

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of Part 22 and)
Part 90 of the Commission's)
Rules to Facilitate Future)
Development of Paging)
Systems)
)
Implementation of)
Section 309(j) of the)
Communications Act--)
Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

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REPLY COMMENTS OF PRONET INC. ON
INTERIM LICENSING PROPOSAL

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REPLY COMMENTS OF PRONET INC. ON
INTERIM LICENSING PROPOSAL

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby replies to Comments with respect to the Interim Licensing Proposal ("Interim Proposal") in the above-captioned rulemaking proceeding ("NPRM").

I. SUMMARY

The Comments demonstrate widespread agreement within the paging industry regarding the devastating impact of the Interim Proposal in its present form, and the fundamental changes needed to mitigate the damage the Proposal has already inflicted. Unlike other communications services for which the Commission has imposed a freeze and restrictive interim rules in order to implement an auction-based licensing scheme, paging is a mature, highly competitive and spectrally efficient service. Far from preserving

and strengthening these pro-consumer, spectrum conserving attributes, the Interim Proposal brutally undermines incumbent carriers engaged in routine system operation, planned service expansion and conversion to higher-speed signalling formats that increase the subscriber population accommodated by a single paging channel.

To restore the growth and vibrancy that characterized the paging industry prior to the Interim Proposal's release, the following policies must be instituted during the pendency of the instant rulemaking:

- allow incumbents to expand existing systems within confines of rational guidelines agreed upon by the paging industry and the Commission;
- return to the pre-Proposal method for calculating interference contours, or clarify the scope of NPRM footnote 271 to make plain that composite interference contours will continue to be computed by the pre-Proposal method; and
- make the application freeze wholly prospective, or cancel it outright.

Other aspects of the Interim Proposal must be refined and clarified; specifically, the Proposal's provisions must be deemed inapplicable to shared PCP channels (where there are no exclusive licenses) including those in the Special Emergency Radio Service ("SERS") that have been specifically designated for paging.^{1/}

^{1/} The principal SERS paging channels are 152.0075 and 163.250 MHz. In addition four 453 MHz channels are available for SERS paging on a waiver basis.

II. INCUMBENT EXPANSION RIGHTS

The Comments provide compelling justifications for incumbent expansion rights. ProNet's proposal to accord incumbents the right to add new sites within 40 miles of existing sites is embraced by multiple commenters and is critical if licensees are to meet minimum service obligations during the interim period. More expansive proposals merit serious consideration and could also be adopted. Secondary licensing, imposing a minimum coverage threshold to qualify for expansion rights and other more restrictive proposals, should be summarily rejected as contrary to the interests of the paging industry and the public.

A. Need For Expansion Rights

An overwhelming number of commenters agree with ProNet that incumbent licensees must be able to undertake appropriate system expansion during this rulemaking's pendency. Essentially all Comments stress that incumbent carriers' need to add sites to respond to growing subscriber demand, meet competition, or improve signal strength in outlying areas. ProNet's position that expansion is crucial to new construction of, and conversion to, next-generation, spectrally efficient FLEX protocol is affirmed in an "Emergency Petition for Immediate Withdrawal of Freeze" ("Emergency Petition") filed by the Coalition for a Competitive Paging Industry ("CCPI") and in the "Joint Comments On Interim Licensing Proposal" ("Joint Comments" or "Joint Commenters").^{2/} In addition, several commenters note that many new or proposed

^{2/} See Emergency Petition at 13-14; Joint Comments at 8, n.20.

subscribers affected by a denial of system expansion are medical or law enforcement agencies, who use paging services for health and safety emergencies, as well as prospective organ donor recipients participating in the LifePage program.^{3/}

B. Alternative Proposals

The Comments present several proposals to ensure incumbent expansion rights during this rulemaking's pendency. Among these proposals, the widely cited "40 mile expansion rule" supported by ProNet is reasonably modest, consistent with existing Commission rules, and easily adopted within the framework established by the Interim Proposal.

One could reasonably contend that no geographic limits on system expansion are necessary at all; most applications are already filed by incumbents and the likelihood that mutually exclusive applications will ultimately be resolved by auction will deter speculative and abusive interim applications. Some commenters would restrict new expansion sites to those: contiguous with existing service contours;^{4/} located anywhere within existing service contours, provided no interference is caused to existing licensees;^{5/} or whose service contours overlap pre-existing

^{3/} Comments of Metrocall, Inc. ("Metrocall") at 8-9; Comments of Mobilemedia Communications, Inc. ("Mobilemedia") at 9-10; Comments of Teletouch Licenses, Inc. ("Teletouch") at 5, n.3; Comments of the Personal Communications Industry Association on Interim Licensing Procedures ("PCIA") at 16.

^{4/} See Pacific Bell Comments on Interim Licensing Rules ("Pacific Bell") at 3.

^{5/} See Comments of PageMart, Inc. ("PageMart") at 4.

service contours.^{6/}

Although reasonable on their face, these proposals are insufficiently robust to afford incumbent carriers the expansion capacity needed to construct new, or retrofit existing, systems with FLEX-capable signalling. In addition, Commission evaluation of expansion applications under these proposals-- requiring careful analysis of service contours-- will create additional administrative burdens and processing delays.^{7/}

Instead, ProNet and a host of other commenters suggest that the Commission permit the addition of new sites within 40 miles of any authorized site which was granted or pending on February 9, 1996.^{8/} This proposal will not only accommodate FLEX technology

^{6/} See Comments of Paging Partners Corporation ("Paging Partners") at 3.

^{7/} Joint Commenters' proposal to limit expansion rights to licensees who already cover 66.6% of their MTA should be rejected as arbitrary, unworkable and unduly restrictive. First, absent a final Commission determination that geographic licenses will be assigned according to MTAs, there is no basis for considering existing population coverage as an expansion standard during the interim period. Second, the purpose of incumbent expansion is to enable carriers to meet public demand; restricting expansion based on present service is self-defeating and will unfairly penalize licensees of new or recently acquired systems engaged in system upgrade and build-out and 931 MHz licensees, who due to processing delays over the past two years, have been prohibited from constructing their systems.

^{8/} Commenters supporting some variant of a 40-mile expansion rule include ProNet, Ameritech Mobile Services, Inc. ("Ameritech") at 9, Paging Network, Inc. ("PageNet") at 5-9, the Paging Coalition ("Paging Coalition") at 14-15, the Personal Communications Industry Association ("PCIA") at 32, Private Carrier Paging Licensees ("PCP Licensees") at 10, and Teletouch Licenses, Inc. ("Teletouch") at 10. For reasons set forth in its Comments, ProNet concurs with Page Telecommunications L.L.C. and John Word and Pioneer Telephone Cooperative, Inc., who argue that sites pending as of the date of

(continued...)

and normal expansion in response to consumer demand while preserving vacant spectrum for auction, it also readily lends itself to Commission processing. First, 40 miles is consistent with the Commission's definition of "geographic area" for purposes of limiting simultaneous applications for multiple frequencies.^{9/} Second, a simple 40 mile maximum separation requirement may readily be checked by Commission staff, who already employ site coordinates in processing 931 MHz applications.

C. Secondary Licensing Is Unduly Restrictive

Although some commenters appear to accept the Commission's proposal for licensing expansion sites on a secondary basis, ProNet and many other commenters recognize that secondary licensing creates uncertainty in carriers, equipment suppliers and manufacturers, and investors.^{10/} TSR Paging, Inc. adds that secondary licensing is likely to degrade the value of geographic licenses.^{11/} Secondary licensing will deter investment, system

^{9/} (...continued)

the freeze and subsequently granted should be considered for purposes of applying a 40-mile rule. Comments of Page Telecommunications L.L.C. ("PageTel") at 4-5; Comments of John Word and Pioneer Telephone Cooperative, Inc. ("Word") at 16, n.28.

^{9/} See Section 22.539(b) of the Rules. ProNet disagrees with Joint Commenters' proposal to limit local 929 MHz PCP system expansion to sites within 25 miles of existing sites, consistent with Section 90.495 of the Rules. Rather, ProNet supports the Commission's expressed intent to treat the 929 and 931 MHz bands the same, and to afford incumbent licensees uniform interference protection and expansion rights.

^{10/} See PCIA at 40, Metrocall at 9-10, MobileMedia at 11-12, Ameritech at 8-9, Comments of Pager One at 4-5.

^{11/} Comments of TSR Paging, Inc. ("TSR Paging") at 12-13.

development, and increased subscriber services; it should be rejected.

III. PERMISSIVE MODIFICATIONS

In the NPRM (§140), the Commission expressed an intent to allow permissive modifications in order to avoid disruption of existing paging business. Unfortunately, the Interim Proposal is sufficiently wrought with unduly restrictive and vague limitations that its purported relief does more harm than good. The Commission should immediately clarify and relax its Interim Proposal.

A. Preservation of Existing Interference Contours

The Interim Proposal's imposition of a new formula to calculate interference contours for 931 and 929 MHz facilities inflicts substantial harm on incumbent carriers. See NPRM at §140, n.271. In its Comments (at 4-6), ProNet demonstrated that, in most cases, this new formula dramatically reduces the contours computed under Section 22.537(f) and 90.495(b) of the Rules, thus shrivelling an incumbent's protected service area for build-out purposes, and rendering the Commission's permissive modification proposal meaningless. Numerous other commenters opposed the new formula, while not a single party commented in its favor.^{12/}

^{12/} Significantly, American Paging, Inc., the only Commenter generally supportive of the Interim Proposal, lambasts the abrupt change in interference contours. See Comments of American Paging, Inc. ("API") at 3. Other commenters found the contour reduction resulting from footnote 271 unduly restrictive, disruptive and expensive-- PCIA at 27-28, PageNet at 12-13, Paging Coalition at 21-22, Comments of Priority Communications, Inc. ("Priority") at 5-7, API at 2-3-- and violative of Section 552(b) of the Administrative Procedure Act and Section 316 of the Communications (continued...)

Other commenters note that application of NPRM, footnote 271 by Commission staff may be more flexible than implied by the text's plain meaning and assumed by commenting parties like ProNet.^{13/} Indeed, in their Comments (at 9, n.22) Joint Commenters state that Commission staff has indicated that footnote 271 applies only to interim "fill-in" transmitters, to determine whether composite interference contours as derived under Section 22.537(f) are being exceeded. If confirmed, this interpretation will alleviate some, but not all, of the Interim Proposal's most onerous consequences.

B. Permissive Changes On Shared PCP Channels

As the Commission noted in the NPRM (§56), licensees on shared PCP channels currently have no interference protection and lack interference contours by which such protection could be established. Consequently, these licensees cannot utilize the Interim Proposal's provisions for permissive modifications, although their applications are also subject to the freeze.^{14/} Several commenters have requested that the Commission extend modification rights to shared PCP channel systems.^{15/} This

^{12/} (...continued)

Act-- PCIA at 27, Ameritech at 10-12, Paging Coalition at 18-21, CCPI at 25-27.

^{13/} Joint Commenters at 9, n.22, Paging Coalition at 17.

^{14/} NPRM, §149 also requires clarification. The Commission states its intention to continue processing of pending non-exclusive PCP applications, but then notes that these applications will continue to be filed with frequency coordinators under existing procedures. This contradictory language makes it unclear whether these channels are subject to the freeze.

^{15/} See TSR Paging at 6-8; PCP Licensees at 10-13.

request should be granted to achieve regulatory symmetry and avoid putting licensees of shared PCP systems at an unfair competitive disadvantage.

C. New Sites Not Subject to Valid Competing Applications

In its Comments (at 9-10), ProNet suggested that the Commission allow additional transmitters on a permissive basis where existing interference contours do not wholly encompass the new transmitters but preclude a valid competing application. The Interim Proposal should be amended to incorporate this proposal, which is fully consistent with NPRM, ¶140 and supported by other commenters.^{16/}

IV. THE APPLICATION FREEZE SHOULD BE LIFTED

The Comments provide ample grounds for an immediate lift of the Interim Proposal's application freeze, which unfairly stifles a mature, robust, competitive industry. Alternatively, the freeze should be made wholly prospective; the Commission should process and grant all applications that were received by the Commission or an authorized coordinator on February 9, 1996, the day the NPRM was released.

A. Disruption of the Paging Market

The Comments could not be more resounding in their condemnation of the freeze, which is already having a crippling effect on the paging industry. Only one commenter generally

^{16/} See Ameritech at 9; Paging Coalition at 14-15.

supports the freeze, while dozens of commenters provided example after example of serious harm.

1. Harm to Incumbent Systems

The freeze is antithetical to the Commission's stated objective of enabling incumbent paging operators to continue their businesses during the interim period. NPRM at ¶140. Nearly every commenter notes that the freeze halts routine system expansion necessary to respond to consumer demand.^{17/} This, in turn, subjects incumbent carriers to losses associated with previously designed system modifications, equipment and construction contracts, and potential loss of new subscribers. The freeze also threatens the ability of carriers to fix gaps in existing coverage.^{18/} The potential effect on manufacturers is no less devastating.^{19/}

^{17/} ProNet concurs with several commenters-- PCIA, Mobilemedia, Teletouch, PCP Licensees, and API-- that even if a general freeze on paging applications could be justified, there is absolutely no basis for freezing shared channel PCP applications. First, as noted in the NPRM (at ¶149, n.280), shared channel applications cannot be mutually exclusive; thus, the Commission's rationale for the freeze is inapplicable. Second, as A+ Network, Inc. notes in its Comments (at 6-8), the non-exclusivity and intense usage of these channels should severely constrain their revenue producing value at auction.

^{18/} PCIA at 15.

^{19/} In its Comments (at 4), Glenayre Technologies, Inc. ("Glenayre") estimates its losses due to the freeze at \$10-12 million in revenue, and \$2.9-5.7 million in profit, which may place up to three hundred jobs in jeopardy. As a result, Glenayre lost approximately one-quarter of its market value during a single day of trading on the NASDAQ. Wall Street Journal, "Industrials Drop 12.65 as Traders Await Fresh Data on Economy," March 7, 1996 at C2.

2. No Corresponding Benefits

The serious harms caused by the Interim Proposal are offset by few real benefits. Each potential benefit contemplated by the NPRM is either illusory or more easily achieved by less restrictive means.

Preservation of Spectrum for Auction-- According to data submitted by CCPI,^{20/} and according to the Commission itself (NPRM at ¶65), little unused spectrum is available for auction. Moreover, most of this "white space" has utility only for incumbent carriers.

Curtailing Speculation-- By signalling that new entrants will face difficulties obtaining sufficient territory to develop feasible systems, the NPRM has already significantly curtailed speculation in paging licenses. To the extent additional steps are deemed necessary to deter speculators, the Commission has ample alternatives at its disposal, including financial qualifications, short-term construction deadlines and anti-alienation provisions.

Limiting Administrative Burdens-- The Commission's use of the freeze to limit cases of mutual exclusivity is misplaced. Of the hundreds of applications frozen because they were subject to competing applications as of the NPRM adoption date, only a handful were likely blocked by mutually exclusive applications.^{21/} Further, as ProNet stated in its Comments, any additional mutual exclusivity generated by processing all CCP applications pending as

^{20/} See Emergency Petition at Exhibit 1 (at 3).

^{21/} See Comments of B&B Communications, Inc. at 1-2.

of February 9, 1996 is likely to be modest and will itself be quickly resolved by competitive bidding. Thus, any additional burden on the Commission's application processing resources will be minimal.

B. Retroactivity

In ProNet's Comments, and in the Comments of PCIA, Ameritech, CCPI, MobileMedia, MTel, and PageMart, it was demonstrated that the application freeze is impermissibly retroactive as applied to CCP applications, particularly 931 MHz applications. These commenters agree that the retroactive impact of the freeze plainly violates the APA's notice and comment provisions regarding rule changes of substantive impact.^{22/} In addition, MTel observes that licensees refrain from prematurely applying for new transmitting sites to avoid a claim of impermissibly warehousing frequencies. The Interim Proposal penalizes licensees for attempting to comply with Commission rules and policies.^{23/}

Further, the application freeze is retroactive and arbitrary regarding PCP applications filed with frequency coordinators before February 9, 1996. For several years frequency coordination has been an integral part of application processing; licensees have no

^{22/} The freeze is also arbitrary in establishing a retroactive cut-off date over which applicants had no control. 931 MHz applications filed with the Commission as early as November 1995 are frozen because they did not appear on a Public Notice before December 8, 1995. Lower-band CCP are even more unfairly affected; due to government closings for inclement weather and the budget impasse, no Public Notices were issued between December 13, 1995 and the applicable 30-day cut-off date of January 8, 1996.

^{23/} See MTel at 7.

control over their applications once they are filed with the coordinator.^{24/}

C. Competitive Advantage for Nationwide Licensees

As discussed in ProNet's Comments (at 17-18), the exemption of nationwide licensees from the application freeze bestows upon them a vast, albeit unjustified, competitive benefit. To the extent nationwide paging licensees provide nationwide service exclusively, the Commission's rationale for exempting these carriers from the freeze is reasonable. Nationwide paging licensees, however, routinely provide local and regional service, with nationwide service as an option; to the local customer, there is no distinction between these carriers and local or regional carriers like ProNet.^{25/}

The most logical means to eliminate the competitive distortion imposed by the Interim Proposal is, as ProNet argued in its Comments, to lift the freeze completely or make it wholly prospective as of the NPRM's release date. In addition, the Commission should restore the 70 mile interference contour for all authorized 929 and 931 MHz facilities (or the interpretation and application of footnote 271 must be clarified), and should commit to final disposition of all pending 929 MHz exclusivity requests.

^{24/} See Comments of PCP Licensees, Teletouch, CCPI and Preferred Networks, Inc.

^{25/} Moreover, there is no logical distinction-- from the subscriber's perspective-- between carriers with nationwide exclusivity, like PageNet, and carriers with nationwide capability on other channels. CCPI at 16, n.24. Nevertheless, the Interim Proposal favors the former and constrains the latter.

V. ADDITIONAL CLARIFICATIONS ARE NEEDED

In addition to the clarifications discussed above with respect to the change in interference contours and treatment of shared PCP channels, the Commission must address issues omitted from discussion in the NPRM. Because substantial uncertainty exists regarding these matters, the Commission should issue a Public Notice addressing the issues discussed below.

A. Exemption of SERS Channels

The SERS paging channels, which are limited to the provision of paging services for healthcare eligibles, are not included in the CMRS, nor are they listed among the frequencies subject to the Interim Proposal or proposed geographic licensing scheme. (NPRM at ¶3). Given this omission from the NPRM and the critical nature of this service, there is no reason to include the SERS in this matter. The Commission should confirm this understanding.

B. Essential and Emergency System Modifications

In its Comments, ProNet noted that requests for relocation pursuant to Section 22.142(d) of the Rules were not addressed in the Interim Proposal. ProNet agrees with Diamond Page Partnerships^{26/} that relocation of existing or authorized (but not yet constructed) transmitters due to unanticipated, changed circumstances are essential, not only for small carriers, but all carriers, particularly those engaged in system build-out. Accordingly, it is imperative that the Commission affirm that it

^{26/} See Comments of Diamond Page Partnerships, AmericaOne and Affiliated Entities, at 5-6.

will honor Section 22.142(d) applications, and accept these relocations subject to the expansion proposal set forth above.

For similar reasons, the Commission should confirm that requests for Special Temporary Authority will continue to be accepted and processed, to enable licensees to respond to emergency and unforeseen circumstances.

C. Amendments to Resolve Mutual Exclusivity

Although the NPRM was silent on this issue, several commenters (Pacific Bell, Joint Commenters and B&B Communications) agreed with ProNet that amendments to resolve mutual exclusivity should be permitted under the Interim Proposal. Because these applications will otherwise be held in abeyance until a final order is issued, and are unlikely to generate high bids at auction, such amendments will accelerate the delivery of service to the public while preserving Commission resources.

VI. CONCLUSION

Accordingly, the Commission should immediately clarify its Interim Proposal by Public Notice regarding ambiguities raised in the Comments, and should modify the Proposal as set forth herein.

Respectfully submitted,

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I hereby certify that I have caused a copy of the foregoing Reply Comments of ProNet Inc. on Interim Licensing to be served this 11th day of March, 1996, via regular mail, postage prepaid, on the following:

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