24. As set forth above,[24], the Commission has granted to TPI the TPI Nationwide System Authorization, which authorizes not only the individual 929.2125 MHz transmitter sites specified in the TPI Nationwide System Application, but also includes authorization to establish additional 929.2125 MHz transmitter sites throughout the country without competition from co-channel applicants during a specified construction period.[25] By granting to TPI the December 1, 1995, Slow Growth Authorization, that construction period has now been extended and both the construction period and TPI's nationwide exclusivity are still outstanding and in force.[26] In point of fact, TPI is taking all possible steps to complete construction of the TPI Nationwide System as quickly as possible and TPI fully expects: (1) to complete construction of a sufficient portion of the system to comply with nationwide exclusivity construction requirements in the immediate future and well before expiration of the outstanding construction period; and

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> and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue.
>
> 47 U.S.C. §316(a).

Similarly, Section 312 of the Act allows for revocation of Commission licenses only for specified reasons and only after providing the licensee an opportunity for a hearing. 47 U.S.C. §312.

[24]See paragraphs 8-15, supra.

[25]47 C.F.R. §§90.495(b), (b)(3). See also 47 C.F.R. §90.495(c).

[26]47 C.F.R. §§90.495(b), 90.496.

(2) to go far beyond this construction minimum to implement an unequalled, comprehensive, nationwide paging service that will compete directly with other existing PCP and CCP nationwide paging systems.

25. If the Commission adopts its proposed definition of nationwide exclusive PCP channels exempt from geographic licensing to exclude TPI's frequency, 929.2125 MHz, the Commission's action will constitute a drastic and severely-damaging unilateral modification of the TPI Nationwide System Authorization. Specifically, the Commission's action will result in immediate deletion from the TPI Nationwide System Authorization of TPI's Section 90.495/90.496 right to expand the TPI Nationwide System on 929.2125 MHz throughout the United States without competing co-channel applications. This devastating modification of the TPI Nationwide System Authorization would have been illegally undertaken by the Commission in violation of Section 316 of the Act without any demonstration that the modification "will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States..." and without affording TPI the due process hearing rights guaranteed to TPI pursuant to Section 316 of the Act.[27]

26. In point of fact, TPI must observe that the only conceivable justification for Commission adoption of the proposed definition of nationwide exclusive PCP frequencies to exclude TPI's 929.2125 MHz would be an attempt by the Commission to increase

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[27] 47 U.S.C. §316.

revenues by making as many PCP frequencies as possible subject to geographic licensing and competitive bidding. In other words, by narrowly crafting the definition of nationwide exclusive PCP frequencies exempt from geographic licensing to exclude TPI's nationwide exclusive frequency 929.2125 MHz, the Commission intended to subject 929.2125 MHz to geographic licensing in order to reap as much revenue as possible from the auctions for geographic licenses that would then occur for this frequency.

27. As the Commission is surely aware, this motivation would be in direct violation of Section 309(j)(7)(A) of the Act, which explicitly provides that:

> In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may <u>not</u> base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this section.
>
> 47 U.S.C. §309(j)(7)(A) (emphasis added).

Obviously, therefore, this motivation would not meet the Section 316 standard allowing unilateral Commission modification of licenses only if such modification will "promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States...."[28] Moreover, Commission action based on such an illegal motivation would clearly be arbitrary and capricious. <u>Arent v. Shalala</u>, 70 F.3d 610, 616 (D.C. Cir. 1995).

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[28] 47 U.S.C. §316.

28. Although TPI is certain that the Commission cannot have crafted its proposed definition of nationwide exclusive PCP channels exempt from geographic licensing with this purely illegal motivation in mind, TPI respectfully submits that the Commission must act immediately to correct that definition to avoid the impermissible modification of TPI's Nationwide System Authorization that would occur if 929.2125 MHz is subjected to geographic licensing.

29. TPI must also emphasize that subjecting 929.2125 MHz to geographic licensing in violation of the outstanding TPI Nationwide System Authorization and Slow Growth Authorization violates TPI's fundamental rights to due process of law, including, but not limited to the hearing rights guaranteed by Section 316 of the Act. Such action by the Commission may also constitute a "taking" within the meaning of the just compensation clause of the Fifth Amendment to the Constitution.[29]

30. For all of these reasons, TPI respectfully submits that the Commission must revise its proposed definition of nationwide exclusive PCP frequencies exempt from geographic licensing as requested by TPI at paragraphs 21-22, supra. Only by making the requested modification can the Commission avoid the violation of

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[29]See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (hereinafter "MacDonald"); Hodel v. Irving, 107 S.Ct. 2076 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Although there is no fixed formula for determining where regulation ends and taking begins, courts consider the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action, as having particular significance. See MacDonald, 470 U.S. at 348-349.

Section 316 of the Act and TPI's due process rights that would occur if the current Commission definition is adopted.

X. Adoption Of The Incorrect Definition Will Impermissibly Treat Similarly Situated Licensees Differently

31. Commission adoption of the proposed definition of nationwide exclusive PCP frequencies exempt from geographic licensing will also violate vital principles of fundamental fairness repeatedly articulated in Commission precedent. It is well-established that it is arbitrary and capricious for the Commission to treat similarly situated parties differently and that such disparate treatment must be adequately justified by the Commission.[30]

32. In the instant case, CCP and PCP nationwide licensees who meet the restrictive definition specified in the NPRM are in exactly the same situation as TPI -- i.e., all parties are licensed for frequencies on which no further licensing can occur throughout the country by operation of the Commission's Rules.[31] TPI's existing exclusivity rights are currently in effect regardless of the fact that TPI could theoretically lose those rights for failure

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[30] Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172-1173 (D.C.Cir. 1994); New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C.Cir. 1987); Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C.Cir. 1985); Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C.Cir. 1978).

[31] In the case of TPI and other nationwide PCP licensees, this nationwide exclusivity is embodied in 47 C.F.R. §§90.495(b), (b)(3) and 90.496. In the case of CCP nationwide exclusive licensees, nationwide exclusivity is embodied in 47 C.F.R. §22.531(b).

to timely construct the TPI Nationwide System.[32] In point of fact, TPI has repeatedly assured the Commission, both in connection with TPI's Slow Growth Authorization and in comments filed by TPI in the above-captioned proceeding, that TPI will meet and exceed nationwide exclusivity construction requirements in a timely fashion. As a result, the Commission cannot justify disparate treatment of TPI's nationwide exclusive frequency based on the fact that TPI did not complete construction of the TPI Nationwide System by the February 8, 1996, adoption date of the NPRM. The definition of nationwide exclusive PCP frequencies exempt from geographic licensing proposed in the NPRM is arbitrary and capricious in that it treats similarly situated nationwide exclusive licensees differently based on an inadequate -- and indeed illegal -- construction requirement. Once again, TPI reiterates its request that the Commission modify this definition as proposed by TPI herein[33] to correct this problem.

XI. Related Issues

33. TPI must also take this opportunity to point out related aspects of the NPRM that the Commission should modify in its decision in the above-captioned rulemaking proceeding.

34. First, in describing current licensing procedures for exclusive PCP channels, the Commission stated that:

> We allowed licensees whose systems operate on these channels to "earn" exclusivity on a local, regional, or nationwide basis, by constructing multi-transmitter

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[32] 47 C.F.R. §90.495(c).

[33] See paragraphs 21-22, supra.

systems that meet certain minimum criteria....

NPRM at ¶16 (footnote omitted).

In support of this assertion, the Commission cited the R&O, 8 FCC Rcd "at 8321, ¶¶9-15." NPRM at n.45.

35. This characterization of the PCP exclusivity process is inaccurate. As demonstrated throughout these Comments, 47 C.F.R. §90.495(c) grants exclusivity "at the time of initial licensing." Although it is true that PCP exclusive licensees must timely comply with applicable construction requirements regarding their exclusive systems, exclusivity is not "earned," but rather is granted subject to termination upon failure to timely meet construction requirements.[34] In point of fact, contrary to the Commission's citation at note 45 of the NPRM, the word "earn" was never used by the Commission in the cited portions of the R&O which originally adopted PCP exclusivity requirements.[35] As specified in these Comments, although the Commission's choice of words may seem minor, in TPI's case, the choice of words is important and could lead to an illegal loss of TPI's outstanding nationwide exclusivity rights.

36. Second, as demonstrated in TPI's Interim Comments, portions of the Interim Licensing Proposal included by the Commission in the NPRM constitute an inaccurate representation of current Commission requirements regarding exclusive PCP authorizations. Specifically at paragraph 148 of the NPRM, the Commission stated that:

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[34] 47 C.F.R. §§90.495(c), 90.496.

[35] R&O at 8321, ¶¶9-15.

> 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. As a result, numerous requests for conditional and permanent exclusivity are pending before the Commission. Because of the changes we are proposing to our PCP rules in this proceeding, we believe that consideration of such requests should be postponed while this proceeding is pending. In the event that we adopt our proposals for geographic area licensing, all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot. We therefore will suspend action on all pending exclusivity requests until the conclusion of this rulemaking.

NPRM at ¶148.

37. As demonstrated in TPI's Interim Comments, this portion of the Commission's Interim Licensing Proposal is inconsistent with current rules regarding 929 MHz PCP exclusivity as discussed above.[36] Specifically, Section 90.495(c) of the Commission's Rules conveys exclusivity "at the time of initial licensing."[37] Although the Commission previously issued a Public Notice confirming exclusivity status for "grandfathered" exclusive PCP licensees authorized prior to October 14, 1993, issuance of such a Public Notice relating to "Phase II" exclusive licensees like TPI is not a prerequisite to Commission grant of exclusivity. Moreover, although Section 90.495(c) does require that an exclusive licensee timely construct sufficient transmitters to comply with the exclusivity requirements specified at Section 90.495(a), that regulation does not require a separate action by the Commission to

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[36] See paragraphs 8-17, supra.

[37] 47 C.F.R. §90.495(c).

grant permanent exclusivity upon completion of the required construction.[38] Rather, Section 90.495(c) provides only that the exclusivity granted upon initial licensing "will expire" if the licensee fails to timely construct the required system.[39]

38. In light of these facts, it is not clear what "requests for conditional and permanent exclusivity" remain pending before the Commission at this time. For example, TPI has already been granted nationwide exclusivity on PCP frequency 929.2125 MHz subject only to expiration in the inconceivable event that TPI does not timely construct the TPI Nationwide System within the extended implementation schedule now authorized by the Commission. In any event, TPI reiterates the request in TPI's Interim Comments that the Commission revise paragraph 148 of the NPRM to bring it into compliance with existing PCP exclusivity regulations.

39. TPI must also emphasize that the Commission's statement at paragraph 148 of the NPRM that, "[i]n the event that we adopt our proposals for geographic area licensing, all existing PCP facilities would receive full protection as incumbents, and such pending exclusivity requests would be moot" does not make sense in the context of Phase II nationwide PCP exclusivity. Specifically, as demonstrated herein, Phase II entities such as TPI have already obtained nationwide exclusivity on their PCP Channels and no further licensing on such channels can occur at any location

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[38] Id.

[39] Id.

throughout the country.[40] Moreover, like TPI, these entities may still have a significant amount of time available to complete construction of their systems, or at least a sufficient portion of their systems to comply with Section 90.495(a) exclusivity requirements.[41]

40. Accordingly, TPI reiterates the position taken in TPI's Interim Comments that the Commission's claims that Phase II nationwide exclusive licensees such as TPI will be protected by the incumbent status of only those transmitters licensed as of the February 8, 1996, adoption date of the NPRM is incorrect. In point of fact, as demonstrated herein, there should be no further licensing on channels such as TPI's 929.2125 MHz and these channels should not be subject at all to geographic licensing. As the nationwide exclusive licensee on this frequency, TPI must be able to apply for and construct as many additional transmitter sites throughout the country as possible without regard to the Commission's freeze or geographic licensing.

41. Third, at paragraph 42 of the NPRM, the Commission stated that:

> We tentatively conclude that under our geographic licensing scheme, "slow growth" extensions are unnecessary and that such extensions could hinder geographic licensing because an incumbent licensee obtaining a construction extension could effectively occupy an entire market area. We therefore propose to dismiss all "slow growth" applications pending at the time an order pursuant to [the NPRM] is adopted without prejudice to refile under our new geographic licensing

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[40] 47 C.F.R. §§90.495(b), 90.495(b)(3).

[41] See TPI's December 1, 1995, Slow Growth Authorization.

scheme.

NPRM at ¶42.

TPI must take this opportunity to remind the Commission, as set forth in detail supra, that the Commission has already granted TPI "slow growth" authorization pursuant to 47 C.F.R. §90.496[42] and TPI is not currently prosecuting a "pending" slow growth application subject to dismissal pursuant to paragraph 42 of the NPRM.

XII. Conclusion

42. For all of these reasons, TPI respectfully submits that the Commission must modify that portion of the NPRM by which the Commission defined those nationwide exclusive PCP frequencies that will be exempt from geographic licensing. Specifically, the Commission must reject its currently proposed definition that is limited to "PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the adoption date of [the NPRM]." In its place, the Commission must adopt the following definition:

> All PCP channels for which nationwide exclusivity has been authorized pursuant to Sections 90.495(a)(3) and 90.495(c) of the Commission's Rules and who either: (i) have met the construction requirements for nationwide exclusivity as of the adoption date of the NPRM; or (ii) have time remaining as of the adoption date of the NPRM to meet these construction requirements.

The Commission must also implement this revised definition by including TPI's nationwide exclusive PCP frequency 929.2125 MHz in the Public Notice of nationwide exclusive PCP frequencies that will be exempt from geographic licensing as envisioned in paragraph 26

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[42] See TPI's December 1, 1995, Slow Growth Authorization.

of the NPRM.

WHEREFORE, TPI respectfully submits these Comments with respect to the Commission's NPRM in the above-captioned proceeding.

Respectfully submitted,

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Attachment A

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