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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 RECONSIDERATION AND CLARIFICATION

Respectfully submitted,

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December 19, 1994

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SUMMARY

Paging Network, Inc. ("PageNet") submits this petition for reconsideration and clarification of the *Report and Order*, 59 FR 59502 (1994), released on September 9, 1994, with respect to the revisions of Part 22 of the Commission's Rules (hereinafter "*Part 22 Rewrite Order*"). In the *Part 22 Rewrite Order*, the Commission made extensive and far reaching changes in the rules which govern the provision of commercial mobile radio service. Many of these rule revisions are beneficial in speeding service to the public and minimizing regulatory burdens. However, certain rules were either modified in error, or modified in a manner which results in the reintroduction of licensing and operational inefficiencies and unnecessary regulatory burdens.

In the *Part 22 Rewrite Order*, the Commission set forth a scheme to process all 931 MHz applications filed before January 1, 1995. The Commission's process will allow newly filed applications to compete against applications that were filed months or years ago. The Commission must modify the way in which it intends to process 931 MHz applications filed before January 1, 1995, by granting as many applications as possible under the pre-1995 processing procedures and only subjecting mutually-exclusive applications to competitive bidding. If an application is grantable because: (1) there are more 931 MHz channels available in the area than applications; and (2) the application is not subject to petitions or protests, the Commission should simply process and grant this application as quickly as possible under the pre-1995 processing procedures.

At the present time, 931 MHz processing has reached a virtual standstill. In the northeast corridor from Baltimore to Boston, in Florida and California, the Commission has been unable to resolve difficult processing issues under the pre-1995 processing procedure. In order to rectify this situation, the Commission intends to use competitive bidding for mutually exclusive applications, and if a modification application is part of the processing group, a comparative hearing.

To effectuate this process, the Commission should place 931 MHz applications filed before January 1, 1995, that are mutually exclusive and not immediately grantable, into two (2) processing groups. MX Group 1 applications should be defined as those applications that are either mutually exclusive or subject to petitions or protests and were placed on public notice as accepted for filing prior to October 26, 1994. To process these MX Group 1 applications, the Commission should issue an informative public notice identifying all MX Group 1 applications, including identifying the applicant, file number, location, geographic coordinates and channel preference (if specified). The applicants that did not specify a channel, and those applicants wishing to change their channel preference, should be given fifteen (15) days from the public notice to amend their

applications to specify a channel. Amendments should be required in letter format and considered minor in nature.

After the amendments are filed, the Commission should place the applications in mutually exclusive groups and proceed to hold auctions, or if a modification application is part of the mutually exclusive group, a comparative hearing. If a MX Group 1 application was placed on public notice in the fall of 1994, it is possible that competing applications were filed against it after October 26, 1994, but within the time period allowable for competing applications. These competing applications should be included in the appropriate MX Group 1 mutually exclusive grouping and subject to auction or comparative hearing. If as a result of the amendments, an application is no longer mutually exclusive, that application should be granted without delay.

MX Group 2 applications should be defined as those applications that were placed on public notice as accepted for filing after October 26, 1994, but before January 1, 1994, and are either mutually exclusive or subject to petitions or protests. MX Group 2 will be processed as the same filing group with every application in that group having the potential to be mutually exclusive with another application in that group.

Like the MX Group 1 process, the Commission should issue an informative public notice identifying all MX Group 2 applications, including identifying the applicant, file number, location, geographic coordinates and channel preference (if specified). The applicants that did not specify a channel, and those applicants wishing to change their channel preference, should be given fifteen (15) days from the public notice to amend their applications to specify a channel. The amendments should be required in letter format and considered minor in nature.

After the amendments are filed, the Commission should place the applications in mutually exclusive groups and proceed to hold auctions, or if a modification application (as defined under the new rules) is part of the mutually exclusive group, a comparative hearing. All competing applications to MX Group 2 applications, even though these applications were filed after January 2, 1995, should be included in the appropriate mutually exclusive group and subject to auction or comparative hearing. If as a result of the amendments, an application is no longer mutually exclusive, that application should be granted without delay.

New Section 22.144 provides for automatic termination of authorizations in certain specified circumstances. The Commission should make clear that channels for which the authorizations automatically expire become available immediately upon termination, and that applicants can immediately apply for such channels. This process will permit the immediate relicensing of these channels, and thereby shorten the time in which the channels lie fallow.

Section 22.9 defines service to subscribers as service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier. PageNet requests the Commission clarify that for multiple transmitter systems, the rule requires that the licensee serve an unaffiliated subscriber in the system, not within each transmitter service area. Given the severe penalty for failure to construct, the rules must be clear and unambiguous that the "service to subscriber" requirement is applied on a system, rather than a transmitter, basis.

Since Section 22.142 does not take into account that control stations do not serve subscribers, under the present language of Section 22.142, control stations would never be considered constructed. Section 22.142 should be clarified to provide that construction of control stations should be defined as constructed and capable of operation. Section 22.142 should also be clarified to provide for testing, without any notification to the Commission, anytime during the construction period. Furthermore, Section 22.142 should be clarified to state that the fifteen (15) days to notify the Commission of completion of construction cannot be used to begin service after the construction permit has expired.

Under the new rules, Section 22.539 requires an applicant to wait until it has constructed and placed its facilities in operation, prior to seeking an additional channel in the same area. Since Section 22.539 will adversely affect a paging carrier's ability to acquire spectrum, the Commission should modify Section 22.539 to allow carriers to seek an additional channel once their first construction permit is granted.

Section 22.121(d) states that if a 931 MHz permittee's construction authorization cancels automatically for failure to commence service to subscribers, the FCC will not consider another application to operate in the same geographic area by that permittee for one year after the date the authorization terminated. PageNet agrees with the intent of the rule, but believes it should be modified in order to avoid its circumvention. Section 22.121(d) should provide that a permittee (*i.e.*, not presently an FCC licensee operating any PMS in the same general area) that returns a construction authorization for cancellation or allows a construction authorization to terminate automatically, should be prohibited from filing for the same geographic area for one year. For licensees (*i.e.*, entities that have constructed and are operating paging facilities), Section 22.121 should provide exceptions from the inability to seek a construction authorization in an area in which a previous construction authorization has expired.

The Commission has not included renewal expectancy language in Part 22 of the rules for non-cellular PMS carriers. This significant oversight must be rectified.

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To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Paging Network, Inc. ("PageNet"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby submits this petition for reconsideration and clarification of the *Report and Order* in the above-captioned proceedings released on September 9, 1994 (hereinafter "*Part 22 Rewrite Order*").[1] In support of this Petition, the following is respectfully shown:

I. Introduction

In the *Part 22 Rewrite Order*, the Commission made extensive and far reaching changes in the rules that govern the provision of commercial mobile radio service. Many of these rule revisions

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1 59 FR 59502 (1994).

are beneficial in speeding service to the public and minimizing regulatory burdens under which radio common carriers have long and unnecessarily labored. However, certain rules were either modified in error, or modified in a manner that results in the reintroduction of licensing or operational inefficiencies and unnecessary regulatory burdens, thereby increasing the cost of and delaying service to the public. It is these rules from which PageNet seeks relief in this Petition.

II. The Commission Should Implement A 931 MHz Application Processing Scheme That Does Not Re-Open Filing Windows For Applications Filed Before January 1, 1995

In the *Part 22 Rewrite Order*, the Commission stated that all applicants that have 931 MHz applications pending as of January 1, 1995, will be given sixty (60) days from that date to amend their 931 MHz applications to specify a 931 MHz channel.[2] In addition, the Commission determined that the 931 MHz applications that have been either granted, denied or dismissed, but are the subject of pending petitions for reconsideration or review, as well as new applications filed within sixty (60) days of January 1, 1995, will all be considered as a single, onetime processing group.[3] By this scheme, although many 931 MHz applications have been before the Commission for many months, and in some cases years, the Commission intends to subject these applications to a new sixty (60) day period in which competing applications could be filed. Not only is this scheme patently unfair, it is

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2 *Part 22 Rewrite Order* at ¶ 95-100.

3 *Id.*

indefensible from a regulatory standpoint and will engender extensive federal court litigation as well as increased speculation in licenses. Therefore, the Commission must modify the way in which it intends to process 931 MHz applications filed before January 1, 1995, by granting as many applications as possible under the pre-1995 processing procedures and only subjecting mutually exclusive applications to competitive bidding.

At the present time, 931 MHz processing has reached a virtual standstill. In the northeast corridor, from Baltimore to Boston, in Florida and in California, the Commission has been unable to resolve difficult processing issues under the pre-1995 processing procedure. In order to rectify this situation, the Commission intends to use competitive bidding for mutually exclusive applications, and if a modification application is part of the processing group, a comparative hearing. To effectuate this process, the Commission should place 931 MHz applications filed before January 1, 1995, into two (2) processing groups. The first group of applications are those applications that are grantable because they are not mutually exclusive with any other application. The second group of applications are those applications that are mutually exclusive, including applications subject to protests. The second group of applications will be subject to competitive bidding as specified in the *Part 22 Rewrite Order*.

A. The Commission Should Process As Many Pre-1995 931 MHz Applications As Possible Under The Pre-1995 Processing Rules

Many of the applications filed before January 1, 1995, are grantable as filed because: (1) there are more 931 MHz channels available than applicants in a given area; and (2) the applications are not subject to petitions or protests. Since these applications are grantable, the Commission should not require amendments or reopen filing windows. The Commission should simply process and grant these applications as quickly as possible under the pre-1995 processing procedures.

Specifically, if a pre-1995 application was filed stating a channel preference, the Commission should endeavor to assign and grant that channel to the applicant. If that channel is not available, or the application did not state a channel preference, the Commission should assign an available channel and grant the application.

Since pre-1995 applications were subject to a sixty (60) day cut-off period for competing applications, all applications that were placed on pubic notice as accepted for filing prior to January 1, 1995, should be subject to a sixty (60) day cut-off window for competing applications. For most of these pre-1995 applications presently pending before the Commission, that sixty (60) day period for competing applications has already passed.[4] However, some of the pre-1995 applications will be subject to

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4 If a pre-1995 application is placed on public notice as accepted for filing after January 1, 1995, that application should be subject to a thirty (30) day cut-off period for competing applications.

competing applications as late as February 1995. If mutually exclusive applications are filed against a pre-1995 application, these applications should be processed under the Commission's competitive bidding procedures using the process described below.

B. The Commission Should Process Mutually Exclusive Applications Filed Before January 1, 1995, Using Competitive Bidding Procedures, But Not Reopen Filing Windows For Competing Applications

As outlined below, by utilizing two processing groups for pre-1995 mutually exclusive applications and those applications subject to protests, the Commission will be able to restrict the filing of new competing applications against applications that have been pending for many months or years. Specifically, the creation and utilization of two mutually exclusive processing groups will prevent speculators from daisy-chaining an application to become mutually exclusive with applications whose cut-off period for competing applications has already run. However, the process allows for competing applications that were filed within the cut-off period for specific MX Group 1 or MX Group 2 applications (defined below). Therefore, although the groupings are different, the processing of the MX Group 1 applications and the MX Group 2 applications will be substantially similar.

1. MX Group 1 Applications

MX Group 1 applications should be defined as those applications that are either mutually exclusive or subject to petitions or protests and were placed on public notice as

accepted for filing prior to October 26, 1994.[5] MX Group 1 will be processed as the same filing group with every application in that group having the potential to be mutually exclusive with another application in that group.[6]

In MX Group 1, there will be applications that stated a preference for a particular frequency and those that stated no preference. The Commission should issue an informative public notice identifying all MX Group 1 applications, including identifying the applicant, file number, location, geographic coordinates and channel preference (if specified). The applicants that did not specify a channel, and those applicants wishing to change their channel preference, should be given fifteen (15) days from the public notice to amend their applications to specify a channel. If an applicant specified a channel in its original application, the applicant will not be required to file an amendment unless it wishes to specify another frequency. If the applicant did not specify a channel in its application and fails to timely file an amendment, that

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5 October 26, 1994, was the last date for public notice in which the sixty (60) day cut-off period for competing applications would run completely within 1994. By using this date, the Commission will prevent speculators, filing applications after January 1, 1995, from daisy-chaining a competitive application into MX Group 1.

6 Since all MX Group 1 applications will have been placed on public notice as of October 26, 1994, these applications will have already been subject to competing applications prior to the effective date of the new rules. There is no reason or justification to reopen a window in which competing applications could be filed.

application should be dismissed. The amendments should be required in letter format and considered minor in nature.

If as a result of the amendments, an application is no longer mutually exclusive, that application should be granted without delay. If still mutually exclusive, the Commission should place the applications in mutually exclusive groups and proceed to hold auctions, or if a modification application (as defined under the new rules) is part of the mutually exclusive group, a comparative hearing. If a MX Group 1 application was placed on public notice in the fall of 1994, it is possible that competing applications will be filed against it after October 26, 1994, but within the time period allowable for competing applications. These competing applications should be included in the appropriate mutually exclusive grouping and subject to auction or comparative hearing.

2. MX Group 2 Applications

MX Group 2 applications should be defined as those applications that were placed on public notice as accepted for filing after October 26, 1994, but before January 1, 1994, and are either mutually exclusive or subject to petitions or protests. MX Group 2 will be processed as the same filing group with every application in that group having the potential to be mutually exclusive with another application in that group.

In MX Group 2, there will be applications that stated a preference for a particular channel and those that stated no preference. The Commission should issue an informative public notice identifying all MX Group 2 applications, including

identifying the applicant, file number, location, geographic coordinates and channel preference (if specified). The applicants that did not specify a channel, and those applicants wishing to change their channel preference, should be given fifteen (15) days from the public notice to amend their applications to specify a channel. If an applicant specified a channel in its original application, the applicant will not be required to file an amendment unless it wishes to specify another channel. If the applicant did not specify a channel in its application and fails to timely file an amendment, that application should be dismissed. The amendments should be required in letter format and considered minor in nature.

If as a result of the amendments, an application is no longer mutually exclusive, that application should be granted without delay. If still mutually exclusive, the Commission should place the applications in mutually exclusive groups and proceed to hold auctions, or if a modification application (as defined under the new rules) is part of the mutually exclusive group, a comparative hearing. All competing applications to MX Group 2 applications[7], even though some of these applications may have been filed after January 1, 1995, should be included in the appropriate mutually exclusive group and subject to auction or comparative hearing.

It is simply unfair for the Commission to open the flood gates for new applications to be filed against 931 MHz

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7 Applications filed within sixty (60) days of the pubic notice of accepted for filing of a specific MX Group 2 application.

applications that have been pending for months and even years. By the transitional procedure outlined above, the Commission will be able to utilize its pre-1995 processing scheme to process and grant applications that are not mutually exclusive and not subject to protests. Simultaneously, the Commission will be able to undertake the difficult task of grouping, requiring amendments, and setting for auction or hearing, the 931 MHz applications that are mutually exclusive or subject to protests. By utilizing this simple procedure, the Commission will be able to rapidly process the backlog of 931 MHz applications presently pending before the Commission.

III. The Rules Should Make Clear That Channels Are Available To New Applicants Immediately Upon Automatic Authorization Termination

New Section 22.144 provides for automatic termination of authorizations in certain specified circumstances. The Commission should make clear that channels for which the authorizations automatically expire become available immediately upon termination, and that applicants can immediately apply for such channels. This process will permit the immediate relicensing of these channels, and thereby shorten the time in which the channels lie fallow, depriving the public of service options. PageNet believes the importance of this proposal is magnified by the fact that, to its knowledge, there are a large number of speculators presently holding authorizations, which they may not build, but which most certainly will not voluntarily cancel these authorizations or notify the Commission of their

failure to build. PageNet does not believe it is in the public interest for these frequencies to lie fallow, and to be subjected to long Commission processes before they are again made available to legitimate operators seeking to expeditiously provide service to the public.

The process currently employed by the Commission, that is, requiring authorization terminations to appear on public notice as terminated, prior to the time new applications for those channels can be filed, simply does not work in an environment where channels are scarce and licensees are clamoring to get these frequencies in order to meet public demand for service.

PageNet's proposed process, while speeding licensing and therefore service to the public, does not confer an advantage on the first to recognize that the authorization has automatically expired. The first to be filed application would still be put on public notice, and subject to competing applications. Similarly, the Commission could put in place a process that would not permit a new applicant to obtain a channel that did not in fact automatically expire as suggested by the applicant. The Commission could simply require applicants applying for channels that they believe have automatically expired to serve the former permittee with notice of its filing, giving the former permittee twenty (20) days to notify the Commission and the applicant of its position that the channel had not automatically expired.

IV. The Rules Should Be Clarified To Specify That The "Service To Subscribers" Requirement Contained In The Definition Of Construction Will Be Applied On A System, Not Transmitter, Basis

New Section 22.9 defines service to subscribers as service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier. 47 C.F.R. § 22.9. PageNet requests that the Commission clarify that for multiple transmitter systems, the definition of service requires that the licensee serve an unaffiliated subscriber in the system, not within each transmitter service area. PageNet believes that any other interpretation would be impossible to apply because carriers offer service on a system, not on a transmitter basis, and systems today typically are comprised of numerous, if not dozens, of transmitters.

For example, a start-up PageNet system might consist of fifteen (15) transmitter sites serving a metropolitan or wider area. The service offered to subscribers is within the service area covered by the totality of transmitters, not one transmitter. PageNet does not ask the subscriber where in the system the subscriber intends to receive pages. The subscriber is a subscriber on the system, not to a single transmitter service area. Similarly, when a carrier expands its system to better serve the perimeter areas or, for example, the interstate highway system running between communities, the carrier may simply be providing better service to existing subscribers who do not necessarily live in those areas.

Given the severe penalty for failure to construct in accordance with the Commission's rules, the rules must be clear and unambiguous. The only way to clear up the ambiguity for multiple transmitter systems is to apply the "service to subscriber" requirement on a system, not on a transmitter basis.

V. Section 22.142 Should Be Clarified To Provide That Control Stations Do Not Need To Serve Subscribers In Order To Be Considered Constructed

New Section 22.142 provides that:

> Stations must begin providing service to subscribers no later than the date of required commencement of service specified on the authorization. If service to subscribers has not begun by the date of required commencement of service, the authorization terminates, in whole or in part, without action by the FCC, pursuant to § 22.142.[8]

Since Section 22.142 does not take into account that control stations do not serve subscribers, under the present language of Section 22.142, control stations would never be considered constructed. Accordingly, new Section 22.142 should be clarified to provide that construction of control stations should be defined as constructed and capable of operation no later than the date specified on the construction authorization. Furthermore, the definition of construction of control facilities should not be linked to construction and service to subscribers of the associated base station. The reason for this is that applications for control stations are granted more rapidly than base station applications and control stations have independent construction deadlines from their associated base stations.

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8 47 C.F.R. § 22.142 (effective January 1, 1995).

VI. Issues Regarding The Construction Period

A. Facility Testing Should Be Allowed During Construction

New Section 22.142 specifies when a licensee must notify the Commission of completion of construction of its authorized facilities. However, this section is silent on testing of facilities during construction. Section 22.142 should be clarified to provide for testing, without any notification to the Commission, anytime during the construction period.

B. The Fifteen (15) Day Notification Period Of Completion Of Construction Should Not Be Considered An Additional Fifteen (15) Days To Construct Or Serve Subscribers Once A Construction Authorization Has Expired

There are subtle ambiguities in new Section 22.142 regarding the fifteen (15) day period in which a licensee may notify the Commission of completion of construction. The ambiguities manifest themselves when a licensee constructs its facilities at the end of the construction period. First, the Commission should clarify whether Section 22.142 allows a licensee to file its Form 489 completion of construction notification after the termination date of the authorization. For example, if a licensee constructed and began service to subscribers on the last day to construct pursuant to the authorization, must the Form 489 notification be filed on that day in order that the construction authorization not be allowed to expire, or may the licensee file the Form 489 construction notification after the expiration of the authorization, but no later than (15) days after the date of the expiration of the construction authorization.

Second, the Commission should amend Section 22.142 to specifically state that the fifteen (15) day period in which the rule allows for notification to the Commission of completion of construction and commencement of service, does not allow the licensee an additional fifteen (15) days in which to construct and commence service.

VII. Paging Carriers Should Not Be Unduly Limited In their Ability To Obtain 931 MHz Spectrum

A. Ability To Acquire Additional Channels

Under the old Part 22 rules, a 931 MHz applicant could file for another channel in the same area once the construction permit for the first channel had been granted. Under the new rules, Section 22.539 requires an applicant to wait until it has constructed and placed its facilities in operation, prior to seeking an additional channel in the same area.

The new rule does not properly take into account the rapid growth in paging subscribership, and thus the need of existing carriers serving those subscribers to plan for and install new facilities to meet demand. The old rule did far more to accommodate that need, and should be retained in lieu of new Section 22.539.

Subscribership of paging carriers, such as PageNet, are growing at a tremendous rate. Under Section 22.539, by the time PageNet is granted a second construction authorization, PageNet's first facility could be at maximum or out of capacity in some markets thus affecting service quality and system performance. Moreover, as the paging industry subscribership continues to

skyrocket, Section 22.539 will significantly restrict paging system build-out. This phenomenon not only hampers graceful expansion, instead requiring crisis-mode build-out, but also puts the paging industry at a disadvantage vis-a-vis its competitors. For example, virtually all other carriers in the CMRS marketplace are eligible to offer paging and services complementary to paging. These carriers, by virtue of the fact that they are granted larger portions of spectrum, are not hamstrung by such a requirement. Their initial capacity grants already permit vast numbers of subscribers on these systems, without recourse to the Commission for additional licenses.

Section 22.539 also does not take into account the fact that carriers simultaneously constructing and operating different systems <u>in the same general area</u>. For instance, if a carrier is building-out a regional system in New York on frequency A and moving that system north, while simultaneously building-out a system in Boston on frequency B and moving that system south, at some point the paging carrier will require construction permits in the same area on two channels. In this situation, restricting the availability of a second channel will impede this system build-out and delay service to the public.

Furthermore, since carriers are permitted to utilize multifrequency transmitters, Section 22.539 should be reconciled with multifrequency transmitter use, which allows paging carriers to put more than one channel in operation without having to purchase an additional transmitter. Accordingly, the Commission should modify Section 22.539 to allow 931 MHz licensees to seek

one additional channel in the same area immediately after the construction permit for the first channel has been granted.

B. Termination Of Construction Permit Should Limit The Ability Of Speculators From Filing For Additional Facilities, But Not Limit The Ability Of Carriers To Seek Additional Facilities

Section 22.121(d) states that if a 931 MHz permittee's construction authorization cancels automatically for failure to commence service to subscribers, the FCC will not consider another application to operate in the same geographic area by that permittee for one year after the date the authorization terminated.[9] In the *Part 22 Rewrite Order*, the Commission stated that the purpose of this rule was to prevent licensees from repeatedly obtaining and holding the same authorization for a channel or channels in an area but "never construct[ing] the stations."[10] PageNet agrees with the intent of the rule, but believes that the rule as drafted does not achieve its purpose, instead harming legitimate operators, and interfering with the build-out of high quality systems.

For example, the rule as drafted does not deter speculators. If a permittee became authorized to construct facilities for the purpose of speculation (the sale of the authorization to a *bona fide* carrier) or to warehouse spectrum (hold spectrum to avoid competition), the operation of Section 22.121(d) would not prevent speculators or warehousers from holding the channels for more than one year. Specifically, to avoid its inability to reapply for

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9 47 C.F.R. § 22.121(d) (effective January 1, 1995).

10 *Part 22 Rewrite Order*, Appendix A at 11.

channels, the speculator or warehouser need only voluntarily return its authorization for cancellation.[11] In addition, if the speculator or warehouser did not wish to compete in an auction, this entity need only file additional applications for nearby facilities on the same channel prior to the expiration of a construction authorization. The speculator or warehouser could file an application every three months in the same general area of its first construction authorization and, by the time the prior construction authorization either terminates automatically or is voluntarily submitted for cancellation, the speculator is already authorized for another facility. A speculator or warehouser could follow this procedure several times and tie-up a channel in the same general area for many years.

To give legitimate operators the flexibility they need, but deter speculators, Section 22.121(d) should provide that a permittee (*i.e.*, not presently an FCC licensee operating a PMS in the same general area) that returns a construction authorization for cancellation, or allows a construction authorization to terminate automatically, should be prohibited from filing for the same geographic area for one year. In addition, Section 22.121(d) should require permittees that seek a second construction authorization within a 100 mile radius of an existing construction permit to demonstrate that it has taken significant steps to ensure the construction of the first facility, including the

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11 PageNet is not suggesting that the voluntary cancellation provision be deleted or omitted, as it provides a necessary safeguard for legitimate carriers. *See Part 22 Rewrite Order* at Appendix A-11.

purchase of the transmitter and execution of a site lease. If the second authorization is sought because of the loss of a transmitter site, the permittee must still be able to show that it has taken significant steps to build the first facility, including the purchase of a transmitter. As modified in this manner, Section 22.121 will prevent speculators, -- those who apply for facilities without any intention to construct, -- from holding channels for long periods of time.

For licensees (*i.e.*, entities that have constructed and are operating paging facilities), Section 22.121 should provide exceptions to the consequences of its application. These exceptions should be based upon the fact that licensees have proven their intent to construct and operate communication systems. The first Section 22.121 exception should allow operating carriers to propose same channel facilities within the forty (40) mile radius of any of its operating facilities, no matter if this new proposal overlaps an area that was to be covered by an expired construction permit. The second Section 22.121 exception should allow an applicant to propose a facility in an area in which it allowed a construction authorization to terminate during the one year blackout period, if the carrier can demonstrate that it intends to use the proposed facilities within an existing system.

By creating these two (2) exceptions, the Commission will allow legitimate carriers to avoid the harsh consequences of Section 22.121 and provide the flexibility to build-out their systems by demonstrating that they have constructed a

communications system and intend to utilize the proposed facility as part of its system. The reason this is necessary is that sites become unavailable, equipment is delivered late, and coverage requirements change. As such, carriers that have proven they are not speculators by operating communication businesses pursuant to licenses issued by the FCC must be given the flexibility to build viable communication systems without being prohibited from seeking additional channels or coverage areas for their systems because they were unable to construct every facility authorized. If the Commission is concerned that existing carriers may warehouse channels, the Commission could cap the amount of time a licensee could continue to propose facilities in an area without having ever built such facilities.

VIII. PMS Carriers Must Be Provided With A Renewal Expectancy In Part 22 Of the Rules

New Section 22.145 relates to renewal procedures for PMS stations. Section 22.145 states that "[a]dditional renewal requirements applicable only to specific Public Mobile Services are set forth in the subparts governing those services."[12] The only PMS service that has additional requirements related to renewal is the Cellular Radiotelephone Service.[13] However, although the Commission has provided for competing applications to be filed against PMS carriers seeking to renew their licenses, unlike cellular, no renewal expectancy language has been

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12 47 C.F.R. § 22.145 (effective January 1, 1995).

13 *See* 47 C.F.R. §§ 22.933, 22.935.