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

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 to Delete Section 22.118 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

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR RECONSIDERATION AND CLARIFICATION

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR RECONSIDERATION AND CLARIFICATION

The Personal Communications Industry Association ("PCIA") herewith submits its petition for reconsideration and clarification of the Commission's Report and Order in the above-captioned docket.[1] As discussed below, PCIA requests the Commission to adopt a new plan for transitioning to frequency-specific, auction-based processing of 931 MHz paging applications, to eliminate the new policy prohibiting multiple licensing of transmitters, to abolish the one-year limit on reapplying for the same channel in the same area, to return to a definition of "constructed" that does not require service to subscribers, to limit the number of filings for which microfiche are required, and to allow carriers to apply for new

[1] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115 (Sept. 9, 1994) ["*Part 22 Rewrite Order*"].

channels under the additional channel policies following grant of an authorization. PCIA has also filed a concurrent request for partial stay of the effective dates of the new 931 MHz paging application processing rules and the policy against multiple ownership of transmitters.

I. INTRODUCTION AND SUMMARY

The *Part 22 Rewrite Order* is the culmination of a long and complex proceeding to revise, update, and streamline the rules governing Public Mobile Services. PCIA believes the Commission's order admirably succeeds at these goal in almost all respects, especially in light of the further complication introduced by the regulatory parity provisions of the Omnibus Budget Reconciliation Act. PCIA believes, however, that the goals of the Commission's Part 22 Rewrite proceeding and the public interest would be served by adopting the limited proposals discussed below.

The *Part 22 Rewrite Order* adopted a processing framework for pending 931 MHz paging applications that presumed the existing application backlog would be nearly eliminated by the effective date of the new rules. Unfortunately, for a variety of reasons, the pending application queue remains. Accordingly, PCIA believes that the plan for transitioning to new frequency-specific, auction-based application rules must be reconsidered. PCIA proposes herein a simple and fair consensus plan that will reduce the Commission's administrative workload, provide for expeditious resolution of many existing applications, and allow an orderly changeover to the new auction-based processing framework.

PCIA also addresses below a number of other issues decided in the *Part 22 Rewrite Order* that require clarification or reconsideration. First, the new policy prohibiting

transmitter sharing between licensees, which was adopted without notice or comment, should be deleted. Second, because the auction application processing framework adopted by the Commission will eliminate the potential for speculative warehousing of radio channels, the one-year limitation on reapplying for the same channel in the same area should be deleted. Third, PCIA believes the Commission should not require service to subscribers in determining whether a licensee has met the construction deadlines contained in an authorization. Fourth, PCIA believes that the regulations should be modified to eliminate the microfiching requirement for submissions of five pages or less, whether or not the filing is on a prescribed form. Finally, PCIA urges the Commission to permit licensees to apply for new channels under the additional channel policies immediately following grant of, rather than construction of, already applied for facilities. Adoption of these limited changes and clarifications, as discussed below, will provide significant benefits to the industry and streamline the provision of service to the public.

II. THE EXISTING APPLICATION BACKLOG COMPELS ADOPTION OF A NEW TRANSITION FRAMEWORK FOR 931 MHz PAGING

In the *Part 22 Rewrite Order*, the FCC adopted rules for existing 931 MHz paging applications that provide:

(1) The FCC will process as many of the existing 931 MHz paging applications as possible under the existing rules by January 1, 1995;

(2) Remaining applicants will be required to file frequency-specific amendments within 60 days of the January 1, 1995 effective date of the rules (or March 2, 1995);

(3) All pending amended applications and newly filed applications that are mutually exclusive with those pending applications and are filed by March 2, 1995 would be considered as a processing group; and

(4) Auctions will be used to resolve licensing for mutually exclusive frequency-specific applications.[2]

Unfortunately, processing of 931 MHz applications has come to a virtual standstill. It is PCIA's understanding that the staff currently is processing applications filed in April, 1994, and, at best, the staff hopes to reach May- or June-filed applications by the end of the year. Thus, contrary to the staff's desire of being virtually caught up with pending application processing, a six to eight month backlog of 931 MHz applications will remain at the January 1st deadline.

Grave problems are likely to result if the staff is forced to process this backlog of applications under frequency-specific procedures beginning on January 1, 1995. Even though groups of mutually exclusive applications will be limited to specific frequencies, the daisy-chaining within each frequency group will result in massive processing problems. Determining what can be granted and what will be sent to auction -- or comparative hearing, if modification applications are implicated -- will be a herculean, time-consuming task. Since expansion plans in many areas must be delayed until after the backlog is processed, the

[2] To date, the Commission has not yet adopted specific auction rules either for 931 MHz applications specifically or paging applications generally. This matter should be promptly addressed in order to avoid undue delay in resolving auctionable applications.

detrimental effects of a change-over to the new rules on January 1, 1995, could be felt for years to come.[3]

Working with the industry, PCIA proposes herein a new framework for transitioning to the new application processing rules that provides a more manageable task for the staff, will result in speedier processing of most applications, and solves the mutual exclusivity problems in some areas in a fair and rational manner. Specifically, PCIA proposes the following application processing regime:

First, the Commission would continue to process all applications received by the effective date of the new rules, to the extent possible, under the existing rules. To speed processing, PCIA suggests that extensive technical evaluation of the applications is unnecessary. Rather, the Commission should engage in a an initial "triage." Any applications that are non-mutually exclusive would be granted, if otherwise acceptable. If an application is mutually exclusive with other applications, but initial inspection reveals that there are sufficient frequencies available to grant all of the applications, the Commission would grant all of the applications, as it does now. However, if upon initial inspection the application appears to be implicated in one of the areas where daisy-chained mutual exclusivity problems are evident, the Commission would remove the application from the processing queue and indicate on a subsequent public notice that the application could not yet

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[3] PCIA must underscore the need for the Commission promptly to resolve the existing backlog and to avoid adopting any policies that would increase the delay in action on applications. Simply put, the delays are hindering the ability of licensees to meet customer needs. Many routine system modifications are being held up by processing delays. The effectiveness and competitiveness of such carriers are being undercut for reasons beyond the licensees' control. The Commission accordingly must seek to ensure the application backlog is promptly reduced.

be granted due to mutual exclusivity problems. This approach to processing would allow the Commission rapidly to grant a large percentage of the applications in the backlog, but should not be time-intensive since no extensive analysis of mutual exclusivity will be necessary.

Second, if an application is cannot be immediately granted due to mutual exclusivity problems, applicants would have two weeks after the public notice identifying that fact to file a certification that the application cannot be overfiled. In many cases, due to the geographic area in which an application is filed, a brief inspection may lead to the Commission to the conclusion that the application is involved in mutual exclusivity problems. However, if a carrier can certify that the new site cannot be overfiled by any other applicant because of the presence of existing protected service area contours, the application should be rapidly processed to grant, if otherwise acceptable. By relying on certifications, the Commission would be able to limit the time required for the initial application "triage," but allow carriers with existing service to modify their systems as needed.

Third, PCIA suggests adopting a two-phase processing system for pending applications that cannot be easily granted. Group 1 applications would consist of all applications that complete the 60-day period for the filing of competing mutually exclusive applications by January 1, 1995; *i.e.*, those applications appearing on or prior to the Commission's October 26, 1994, public notice as accepted for filing.[4] Group 1 applicants, and any other applicants that timely filed applications that are mutually exclusive with Group 1 applications, would be given a 15-day period to file frequency-specific minor amendments

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[4] The October 26, 1994, public notice was the last public notice listing 931 MHz applications as accepted for filing that will pass the 60-day mark by January 1, 1995.

in letter form along with a consolidated exhibit showing which frequencies were selected in which areas. The consolidated exhibits would be released as informational public notices to apprise other applicants of which frequencies remain available, but would not re-open any new filing windows.[5] Once the frequency-specific amendments are received, applications that are not mutually exclusive (and otherwise in conformance with the rules) would be granted, and mutually exclusive groups of frequency-specific applications would be subject to competitive bidding or comparative hearing, as determined by the new Part 22 rules.

Finally, Group 2 applications would consist of those applications that are placed on public notice as accepted for filing before the effective date of the rules (by December 31, 1994), but not processed under the Group 1 rules. When the FCC starts processing Group 2 applications, those applications that have completed the period for the submission of competing mutually exclusive filings would not be subject to new applications.[6] Like the processing for Group 1, Group 2 applicants and applicants filing applications that are mutually exclusive with Group 2 applications would be given 15 days to file minor letter amendments specifying frequencies that remain available after Group 1 processing and consolidated exhibits; non-mutually exclusive applications would be granted; and groups of

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[5] PCIA also believes that any amendments after the frequency selection process has occurred that eliminate mutual exclusivity problems (*e.g.*, changes in frequencies or settlements) should be classified as "minor" amendments in nature.

[6] Although it is unlikely that the Commission will reach this processing stage within 60 days of the public notice listing the last application filed before January 1, 1995, if this occurred, new applications could be filed that are mutually exclusive with Group 2 applications that have not passed their cut-off date.

frequency-specific mutually exclusive applications would be resolved through auctions or comparative hearings.

PCIA believes that this plan offers considerable benefits to the public, the FCC, and the industry. As an initial matter, by quickly freeing up the easily-grantable applications in the backlog, the Commission will be able effectively to maximize the throughput of applications and allow operators to initiate service to the public rapidly. This would also allow a prompt transition to the new rules for areas that are not congested. Furthermore, by splitting the "difficult" applications into two separate processing batches, the magnitude of the staff's problem with identifying and acting on daisy-chained mutual exclusive applications will be drastically cut. Indeed, it is quite possible that resolution of the Group 1 applications may moot many of the Group 2 applications, thereby further easing the processing problem. PCIA strongly urges the Commission to adopt this approach upon reconsideration.

III. THE PROHIBITION ON TRANSMITTER SHARING BETWEEN LICENSEES SHOULD BE ELIMINATED

In the *Part 22 Rewrite Order*, in the context of addressing the elimination of Section 22.119, the Commission stated:

> [W]e do not believe that it is in the public interest to allow two different licensees to share the same transmitter. 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.[7]

[7] *Part 22 Rewrite Order* at ¶71.

The rules themselves, however, do not contain any such ban.

This statement of policy should be retracted. The policy represents a radical departure from current practice, was not a proposal in the original Part 22 Rewrite proceedings, and was not subject to public comment. Moreover, the rationales expressed for the rule are unjustified and may have the effect of limiting the availability of service in rural areas.

The dual licensing of transmitters, which the Commission previously has routinely authorized, is a practice used in some rural areas to extend service coverage where it is not economically justifiable for two carriers each to maintain their own separate facilities. Thus, elimination of the policy may result in no coverage in these areas, since neither carrier can independently justify its own transmitter on an economic basis. In some cases, after the carriers have established their respective businesses, they can financially justify the separate licensing of their own transmitters. In other cases, however, independent operation of separate transmitters may never be justified.

Furthermore, multiply licensed transmitters are generally monitored and maintained by both of the carriers involved and, thus, contrary to the rationale expressed in the order, outages are twice as likely to be rapidly detected and corrected.[8] Moreover, the sharing of transmitters by private licensees is quite common, and does not appear to raise questions of control. Under the circumstances, PCIA believes the practice of sharing transmitters is

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[8] In this regard, the Commission does permit licensees to use the same transmitter in the analogous case of multifrequency operation for economic efficiency.

beneficial to the public, since it allows extension of coverage to areas that would otherwise potentially be unserved, and should be permitted to continue.

IV. THE ONE-YEAR LIMIT ON REAPPLYING FOR THE SAME CHANNEL IN THE SAME AREA SHOULD BE DELETED

In the *Part 22 Rewrite Order*, the Commission adopted Section 22.121(d), which prohibits a carrier from reapplying for the same channel in the same area for a period of one year following termination of the authorization for failure to construct. While PCIA generally supports measures designed to ensure that frequencies are not warehoused, the rule as adopted may have unintended consequences for legitimate carriers. Moreover, the efficacy of the rule is undermined by numerous loopholes, and it does not appear to be necessary in an auction era. Under the circumstances, the one-year limitation on reapplying for the same facilities should be deleted.

Section 22.121(d) is premised on the assumption that carriers can preclude others from legitimately using channels by repetitiously applying for the same facilities and allowing the authorizations to terminate for failure to construct. Under an auction regime, however, channels cannot be tied up for more than one year at minimal cost to the licensee/applicant. Should a speculator or warehouser reapply for an authorization that was terminated for failure to construct, legitimate applicants will have an opportunity to overfile and compete for the license at auction. Moreover, when licensees are required to pay for channels, attempting to warehouse channels becomes prohibitively expensive.

Beyond being unnecessary, Section 22.121(d) appears to be of limited enforceability in any event. Because the Commission has wisely exempted carriers who voluntarily return

authorizations from the one-year ban, any speculator seeking to get around the rule could voluntarily return an authorization a few days before the application is set to expire. Thus, the rule would only be a trap for the unwary or naive. Under the circumstances, the limitation on a carrier's flexibility appears to be unjustified, of dubious policy value, and should be eliminated.

V. THE COMMISSION SHOULD NOT REQUIRE SERVICE TO THE SUBSCRIBERS TO MEET CONSTRUCTION REQUIREMENTS

Under the new Part 22 rules, a licensee is deemed to have complied with the construction requirements only if a new station is actually providing service to at least one subscriber who is unaffiliated with the carrier.[9] The application of this rule, however, could have draconian effects for licensees and also is compounded by a number of uncertainties. For example, it is unclear when a control station is deemed "constructed," since control stations do not actually provide service to the public, but rather facilitate the provision of service to the public from other transmitters. Furthermore, since customers subscribe to systems and not individual transmitters, it is unclear how to determine whether a new transmitter extending the coverage of an existing system is "constructed." On the other hand, if it is assumed that a transmitter that extends the coverage of an existing system is serving subscribers for purposes of the construction rules, line drawing problems will arise with respect to what transmitters are considered to be "extending the coverage of an existing system."

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[9] *See* §§ 22.142, 22.99.

On the whole, PCIA believes that returning to a definition of "constructed" that does not require service to subscribers is appropriate. Specifically, PCIA recommends that a licensee be deemed to have met this requirement if it has constructed the facilities and they are interconnected to the public switched telephone network (and thus available for service).[10] This proposal was also broadly supported in the record.[11] As carriers noted, a definition of construction that does not require actual service to subscribers existing is administratively simple and has the benefit of being clear and well-understood with an existing body of interpretive precedent.

VI. MICROFICHING SHOULD NOT BE REQUIRED FOR ANY SUBMISSIONS THAT ARE LESS THAN FIVE PAGES

The *Part 22 Rewrite Order* substantially increases the burden on licensees by requiring microfiching of all application forms and any other submissions of three pages or more. Previously, licensees were only required to microfiche submissions of five pages or

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[10] *See Telocator Part 22 Rewrite Comments*, CC Docket No. 92-115 (filed Oct. 5, 1992) at 17, Attachment B, Proposed Rule § 22.99 (proposing to define "service to the public" as "the facilities authorized by the Commission have been constructed in accordance with the Commission's Rules and are either (1) actually providing service to customers or (2) if no customers are yet using the facilities, are fully capable of providing service within a reasonable period of time following a request by a representative of the Commission and are available to customers upon their request").

[11] *See* Comments filed on June 20, 1994, in the Matter of Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252; *e.g.*, Comments of Celpage, Inc. at 15-17; Comments of McCaw Cellular Communications, Inc. at 28; Comments of Metrocall at 15-17; Comments of the National Association of Business and Educational Radio, Inc. at 30-31; Comments of Network USA at 15-16; Comments of Paging Network, Inc. at 26; Comments of RAM Technologies, Inc. at 15-17.

more, regardless of whether the filing was an FCC form or not. This change in the microfiching regulations is unsupported by the record, and should be reversed upon reconsideration.

For many of PCIA's smaller members, the microfiching requirement is a substantial burden. The vast majority of carriers do not have sufficient volumes of filings to justify a microfiche machine, and thus must send out filings to commercial contractors. Until now, this potential burden was blunted because microfiching was not required for a substantial number of routine filings, including, in particular, the FCC Form 489 notification of status. By requiring microfiching of routine FCC Form 489 filings, the Commission will create unnecessary expenses that must be passed on to subscribers and increase the complexity of what should be a simple notification procedure. Accordingly, PCIA requests the Commission to revisit its conclusion to require the microfiching of filings less than five pages.

If the Commission nonetheless determines that the rule should not be changed, it should clarify the text of the *Part 22 Rewrite Order*. Although the microfiching rule and other parts of the text state that non-form filings of three pages or less do not need to be microfiched, Appendix A restates the microfiche proposal as requiring microfiching of "any filings pertaining to a current or pending application or an existing authorization," and notes the "adoption of the rule as proposed."[12] The FCC should clarify that, notwithstanding the statement in Appendix A, non-form filings of three pages or less are not required to be microfiched.

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[12] A-7 & A-8.

VII. THE COMMISSION SHOULD PERMIT LICENSEES TO APPLY FOR ADDITIONAL CHANNELS FOLLOWING GRANT OF A FACILITIES APPLICATION

Under the Commission's additional channel policies, carriers are only permitted to apply for a second channel in an area if the carrier's first channel is constructed. This policy is intended to ensure that licensees do not warehouse spectrum for future capacity needs without already using what has been made available to them. Unfortunately, with the rapid expansion pace of today's mobile services and typical timeframes for grant of new applications, carriers will often have legitimate needs for additional channels that will go unmet if the current rule is enforced. Instead, PCIA urges the Commission to permit carriers to apply for a second channel immediately after having been granted the originally requested facilities.

Even with the processing speed increases that will result from frequency-specific, auction-based licensing procedures and more limited cut-off windows, new facilities applications will still require months to grant. Thus, a carrier cannot commence service from a second channel in a congested area until after it has applied for an initial channel, received a grant of the initial channel, constructed the initial channel, applied for a second channel, and received grant of the second channel, a process that could take over a year. When the timing of service from a second channel is critical, as it often is, carriers should be allowed to let the processing cycle for the second channel run at the same time they are constructing the first channel. PCIA's proposal would significantly shorten delays in

bringing service to the public, increase carriers' flexibility, and can be implemented consistent with the Commission's overall goal of achieving efficient spectrum usage.[13]

VIII. CONCLUSION

PCIA commends the FCC for its comprehensive and well-thought rewrite of the public mobile service rules. As discussed above, however, assumptions regarding the processing of pending 931 MHz paging applications have not proved out in practice. Indeed, the severity of the situation compels revisiting the proposal for transitioning to frequency-specific auction processing. PCIA's proposal provides a fair, simple, and efficient procedure for clearing the backlog and allowing the introduction of service to subscribers and should be adopted. In addition, as discussed above, the Commission could facilitate and streamline the procedures for public mobile services if it eliminated the prohibition on transmitter sharing by licensees, deleted the one-year limit on reapplying for the same frequency in the same area, abolished the requirement that carriers actually provide service to an unaffiliated

[13] If the Commission remains concerned about frequency warehousing in such circumstances, despite that warehousing is a less significant concern in an auction-based processing regime, the Commission could, for example, process the application for an additional channel but withhold grant until completion of construction of the first channel is certified.

subscriber to meet the construction requirements, limited the instances where microfiching of routine applications was required, and permitted licensees to begin the application process for additional channels following grant, rather than construction, of already applied for facilities.

Respectfully submitted,

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