy underlying the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), which states at § 2(a)(5) that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." The Commission fails to address this additional burden adequately in a regulatory flexibility analysis in the Report and Order.

IV. "First Come, First Served" Licensing Should Not Be Used For Modification Applications.

The Commission has adopted "first come, first served" licensing for mutually exclusive modification applications. A paging system grows based on the customer needs and demands for coverage; and it is not always possible for a licensee to predict where its expansion area is situated. Beyond that, a licensee may not be able to afford to build all transmitters at once, given its economic situation. Therefore, an existing licensee should be provided the opportunity to file on top of competing co-channel applications, which may block its expansion.

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,

the Commission restricts the availability of such hearing rights to instances where the two existing licensees happen to file their applications on the same day. Instead, an established licensee should be able to respond to filings by a competitor that will affect its ability to expand and otherwise modify its system. The first-come, first-served licensing concept will also disadvantage small businesses that cannot afford to build out all of their transmitters at once. See Report and Order at para. 10; Comments of the Office of Advocacy for the Small Business Administration at pp. 10-12. Where valuable services are already being provided to the public, the merits of each competing modification proposal should be considered in detail. The scheme adopted by the Commission fails to achieve that objective.

V. **The Commission Should Clarify the Repetitious Application Rule**

New Rule Section 22.121(d) places 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. The purpose of this rule is to "discourage warehousing and encourage construction of facilities." Report and Order at A-10. The text of the Report and Order (Id. at A-11) states 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, Rule Section 22.121(d) provides that the moratorium will apply "if an authorization is voluntarily cancelled or automatically terminated. . . ." (emphasis added). It appears that this contradiction was an inadvertent oversight, which will be corrected. However, it has yet to be corrected in either the Commission's Erratum to the Report and Order, or a subsequent release.

The proposed refiling moratorium will hamper the ability of existing licensees to build out their wide-area systems. It should provide exceptions for licensees who did not construct for perfectly legitimate reasons. However, if the licensee can avoid the moratorium by voluntarily cancelling its authorization (which cancellation is placed on public notice), this would cure the ill effects of the new rule. Therefore, Section 22.121(d) should be revised to

clarify that it does not apply in the case of a voluntary cancellation. In the alternative, the rule should be deleted altogether.

VI. 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." While this requirement is designed to prevent warehousing of frequencies, it should provide an exception for bona fide licensees who timely construct a facility and stand ready to place any interested customer on the system. Otherwise, new services will be discouraged because of the risk that the investment will be lost if a customer cannot be found upon completion of construction. 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. Radiofone opposed this requirement, because it constitutes an impermissible modification of an already granted license under Section 316 of the Communications Act of 1934, as amended. The Report and Order fails to address this argument.

The Commission should likewise clarify that these grounds will justify an extension of the discontinuance of operation period, if a license loses subscribers for a period of more than 90 days. Otherwise, new service offerings and services to less populated areas will be discouraged, to the detriment of the public. This rule will also 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.

VII. The Commission Should Clarify Its Technical Requirements.

New Rule Section 22.132(a)(7) provides that applications will not be granted unless the Commission finds that "operation of the proposed station would not cause interference to any authorized station(s)." The Commission should clarify this criterion to reflect that applicants need only demonstrate that their proposal will not cause harmful interference to the protected

service area of any authorized station. The rule should likewise cross-reference the revised interference standard adopted by the Report and Order. Otherwise, the broad language of Section 22.132(a)(7) invites protests of the type seen prior to the adoption of the specific interference guidelines currently embodied in Rule Sections 22.16 and 22.516.

The Commission should also revise new Rule Section 22.535(d), which provides that a licensee may establish a transmitting facility exceeding the basic height-power limits only if the interference contour of the proposed high-power facility is totally encompassed by the composite interference contours of "operating" co-channel base transmitters, which are controlled by the same licensee. The rule thus requires the licensee to construct and serve subscribers over each of the "exterior" transmitter sites comprising its wide-area coverage, before it may even file an application requesting authority to replace several of the exterior transmitters with a single, high-power station. Since the licensee has gone through the process of authorizing its exterior sites (thereby affording interested parties an opportunity to protest and/or file competing applications against these sites), there appears to be no logic to requiring the construction of each and every authorized transmitter before allowing the high-power replacement transmitter application. This two step process only wastes valuable resources, and adds several months of delay. The cost of service to the public will likewise be increased. Accordingly, the Commission should eliminate the requirement that the authorized exterior sites be constructed. The requirement that the licensee construct and place subscribers on the high-power transmitter will prevent warehousing.

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

Without prior notice, the Commission has decided to prohibit 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." Report

and Order, at para. 71. This conclusion is unsupported by the record, and would be harmful to the public interest.

The very justifications for allowing the use of the same transmitter for both common carrier and non-common carrier services (Id. at para. 70), and the use of multifrequency transmitters in general (para. 44), support the sharing of transmitters by two different licensees. Transmitter sharing reduces costs of constructing and operating facilities. 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. "The competitiveness of the paging industry provides assurance that service to existing paging customers will not suffer." Id. at para. 69.

The Commission's concern that shared use of a transmitter by two different licensees will raise issues over control and responsibility for the transmitter are without basis. The sharing of transmitters is allowed for community repeaters, which are authorized under Part 90 of the Commission's Rules; licensees having access to the repeater is responsible for its proper operation, and the Commission has fined several dozen licensees for the same violation by a single community repeater.² Moreover, transmitter sharing is an established practice under Part 22, especially for guardband licensees reaching settlements in comparative proceedings. Many of these licensees entered into time-sharing agreements, and utilize shared transmitters. The Report and Order recognizes this fact, in discussing the permissibility of multichannel transmitters (MCT). There, the Commission refers to MCTs as "facilitating the sharing of channels under timesharing agreements." Id. at para. 43. 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

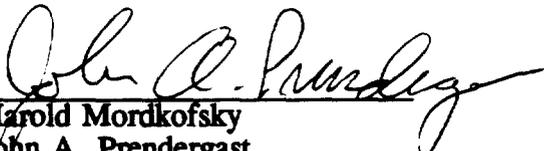
² See News Release, "23 NAL's for \$8,000 issued for failure to light antenna tower," Mimeo No. 22336, released March 20, 1992.

either case, two services will be simultaneously disrupted. 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.

CONCLUSION

In light of the foregoing, the Commission should revise its Part 22 rules as suggested above, or should take further public comment on the issues raised herein.

Respectfully submitted,


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