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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 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.

METROCALL, INC.
PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

Metrocall respectfully requests that the FCC reconsider certain provisions of its Order in the Part 22 Rewrite proceeding.

The "one-time," "double processing" procedure for 931 MHz applications should be reconsidered, at least insofar as it applies to applicants who were placed on Public Notice and attained "cut-off" status under the existing Rules. "Cut-off" applicants have some equitable interest in that status; the "double processing" procedure adopted by the Order retroactively deprives "cut-off" applicants of the benefit of that status without countervailing public interest benefits. The "double processing" procedure will likely encourage "greenmail" filings, and it will certainly delay services to the public. Moreover, the requirement that previously "cut-off" applications be processed a second time will place unnecessary burdens on the FCC's already overworked staff.

Metrocall also requests reconsideration of the definition of "initial" 931 MHz applications. Under the FCC's definition, nearly all 931 MHz modifications will be treated as "initial" applications, subject to a thirty-day "cut-off" period and the possibility of auctions. The FCC should base its definition on an application's impact on the licensee's service area; such an approach would allow minor changes to paging systems to be made without unnecessary delays.

The Order's adoption of a policy prohibiting licensees from

sharing their transmitters should also be reconsidered. That policy, adopted with little notice and apparently no comments, would prohibit legitimate networking arrangements that the FCC previously permitted for Part 22 licensees, and still permits for Part 90 licensees. Prohibiting networking arrangements and compelling licensees to overbuild their systems will be extremely expensive and burdensome for licensees, and will deny licensees the flexibility to respond rapidly and cost-effectively to customer demands.

Finally, Metrocall requests reconsideration or clarification of the Rule provision which, in connection with assignments and transfers of Part 22 facilities, would prohibit licensees from entering into management or option agreements during the first year of operation. It is not clear that that provision applies to paging licensees; however, to the extent that it does, that provision was adopted without adequate notice and will unreasonably restrict legitimate transactions. Metrocall requests that the Commission clarify its intentions with regard to the prohibition on management agreements, and permit affected parties to comment on that issue.

In short, Metrocall submits that the foregoing Rule changes place unnecessary burdens upon licensees and may harm, rather than improve, services to the public.

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PETITION FOR PARTIAL RECONSIDERATION

Metrocall, Inc. ("Metrocall"), through its undersigned counsel and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, respectfully requests reconsideration of certain Rules and policies adopted in the "Part 22 Rewrite" Report and Order (the "Order") in the above-referenced proceedings.[1]

I. Statement of Interest.

Metrocall has long been authorized to provide RCC paging services pursuant to Part 22 of the Commission's Rules. Metrocall currently provides wide-area paging services to

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[1] Report and Order in CC Docket No. 92-115, FCC 94-102, CC Docket No. 94-46 and CC Docket No. 93-116, 59 Fed.Reg. 59502 (November 17, 1994).

hundreds of thousands of subscriber units at various locations throughout the United States, and continues to expand its RCC paging services in order to meet the growing public demand for rapid, efficient, and reasonably-priced one-way signalling services.

As an experienced provider of paging services, Metrocall filed comments on a number of the Rule changes proposed in these proceedings. Because the rule changes adopted in the FCC's Order will have an immediate impact on Metrocall's paging business, Metrocall has standing to file this Petition for Reconsideration.

II. Summary of Proceeding.

By a Notice of Proposed Rule Making released on June 12, 1992, the Commission proposed comprehensive revisions to Part 22 of its Rules. See Notice of Proposed Rule Making in CC Docket No. 92-115, 7 FCC Rcd. 3658 (1992) (the "Part 22 Rewrite Notice"). During the pendency of this proceeding, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), which amended Sections 3(n) and 332 of the Communications Act of 1934 (the "Act") to create a comprehensive new regulatory framework for all mobile services.

In May of 1994, the FCC released its Further Notice of Proposed Rulemaking in the Part 22 Rewrite proceeding, proposing additional rule revisions to be incorporated into the new regulatory framework being developed for commercial mobile radio services ("CMRS"), which the Commission believed would further

streamline and improve the licensing of Part 22 mobile services. See Further Notice of Proposed Rulemaking, CC Docket No. 92-115, FCC 94-102 (released May 20, 1994) (the "Further Notice").

Subsequently, the Commission released a Notice of Proposed Rulemaking and Order, CC Docket 94-46, FCC 94-113 (released June 9, 1994) (the "Joint Transmitter Notice"), proposing to delete the Section 22.119 prohibition on joint use of transmitters for RCC and non-common carrier use. Noting the technical and regulatory developments since the adoption of Section 22.119, the Joint Transmitter Notice tentatively concluded that permitting a single transmitter to operate on both RCC and private carrier paging ("PCP") channels would not disrupt or impair service to subscribers; however, it sought comments on whether to limit the circumstances in which such joint use would be allowed. Id. at ¶ 7.

The Order adopted a comprehensive revision of Part 22 of the Rules, including the proposed deletion of Section 22.119. Although Metrocall generally approves of the Commission's attempts to update and streamline the requirements applicable to Part 22 licensees, Metrocall respectfully submits that some of the regulatory changes adopted in the Order will disserve the Commission's salutary goals of "expedit[ing] authorization of service, and promot[ing] efficient use of the electromagnetic spectrum." See Order at ¶ 1. Metrocall therefore respectfully requests that the Commission reconsider certain provisions of the Order, as explained below.

III. The Application of the New 931 MHz Processing Rules to Pending Applications is Unfair and Unnecessary and Should Be Reconsidered.

The Order adopted the Commission's proposal, in the Further Notice, to require all 931 MHz paging frequencies to specify the frequencies for which they seek authorization. See Order at ¶ 98. To implement this rule change, the Commission adopted its proposal to treat all 931 MHz applications pending on the effective date of the new Rules as a single processing group. After a 60-day amendment period within which applicants must amend their applications to specify the precise frequency sought, those applications will be placed on public notice and subject to petitions to deny and the filing of mutually exclusive applications. See id.

The Order does not include an exception for 931 MHz applications that have already been placed on Public Notice and achieved "cut-off" status, but which remain pending on January 1, 1995. Moreover, the Order's definition of "pending" includes applications which have already been granted, but for which petitions for reconsideration or applications for review have been filed. Id. If the Common Carrier Bureau is unable to resolve those outstanding reconsideration and review proceedings by the effective date of the new Rules, the Order indicates that the implementation of the new 931 MHz processing procedures (including, presumably, the one-time processing group procedure) will be stayed. Id. at ¶ 99, n. 171.

The application of this new processing Rule to previously

"cut-off" applicants is fraught with legal, practical and procedural problems for applicants and the FCC. This "double processing" procedure for "cut-off" applicants would retroactively deprive previously "cut-off" applicants of the legitimately earned protection of that status, it will encourage the filing of insincere protests and mutually exclusive applications, it will delay service to the public, and it will cause the FCC's overworked staff additional, unnecessary paperwork without any countervailing public interest justification.

A. The "Double Processing" Procedure May be Unlawful if Applied to Cut-Off Applicants.

The Commission and the courts have long recognized that applicants who have achieved "cut-off" status have an equitable interest in not being subject to further competing proposals. See, e.g., Florida Institute of Technology v. FCC; 592 F.2d 549, 554 (D.C. Cir. 1992). Only in the most "extraordinary circumstances" has the Commission accepted applications filed beyond a "cut-off" date. Id. Where an agency action retroactively impairs parties' interests, the agency must weigh the "mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" against the "ill effect of retroactive application of a new standard[.]" See, e.g., Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); citing, SEC v. Chenery Corp., 332 U.S. 194 (1947).

The Order provides no indication that the Commission has

ever considered what "extraordinary circumstances" would warrant subjecting cut-off applicants to yet another statutory protest period. Moreover, while these cases would allow, under extremely limited circumstances, additional applications after the expiration of a cut-off date, Metrocall knows of no legal authority that would allow the FCC to retroactively remove cut-off protection from applicants that have already been subject to statutory protest and mutually exclusive filings, which is what the Order would do. It is hard to see how the Order does not simply ignore Section 309's explicit mandate of one protest period per application.

Metrocall respectfully submits that, when the Commission engages in the required balancing on reconsideration, it should find absolutely no "mischief" in processing previously "cut-off" applications under the current Rules. To the contrary, the application of the double processing procedure to previously "cut-off" applications will create, rather than prevent, "mischief" by delaying service to the public, disregarding the long-recognized statutory and equitable rights of "cut-off" applicants, and providing insincere applicants with an additional opportunity to hinder legitimate service providers.

B. The Re-Processing of Cut-Off Applications Will Cause Unnecessary Licensing Delays.

It does not appear that the Commission has recognized the harm to 931 MHz paging licensees, and their subscribers, that this "double processing" procedure will cause. Even under the best of circumstances, the delays inherent in this procedure will

be substantial: assuming that all outstanding reconsideration and review proceedings are completed before January 1, 1995, and that the Commission releases a Public Notice commencing the sixty-day amendment period on January 3, 1995[2], the amendment period will not end until Monday, March 6, 1995. Assuming further that a Public Notice commencing the protest and "cut-off" period is released immediately thereafter, the earliest that 931 MHz applications pending on January 2, 1995 will be available for processing is early April, 1995. Given the numerous competing demands upon the Commission's scarce resources, Metrocall doubts that the Commission will be able to provide such an "expedited" timetable for the processing of 931 MHz applications.

The extent of that delay is even more troubling when one considers that many of the 931 MHz applications which will be pending on January 2, 1995 have already specified the frequency sought,[3] and have been pending at the Commission for many months, and have already achieved "cut-off" status under the current Rules. For example, if the current Rules' "cut-off" period for a pending 931 MHz application were to end on December 19, 1994, that application would have been placed on Public Notice on October 19, 1994; that application most likely was filed in September of 1994. Under the "double processing" procedures to

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[2] January 3, 1995 is the first business day after the effective date of the new Rules.

[3] The Order seems to honor the letter of the Rules, over the long practiced policy of the Commission, which is, that the FCC has routinely honored requests for a particular 931 MHz channel, so long as that channel was available in a given area.

be adopted in the Order, it will be no less than seven months from the filing of that application before it can be granted; and it will be significantly longer if mutually exclusive applications are filed the second time the application is on public notice.

Certainly in Metrocall's case, all of its now pending, "cut-off" applications were filed to improve or expand existing paging services, in response to subscriber demand.[4] The public interest is ill-served by an application processing procedure that will leave subscribers' communications needs unmet for the better part of a year, if not longer.

Moreover, there is simply no countervailing public interest benefit in imposing these extraordinary delays on licensees and their customers. Since parties with any legitimate need to file a mutually exclusive application or petition to deny against these pending applications, have already had their statutory opportunity to do so, those who take advantage of this unusual second "cut-off" will likely be "greenmailers" or unscrupulous parties seeking only to impose expense and delay upon legitimate paging operators. Since the FCC has not yet adopted service-specific auction Rules for Part 22 paging applications, any application against which a mutually exclusive proposal is filed will face additional, indefinite delays.

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[4] Such modifications to existing systems would, of course, have specified the 931 MHz frequencies for which the applicants are already licensed. The Order does not indicate whether such applicants are required to "amend" their applications to confirm their specification of frequencies.

C. The Re-Processing of Cut-Off Applications Will Place Unnecessary Processing Burdens on the FCC's Overworked Staff.

While the "double processing" proposal seems to treat everyone equally, that is not the case: previously "cut-off" applicants are subject to "double jeopardy." In addition to that hardship to affected applicants, the FCC's staff will again have to process these previously "cut-off" applications, in addition to any newly filed applications. The Commission is undoubtedly aware of the volume of applications which its staff must process; to require the staff to process large numbers of 931 MHz applications a second time will place an unprecedented burden upon the Commission's resources.

The processing burdens that the Commission's proposed procedure will create are simply not necessary. There is a fair and equitable alternative: specify a new start date for the new processing rules that does not subject "cut-off" applications to "double jeopardy." For example, the Commission could simply designate January 3, 1995 as the effective date for its new 931 MHz processing procedures. Any application which has not achieved "cut-off" status as of that date would be processed according to the new Rules, while applications that have achieved "cut-off" status on or before that date (and any timely-filed mutually exclusive applications thereto) would continue to be processed under the "old" Part 22 procedures.

IV. Definition of "Initial Applications".

The Order adopted the Further Notice's proposal that the

following 931 MHz applications would be considered "initial" applications: (1) an application anywhere on a new frequency, and (2) a proposal to operate a new facility or to relocate a facility more than two kilometers (1.2 miles) from an existing facility on the same frequency. Order at ¶ 105. Metrocall respectfully submits that the Commission's new Rule defines "modifications" for 931 MHz paging systems far too narrowly, and urges the Commission to reconsider the comments filed by Metrocall and other parties concerning this issue.

Under the new two kilometer limit for additional facilities and site relocations, along with its classification of even de minimis extensions of service areas as "initial" applications, very few modifications to existing 931 MHz systems would be exempt from the possibility of competitive bidding. This Rule will cause unnecessary licensing delays and costs, and bears no resemblance to the practical needs of paging operators.

By focusing on the location of the proposed transmitter site in relation to existing transmitter sites, rather than on the substantiality of the effect of certain modifications on a licensee's service area, the new Rule may have the undesirable result of delaying and increasing the cost of modifications that are necessary to improve existing paging services or prevent disruptions in service. Those additional delays will not necessarily result in greater competition for frequencies.

If a new or relocated transmitter increases the licensee's existing service area by only a few miles, a would-be competitor

would find it almost impossible to engineer a viable application proposal that would not cause co-channel interference to the licensee's previously-authorized facilities. The only likely result of this two kilometer Rule is delay for the existing licensee (and its subscribers), without the realistic possibility of increasing the number of competitive service providers in the subject service area. Indeed, by subjecting even minor relocations or expansions to the possibility of competing proposals and competitive bidding, the Commission may have unwittingly created more opportunities for "greenmailers" than for legitimate newcomers.

Metrocall now, as in its Comments in this proceeding, respectfully submits that the Commission should base its determination of whether an application is "initial" (and thus "auctionable") upon the impact that the application will have on the licensee's service area. While Metrocall understands the Commission's desire to encourage new entrants, the new definition of "initial" applications imposes disproportionate burdens upon existing licensees, without any real analysis, or even discussion, of less drastic alternatives.

There does not appear to be any reason why the Commission could not adopt a "bright line" rule providing that applications for new service areas that do not overlap with the licensee's existing service areas, or that overlap by less than some fixed percentage (for example, by 50% or less) would be deemed "initial" applications. In the alternative, the Rules could

state that extensions of the licensee's currently authorized service and interfering contours by more than a specified distance would be an "initial" application, subject to a 30-day cut-off period and the possibility of auctions, while applications that do not so extend the licensee's service area would be "modifications" subject to the "same day cut-off" procedure for competing applications.

In short, a more realistic, service area-based approach would serve the public interest in the "rapid deployment of new ... services" by permitting licensees to make necessary modifications to their existing systems without the additional costs and "administrative delays" that the auction process will entail. See 47 U.S.C. § 309(j)(3).

V. The Prohibition on Shared Use of Transmitters Eliminates Legitimate and Beneficial Licensee Arrangements.

Metrocall fully supports the Order's approval of the use of multifrequency transmitters and the elimination of the prohibition of joint RCC-private carrier use of such transmitters. See Order at ¶ 44 and ¶ 70, respectively. However, the Order's surprising and unanticipated adoption of a policy prohibiting licensees from sharing the use of transmitters is contrary to those other Rule changes which encourage licensee flexibility and efficiency, is contrary to other FCC Rules that encourage such arrangements, and blithely ignores widespread industry practices that have improved services to the public while minimizing infrastructure costs.

The Order's "discussion" of this issue is contained in a

single, brief paragraph, and no Rule was adopted containing this prohibition. The Order merely states that the Commission "do[es] not believe that it is in the public interest to allow two different licensees to share the same transmitter." See Order at ¶ 71.

It does not appear from the Order's brief discussion that there was much, if any, comment on this issue during the Part 22 Rewrite proceeding. Indeed, it is not apparent that the adoption of this new "policy", which drastically departs from prior agency acquiescence toward such technical arrangements, is consistent with due process requirements under the Administrative Procedure Act. See 5 U.S.C. § 553.

The Commission may not be aware of the impact of its new policy upon licensees, or of the legitimate reasons licensees have for sharing the use of their transmitters, such as in wide-area networking agreements. Through such networking arrangements, licensees are able to offer consumers expanded coverage and additional service options that a single licensee might not otherwise be able to provide in as expeditious and cost-effective a manner.[5] It simply defies logic to mandate that all paging operations over-build each other's service areas, for the sake of owning their own transmitters. No public interest would be served by such a Rule.

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[5] In fact, there is a commonly accepted networking protocol for such transmitter sharing arrangements, called the "Telocator Network Paging Protocol" ("TNPP"). Presumably, industry trade associations would be as shocked as Metrocall to learn that there is something improper about these arrangements.

The sharing of transmitters has not previously been prohibited by Commission Rule or policy; indeed, for Part 90 licensees, such arrangements are expressly permitted by the FCC's Rules. See 47 C.F.R. § 90.179. The Budget Act's goal of regulatory symmetry is hardly served by permitting one class of paging licensees to enter into mutually beneficial networking arrangements, while denying that same flexibility to similarly situated Part 22 paging licensees.

Moreover, nothing in the Order "grandfathers" existing licensees who may previously have entered into such sharing arrangements. If a Part 22 licensee is operating from another licensee's transmitter, it will presumably need to construct its own transmitter prior to the effective date of the new Part 22. This policy change will be extremely burdensome and expensive to licensees who are using numerous shared transmitters. In addition, if a licensee is unable to locate its own transmitter at the site where it is currently sharing transmitter capacity, there is little time left within which to relocate. The imposition of such burdens upon previously-acceptable licensee arrangements, and the potential disruption of services if those arrangements must be discontinued, warrant reconsideration of the Commission's new policy.

VI. The Restrictions on Management Agreements Are Procedurally Defective and Unsupported by the Record.

New Section 22.137(d) provides that the Commission "may not" grant applications for transfer or assignment of Part 22 facilities under certain circumstances; for Air-Ground

Radiotelephone and cellular "unserved area" authorizations, subsection (d)(3) prohibits transfers or assignments until such facilities have been constructed and operated for one year. See Order at Appendix B, pp. B-21 - B-22. Section 22.137(d)(3)(i) further provides that licensees "must not" enter into management or option agreements before or during the first year of operation. Id. This restriction applies even if any contemplated assignment or transfer of the license will not occur until after the first year of operation. See id. It is not clear from the text of the Rules whether the prohibition on management and option agreements is limited to Air-Ground Radiotelephone and cellular unserved licensees, or whether that subsection was intended to apply to other Part 22 services. Neither the text of the Order nor the current Rules provide guidance as to the Commission's intended application of the Section 22.137(d)(3)(i) restriction. There does not appear to have been any notice given in the Part 22 Rewrite Notice, the Further Notice or the Joint Transmitter Notice that such a broad restriction on licensees' ability to contract was under consideration, nor does it appear that comments were solicited or received on this issue.

The Administrative Procedure Act requires that an agency give prior notice, at a minimum, of "the subjects and issues involved" in a proposed rule change, and that interested persons be given an "opportunity to participate" on the issues under consideration in such proceedings. See 5 U.S.C. § 553. Nothing

in the FCC's prior pronouncements in these proceedings indicated that such a drastic change in the FCC's policies governing management agreements was contemplated. Moreover, when an agency changes its policies, it is required to articulate a "reasoned analysis" for doing so. See Greater Boston Television Corp. v FCC, 444 F.2d 841, 852 (D.C. Cir. 1971). The FCC's Order failed to provide any analysis for the rule change adopted here; for this reason alone, the new restriction on management agreements should be reconsidered.

In addition to the procedural infirmities surrounding the adoption of this provision, Metrocall respectfully submits that the restriction on management agreements is an unnecessary and unsupported restriction on the commercial use of Part 22 channels. There are any number of legitimate business reasons, such as changed circumstances subsequent to a license grant, which may prompt a licensee to enter into a contract with a manager to construct and operate one or more of its facilities. If the Commission intended to restrict management and option agreements as an "anti-trafficking" measure, Metrocall respectfully submits that the Rule, as adopted, reaches too far, and may prohibit licensees from into entering reasonable, legitimate transactions.

As previously stated, the text of the Rule does not indicate how broadly the Commission intends to apply it. Metrocall therefore requests that the Commission clarify its intent in adopting Section 22.137(d)(3)(i), specify with clarity the

services to which that Rule provision will apply, and give interested licensees their statutory opportunity to comment upon that Rule provision and to propose less sweeping alternatives that will serve the Commission's purposes, whatever they may be, without unduly restricting legitimate contractual arrangements.

Conclusion

For all the foregoing reasons, Metrocall respectfully requests that the FCC reconsider its Report and Order and the Rules adopted therein governing 931 MHz application processing, the definition of "initial" applications, and the restrictions on networking and management agreements.

Respectfully submitted,

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December 19, 1994

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