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

In the Matter of )  
 )  
Amendment of the Commission's Rules ) PR Docket No. 93-35  
To Provide Channel Exclusivity To ) RM-7986  
Qualified Private Paging Systems at 929- )  
930 MHz )

**MEMORANDUM OPINION & ORDER**

**Adopted: February 8, 1996**      **Released: February 13, 1996**

By the Commission:

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## I. INTRODUCTION

1. Before the Commission are six petitions for reconsideration and/or clarification of our *Report and Order* in this docket establishing channel exclusivity for qualified local, regional, and nationwide paging systems in the 929-930 MHz band.<sup>1</sup> After reviewing the issues involved, we grant the petitions in part and deny them in part. In particular, we deny petitions requesting that we grant exclusivity to regional 929 MHz systems in regions defined by state borders, rather than based on their actual service areas. We partially grant those petitions that seek to increase the maximum transmitter power for local and regional systems. We also partially grant certain pending waiver requests of incumbent licensees seeking additional time to comply with our multi-frequency transmitter specifications. We otherwise affirm our rules governing 929 MHz private paging as adopted in the *PCP Exclusivity Order*.

2. In addition to this *Order*, we are adopting a *Notice of Proposed Rule Making* in WT Docket No. 96-18 to examine ways to promote continued growth of the paging industry. In the *Notice*, we propose to adopt new rules providing that future licensing of all exclusive paging channels, including 929 MHz channels, will be based on market-defined service areas, with mutually exclusive applications to be resolved by competitive bidding. Therefore, the conclusions reached in this *Order* are subject to future modification based on the outcome of our comprehensive paging rulemaking.

## II. BACKGROUND

3. Report and Order. In the *PCP Exclusivity Order*, we implemented a system of exclusive licensing for qualified local, regional and nationwide 929 MHz private paging systems on 35 of 40 available channels.<sup>2</sup> Prior to this action, all private paging frequencies, including those at 929 MHz, were assigned on a non-exclusive basis.<sup>3</sup> The *PCP Exclusivity Order* concluded that enabling 929 MHz paging systems to operate on an exclusive basis is in the public interest, due to the efficiencies and incentives such an approach encourages in the marketplace. Specifically, we indicated that continued sharing of frequencies would undermine efficient use of 929 MHz paging channels as demand for paging services expands

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<sup>1</sup> Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993) (*PCP Exclusivity Order*).

<sup>2</sup> In the *PCP Exclusivity Order*, we decided to continue to designate five channels for shared use, to accommodate small and local systems operating on these frequencies that would not qualify for exclusivity in any event. See *PCP Exclusivity Order*, 8 FCC Rcd 8318, ¶ 21.

<sup>3</sup> Our decision to adopt a channel exclusivity scheme for 900 MHz private paging was based on a Petition for Rule Making filed by the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER). See Petition for Rule Making, RM-7986, filed April 24, 1992. A discussion of the development and utilization of 900 MHz private carrier paging is contained in the *Notice* to this proceeding. See *Notice of Proposed Rule Making*, 8 FCC Rcd 2227 (1993).

in the future. We observed that, while sharing is technically feasible, dividing air time among multiple licensees imposes significant constraints on the efficiency and quality of service in crowded markets. We also indicated that in a shared environment, licensees are reluctant to invest in advanced paging technology because of the risk that others will be assigned to the same frequency in the future.<sup>4</sup> We concluded that exclusivity would create a stable, predictable environment necessary for the industry to attract investment in wide-area, high capacity paging systems in the 929-930 MHz band.<sup>5</sup>

4. The *PCP Exclusivity Order* established the requirements for licensees to obtain channel exclusivity in the 929 MHz band. In particular, we established minimum standards for the configuration of protected systems, including the number of transmitters required for local, regional, and nationwide systems, and the treatment of multi-frequency transmitters. We also implemented geographic separation standards for placement of co-channel stations, to protect qualified local or regional systems, and we established effective radiated power (ERP) limits for all such systems.<sup>6</sup>

5. The *PCP Exclusivity Order* also set forth other prerequisites to obtaining exclusivity. Most notably, we conditioned exclusivity on construction of a qualified system within eight months of licensing. For larger systems, we indicated that a new applicant may request an extension of up to three years, based on its showing of need, a construction timetable, and its establishment of an escrow account or securing of a performance bond to cover construction costs. Other matters addressed in the *PCP Exclusivity Order* include issues associated with application of exclusivity to existing systems and to future licensing, and certain transitional procedures. In particular, we grandfathered all existing systems and indicated that we would grant immediate exclusivity to existing systems that satisfied the new exclusivity criteria.<sup>7</sup>

6. Petitions for Reconsideration/Waivers. We received petitions for reconsideration of the *PCP Exclusivity Order* from the following businesses and organizations: (1) the National Association of Business and Educational Radio and its Association for Private Carrier Paging Section (NABER); (2) First American National Paging (First National); (3) Afro-American Paging, Inc. (AAP); (4) American Mobilephone, Inc (AMI); (5) Paging Network, Inc. (PageNet); MAP Mobile Communications, Inc. (MAP); and (6) Metrocall,

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<sup>4</sup> Message transmission is delayed on shared frequencies because air time is allotted among multiple users. Paging licensees operating on common frequencies also have to invest in expensive monitoring or interconnection equipment. Due to such factors, we found that continued frequency sharing could inhibit the development of wide-area paging systems that rely on high-speed technologies. See *PCP Exclusivity Notice*, 8 FCC Red 2227, ¶¶ 14-17.

<sup>5</sup> *PCP Exclusivity Order*, 8 FCC Red 8318, ¶ 6.

<sup>6</sup> *Id.* at ¶¶ 9-19.

<sup>7</sup> *Id.* at ¶¶ 22-42.

Inc. We have sought and received comment on the issues raised by these petitions.<sup>8</sup> We note that some parties also have filed petitions asking that we waive various provisions of our new exclusivity rules to accommodate specific hardship situations.<sup>9</sup> These requests generally involve waiver of our construction requirements, ERP limits, or system configuration rules. For the most part, we will decide these waiver requests in other proceedings. As discussed in Section III(E) *infra*, however, we partially grant the waiver requests of certain grandfathered licensees seeking time to convert their systems from multi-frequency transmitter to single-frequency transmitter operations for exclusivity purposes.

### III. DISCUSSION

#### A. Configuration of Local Systems

7. Background. To qualify for channel exclusivity under our 929 MHz paging rules, the *PCP Exclusivity Order* provided that a local system must consist of at least six contiguous transmitters, except in the New York, Los Angeles, and Chicago markets, where 18 contiguous transmitters are required. We also provided that transmitters will be considered contiguous if (1) each transmitter is located within 25 miles of at least one other transmitter in the system; (2) the combined area defined by a 12.5 mile radius around each transmitter forms a single contiguous area; and (3) no transmitter is co-located with any other transmitter being counted as part of the local system.<sup>10</sup>

8. Petitions for Reconsideration/Comments. On reconsideration, AAP challenges Section 90.495 (a)(1)(ii) of the rules, as adopted in the *PCP Exclusivity Order*, which requires that a 12.5 mile radius surrounding each transmitter form a single contiguous area.<sup>11</sup> AAP argues that there was no notice of this rule change, because the restriction was not part of our original proposal and is not a logical outgrowth of the *PCP Exclusivity Notice*.<sup>12</sup> AAP claims that as a result of the added 12.5 mile radius requirement, one of its systems now is disqualified from obtaining exclusivity. AAP believes that if it is the Commission's goal to confine systems to smaller geographic areas, a 15 mile radius standard is more equitable.<sup>13</sup> We received no comments on AAP's reconsideration proposal.

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<sup>8</sup> See Public Notice, 59 Fed. Reg. 8475 (Feb. 22, 1994). A list of commenters is attached as Appendix B.

<sup>9</sup> See, e.g., AMI Petition for Waiver (filed Feb. 28, 1994) at 3 (construction); ComTech Petition for Waiver (filed Jan. 28, 1994) at 1 (construction); ARCH Communications Petition for Waiver (filed Jan. 27, 1994) at 1-2 (construction); ARCH Communications Petitions for Waiver (filed May 23, 1994) at 1,5 (ERP level); ABC Cellular Corp. Petition for Waiver (filed Jan. 28, 1994) at 3 (system configuration).

<sup>10</sup> 47 C.F.R. § 90.495 (a)(1).

<sup>11</sup> See 47 C.F.R. § 90.495 (a)(1)(ii).

<sup>12</sup> See AAP Petition for Partial Reconsideration, filed Dec. 27, 1993, at 7 (AAP Petition).

<sup>13</sup> AAP Petition at 10.

9. Decision. We will not eliminate or alter the requirement for local exclusivity that requires that a 12.5 mile radius surrounding each transmitter form a single contiguous area. The 12.5 mile rule is a necessary component of our exclusivity rules, because it ensures that a local system will serve a contiguous geographic area. Without such a requirement, licensees could obtain local exclusivity based on non-contiguous placement of transmitters, undermining our effort to establish truly local systems serving an indigenous locale or community.<sup>14</sup> We also decline to increase the mileage distance to 15 miles as AAP suggests. Proportionately, the 12.5 mile distance is one-half the distance of our 25 mile rule,<sup>15</sup> and thereby works well to ensure that transmitters are located to serve a single contiguous geographic territory.

10. Also, while the 12.5 mile rule was not expressly included in the *PCP Exclusivity Notice*, we believe this restriction nonetheless is a "sufficiently minor" difference from the rule we proposed to be a "logical outgrowth" of our efforts to establish a system of local exclusivity.<sup>16</sup> The *Notice* sought comment on the configuration of locally protected systems. Specifically, we proposed that each transmitter in a qualified system would have to be within 25 miles of another transmitter to count toward the number required for exclusivity.<sup>17</sup> Incorporation of the 12.5 mile restriction in our final rules constitutes a minor, technical change to our original proposal, which is necessary to ensure that local exclusivity is awarded to operators that locate transmitters in close proximity to one another within a system. The 12.5 mile rule effectively closes a loophole in our original proposal, and comports with our intent to create local paging systems in the 929-930 MHz band. Only AAP has objected to the change, apparently based on its own unique situation (*i.e.*, one of its transmitters is 13.2 miles from the nearest other transmitter), which is best resolved by a request for waiver.

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<sup>14</sup> The problem posed by the lack of such a rule is illustrated by the following example: Licensee X configures its six transmitters in three pairs -- A, B and C. The two transmitters in pair A are within 25 miles of one another, as required by our rules. The same is true for the transmitters in pair B and C. Licensee X, however, decides to set the distance from its transmitters in pair A to the transmitters in pair B at 100 miles. Similarly, it establishes the same distance from transmitter pair B to C. Such a system would be beyond the scope of what we envisioned for local systems.

<sup>15</sup> 47 C.F.R. § 90.495(a)(1)(i).

<sup>16</sup> A final rule need not be an exact replica of the rule proposed in the *Notice*, but must be a "logical outgrowth" of the rule proposed. See *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988)(quoting *Small Refiner Lead Phase - Down Task Force v. EPA*, 705 F.2d at 111) *cert. granted, judgment vacated and remanded on other grounds*, 110 S. Ct. 929 (1990). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor," otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. See *National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

<sup>17</sup> See *PCP Exclusivity Notice*, 8 FCC Rcd 2227, ¶ 22.

## B. Configuration of Regional Systems

11. Background. The *PCP Exclusivity Order* provided protection for exclusive regional systems based on the location of stations comprising the system. To qualify for exclusivity, a regional system must consist of 70 or more transmitters, not necessarily contiguous, located in no more than twelve adjacent states in the continental United States. The rules provide regional systems with exclusivity based on a prescribed separation distance around each of the regional licensee's stations, ranging from 112 to 187 kilometers (70 to 116 miles) depending on the class of the station.<sup>18</sup> Also, in each of the top thirty markets (specified in Section 90.741 of the Rules),<sup>19</sup> no transmitter may be counted as part of a regional system unless it also meets the requirements for local exclusivity in that market.<sup>20</sup>

12. Petitions for Reconsideration/Comments. NABER and PageNet argue that the geographic scope of exclusivity granted to 929 MHz regional systems should be based on state borders, rather than the location of the system's stations.<sup>21</sup> According to NABER, allowing regional paging systems statewide exclusivity in each state in which the system provides service is needed to promote the development of regional systems. NABER and PageNet also express concern that under the current rules, speculators can file applications in strategic locations designed solely to extract payment from regional systems seeking to expand their coverage.<sup>22</sup> NABER therefore recommends that the Commission grant regional applicants (*i.e.*, applicants proposing a system of 70 or more transmitters) exclusivity extending to the borders of any state in which the applicant constructs at least one transmitter, except that in states having markets listed among the top 30, the applicant must construct 6 or 18 transmitters (depending on the size of the market).<sup>23</sup> NABER also requests that the Commission permit regional licensees to locate transmitters anywhere within any state included in the system, as long as they maintain the required geographic separation from facilities in adjoining regions.<sup>24</sup>

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<sup>18</sup> 47 C.F.R. § 90.495(b)(2).

<sup>19</sup> 47 C.F.R. § 90.741.

<sup>20</sup> See 47 C.F.R. § 90.495(b)(1)-(2).

<sup>21</sup> NABER Petition for Reconsideration and Clarification, filed Dec. 27, 1993, at 13-14 (NABER Petition); PageNet Petition for Clarification and Reconsideration, filed Dec. 27, 1994, at 5 (PageNet Petition).

<sup>22</sup> NABER Petition at 13.

<sup>23</sup> NABER points out that markets listed among the top 30 in the nation are located in 21 states and the District of Columbia. Thus, under NABER's proposal, an applicant seeking to obtain regional exclusivity in any of these 21 states would be required to construct at least 6-18 transmitters within that state. NABER

13. AMI and ADC express concern about the application of NABER's proposal to licensees who are entitled to regional exclusivity under our existing rules. In general, these commenters are opposed to any change that would result in divesting licensees of existing exclusivity rights.<sup>25</sup> ADC suggests that the Commission not apply statewide exclusivity to licensees whose applications (including those for local exclusivity) were received by NABER for coordination on or before March 31, 1994, at least where a portion of the involved local system was constructed and in operation before October 14, 1993.<sup>26</sup>

14. ARCH, API, and Airtouch, on the other hand, favor statewide exclusivity for licensing as proposed by NABER and PageNet. According to these commenters, permitting licensees to achieve exclusivity on a statewide basis is essential to the development of truly regional systems. Airtouch and ARCH believe AMI and ADC's opposition to statewide exclusivity stems from the unique market situation of these licensees. They argue that the appropriate Commission remedy for AMI and ADC is a waiver, not a decision to retain the *status quo*.<sup>27</sup>

15. Decision. We decline to reconsider our rules defining regional exclusivity for 929 MHz regional systems in this proceeding. As noted above, we are considering the issue of revising our paging licensing area definitions in a separate *Notice of Proposed Rule Making* on market-area licensing. Under our market-area licensing proposal, paging systems in general (including 929 MHz systems) no longer would be licensed on a station-by-station basis. Instead, licensees would be licensed within Commission-defined service areas, and would be afforded the same flexibility, to the extent feasible, as cellular and PCS licensees to locate, design, construct, and modify system facilities throughout those areas. Because we are addressing this issue in a broader context than 929 MHz paging alone, we believe it is premature to modify our rules for this single category of paging service in response to NABER's reconsideration petition.

16. Moreover, even if we regarded the issue as ripe for consideration, we are not

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<sup>25</sup> See AMI Partial Opposition To, Or Comments On, Petition for Reconsideration, filed March 31, 1994, at 3-4 (AMI Comments). AMI qualifies for regional exclusivity for an area covering six states, including the Florida Panhandle. In Florida, however, AMI does not service two top-30 markets located in that state -- Miami and Tampa-St. Petersburg. AMI is concerned it would not qualify for regional exclusivity if NABER's proposal is adopted because of its failure to serve the Miami and Tampa-St. Petersburg markets.

<sup>26</sup> See ADC Comments, filed March 31, 1994, at 3 (ADC Comments). ADC observes that on March 16, 1994, the Commission published notice of NABER's petition containing the statewide licensing proposal in the Federal Register. ADC therefore believes that statewide exclusivity should not be applicable to local licensees whose applications were received by NABER for coordination within a reasonable period after March 16, 1994. ADC suggests the due date for reply comments in this proceeding (*i.e.*, March 31) as an appropriate cutoff date. ADC Comments at 1-2.

<sup>27</sup> See ARCH Reply Comments, filed April 11, 1994, at 4-5 (ARCH Reply Comments); Airtouch Reply Comments, filed April 11, 1994, at 3-5 (Airtouch Reply Comments).

persuaded that paging licensing areas should be based on state borders, as NABER proposes. In all other services where we have adopted Commission-defined licensing areas, as opposed to station-by-station licensing, we have used licensing area definitions that are based on economic markets or trading areas (*e.g.*, MSAs/RSAs for cellular, and MTAs/BTAs for PCS and 900 MHz SMR). By contrast, using state borders would create licensing areas with political boundary lines which do not necessarily correspond to economic markets or trading areas and, in some instances, which may cut across them. We therefore conclude that the *status quo* should prevail while we consider alternative licensing area definitions more consistent with our approach in other services.

### C. Effective Radiated Power

17. Background. In the *PCP Exclusivity Order*, we established effective radiated power (ERP) limits of 1000 watts for local and regional 929 MHz systems and 3500 watts for nationwide systems.<sup>28</sup> We noted that the 3500 watt limit for nationwide systems was the same as the limit for nationwide common carrier paging systems in the 931 MHz band. We declined to adopt a 3500 watt limit for non-nationwide systems, however, notwithstanding the fact that the Part 22 rules then in effect allowed 931 MHz non-nationwide common carrier licensees to operate internal system sites at 3500 watts. We reasoned that higher power limits for 931 MHz licensees were justified because demand for 931 MHz licenses largely was confined to expansion by existing systems. By contrast, we concluded that a 1000 watt maximum for 929 MHz non-nationwide systems was appropriate to preserve opportunities for entry by new systems.

18. Petitions for Reconsideration/ Comments. NABER and PageNet request that we increase the maximum ERP for 929 MHz regional systems from 1000 watts to 3500 watts, provided that adjacent co-channel systems remain protected.<sup>29</sup> NABER claims that, in the context of the statewide regional licensing scheme it has proposed (*see discussion supra*), a 3500 watt power limit would not restrict opportunities for the entry of new systems into the market, which was the reason the Commission rejected a 3500 watt ERP previously.<sup>30</sup> According to NABER and PageNet, use of high-power transmitters within the boundaries of a regional system will enable licensees to offer superior service at a lower cost. Celpage, ARCH, Airtouch, and API support NABER's proposal.<sup>31</sup>

19. Another petitioner, MAP, seeks clarification whether the 1000 watt ERP restriction applies only to facilities that define the exterior of the licensee's service area, and

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<sup>28</sup> 47 C.F.R. § 90.494(f), (g).

<sup>29</sup> NABER Petition at 17; PageNet Petition at 6.

<sup>30</sup> *See PCP Exclusivity Order*, 8 FCC Rcd at 8324.

<sup>31</sup> Celpage Comments at 12; ARH Comments at 13; Airtouch Comments at 10; API Comments at 3.

whether higher power facilities are permitted at internal sites within existing service areas.<sup>32</sup> MAP observes that 931 MHz common carrier paging licensees are permitted to operate at 3500 watts ERP at internal sites within their service areas. MAP asserts that principles of regulatory parity require us to apply the same rule to private paging systems.<sup>33</sup> We received no comments on MAP's request for clarification.

20. Decision. Except in certain limited circumstances discussed below, we decline to raise the maximum ERP for non-nationwide 929 MHz systems at this time. NABER's proposal to raise the ERP limit is premised on our adopting its proposal to base regional exclusivity on state borders, rather than site location. Because we have declined to reconsider our definition of regional exclusivity, NABER's rationale for raising the ERP limit does not apply. Our decision on this issue does not preclude future changes to our rules, however, if we adopt some form of market-based licensing for 929 MHz channels. Therefore, we are seeking further comment on height and power limits in our *Notice of Proposed Rule Making* on common carrier and private carrier paging.

21. We agree with commenters, however, that under certain circumstances, allowing local and regional 929 MHz licensees to operate at greater than 1000 watts ERP may be appropriate. Specifically, if operation of sites at a higher power would not expand a licensee's existing service-area contour, we see no reason to prohibit operation at such higher power. Therefore, we will modify our rules to allow non-nationwide licensees to operate sites within their existing service area at up to 3500 watts ERP, provided that such operation does not increase the minimum geographic separation applicable to co-channel systems under Section 90.495(b)(2).<sup>34</sup> We believe this will give licensees greater flexibility to build technically and economically efficient systems, without compromising opportunities for co-channel entry in areas adjacent to those systems.

#### **D. Slow Growth Eligibility**

22. Background. In the *PCP Exclusivity Order*, we adopted rules allowing for so-called "slow growth" extensions of our eight month construction requirement for larger system applicants. Specifically, for applications filed after October 14, 1993, a period of up to three years may be authorized for construction and commencement of operations, if the proposed system is composed of more than 30 transmitters and the applicant submits specific justification for an extended implementation period. Applicants must provide a detailed construction timetable and evidence of the ability to fund construction, either in the form of a construction escrow account or a performance bond covering construction costs.

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<sup>32</sup> MAP Petition for Clarification or Reconsideration, filed Dec. 27, 1993, at 9 (MAP Petition).

<sup>33</sup> MAP Petition at 9-10.

<sup>34</sup> See 47 C.F.R. § 90.495.

23. Petitions for Reconsideration/ Comments. NABER, PageNet, Metrocall, First National Paging, and AMI challenge our decision to make the three-year slow-growth option available only to post-October 14, 1993 paging applicants. NABER contends that the Commission did not provide adequate notice of the rule, because the *PCP Exclusivity Notice* did not expressly propose to limit the slow growth option to new applicants. According to NABER, the restriction has a detrimental impact on existing licensees, because of the added construction demands posed by our treatment of multi-frequency transmitters under our exclusivity rules (discussed in Section III(E), *infra*). AMI suggests that slow-growth eligibility be extended to licensees who filed for exclusivity after the March 31, 1993, release date of the *Notice*, rather than limited to applicants filing after the October 14, 1993, date established in the *PCP Exclusivity Order*. According to AMI, there is no link between the October 14, 1993, date and the decision by any affected licensee to rebuild its facilities.<sup>35</sup>

24. Commenters generally support extending the slow growth option to grandfathered licensees on the grounds that additional construction time is needed for incumbents to transition to our new system of channel exclusivity.<sup>36</sup> Celpage, however, is concerned about the treatment of licensees who relied on single-frequency, as opposed to multi-frequency, transmitters. Celpage does not want operators that decided to build dedicated facilities at each licensed site, rather than to rely on inter-carrier agreements allowing them to utilize other licensees' dual-frequency transmitters, to be penalized under an extended transition period. Celpage therefore seeks reinstatement of certain "single use" transmitter licenses, whose authorizations expired while the exclusivity rules were under consideration.<sup>37</sup> Arch and Airtouch support a slow growth period for existing licensees, but argue that the bond and escrow requirements for new construction should not apply in such cases.<sup>38</sup>

25. Decision. We will not change our rules to make pre-October 14, 1993, applicants automatically eligible for our extended implementation construction schedule as petitioners ask. We stand by our decision to establish October 14, 1993, the date of our Sunshine Notice on the *Report and Order*, as the cutoff date for slow growth eligibility, and to deny slow growth extensions to grandfathered licensees generally. In our view, as of our Sunshine Notice on October 14, 1993, applicants reasonably could anticipate that we were going to adopt channel exclusivity rules for 929-930 MHz paging licensees. To deter speculative filings, therefore, we decided not to grandfather anyone that filed after October 14, 1993. We believe that the date for dividing "old" from "new" applicants also is the appropriate date for triggering slow growth eligibility. Moreover, we never suggested that slow growth extensions would apply to grandfathered licensees. Indeed, in an April 6, 1993

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<sup>35</sup> AMI Petition at 7.

<sup>36</sup> See API Comments at 3; ARCH Comments at 9-10; CelPage Comments at 10; Airtouch at 9; MAP Reply Comments at 4; CIC Reply Comments (late filed) at 7.

<sup>37</sup> Celpage Comments at 10-11.

<sup>38</sup> ARCH Comments at 9-10; Airtouch Comments at 4-9.

*Order*, we indicated that all parties in the application and coordination process were expected to comply with existing eight-month construction requirements while our rule making was underway.<sup>39</sup> Consequently, applicants falling into our grandfathered category cannot legitimately claim that they expected to be eligible for slow growth extensions.

#### E. Multi-Frequency Transmitters

26. Background. In the *PCP Exclusivity Order*, we considered the issue of whether licensees should be allowed to count multi-frequency transmitters for exclusivity purposes on more than one channel. We concluded that licensees should not be barred from using multi-frequency transmitters, but that each such transmitter would be counted only once for exclusivity purposes. The purpose of this requirement was to ensure that licensees would not claim exclusivity on multiple channels by repeatedly counting the same transmitter. We noted, however, that a licensee using multi-frequency transmitters could qualify for exclusivity on two frequencies by constructing twice the number of transmitters required to obtain one channel.<sup>40</sup>

27. Petitions for Reconsideration/Comments. Several parties urge us to relax our "single-count" rule to accommodate incumbent licensees who had constructed systems based on multi-frequency transmitters prior to the adoption of the *PCP Exclusivity Order*. NABER argues that these licensees need time to construct sufficient single-frequency transmitters to comply with our exclusivity requirements on a single-count basis. PageNet suggests that existing licensees be given two years from the time they qualify for earned exclusivity to make this conversion.<sup>41</sup> First National Paging suggests establishing a reasonable transition period for incumbent licensees, beyond the existing eight month construction requirement.<sup>42</sup>

28. In addition to reconsideration petitions on this issue, we have received waiver requests from Arch, Comtech, First National Paging, Metrocall, Airtouch, and Message Center Beepers.<sup>43</sup> At the time the *PCP Exclusivity Order* became effective, each of these petitioners was operating systems on dual channels using multi-channel transmitters.

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<sup>39</sup> See *Order*, PR Docket No. 93-35, 8 FCC Rcd 2460 (1993) at ¶ 4.

<sup>40</sup> For example, a system comprised of 12 dual-frequency transmitters would qualify for local exclusivity on both frequencies, provided that all other geographic and technical criteria are met. Similarly, a nationwide licensee may obtain exclusivity on two frequencies based on a system of 600 dual-frequency transmitters.

<sup>41</sup> PageNet Petition at 3.

<sup>42</sup> First National Paging Petition for Reconsideration and Clarification, filed Dec. 27, 1993, at 4 (First National Paging Petition).

<sup>43</sup> See Arch Petition for Waiver (filed Jan. 27, 1994); ComTech Petition for Waiver (filed Jan. 27, 1994); First National Paging Petition for Waiver (filed Feb. 25, 1994); Message Center Beepers Petition for Waiver (filed Jan. 28, 1994); Metrocall Petition for Waiver (filed Jan. 28, 1994); and Airtouch Petition for Waiver (filed Dec. 23, 1993).

Petitioners note that in each system, the number of transmitters in place is sufficient to qualify for regional or nationwide exclusivity on one channel, but that under the single-count rule, they would be required to construct additional sites to obtain protection for their operations on the second channel. Because their construction plans prior to the *PCP Exclusivity Order* relied on use of dual-channel transmitters, petitioners request twenty-four months rather than eight months to reconfigure their systems and construct additional sites to meet the requirements of the single-count rule.

29. **Decision.** We decline to modify the general rule that no transmitter may be counted more than once for exclusivity purposes. This rule prevents the potential hoarding of multiple frequencies, by requiring paging licensees seeking more than one exclusive frequency to meet a higher construction threshold. Licensees may continue to use multi-frequency transmitters in their systems, but exclusivity will be conferred on multiple channels only if the total number of transmitters is sufficient to qualify for exclusivity on each channel on a single-count basis.

30. We will grant some additional time to those grandfathered licensees who have filed waiver requests to bring existing systems into compliance with the single-count rule. Prior to the adoption of the *PCP Exclusivity Order*, these licensees had embarked on construction and operation of substantial systems relying on dual-frequency transmitters. The adoption of the single-count rule required these licensees to modify their plans to add additional transmitters in order to gain full exclusivity protection for their existing systems. We believe that a reasonable time should be afforded to petitioners to make this adjustment. We also note that the risk of allowing hoarding of frequencies is not present here, because (1) the systems at issue already are grandfathered on both channels, (2) petitioners substantially have constructed their systems and are providing service to the public on a dual-channel basis, and (3) the additional construction needed will promote increased coverage and better quality service.

31. In determining the amount of time to grant to petitioners, we note that petitioners filed their initial requests for a twenty-four month construction period in early 1994. Since that time, petitioners have had substantial opportunity to construct additional facilities on a single-frequency transmitter basis to bring their systems into compliance. Because of this elapsed time, we conclude that petitioners should be granted an amount of time consistent with their original estimate of the time required to bring their systems into compliance. We therefore grant Arch, Comtech, First National Paging, Metrocall, Airtouch, and Message Center Beepers until six months after the publication date of this *Order* in the Federal Register to demonstrate that their grandfathered systems qualify for exclusivity on a single-count basis.

## **F. Modification of Existing Systems**

32. **Background.** In the *PCP Exclusivity Order*, we concluded that all existing 929 MHz licensees should be grandfathered under the new rules whether or not they qualified for

exclusivity. Thus, incumbent systems that did not qualify for exclusivity would be allowed to continue operating their existing facilities, and any licensee granted exclusivity on the same channel in the same area would be required to share the channel with the grandfathered system. Grandfathered systems would not be allowed to add new facilities to their systems, however, if such expansion conflicted with exclusivity rights granted to another licensee.<sup>44</sup>

33. Petitions for Reconsideration/ Comments. MAP contends that we should allow grandfathered licensees who do not qualify for exclusivity to modify their existing systems in order to continue service to subscribers. MAP argues that allowable modifications should include changes in the number of paging receivers, type of emission, antenna height, power, class of station, ownership or corporate structure, and location of existing facilities.<sup>45</sup> API opposes MAP's proposal. API believes that minor and reasonable modifications to existing facilities should be allowed, but that other changes should not be permitted, particularly if the effect is to diminish or impair the development of a co-channel system which already has qualified for exclusivity in the same area.<sup>46</sup> MAP replies that it is not asking to expand the rights of grandfathered licensees, but only is seeking a clarification of the types of "minor" modifications that the FCC will allow. MAP does not want the rules interpreted in a manner that hampers the ability of existing licensees to improve service, respond to customer needs, and adjust to business changes.<sup>47</sup>

34. Decision. Our rules provide that grandfathered licensees who do not qualify for exclusivity may make modifications to existing facilities that do not impair the exclusivity rights of co-channel licensees or otherwise violate our rules. We see no reason to change this rule, based on MAP's petition. We also note that this issue is raised more broadly in our *Notice of Proposed Rule Making* in WT Docket No. 96-18. Therefore, we will defer additional consideration of the issues raised by MAP to that proceeding.

## G. Miscellaneous

35. In the *PCP Exclusivity Order*, we addressed the issue of conditional operation of 929-930 MHz stations located above "Line A," *i.e.*, within 250 miles of the Canadian border. Noting that a 1992 agreement between the Commission and Canada's Department of Communications had eliminated the need for international coordination of these channels, we stated that we therefore would allow operation of 929 MHz stations above Line A, provided all other requirements of our rules are met.<sup>48</sup> Some licensees have misconstrued this

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<sup>44</sup> *PCP Exclusivity Order*, 8 FCC Rcd at 8328-29.

<sup>45</sup> MAP Petition at 6-7.

<sup>46</sup> API Comments at 4.

<sup>47</sup> MAP Reply Comments at 2-3.

<sup>48</sup> *PCP Exclusivity Order*, 8 FCC Rcd 8318 at ¶ 41.

language in the *PCP Exclusivity Order* to open all channels in the 929-930 MHz band to operation by U.S. licensees above Line A. In fact, the 1992 U.S.-Canada agreement provides that only channels between 929.5 and 930 MHz may be used by U.S. licensees above Line A. To eliminate any possible confusion, we clarify that operation above Line A (which is now within 75 miles of the Canadian border) is allowed only on these channels.<sup>49</sup> In accordance with the 1992 agreement, no U.S. licensee may operate conditionally or otherwise on channels from 929.0 MHz to 929.5 MHz.

#### IV. CONCLUSION

36. We are amending our rules as described above to facilitate the rapid and efficient licensing of paging in the 929-930 MHz band. Our limited amendments to the regional channel exclusivity scheme established in the *PCP Exclusivity Order* will facilitate the development of seamless, wide-area 900 MHz paging systems. We otherwise affirm our rules as adopted in the *Report and Order*.

#### V. PROCEDURAL INFORMATION

37. Regulatory Flexibility Analysis. The analysis required by the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix C.

38. Ordering Clauses. Accordingly, IT IS ORDERED that pursuant to the authority of Sections 4(i), 303(g) 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as specified in Appendix A.

39. IT IS FURTHER ORDERED that the rule amendments will be effective 30 days after publication in the Federal Register.

40. IT IS FURTHER ORDERED that the petitions for reconsideration filed by National Association of Business and Educational Radio/ Association for Private Carrier Paging Section, First National Paging Company, Inc., Afro-American Paging, American Mobilephone, Inc., Paging Network, Inc., MAP Mobile Communications, Inc. and Metrocall, Inc. ARE GRANTED to the extent described above and ARE DENIED in all other respects.

41. IT IS FURTHER ORDERED that the waiver requests filed by American Mobilephone, Inc., Arch Communications Group, Inc., Comtech, Inc., First National Paging Company, Inc., Message Center Beepers, Inc., Metrocall, Inc. and PacTel Paging (now

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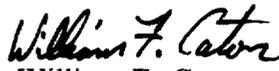
<sup>49</sup> See Letter from Robert W. McCaughern, Deputy Director General, Engineering Programs Branch, Department of Communications, Government of Canada, to Bruce Franca, Deputy Chief Engineer, Office of Engineering and Technology, dated July 22, 1992.

"Airtouch Paging") ARE GRANTED to the extent described above.

42. IT IS FURTHER ORDERED that, pursuant to the authority of Section 0.331 of the Communications Act of 1934, as amended, we delegate to the Wireless Telecommunications Bureau the authority to address any request for waiver of our exclusivity rules, which shall be evaluated based on criteria set forth above.

43. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

### **PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES**

1. The authority citation for Part 90 continues to read as follows:

**Authority:** Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.494 is amended to read as follows:

#### **§ 90.494 One-way paging operations in the 929-930 MHz band.**

(g) \* \* \* Stations operating as part of regional or local systems under Section 90.495(a)(1) or (a)(2) may also operate sites within their existing service area at a maximum effective radiated power of 3500 watts, provided that such an increase in power does not expand the licensee's service-area contour, and the requirements of Section 90.495(b)(2) are met as to any co-channel system that has preexisting exclusivity rights.

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## **APPENDIX B**

### **Parties Filing Comments and Replies In Response to Petitions for Reconsideration (PR Docket No. 93-35)**

#### Comments

American Digital Communications, Inc. (ADC)  
American Mobilephone, Inc. (AMI)  
American Paging, Inc. (API)  
Arch Communications Group, Inc. (ARCH)  
Celpage, Inc. (Celpage)  
PacTel Paging (PacTel)

#### Replies

API  
ARCH  
Communications Innovations Corp. (CIC) (late-filed)  
MAP Mobile Communications, Inc. (MAP)  
National Association of Business and Educational Radio/Association of Private Carrier  
Paging (NABER)  
PacTel (now "Airtouch Paging")

## Appendix C

### FINAL REGULATORY FLEXIBILITY ANALYSIS

1. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

#### A. Need for and purpose of this action.

2. This *Memorandum Opinion and Order* makes amendments to Part 90 of the Commission's rules relating to channel exclusivity for qualified local, regional, and nationwide private paging systems on certain channels at 929-930 MHz. The amendments will promote the efficient use of paging channels by encouraging investment in new paging technology. They also will foster the development of more efficient paging systems on a local, regional, and nationwide basis.

#### B. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis.

3. Only one party, Radiofone, filed comments responding to the Initial Regulatory Flexibility Analysis (IRFA).<sup>50</sup> Radiofone argued that we have not adequately addressed the impact of our proposal on small paging systems and that exclusive licensing will preclude small business entry at 900 MHz. We reviewed Radiofone's concerns in the context of our *PCP Exclusivity Order*. No additional comments have been submitted.

#### C. Significant alternatives considered and rejected.

4. As we determined in the *PCP Exclusivity Order* and affirm today, this action is fully consistent with our small business policy objectives. We noted in the IRFA that this action imposes certain conditions on the licensing of smaller 929-930 MHz paging systems, but these requirements are not unduly burdensome. The new rules contain significant benefits for small businesses by protecting dozens of small existing systems in place, allowing many such systems to obtain exclusivity, and creating opportunities for expansion and new entry by small business licensees.

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<sup>50</sup> Radiofone Reply Comments at 8-9.