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

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DEC 21 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RECONSIDERATION

Respectfully submitted,

PAGING NETWORK, INC.

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December 21, 1994

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SUMMARY

Paging Network, Inc. ("PageNet") hereby petitions the Commission for reconsideration of its *Third Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, 59 FR 59945 (1994) ("*Third R&O*").

Although the Commission took major steps to achieve regulatory symmetry among mobile services in the *Third R&O*, by not adopting rules and procedures for conditional pre-grant operation of paging facilities, the Commission missed an opportunity to establish regulatory symmetry for paging carriers in the CMRS marketplace. In this Petition, PageNet seeks reconsideration of the Commission's determination not to authorize conditional pre-grant operation for paging carriers. In addition, this Petition requests that the Commission add renewal expectancy language for PMS carriers to Part 22 of the rules.

In the build-out of 900 MHz paging systems, particularly PMS paging systems, licensees often find that after the construction of the initial transmitters, there are areas almost totally encompassed by the service areas of operating transmitters that also require service coverage. The Commission should allow the licensee to certify in its Form 600 application that the area to be served cannot be served by any other licensee. Upon the filing of the application and certification, the licensee should be allowed to begin pre-grant conditional operation and continue that operation during the pendency of its application for permanent authority.

In the CMRS marketplace, both Public Mobile Service paging ("PMS") and Private Carrier Paging ("PCP") carriers are at a distinct disadvantage. Most significantly, paging carriers license their facilities on a transmitter-by-transmitter basis, while the rest of the CMRS carriers enjoy unrestricted build-out within their geographically defined service areas. To build-out the same system that a narrowband PCS licensee could build on a grant of one application, a paging carrier may have to file from a dozen to hundreds of applications. In this proceeding, the Commission has the opportunity to cure this significant inequity by allowing paging carriers to conditionally operate during the pendency of an application for permanent authority. PageNet urges the Commission to do so.

In the *Third R&O*, the Commission declined to adopt a conditional operation proposal citing Section 309(f) of the Communications Act of 1934 (hereinafter the "Act"). PageNet urges the Commission to reconsider its determination in the *Third R&O* with respect to conditional pre-grant operation. PageNet believes that the Commission has the authority to allow

conditional pre-grant operation for paging carriers, just as the Commission allows Part 21 microwave licensees to operate on a temporary basis pursuant to 47 C.F.R. § 21.707.

Although PageNet believes pre-grant conditional operation is separate and distinct from special temporary authority, PageNet wishes to emphasize that there are extraordinary circumstances that would allow the Commission to provide for pre-grant conditional operation under Section 309(f) of the Act. Specifically, it is an extraordinary circumstance that the Commission would license some CMRS carriers on a wide-area geographic basis, while not providing this essential and mandatory opportunity to PMS paging and PCP carriers. Unless paging carriers are provided the opportunity to rapidly bring wide-area service to the public, by no means does parity exist between paging carriers and other CMRS carriers.

Furthermore, processing for both PMS paging and PCP applications has reached a virtual standstill. Therefore, it is an extraordinary circumstance that, while PMS and PCP application processing grinds to a complete halt, other CMRS carriers can build-out their systems at will.

In the *Third R&O*, the Commission provided for renewal expectancies for all CMRS services, including PMS paging. However, language for a renewal expectancy for PMS carriers, other than cellular, has not been incorporated into Part 22 of the rules. As required by the *Third R&O*, the Commission must incorporate similar renewal expectancy language into Part 22 of the rules with respect to PMS stations other than cellular stations.

A basic element of regulatory symmetry among mobile radio services is system build-out. When one group of CMRS carriers can build-out wide-area systems upon grant of one initial application, and the other group of carriers must build-out their systems by separately licensing each and every transmitter of the system, the Commission has not fully achieved parity among the mobile radio services. To alleviate some of the effect of this significant inequity among substantially similar mobile radio services, the Commission must allow conditional pre-grant operation.

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To: The Commission

PETITION FOR RECONSIDERATION

Paging Network, Inc. ("PageNet"), pursuant to 47 C.F.R. § 1.429, hereby petitions the Commission for reconsideration of its *Third Report and Order* in the above-captioned proceedings.[1] In support this Petition, the following is respectfully shown:

I. Introduction

In the *Third R&O*, the Commission completed its initial implementation of Section 3(n) and 332 of the Communications Act

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1 *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, 59 FR 59945 (1994) ("*Third R&O*").

of 1934, as amended by Section 6002(b) of the Omnibus Reconciliation Act of 1993. As mandated by Congress, the task of the Commission was to adopt changes to the technical, operational, and licensing rules for common carrier and private mobile radio services in order to establish regulatory symmetry among similar mobile services. The rules adopted in the *Third R&O* were intended to enhance competition among mobile service providers, promote the development of new and technologically innovative service offerings, and ensure that customer demand, -- not regulatory decree, -- dictates the course of the mobile services marketplace.[2]

Although the Commission took major steps to achieve regulatory symmetry among mobile services, by not adopting rules and procedures for conditional pre-grant operation of paging facilities, the Commission missed an opportunity to establish regulatory symmetry for paging carriers in the CMRS marketplace. In this Petition, PageNet seeks reconsideration of the Commission's determination not to authorize conditional pre-grant operation for paging carriers. In addition, this Petition requests that the Commission add renewal expectancy language for PMS carriers to Part 22 of the rules.

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2 *Third R&O* at ¶ 1.

II. The Commission Must Allow Conditional Operation For Paging Services Competing In The CMRS Marketplace

A. The Necessity Of Conditional Operation For Paging Carriers

In the CMRS marketplace, both Public Mobile Service paging ("PMS") and Private Carrier Paging ("PCP") carriers are at a distinct disadvantage.[3] Most significantly, paging carriers license their facilities on a transmitter-by-transmitter basis, while the rest of the CMRS carriers enjoy unrestricted build-out within their geographically defined service areas. As such, unlike other CMRS carriers, paging carriers are required to continuously file applications to cover additional service areas. To build-out the same system that a narrowband PCS licensee could build on a grant of one application, a paging carrier may have to file from a dozen to hundreds of applications. In this proceeding, the Commission has the opportunity to cure this significant inequity by allowing paging carriers to conditionally operate during the pendency of an application for permanent authority. PageNet urges the Commission to do so.

Competition in the CMRS marketplace will be strenuous for paging carriers that will compete against cellular, Special Mobile Radio, Broadband PCS and Narrowband PCS. However, even

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[3] It should be noted that although PCP carriers have been redesignated as Commercial Mobile Radio Services ("CMRS") carriers, PCP has been grandfathered until August 10, 1996. Under the rules applicable to PCP until that time, conditional pre-grant operation is allowed. However, after August 10, 1996, PCP will be placed in the same difficult dilemma the PMS carriers now must face. The conditional pre-grant operation proposal recommended herein would also be available to PCP after August 10, 1996.

though the Commission has adopted rules to provide for regulatory parity among CMRS carriers, there is a significant difference between paging carriers and the rest of the CMRS carriers. That significant difference is system build-out. To fulfill its Congressional mandate, the Commission must act to bring parity to paging carriers with respect to system build-out. Unless the Commission is prepared to begin licensing PMS paging and PCP on a wide-area basis immediately, the Commission must provide for pre-grant conditional operation for paging carriers.

B. Proposed Conditional Licensing Process For Paging Carriers

CMRS paging applicants should be permitted to conditionally operate facilities proposed in an application thirty (30) days after their application has appeared on public notice as accepted for filing if:

1. The application is not mutually exclusive with any other application;

2. No petitions to deny the application have been filed;

3. The application does not include a request for a waiver of one or more FCC rules;

4. Construction or alternation that would exceed the requirements of 47 C.F.R. § 17.7 is properly noticed to the appropriate FAA regional office and a request for antenna height clearance and obstruction marking specifications has been filed with the FCC.

5. The applicant has indicated in the application that the facility would not have a significant environmental affect, in accordance with § 1.1301, et seq.; and

6. Under applicable international agreements and rules, individual coordination of the proposed channel assignment(s) with a foreign administration is not required.[4]

The applicant should be able to begin operation without further notice to the Commission, provided that, it has satisfied the requirements specified above. The applicant should be able to continue operation during the pendency of its application for permanent authority. If an applicant is found to be the cause of interference to facilities operating under grant of permanent authority, the Commission may require the applicant to modify its operation or cease operation in order to terminate the interference.

C. Paging Licensees Should Also Be Able To Begin Operation When They Have Self-Certified In Their Application For Permanent Authority That, Although The Application Covers Some New Area, The Nature Of The Application Is Essentially "Fill-In"

In the build-out of 900 MHz paging systems, particularly PMS paging systems, licensees often find that after the construction of the initial transmitters, there are areas almost totally encompassed by the service areas of operating transmitters that also require service coverage. In this circumstance, the application that must be filed will be an FCC Form 600, which will require the appropriate processing and public notices. This is so although this application is essentially a fill-in application because it is not possible for any other applicant to engineer a proposal to cover the unserved area proposed in the

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4 This criteria specified above is the criteria for pre-grant construction under 47 C.F.R. § 22.143.

application. The Commission should allow the licensee to certify in its Form 600 application that the area to be served in the application could not be served by any other licensee. Upon the filing of the application and certification, the licensee should be allowed to begin pre-grant conditional operation and continue that operation during the pendency of its application for permanent authority. If an application is in fact filed by a competing applicant that demonstrates that the area was available for licensing to applicants other than the self-certifying licensee, the licensee would have to cease operations and compete for the application in the competitive licensing process.

D. Conditional Pre-Grant Operation Is Permitted Under The Communications Act

In the *Third R&O*, the Commission declined to adopt a conditional operation proposal asserting that pursuant to Section 309(f) of the Communications Act of 1934 (hereinafter the "Act"), the Commission may only provide for special temporary authority only if "extraordinary circumstances" are demonstrated.[5] PageNet urges the Commission to reconsider its determination in the *Third R&O* with respect to conditional pre-grant operation. PageNet believes that the Commission has the authority to allow conditional pre-grant operation for paging carriers, just as the Commission allows Part 21 microwave licensees to operate on a temporary basis pursuant to 47 C.F.R. § 21.707.

For Part 21 licensees, Section 21.707 of the Commission's Rules provides for authorizations for temporary service to

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5 *Third R&O* at ¶ 383. *See* 47 U.S.C. § 309(f).

subscribers. Under a Section 21.707 license, Part 21 licensees are able to temporarily construct and operate a common carrier microwave facility for a period of six (6) months upon proper coordination and notification to the FCC. Part 21 licensees use this type of authorization to operate Part 21 point-to-point microwave facilities during the pendency of an application for permanent authorization for the same facilities. The effect of operating under a Section 21.707 authorization is that a Part 21 licensee may construct and operate facilities proposed in an application for permanent authorization prior to grant.

Accordingly, if this pre-permanent grant operation is permissible under Section 309(f) of the Act, the conditional pre-grant operation proposed herein is likewise permissible. The Commission simply cannot allow pre-grant operation in one common carrier service and then find that pre-grant operation in another common carrier service is prohibited under Section 309(f) of the Act. Furthermore, PageNet does not believe that the temporary operation allowed under Section 21.707 and the pre-grant conditional operation proposed herein can be distinguished. However, if the Commission should determine that the distinction between Section 21.707 and the pre-grant operation proposed by PageNet is that under Section 21.707 the licensee must first seek a blanket temporary fixed license[6], the Commission need only

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6 This temporary fixed license is issued for a full license term, and is assignable and renewable. Once the carrier has such a license, notification of operations may simply be filed with the FCC and construction and operation of the facilities may begin five (5) days thereafter. *See* 47 C.F.R. §§ 21.707 and 21.708.

provide a similar temporary license process for CMRS carriers using the criteria specified above.

In any event, PageNet wishes to emphasize that there are "extraordinary circumstances" that would allow the Commission to provide for pre-grant conditional operation under Section 309(f) of the Act. In the absence of conditional operational authority, all other CMRS carriers will have a significant competitive advantage against paging carriers. As noted above, Congress mandated that the Commission adopt rules that treat like services in a similar manner. The Commission determined to create a commercial mobile radio service that includes Cellular, Broadband PCS, SMR, Narrowband PCS and PMS and PCP paging. Of the group, PMS and PCP paging carriers must apply for every transmitter they seek to construct. For every transmitter sought, the paging carrier must: (1) file an application; (2) wait for public notice of the application's acceptance for filing; (3) be subject to protests; (4) be subject to competing applications; (5) wait for the application to be processed; (6) wait for the public notice of grant; and (7) be subject to petitions for reconsideration.

How can this method of per transmitter licensing resemble any form of parity with other CMRS carriers? The answer is that it cannot. Therefore, it is an extraordinary circumstance that licensing on a transmitter-by-transmitter basis prevents paging carriers from: (1) rapidly building-out paging systems to meet customer demand; and (2) from effectively competing on the CMRS marketplace. Unless paging carriers are provided the opportunity to rapidly bring wide-area service to the public, by no means

does parity exist between paging carriers and other CMRS carriers.

Furthermore, at the present time, processing for both PMS paging and PCP applications has reached a virtual standstill. Because of the backlog of applications, carriers have had to wait six months or more to receive grant of a single uncontested application. This backlog also adversely affects service to the public because when customers request coverage in an unserved area, that service will take many months to provide. PMS paging and PCP applications filed today, will have to wait for the Commission to resolve this backlog and whatever additional backlogs that are created by the transition from the old rules to the new rules. The result is that paging carriers cannot build-out their systems because the Commission's licensing process for CMRS paging does not provide for rapid deployment of services that are licensed on a transmitter-by-transmitter basis. In fact, to date, as we understand it, the Commission has only had the resources to commit one processor to 931 MHz applications. Therefore, it is an extraordinary circumstance that, while PMS and PCP application processing grinds to a complete halt, other CMRS carriers can build-out their systems at will.

Accordingly, in evaluating the current status of CMRS paging in the CMRS marketplace, if the Commission were to consider pre-grant authorization as special temporary authority, extraordinary circumstances exist to satisfy Section 309(f) of the Act.

III. PMS Carriers Must Be Provided With A Renewal Expectancy In Part 22 Of The Rules

In the *Third R&O*, the Commission provided for renewal expectancies for all CMRS services, including PMS paging.[7] However, language for a renewal expectancy for PMS carriers, other than cellular, has not been incorporated into Part 22 of the rules. In fact, other CMRS carriers have been provided with renewal expectancies in the specific rules governing their services. For instance, in Part 24 of the Commission's Rules, a renewal expectancy has been adopted for Broadband and Narrowband PCS. Specifically, Section 24.16 provides that the renewal expectancy is the most important comparative factor to be considered in a comparative PCS renewal proceeding. The PCS renewal applicant is awarded the preference if it has: (1) provided "substantial service," which is defined as service that is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal; and (2) substantially complied with applicable Commission rules, polices and the Act.[8] As required by the *Third R&O*, the Commission must incorporate similar renewal expectancy language into Part 22 of the rules with respect to PMS stations other than cellular stations.

IV. Conclusion

A basic element of regulatory symmetry among mobile radio services is system build-out. When one group of CMRS carriers can

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7 *Third R&O* at ¶ 386.

8 47 C.F.R. § 24.16.

build-out wide-area systems upon grant of one initial application, and the other group of carriers must build-out their systems by separately licensing each and every transmitter of the system, the Commission has not fully achieved parity among the mobile radio services. Specifically, if a carrier, such as a narrowband PCS licensee, builds-out a system comprising of 100 transmitters, that PCS licensee files only one application. If a paging carrier wishes to build-out a 100 transmitter system, it must prepare, file and prosecute 100 separate applications. The inequity between these two services in cost and time spent prosecuting applications alone is astounding.

To alleviate some of the effect of this significant inequity among substantially similar mobile radio services, the Commission must allow conditional pre-grant operation. PageNet wishes to emphasize that even conditional pre-grant operation does not resolve this substantial inequity and urges the Commission to initiate appropriate measures to do so. In the meantime, the parity measure proposed herein will allow more rapid build-out of paging systems and enable paging carriers to bring high quality paging service to the public without extensive delay.

WHEREFORE, for all of the foregoing reasons, PageNet requests that the Commission reconsider and adopt measures for pre-grant

operation by paging carriers. In addition, PageNet requests that the Commission provide specific renewal expectancy language for PMS carriers in Part 22 of the rules.

Respectfully submitted,

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Dated: December 21, 1994

CERTIFICATE OF SERVICE

I, Deborah S. Cohill, hereby certify that on this 21st day of December, 1994, a true and correct copy of the foregoing Petition for Reconsideration of Paging Network, Inc. was hand-delivered to the following individuals:

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