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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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March 11, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC. 20554

Via Messenger

Re: **Future Development of Paging Systems
(Interim Licensing Proposal)**
WT Docket No. 96-18; PP Docket No. 93-253
Reply Comments of Caraway Communications

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Transmitted herewith is the original and four copies of the Reply Comments of Caraway Communications on the above-captioned Interim Licensing Proposal.

Kindly contact my office directly with any questions or comments regarding the attached.

Respectfully submitted,

William J. Franklin

William J. Franklin
Attorney for Caraway Communications

cc: Caraway Communications
Service List

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

**REPLY COMMENTS OF
CARAWAY COMMUNICATIONS
ON INTERIM LICENSING PROPOSAL**

Caraway Communications ("Caraway"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, hereby respectfully files reply comments on the Commission's proposal to adopt interim licensing rules for commercial paging services.^{1/}

BACKGROUND

Caraway is an established firm responsible for the design and construction of communications sites for major companies across the country. As such, it is a well-established member of the communications industry. Caraway's President and founder is Mr. Dwayne Caraway, an experienced consulting RF engineer.

Caraway is filing these Reply Comments on behalf of its clients, who are CMRS licensees with 929 MHz and 931 MHz paging systems at various locations around the country. In many cases, those clients have exclusivity rights for their systems. Those clients

^{1/} Future Development of Paging Systems, 11 FCC Rcd ____ (FCC 96-52, released February 9, 1996) (WT Docket No. 96-18, PP Docket No. 93-253) (Notice of Proposed Rulemaking) ("NPRM").

are in the process of building out those systems, a process which involves substantial investments of capital. Caraway is intimately involved with the technical and financial aspects of this system development. As such, Caraway has a special expertise to discuss the interim licensing rules from the perspective of start-up CMRS paging operators.

I. AS SOME PARTIES HAVE NOTED, THE COMMISSION'S POLICY ON 929 MHz EXCLUSIVITY MUST CONFORM WITH THE EXISTING RULES.

The existing channel exclusivity now afforded to 929 MHz paging systems by Section 90.495(c) of the Commission's is very important to Caraway and its clients. Accordingly, Caraway supports the comments of others which describe how existing exclusivity rights are vested and cannot be abrogated by mere Commission processing policies.^{2/}

Although carriers expect that they may face increased or different types and amounts of competition from new technologies or new Commission licensees as time passes, channel exclusivity assures them that the signal quality of their authorized paging service can never be diminished by outside forces. With channel exclusivity, carriers can have a stable regula-

^{2/} See, e.g., Initial Comments of Diamond Page Partnerships, AmericaOne and Affiliated Entities in Phase 1 Issues. Caraway also supports Diamond Page's comments requesting that the Commission adopt a single, liberal transfer and assignment policy for both 929 MHz and 931 MHz paging authorizations.

Caraway also supports the suggestion in paragraph 143 of the NPRM to permit incumbents to continue to file new applications during the pendency of the proceeding. The Commission should also continue to accept control applications during this period. By definition, licensees filing additional applications would be expanding its coverage to provide added service to the public. This added coverage should become protected if the auction winner is unwilling or unable to do so. While the Commission might want to designate this added coverage as secondary, procedures should exist to convert the coverage to primary status if either (a) the auction winner for the market either does not cover the incumbent's added coverage area during the auction winner's initial license term or (b) the auction winner loses its license for failure to construct or otherwise.

tory future in which encourages them to invest and develop their paging businesses. This serves the public interest by increasing competition between paging carriers.

The NPRM describes the Commission's existing rules for 929 Mhz channel exclusivity as follows:

148. Under our current PCP exclusivity rules, applicants are granted conditional exclusivity when they are licensed, and permanent exclusivity is awarded when the licensee demonstrates that it has constructed and is operating a qualified system.

NPRM at 67 (¶148). Based on this analysis, the Commission then placed a freeze on its so-called "requests for ... permanent exclusivity...." Id. This analysis misstates the Commission's exclusivity rules, and is unlawful.

As the Commission is well aware,^{3/} it is bound by its own rules until they are modified or repealed.^{4/} This is true even if the Commission is considering a modification of its rule, and has proposed to modify or repeal them in rulemaking proceedings. "[A]n adjudication which violates such rules cannot be defended on the basis of an explanation accompanying a proposed rules change"^{5/} Rather, "unless and until [an agency] amends or repeals a valid legislative rule or regulation, an agency is bound by such rule or regulation."^{6/} Thus, the Commission must continue to apply its 929 MHz exclusivity rules as adopted, and cannot "freeze" its implementation of those rules on the basis of the NPRM.

^{3/} See, e.g., Brief for Respondent Commission at 31-32, Suncom Mobile & Data, Inc. v. FCC, No. 95-1478 (D.C.Cir.).

^{4/} See, e.g., Reuters, Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C.Cir. 1986).

^{5/} American Federation of Gov't Employees v. FLRA, 777 F.2d 751, 759 (D.C.Cir. 1985).

^{6/} Id. See also United States v. Nixon, 418 U.S. 683, 694-96 (1974).

Specifically, Section 90.495(c) of the Rules states that a proposed 929 MHz paging system that meets the criteria for channel exclusivity "will be granted exclusivity ... at the time of initial licensing." In other words, Section 90.495 awards the license a vested right to channel exclusivity at the time of initial grant. While this exclusivity is subject to satisfaction of the construction requirements, so is every other exclusive license issued by the Commission. The Commission cannot seriously contend that a 800/900 MHz SMR licensee, a cellular licensee, or a PCS licensee lacks permanent channel exclusivity because it has not constructed its system. And yet, the type of notification for the completion of construction is identical for SMR and 929 MHz paging licensees, and substantially similar for cellular and PCS.

Thus, for an exclusive 929 MHz license, there is no "request" for permanent exclusivity which the Commission might grant; the licensee's only obligation is to notify the Commission of the completion of construction so the condition can be marked as satisfied. Until the Commission modifies Section 90.495, 929 MHz paging licensees who timely construct and operate their systems must receive permanent exclusivity as a matter of law.

CONCLUSION

As set forth herein, Caraway respectfully requests that the Commission continue to apply Section 90.495 as written until the rule is modified or repealed.

Respectfully Submitted,

CARAWAY COMMUNICATIONS

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Its Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments of Caraway Communications was sent by U.S. mail, first-class postage prepaid, on this 11th day of March, 1996, to:

William L. Fishman
Sullivan & Worcester, LLP
1025 Connecticut Avenue, N.W.
Washington, DC 20036

/s/ William J. Franklin
William J. Franklin, Esq.