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

FEB 28 1996

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding	)	PP Docket No. 93-253
	)	
To: The Commission	)	

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EMERGENCY PETITION FOR IMMEDIATE WITHDRAWAL OF FREEZE

COALITION FOR A COMPETITIVE
PAGING INDUSTRY

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Its Attorneys

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EMERGENCY PETITION FOR IMMEDIATE WITHDRAWAL OF FREEZE

The Coalition for a Competitive Paging Industry ("Coalition"),[1] by its attorneys, hereby requests an immediate withdrawal of the freeze on acceptance and processing of certain paging applications imposed in the above-captioned Notice of Proposed Rulemaking (hereinafter "NPRM"), released by the Commission on February 9, 1996.[2]

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[1] The Coalition consists of local and regional paging carriers, of varying sizes and geographical locations, that were prepared to move forward with major investments in new paging technology and facilities -- bringing improved services to the public -- when the freeze was imposed. The freeze not only impairs the ability of Coalition members to continue operating their businesses and meeting public demand for paging services, but it also precludes implementation of publicly beneficial advanced paging services. The Coalition therefore has standing on behalf of its members. *See Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995).

[2] *Notice of Proposed Rulemaking*, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52, released February 9, 1996. This petition should also be treated as comments on the Commission's interim licensing proposals.

SUMMARY OF ARGUMENT

The Coalition comes before the Commission with this Petition to seek the immediate withdrawal of the Commission's freeze on the processing of certain paging applications. We believe that the freeze put in place is fundamentally wrongheaded, excessive, and unprecedented -- indeed, it is unlawful -- because it is so unnecessary to the course the Commission wishes to pursue, while causing significant harm to those already bringing these services to consumers, and depriving consumers of the new services promised by rapidly developing technology.

Perhaps most troublesome is the Commission's erroneous (though well-intended) belief that the freeze was carefully crafted to allow existing businesses to meet customer demand during the rulemaking period. This is not true. Virtually all segments of the paging industry (with the limited exception of nationwide carriers) will be precluded from making the routine modifications and system upgrades needed to survive in this highly competitive industry. Declarations attached to this Petition illustrate just a few of the many individual, but representative, examples of specific injury not considered by the Commission in imposing the freeze. Moreover, as these declarations reflect, the terms of the freeze are far from clear, creating confusion and uncertainty as to the scope and length of the freeze which is harmful in itself not only to paging licensees, but to other related businesses, including equipment suppliers whose orders have been frozen indefinitely as a result of the freeze.

As the Commission has recognized, the paging industry is a mature, well-established, and highly competitive industry which has developed within a mere 3.46 MHz of spectrum. For this reason, the Commission has rightly concluded that the process of establishing the new geographic-based licensing regime requires, practically speaking, a different transition process

than might be the case where a rulemaking involved a completely new service. The most distinctive requirement of such a regulatory transition in a mature industry like paging is the practical need to let those already providing these services continue about their business where that business will not impair the transition. And the Commission has acknowledged the need to allow interim licensing while this rulemaking proceeds.

Nevertheless, the Commission has imposed an essentially blanket freeze on the acceptance and processing of paging applications (and exclusivity requests) by anyone except nationwide providers. In doing so, the Commission has not identified why granting such licenses or modifications -- particularly where applicants are not seeking mutually exclusive applications -- would in any way handicap the transition contemplated by the NPRM, much less why the discrimination in favor of nationwide providers is necessary or fair. Indeed, we know of nothing before the Commission that suggests such a freeze is warranted.

The circumstances would be entirely different if the paging marketplace was completely virgin territory, instead of being nearly fully occupied with incumbent service providers. The Commission's own data confirms that in the top 20 markets in the country there is not a single paging channel available for assignment. This is further underscored by the fact that in establishing the extraordinarily modest interim licensing it will allow during this rulemaking, the Commission has unilaterally -- and without notice and comment rulemaking -- narrowed the interference contours of the licenses held by incumbents in an apparent effort to squeeze more "white space" out of the market.

Thus, the overarching task in this transition to geographic licensing is the conversion of incumbent licensees to the new system. Even assuming the lawfulness of the redefinition of

interference contours, the extremely limited white space remaining cannot support totally new entrants into these markets or in any other way pose more than a *de minimis* issue to be considered in this transition. The Commission will have to adopt a process for transitioning incumbent licensees in any event, and the acquisition by incumbents of licenses for the available white space while this rulemaking proceeds by no serious measure can be viewed as a significant burden or impediment to the Commission's work. The most that can logically be said is that a freeze on licenses for mutually-exclusive applications might be warranted.

While the freeze advances no public interest, it will cause serious harm to the interests of incumbent paging service providers and their customers. In order to meet accelerating demand and remain competitive, paging companies must constantly add or modify transmitter sites, fill in coverage gaps in their existing service area, and persistently seek avenues to improve the product they offer to consumers. At a mundane level, this vigorous competitive posture means that paging companies at this moment have in process plans to acquire, finance, and construct new facilities, and have pending hundreds of millions of dollars in equipment orders. At a more sophisticated level, paging systems are in the process of incorporating FLEX and other cutting edge technologies in order to provide their customers with the most advanced alphanumeric services possible through the most efficient use of the available spectrum. All this activity must be abruptly halted under the freeze, imposing millions of dollars of immediate costs to cancel plans and withdraw orders, while creating great uncertainty as to what commitments and investment for future activity can be undertaken. In addition, the freeze imposes the tremendous opportunity cost on paging companies of preventing them from responding to the needs of consumers through these activities. And all these costs are visited on companies serving local and regional markets --

many of which are small businesses -- while leaving nationwide carriers free to expand their systems.

To be sure, while the Commission has recognized the urgency of this matter by putting in place an expedited comment procedure addressing the freeze, even the most extraordinary effort by the Commission will be unlikely to produce a final judgment on the need for a freeze in less than 90 days from imposition of the freeze (*i.e.*, 60 days after the comment period closes on March 11, 1996). Assuming that such an ambitious schedule will be met even in light of the major new rulemaking responsibilities imposed on the Commission by the Telecommunications Act of 1996, the design of this procedure -- as well-intended as it might be -- seriously underestimates the dynamics of the paging industry and the extraordinary impact of even a three-month freeze on many paging service providers

Indeed, this "freeze first and comment later" procedure improperly places the burden on the industry to object to the freeze instead of placing the burden on the Commission, where it properly belongs, to justify its extraordinary action. We respectfully submit that this procedure inverted the components of what would have been the correct approach in the particular confines of such a mature and competitive market: continue processing applications pending expedited consideration of the need for any freeze, imposing any freeze that might be necessary only after the Commission had the benefit of better information from affected private parties.

The unnecessary character of the current freeze and the severe consequences of the freeze for the affected private interests combine to render this action by the Commission unlawful because it is arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act ("APA"). Similarly, this freeze fails to serve the public interest as Commission

action must under the Communications Act. Moreover, the unilateral imposition of this freeze and the corresponding reduction in the interference contours of incumbent licenses without notice and comment rulemaking was unlawful under the APA and the Communications Act.

The Commission's proposal to move to geographic licensing for the paging industry is obviously a major initiative that will raise many issues. We respectfully submit that the blanket freeze ordered in the NPRM was ill-considered. This action threatens to unnecessarily encumber this rulemaking with an additional legal dispute and cast a cloud over the potentially cooperative working relationship between the Commission and the many incumbents that can smoothly make this initiative a reality. We urge the Commission to withdraw the freeze, or, at the very least, to impose a freeze only for the processing of mutually-exclusive applications.

BACKGROUND

A. The NPRM and Interim Licensing Proposal

In the NPRM, the Commission proposed two fundamental changes in its paging regulations. The Commission proposed to transition to a geographic licensing approach for paging services where single licenses would be issued for geographic areas that encompass many sites (based on the Rand McNally Major Trading Areas) in place of the current approach where individual licenses are issued on a transmitter-by-transmitter basis. The Commission also proposed to adopt competitive bidding rules for selecting among mutually exclusive paging applications.

The Commission simultaneously adopted a freeze on paging applications, effective upon adoption of the NPRM (February 8, 1996) and continuing during the pendency of the rulemaking proceeding. With limited exceptions as described below, the Commission suspended (i)

acceptance of new applications for paging channels received after the adoption of the Notice; (ii) processing of pending applications; and (iii) consideration of exclusivity requests. Recognizing the "urgency of interim licensing as an issue for incumbent paging licensees," NPRM ¶ 143, the Commission requested comment under an expedited comment cycle separate from the comment cycle for other issues raised in the NPRM. The Commission also invited comment, on an expedited basis, on the issue of whether during the pendency of the rulemaking incumbents should be allowed to file new applications that would expand or modify existing systems beyond their existing interference contours with such modifications receiving only secondary site authorization (*i.e.*, no interference protection) if the geographic licensing proposals are ultimately adopted.[3]

The Commission carved out three narrow exceptions to the freeze which, as discussed below, are not entirely clear. First, all non-mutually exclusive applications for paging licenses pending as of the date of the NPRM will be processed as long as the relevant date for filing competing applications has expired.[4] Second, the Commission will allow common and private paging carriers to file applications to authorize new facilities or to modify existing facilities within their

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[3] Petitioners see no benefit in this proposal because, as a practical matter, no paging company would be willing to take the risk of building new facilities (at a potential cost of $25,000 per transmitter site) which might subsequently be subjected to interference from geographic licensees.

[4] This exception covers 931 MHz applications filed more than sixty days, and VHF/UHF applications filed more than thirty days, before February 8, 1996. *See* 47 C.F.R. § 22.31 (1993) (931 MHz); *id.* at § 22.131 (1995) (VHF/UHF). While theoretically pending Private Carrier Paging ("PCP") applications could be processed (because there is no cut-off date for PCP applications on 929 MHz which are filed on a first come-first served basis), the suspension of exclusivity requests would appear to preclude processing of many 929 MHz applications now on file (or, at the least, create sufficient uncertainty to inhibit 929 MHz applicants from moving forward with construction even if their applications are processed). Another issue raised by this exception is the treatment of applications filed during the Commission's budget and snow-related closures in December and January; in fact, the Commission was open for only one business day between December 15, 1995 and January 16, 1996. As a result, an application may have been filed in Pittsburgh at the Mellon Bank but not received by the Commission until it re-opened in mid-January, thereby delaying expiration of the cut-off period for mutually exclusive applications through no fault of the licensee. *See* Declaration of Louis S. Zandy, Vice President, Always Answering Services, Inc., at 4 (hereinafter "Zandy Declaration").

interference contours; however, the Commission simultaneously revised the relevant interference contour for purposes of interim licensing resulting in a drastic reduction of the contour for incumbent 929 and 931 MHz licensees.[5] Third, common carrier and private paging carriers with nationwide exclusivity will be allowed to file applications for additional or modified sites without restriction.[6]

As justification for the freeze, the Commission stated only in conclusory terms the "fundamental changes" proposed in the paging licensing rules and its belief that, after the public had been placed on notice of the proposed rule changes, "continuing to accept new applications under the current rules would impair the objectives of this proceeding." NPRM at ¶ 139. The Commission also noted its belief that the freeze is consistent with the approach taken in "other existing services where we have proposed to adopt geographic area licensing and auction rules." *Id.*[7] No explanation was provided to support this conclusion. In imposing the freeze, the Commission apparently believed that the impact of the freeze would be limited. NPRM at ¶ 140 ("It is our desire to allow

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[5] In footnote 271 of the NPRM, the Commission indicated that, for purposes of the freeze, the interference contour for both 929 and 931 MHz licensees would be based on a median field strength of 21 dBμV/m, which is the calculation proposed in paragraph 52 of the NPRM. This is a far more restrictive calculation than now applicable under Rule 22.537(f), the effect of which is to reduce significantly the protected operations of the licensee. To illustrate, assuming co-channel facilities operating at a power of 500 watts ERP and a height of 152 meters above average terrain (500 feet), the minimum mileage separation under the current rules is 112 kilometers (70 miles) based on a defined service contour of 32.2 km (20 miles) and an interference contour of 80.5 km (50 miles). Using the 21 dBμV/m calculation, however, the interference contour of the same station would be 55 km, a reduction in the carrier's protected area of 10,855 square kilometers (4,182 square miles.) *See* Declaration of Kevin F. O'Brien, President, O'Brien Communications (hereinafter "O'Brien Declaration") at ¶ 21.

[6] In the NPRM, the Commission apparently proposed to continue processing pending applications for non-exclusive (*i.e.*, shared) PCP channels. *See* NPRM at ¶ 149. However, Commission Staff subsequently advised the industry that, contrary to the stated policy, it will not accept or process shared channel PCP applications during the pendency of the rulemaking. *See* PCIA Member Alert, February 15, 1996.

[7] The Commission specifically cited its actions in the Specialized Mobile Radio Service and the 39 GHz band proceedings. *See* NPRM at ¶ 139, n.270.

incumbent licensees to continue operating their businesses and meeting public demand for paging services during this rulemaking ")[8].

B. The Impact of the Freeze

1. The Impact of the Freeze on the Transition to Geographic Licensing and Auctioning

The Commission correctly recognized in the NPRM that the paging industry has a number of unique characteristics. Most importantly, the paging industry, although dynamic, is a mature and established industry.[9] Since paging frequencies were first allocated in 1949, the paging industry has grown dramatically, counting 34.1 million paging subscribers in 1995.[10] In contrast to other wireless services where the Commission has imposed geographic licensing, paging frequencies are heavily used.[11] Very limited paging spectrum is available for new systems and whatever "white space" does exist "is unlikely to be of practical value to anyone other than [existing paging licensees] and yet it may be of critical importance to the incumbent's ability to maintain its position in this highly competitive market."[12]

8/ *See also* NPRM, *Separate Statement of Commissioner Susan Ness* (hereinafter "Statement of Commissioner Ness") ("[W]e are taking measures that will allow existing paging businesses to continue to meet customer demand during the pendency of this proceeding.").

9/ *See id.* ("The Notice recognizes that paging is a mature service.")

10/ *See Top 20 International Paging Markets*, RADIO COMMUNICATIONS REPORT, (January 22, 1996) at 10 (hereinafter cited as "RCR"). The NPRM estimated that there were 27.3 million paging subscribers in 1994. NPRM at ¶ 6, n.18.

11/ In the 39 GHz proceeding, for example, where the Commission recently imposed a freeze on new applications pending the rulemaking outcome, there were no private sector operations and only nine government operations in the relevant band. Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services; Implementation of Section 309(g) of the Communications Act -- Competitive Bidding, *Notice of Proposed Rulemaking and Order,* ET Docket No. 95-183, FCC 95-500, released December 15, 1995 at ¶ 3 (hereinafter "SMR NPRM").

12/ Statement of Commissioner Ness.

In the top twenty markets in this country, there is not a single paging channel available for assignment excluding a limited number of undesirable 35/43 MHz low band channels. O'Brien Declaration at 9. The situation in the top twenty markets is mirrored in numerous smaller markets. *Id.* In this unique context, the decision by the agency to freeze new applications for paging licenses and to suspend processing of pending applications will have an immediate and detrimental effect on paging system operators, equipment suppliers, and consumers, among others, all without any compensating public benefit.

Although the Commission expressed concern that acceptance of applications during the freeze would impair the objectives of the rulemaking proceeding, this concern does not reflect any facts in the record. The objectives of the proceeding are two-fold: (1) to impose a geographic licensing approach in the paging regulations in place of the current transmitter-by-transmitter approach now utilized; and (2) to use competitive bidding to award licenses where there are mutually-exclusive applications The freeze will not further either of these objectives. Nor will acceptance and processing of applications during the freeze impair the expressed objectives.

The geographic licensing proposal is based on the Commission's view that "licensing based on pre-defined service area poses significant advantages over site-based licensing, because of the greater flexibility it gives licensees and the greater ease of administration for the Commission." NPRM ¶ 19. Regardless of whether this observation is true, it does not justify imposition of a freeze. Even assuming that geographic licensing is ultimately applied to incumbent licensees, acceptance of applications during the pendency of the rulemaking would not hinder the Commission from implementing a geographic licensing approach.

The Commission's second goal, to authorize competitive bidding for mutually-exclusive applications, is also not impaired by acceptance of applications during the pendency of the rulemaking. The Commission could achieve this objective simply by freezing action on mutually exclusive applications during the rulemaking. If auctions are authorized, the Commission could then move forward to act on pending mutually exclusive applications. In the meantime, other applications could be accepted and processed.

Stating the Commission's objectives in this fashion, it is apparent that the primary objective served by the freeze is the following: to the extent that the rulemaking identifies or creates "white space" that can be auctioned to new licensees (*i.e.*, by reducing the interference contour of incumbent licensees), acceptance and processing of applications during the freeze could negate the alleged benefits of such auctionable white space.

The assumptions underlying this line of reasoning are wholly flawed. No evidence exists that there is sufficient "white space" to allow for additional systems to be accommodated in the currently allocated channels, even assuming that the proposed interference contour reduction is adopted.[13/] Paging is a multiple-transmitter service; this means that licensing for a single transmitter has no value (other than possibly extorting a buy-out from an incumbent licensee which abuses can be addressed by the Commission in other ways). In addition, paging is a subscriber-driven service; areas of highest population density are typically served first leaving little or no "white space" in the major markets where demand is greatest.[14/] All of these factors indicate that the prospect of a filing "land-rush" if the freeze were lifted is extremely remote.

13/ *See* O'Brien Declaration at ¶ 12.

14/ *Id.* at ¶¶ 9 and 12.

2. The Impact of the Freeze on the Highly Competitive Paging Industry

As the Commission acknowledges in the NPRM, the paging industry is extremely competitive. The Commission indicates that there are more than 600 licensed paging operators. NPRM at ¶ 7. This number does not really capture the true state of the paging marketplace, which includes many thousands of unlicensed companies reselling paging services to the public as well as retailers such as K-mart and Wal-mart, all of which are part of the distribution chain.[15] This competition has resulted in lower prices to the consumer. It has also sparked large investment in new technology, which has in turn translated into increased diversity and enhancement of services to the public, even as the cost of the product has dropped significantly. Technological developments in paging equipment and services have been rapid and impressive. The industry has evolved dramatically from the early days of the tone-only pagers (requiring a user to call in to a central answering machine to retrieve his or her message) to the current, state-of-the-art hand-held two-way alphanumeric nationwide pagers.[16]

(a) A Freeze on the Ability to Provide Alphanumeric Services

Currently, customer demand is driving the paging industry towards provision of advanced wireless messaging or text (*i.e.*, alphanumeric) services. Alphanumeric paging may consist of simple text messages or more advanced transmission of text pages such as Internet e-mail.[17]

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[15] In any given market in the country there are anywhere between 5 and 25 different licensed carriers, and often dozens of agents and resellers, all competing for the same customers. *Id.* at ¶ 12.

[16] The paging industry is one of the most spectrally efficient radio services with a total allocation of a mere 3.46 MHz. O'Brien Declaration at ¶ 7. In 1995, the industry serviced approximately 34.1 million customers (a per population penetration rate of approximately 13%), which translates into 9.86 million subscribers per MHz of spectrum. Thus, spectral efficiency of paging on a per subscriber basis is substantially greater than other mobile services, including SMRS and cellular services which have been allocated over 90 MHz of spectrum.

[17] *See, e.g.*, *Alphanumeric Paging Heats Up*, WIRELESS WEEK, December 1995, at 25 (predicting 25% alpha-

Alphanumeric pagers are the vehicle for the provision of many of the enhanced services in paging today, including stock quotes, news and sports updates and the ability to broadcast updated information to a group of paging subscribers (such as a sales manager updating pricing lists to a sales staff).[18/]

In order to provide alphanumeric services, paging carriers are converting to the new "FLEX" protocol, a high-speed synchronous data format, which dramatically increases the capacity of the paging channel through higher data rates (up to 6400 baud.) Most systems now use a lower data rate standard (512 and 1200 baud POCSAG are typical) in contrast to the higher data rate FLEX protocol (6400 baud).[19/] The industry is at a critical juncture in the development of the next generation paging systems. Virtually every medium to large carrier in the country is either in the process of upgrading older equipment to FLEX capability, building out new FLEX systems, or moving forward with immediate plans to do so. O'Brien Declaration at ¶ 18. Not only does this conversion translate to enhanced customer services, but it also means significant expenditures for new equipment (both transmitters and subscriber pagers).[20/]

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numeric usage by the year 2000).

18/ Perry D. Walter & John S. Bain, *The U.S. Paging Industry: The Pager Is No Longer Just a Beeper*, Detailed Study (Raymond James & Assoc., Inc., St. Petersburg, FL.), Dec. 12, 1994 at 18.

19/ The advent of high speed transmission in the FLEX protocol has allowed paging system operators the first practical opportunity to offer inexpensive alphanumeric service to their customers. Until the development of FLEX, carriers were reluctant to increase alphanumeric paging traffic since such traffic utilized a disproportionate share of channel air time. With high speed FLEX transmission, this is less of a concern. As a result, many carriers have invested and are investing in advanced techniques to originate alpha traffic - including through internet gateways for electronic mail - which should allow for rapid growth in this segment of the market. In many cases, the last remaining obstacle to providing these services is the installation and optimization of a FLEX network.

20/ The cost of upgrading newer transmitters to FLEX capability ranges from $6-8,000 per transmitter, while the replacement cost, if a new transmitter is required, can exceed $25,000 per site.

A freeze of even a quarter of a year calls a costly halt to the paging industry's ability to undertake the many interconnected steps needed to offer alphanumeric services and the newest digital display units to its subscribers through the development of new FLEX networks. Most immediately, conversion to a FLEX network requires more transmitters to service the same area. O'Brien Declaration at ¶ 14. These transmitters may be added at perimeter locations outside of a licensee's interference contours *Id.* at 14. As currently defined, the freeze will prevent the filing of the modification applications and/or site applications required to implement FLEX networks, thereby disrupting implementation of these new and publicly beneficial paging services by local and regional providers.

(b) A Freeze on the Ability to Fill-In or Expand Coverage Within Market

In addition to inhibiting use of new advanced technologies, the freeze will prevent existing systems from conducting their day-to-day business, and meeting customer demand, contrary to the Commission's expressed intention. Although paging is an established industry, the growth in demand for paging services has accelerated markedly, and continues to accelerate, reflecting our increasingly mobile society.[21] In order to meet this demand and to remain competitive, paging systems must constantly add transmitters in order to improve and expand service to their customers; this is necessary because of the limited amount of paging spectrum and the need to use the allocated spectrum more efficiently.[22]

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[21] *See* NPRM at ¶ 6 (estimating growth in paging industry as 29% in 1993 and 38% in 1994). *See also* Lehman Brothers, GLOBAL PAGING INDUSTRY MONTHLY MONITOR (February 1996) at 32 ("Between 1990 and 1994 subscriber growth rate advanced at a 25% compounded annual rate."); *RCR, supra.* Based on a 25% annual growth rate, this means, in 1995, more than 560,000 new customers were added each month.

[22] As Commissioner Ness quite rightly observed, "Paging is a thriving industry with established licensees who must regularly expand or modify their facilities in order to meet customer demand and increase their competitiveness in the market." Statement of Commissioner Ness.

Without the ability to add fill-in sites (either outside of or at the perimeter of the licensee's current interference contour), operators are denied the capability to respond to the natural expansion of their markets. Even if the current definition of interference contour is used (in lieu of the more restrictive definition adopted in the freeze which effectively reduces the 900 MHz licensee's potential service area from 80.5 to 55 km), licensees will be unable to fill coverage "holes" in their system, resulting in an inability to improve service in fringe areas and to be able to respond to the natural growth of their markets. *See* Zandy Declaration at ¶ 2.

The natural growth of licensed systems (which has increased at an average of 34% per year in 1993 and 1994) is thus effectively halted. Not only are carriers prevented from providing improved services to existing subscribers, but they are further handicapped in bidding to provide services to new customers (*e.g.*, to provide paging service within a factory or office complex to a particular corporate customer).[23] Moreover, what is at stake here is not simply these sizable opportunity costs, but real, immediate expenditures. Paging companies have pending equipment orders, representing hundreds of millions of dollars in revenues to equipment suppliers, that are placed in limbo as a result of the freeze due to uncertainty as to when pending applications will be processed. *See, e.g.*, Declaration of John Knight, Sr., Partner in Merryville Investments (hereinafter "Knight Declaration") at ¶ 8.

(c) A Freeze on the Ability to Compete With Nationwide Carriers

The Commission's decision to favor nationwide paging licensees by exempting them from the freeze discriminates in a most unjustified fashion against carriers serving local and regional

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[23] *See* Declaration of Joseph H. Buttner, Vice President, Radio Communications of VA at ¶ 3.

markets.[24] The local and regional carriers, many of which are small businesses, are disproportionately impacted by the freeze since nationwide paging licensees are free to file applications and proceed with system development. Non-nationwide carriers, even those with local and regional exclusivity, may only file for facilities within their interference contours as defined by the NPRM.

In favoring the nationwide carriers in this way, the Commission apparently overlooked or was unmoved by the obvious practical impact of this action on the local and regional operators who are competing in their markets with nationwide carriers (and potentially narrowband PCS operators). For example, in the Atlanta market, PageNet holds five nationwide authorizations. As a practical matter, therefore, PageNet competes directly with one of the Coalition's members, Best Page, whose applications in Atlanta (including a request for local Statewide exclusivity) are subject to the freeze while PageNet's are not.[25]

From the subscriber standpoint, there is no distinction between nationwide and other carriers in a particular market besides differences in price and service options. The nationwide carrier typically offers local paging service with nationwide coverage as an option at additional cost. Nationwide carriers are competing for the same customers as other carriers in the market. In this competitive environment, there is no rational basis for exempting only nationwide licensees from the freeze and thereby handicapping local and regional carriers in competing for customers.

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[24] The freeze also distinguishes inequitably between, on the one hand, nationwide carriers using nationwide channels and those with nationwide PCP exclusivity, and, on the other hand, companies such as A+ Network which has assembled a nationwide network with affiliate companies using PCP frequencies. *See* Declaration of Jack L. Baker, President, Mountain Communications, Inc. at ¶ 1.

[25] *See* Knight Declaration at ¶ 10.

3. The Freeze on New Paging Applications Is Unlike Any Other Freeze The Commission Has Employed to Smooth a Transition to a New Regulatory Regime

This case is markedly different from other proceedings in which the Commission has imposed an application freeze pending the outcome of rulemaking proceedings. In the NPRM, the Commission cites the prior freezes in the 39 GHz and 800 MHz Specialized Mobile Radio (SMR) proceedings as authority for its actions here. NPRM at n.270. Neither of these proceedings is analogous to the distinctive circumstances confronting this rulemaking in the paging context. Perhaps the most significant difference is that, unlike other proceedings, this proceeding is unlikely to release a flood of speculative applications. Various industry characteristics and existing Commission rules, including short construction periods, limited utility of single paging sites, and little remaining white space, ensure that speculation is unlikely to be a problem.

In the 39 GHz proceeding cited by the Commission, there was no potential for harm to existing licensees as a result of the freeze imposed in that proceeding. The Commission acknowledged that there were virtually no existing operators in the 39 GHz band, only nine Government stations operating on these frequencies in the entire United States.[26/] Since the Commission's rulemaking proceeding contemplated entirely new uses of the underutilized 39 GHz frequency bands under consideration, it made sense to freeze new applications until rules were adopted defining permissible uses and users of the spectrum. Here, in contrast, the paging industry is characterized by intensive frequency use and established commercial interests.

[26/] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(g) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Notice of Proposed Rulemaking and Order*, ET Docket No. 95-183, P.P. Docket No. 93-253, FCC 95-500, ¶¶ 121-124 (rel. Dec. 15, 1995) (hereinafter "39 GHz NPRM").

Nor can the SMR freeze be analogized to the present situation. The SMR freeze cited by the Commission was intended to stop a "steep rise" in demand for 800 MHz General Category channels[27] pending the outcome of a rulemaking proceeding designed to "enhance the competitive potential of SMR services in the mobile services marketplace."[28] In contrast to the paging industry, the 800 MHz SMR service historically consisted of dispatch radio systems used to meet the licensee's internal business communication needs (*e.g.*, taxi radios). As technology developed, the historic use of SMR frequencies was being undermined by the large-scale use of waivers and grants of extended implementation authority to utilize the SMR frequencies for wide-area PCS-type services. The flood of waiver and extended implementation authority requests had, in the Commission's words, resulted in administrative burdens that were "cumbersome," "inefficient," and "unwieldy."[29] No such administrative tangle needs to be halted in the context of the rulemaking involved here.

A particular concern of the Commission in freezing applications for General Category SMR channels (which may be used for both private business purposes and commercial PCS-type mobile services) was the risk of encroachment by commercial service providers on the non-

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27/ Licensing of General Category Frequencies in the 806-804.750/851-854.750 MHz Bands, *Order*, DA 95-2119 ¶ 2 (rel. Oct. 4, 1995).

28/ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band and Implementation of Section 309(g) of the Communications Act -- Competitive Bidding, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970, 7973 at ¶ 2 (1995) (hereinafter "Further Notice").

29/ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, Implementation of Section 309(g) of the Communications Act -- Competitive Bidding, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029, GN Docket No. 93-252, PP Docket No. 93-253, ¶ 4 (rel. Dec. 15, 1995).

auctionable spectrum allocated for non-commercial, private business use.[30] In this context, the freeze actually protected and preserved spectrum for private business entities.

There is obviously a clear distinction between the 800 MHz SMR and the 39 GHz proceedings, on the one hand, and the paging freeze imposed here. In contrast to the SMR and 39 GHz situations, use of paging frequencies is extensive and the commercial paging industry is highly developed, creating a far greater harm to the existing industry from a freeze. Moreover, a freeze is not required here to preserve the objectives of the underlying rulemaking, in contrast to the other proceedings, due to the unlikely prospect that a flood of speculative applications will result. Ironically, the freeze here may result in a flood of waiver requests, an administrative burden that the Commission sought to eliminate by freeze in the SMR proceeding.

ARGUMENT

I. THE COMMISSION'S INTERIM LICENSING POLICY IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION.

The Commission's decision to freeze the processing of most new paging applications as part of an "interim licensing policy" is not explained by the agency, or based on evidence in the record. Under well-established precedent governing agency action, including section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, the freeze must be declared unlawful on the grounds that it is arbitrary, capricious and an abuse of the agency's discretion.

In making its decisions the Commission is bound to take a "hard look" at all relevant factors and to consider reasonable alternatives. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) (agency must consider reasonable

[30] Further Notice at ¶ 52.

alternatives); *Action for Children's Television v. FCC*, 564 F.2d 458, 478-79 (D.C. Cir. 1977) (agency must give relevant factors a "hard look"). Moreover, it "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995) (quoting *State Farm*, 463 U.S. at 43). *See also Petroleum Communications, Inc. v. FCC*, 22 F.3d 164 (D.C. Cir. 1994). Normally:

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Arent, 70 F.3d at 616.

The sole explanation for the Commission's decision to issue the freeze -- *i.e.*, that continued processing of applications would "impair the objectives of the rulemaking" -- is not supported by evidence in the record, or by any logical analysis based on the facts of the paging industry. The freeze is simply unnecessary to achieve the geographic licensing and competitive bidding procedures contemplated by the NPRM.

From the Commission's perspective, achieving the objectives of this rulemaking obviously must focus on the transition of the incumbent licensees, who by-and-large fully occupy the paging marketplace, to the new geographic-based licensing regime contemplated by the rulemaking. Whether or not one includes the reduction of the interference contours made in the NPRM, the available white space in this industry is so modest that it cannot conceivably attract new entrants who might wish to set up yet another system in this already highly-competitive industry. *See*

O'Brien Declaration at ¶ 10. Thus, increasing competition in these markets can provide no justification for preserving this white space while the rulemaking proceeds. And this white space is such a limited part of the market that it really raises only a *de minimis* concern as a regulatory matter, at most justifying a freeze where mutually-exclusive applications are involved, not the blanket freeze now in place. Any licenses that would be granted for nonmutually-exclusive applications while this rulemaking proceeds could be transitioned into the geograpically-based regime in the same manner as the incumbent licensees that have already occupied most of the available spectrum before this rulemaking was initiated.

Clearly, the situation here is entirely different from other situations where application freezes have been imposed. In the cases cited by the Commission in the NPRM, the agency proposed an entirely new service in unencumbered 39 GHz spectrum or, in the case of the 800 MHz SMR general category channels, sought to preserve spectrum for the private business users of the allocated frequencies. Neither of these public interest concerns is raised here. Paging is a mature and vibrant industry that, on its own, is moving towards implementation of new, advanced and spectrally-efficient technologies.

The arbitrariness of the freeze order is compounded by the fact that, while it is not necessary to achieve any significant regulatory purpose, the order visits serious harm on local and regional paging operators and others, including their employees, customers and equipment suppliers. As we explained above, these harms include hampering local and regional paging operators in their ability to compete for business by preventing them from meeting customer demand and, in many instances, offering enhanced paging services made possible by installing technologically advanced equipment (*i.e.*, FLEX protocols). These providers will have to pay for equipment