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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 1, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C 20554

Re: 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

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Transmitted herewith on behalf of Priority Communications, Inc. ("Priority") are the paper original, three microfiche, and four paper copies of its "Comments on Notice of Proposed Rulemaking Interim Licensing Proposal" in the above-referenced rulemaking proceeding.

This material is respectfully directed to the attention of the Commission.

Please direct any questions or correspondence with respect to this matter to our office.

Very truly yours,

Ellen S. Mandell

Ellen S. Mandell
Attorney for Priority
Communications, Inc.

Enclosure

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

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

COMMENTS ON NOTICE OF PROPOSED RULEMAKING
INTERIM LICENSING PROPOSAL

Priority Communications, Inc. ("Priority"), by its attorney and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its comments with respect to that aspect of the above-captioned Notice of Proposed Rulemaking ("NPRM") which sets forth an interim proposal for licensing paging facilities during the pendency of the proceeding to revise the rules governing paging systems[1/]. NPRM ¶139 et seq.

I. Standing

1. Priority is licensed to operate a wide-area paging system in the Paging and Radiotelephone Service ("PARS") on the frequency 931.2375 MHz in the state of Florida under the call signs KNKK605, KNKK608, KNKK612, KNKK620, KNKK624, KNKK635, and KNKK992. In addition, Priority is an applicant for additional

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[1/]The Commission has bifurcated the instant docket. The Commission has established a deadline of March 1, 1996, to comment on the interim licensing proposal. A later deadline has been established for other aspects of the NPRM. Priority hereby reserves the right to comment on other aspects of the NPRM on or before that later deadline.

co-channel base stations to improve its existing 931.2375 MHz system. The interim licensing proposal, if adopted, will adversely effect Priority's ability to modify its system in response to changing circumstances and the needs of members of the public who subscribe to Priority's service. Accordingly, Priority is an "interested" person for purposes of participating in this proceeding.

II. Interim processing freeze

2. The Commission has imposed a freeze on the filing of applications for new paging facilities and major modifications, and seeks comment on procedures for interim processing of paging applications already on file during the pendency of the instant proceeding. NPRM ¶139-140. In the 931 MHz band, the Commission proposes to process only those pending applications for which the 60-day window for filing competing applications had expired as of February 8, 1996, or, in other words, which had achieved "cut-off" protection by that date. NPRM ¶145. Thus, under the Commission's proposal, a 931 MHz application would have to have been on Public Notice as "accepted for filing" by no later than December 6, 1995 to be eligible for interim processing.

3. Hundreds of applications were on Public Notice as accepted for filing during the period December 6, 1995 through February 7, 1996. These applications propose to improve existing paging systems, as well as to establish new paging services. Action on these applications, to the extent possible, will be beneficial to the public interest by making additional paging

service available. On the other hand, any delay in introducing new and improved paging service to the public will be detrimental to the public interest.

4. The Commission's proposed procedure, to "hold in abeyance" all pending applications which were not "cut-off" by the start of the freeze, NPRM ¶144, will needlessly stall the processing of hundreds of applications for essential communications services, notwithstanding the availability of a narrower mechanism to preserve the Ashbacker rights of parties seeking to file mutually exclusive applications. Ashbacker Radio Corp. v FCC, 326 U.S. 327 (1945).

5. Pursuant to Ashbacker, the Commission cannot process applications if potentially mutually exclusive applicants would thereby be deprived of the opportunity to over-file. However, there is no certainty that the applications accepted between December 6, 1995 and February 7, 1996 will be filed over. Indeed, some of the applications filed during that period cannot be filed over consistent with Commission's current interference protection rules. Rule Section 22.537. For example, Priority's pending applications for additional co-channel facilities at Jacksonville Beach, Florida (File No. 22891-CD-P/ML-96) and Middleburg, Florida (File No. 22892-CD-P/ML-96), which were accepted for filing by Public Notice dated January 31, 1996, are completely surrounded by the interference contours of Priority's existing co-channel facilities or the Atlantic Ocean. Although these applications cannot be filed over, under the interim proce-

dures proposed by the Commission the public will be deprived indefinitely of improved paging service in these areas.

6. It would be contrary to the public interest to unnecessarily defer the processing of non-mutually exclusive applications indefinitely. In the context of prior filing freezes, the Commission has preserved the Ashbacker rights of potential over-filers while assuring that applications which can be processed are processed, by carving a limited exemption from the freeze for the filing of mutually exclusive applications until the close of the applicable Ashbacker period. For example, when the Commission adopted a freeze on the filing of applications for new and certain modifications of AM stations, the Commission provided that it would accept for filing timely-filed over-filings mutually exclusive with applications tendered on or before the seventh day following the adoption of the freeze. Review of the Technical Assignment Criteria for the AM Broadcast Service, 5 FCC Rcd 2136 (1990)[2/]. The Courts have expressly condoned such a procedure. See e.g. Kessler v. FCC, 326 F.2d 673, 677-678 (D.C. Cir. 1963).

7. Priority respectfully submits that interim procedures should be adopted in this proceeding which would exempt from the

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[2/]As a precaution against sham filings deliberately manufacturing mutual exclusivity to circumvent the freeze, the Commission further provided that it would dismiss any application submitted under such procedure if subsequently amended to eliminate mutual exclusivity. Id. See also Low Power Television Broadcasting, 49 RR 2d 433, 435 (1981) (exempting certain mutually exclusive applications from partial freeze on applications for low power television stations).

freeze applications mutually exclusive with applications accepted between December 6, 1995 and February 7, 1996. The Commission could thereby identify actual instances of mutual exclusivity, and defer the processing of only mutually exclusive applications, thus causing no greater delay in introducing service than required under Ashbacker. The remaining singletons could be processed, thus maximizing the timely introduction of new and improved paging service in the public interest.

III. Treatment of pending applications upon adoption of new rules

8. The Commission proposes to "hold in abeyance" during the processing freeze those applications which are mutually exclusive or which were not on Public Notice as accepted for filing by a date certain. NPRM at ¶¶144-145. Upon the adoption of an order in this proceeding, the Commission proposes to "process or dismiss" such applications. Id.

9. It would be arbitrary, capricious, and an abuse of agency discretion to dismiss applications which complied with agency rules at the time of filing, without affording at least an opportunity to bring the applications into compliance with the new rules. If the rules ultimately adopted are so changed that the unprocessed applications are no longer in processable form, due process requires that such applicants be accorded an appropriate opportunity for amendment.

IV. Calculation of interference contour

10. The Commission proposes to allow, during the pendency of this proceeding, incumbent licensees to add or make modifica-

tions to their existing systems "that do not expand the interference contour of the incumbent's existing system." NPRM at ¶149. Under the present rules, the interfering radii of 931 MHz paging stations are set forth in Table E-2 of Rule Section 22.537. Depending upon the transmitting antenna's height above average terrain ("HAAT") and effective radiated power ("ERP"), interfering radii range from 50 miles for most facilities, to 119 miles for the highest and most powerful stations.

11. At note 271 of the NPRM, however, the Commission indicates its intention to base the interference contour for such interim additions and modifications on a median field strength of 21 dBu V/m. This median field strength assumption was heretofore not found in the 931 MHz paging rules. At ¶52 of the NPRM, the Commission introduces a proposed formula to calculate the interference contour of a 931 MHz station which would assume a median field strength of 21 dBu V/m, but there has not yet been a full opportunity for comment on the proposed formula, and the period for comment will not close until March 18, 1996.

12. In many cases, the proposed formula will substantially shrink the degree of interference protection presently accorded 931 MHz incumbents under Table E-2. Table E-2 has served the public well, as the absence of interference enables paging stations to provide more reliable service over a broader area. A reduction of interference protection therefore would be a substantial substantive change in the rules governing paging operations.

13. Under these circumstances, the Commission cannot properly replace the Table E-2 interfering radii with its newly proposed formula for calculating interference absent completion of a notice and comment rule making proceeding. See Section 553(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. §553(d) (requiring notice and 30-day opportunity for comment on proposed substantive rule changes). Table E-2 should remain the basis for determining the interference radii under the interim processing procedures.

V. Contingent minor modifications

14. Although Table E-2 should be determinative of the interference radii demarcating the outer perimeter within which incumbents may make interim additions and modifications to their systems, these radii will change if Table E-2 ultimately is replaced with the Commission's proposed formula. Accordingly, so that incumbent licensees may continue to enjoy the interference protection presently provided under Table E-2, the interim procedures should allow licensees to file contingent applications, for additional sites which would otherwise appear to impermissibly "expand" the system's existing interference contour under Table E-2, but which would enable the licensee to retain its present level of interference protection (and thus avoid degradation of existing service) if the formula is ultimately adopted. Such applications could be held until the resolution of this proceeding. If ultimately Table E-2 is not replaced with the proposed formula, those applications could be amended (if a different rule

change is adopted) or dismissed (if Table E-2 is left in place).

WHEREFORE, the premises considered, Priority Communications, Inc., respectfully submits that the Commission should adopt interim processing guidelines in accordance with the foregoing.

Respectfully submitted,

PRIORITY COMMUNICATIONS, INC.

By Ellen S. Mandell

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Its Attorney

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