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FEDERAL COMMUNICATIONS COMMISSION
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OUR FILE NO.
0027-101-63

March 18, 1996

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

DOCKET FILE COPY ORIGINAL

Re: WT Docket No. 96-18
PP Docket No. 93-253

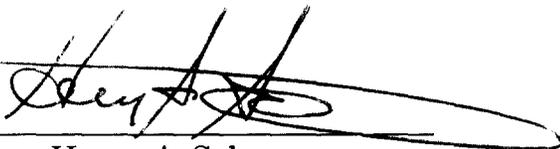
Dear Mr. Caton:

Enclosed herewith on behalf of Pass Word, Inc., are an original and four copies of its Comments in the above-referenced proceedings.

If there are any questions in regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

PASS WORD, INC.

By 

Henry A. Solomon
Its Attorney

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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)
)
Implementation of Section 390(j))
of the Communications Act -- Competitive)
Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

COMMENTS

Pass Word, Inc., and its affiliate Coeur d' Alene Answering Service, Inc. ("Pass Word"), through counsel, files these Comments in the above-entitled matter. In support hereof it is shown as follows:

I. Identity and Interest

Pass Word is a licensee of CCP and PCP stations operating in the lower frequency bands. Based in Spokane, Washington, it has been providing mobile telecommunications service to the public during four decades. Through other wholly-owned entities, Pass Word plans to develop a 931 MHz CCP paging system in Washington, Oregon, and Montana. Its present service areas for paging include the Spokane market and portions of central and eastern Washington and northern Idaho. In a spectrum auction, Pass Word would clearly qualify as a small business under any existing or proposed Commission definition of that term.

II. Comment on Appendix A -- Initial Regulatory Flexibility Analysis: Paging Spectrum Auctions Will Not Serve The Public Interest.

A principal objective of the rule changes proposed in the Notice of Proposed Rule Making (“NPRM”) is to foster competition and innovation. This objective is expressed at the first page of the Initial Regulatory Flexibility Analysis (“IFRA”), and would involve auctions of certain mutually exclusive paging applications. On the second page of the IFRA the Commission declares that competitive bidding will benefit so-called “small entities.” The Commission predicts that auctions will facilitate market entry and access to capital by small businesses and that auctions will “increase the flexibility of small businesses and lessen the administrative burdens on small entities.” Based on its experience in the paging industry, Pass Word believes that competitive bidding would not serve the public interest.

Pass Word is not persuaded that auctions will foster the Commission’s “innovation” goal. Historically, there has been no lack of innovation in the paging industry, and improvements in service and equipment are being introduced almost daily.¹ Since the first CCP station was licensed at New York City more than forty-five years ago, innovation has been a hallmark of the paging industry.² Innovation, in Pass Word’s view, has been fostered by *competition*. Vigorous competition exists today and has been made possible by enlightened regulatory policies. These policies have resulted in open-entry and have enabled small and medium size entrepreneurs to establish paging systems. Auctions, particularly of geographic licenses, could well put a brake on

¹ Indeed, rapid obsolescence of equipment has been a byproduct of innovation.

² The earliest pagers were developed by an answering service operator in New York City, Sherman C. Amsden. The units were hung around the neck or hung on the instrument panel of an automobile. “Profiles * The Man Who Answers Telephones. THE NEW YORKER, April 22, 1939 at 21.

innovation by limiting the number and character of new entrants and by significantly increasing costs of entering markets and building out systems.

Auctions will surely make market entry much more costly and are bound to discourage small entities from even participating in the competitive bidding process. In fact, rational measures to foster market entry by small businesses have already been taken and have succeeded. As noted above, enlightened regulation responsible for enabling small entities to become paging carriers.

Specifically, in the late 1960s, the Commission took an important procompetitive action: It allocated four additional paging-only guard band (VHF) channels, two of which were reserved for independent non-wireline operators. During the next decade the Commission assumed a proactive stance in resolving mutual exclusivity through channel sharing. It also encouraged intercarrier arrangements by which small carriers could expand their geographic areas without having to make large capital expenditures. In the 1980s, the allocations of additional lowband and 900 MHz paging channels provided further opportunities for market entry. Meanwhile, as demand for paging grew, equipment and operating costs decreased, so that small businesses could construct sophisticated systems in major cities for less than the cost of building a Class A FM station. On the regulatory front, the Commission subsequently eliminated the wireline "fence," rescinded restrictions on the use of two-way channels for paging and streamlined Part 22. Additionally, there are no longer state utility commission entry requirements which, in many cases, rewarded inefficient operators and acted as artificial barriers to new competition. Display pagers, of course, can be purchased by subscribers in "designer" colors for well under the

cost of a television set. Thus, until recently (i.e., March 1996), with a modest investment consisting principally of legal, engineering and filing fees, any U.S. citizen could become a CCP permittee. The Commission's weekly public notices attest to the fact that interest in CCP spectrum by individuals and small businesses has not abated.³

In light of this background Pass Word doubts whether auction rules, however small-business friendly, will assist small entities -- whether incumbent licensees or prospective licensees -- in gaining entry to paging markets or in system expansions.

According to the IFRA, auctions will increase the "flexibility" of small businesses and lessen their "administrative burdens." While the lessening of administrative burdens is a laudable goal, state and federal deregulation of paging already has materially reduced administrative burdens on regulatees, not to mention state commissions and the FCC. More importantly, in neither the IFRA or in the NPRM does the Commission articulate what it means by "administrative burdens." Thus it fails to establish any nexus between auction rules and their justification in terms of relieving alleged "administrative burdens" confronting applicants for paging spectrum.

The role of auctions in increasing "flexibility" is, likewise, a mystery. If the Commission means that the auction rules will facilitate small business access to the capital needed to win auctions, the Commission is turning a blind eye to the incontestable fact that if the

³ Women have never found it difficult to become paging licensees. In fact, some of the earliest licensees were "mom and pop" operators of telephone answering bureaus. In recent years, minorities have gained licenses. Thus, in South Florida a large number of Hispanic Americans, many of them Cuban émigrés, operate CCP and PCP systems. As the Commission knows, some of these systems have expanded and now offer regional and statewide access. It is almost a given that these kinds of licensees, the very licensees to Commission wants to attract would have had no chance of winning licenses in the narrowband paging auctions. As start-ups, Pass Word believes that they would be in a similarly disadvantageous position in the proposed paging auctions.

small business people who still populate the paging industry have to compete against major carriers and speculators for capital to bid for licenses, small entities will lose that race.⁴

Pass Word believes that auctions will be antithetical to most, if not all, of the goals expressed in the IFRA. If the past is prologue (*see* IVDS auctions), paging spectrum auctions will create an artificial demand for spectrum by attracting as bidders parties who have little, if any, genuine interest in operating common carrier systems. Artificial demand for paging spectrum will outrun supply, prices will escalate and will likely not reflect fair value. Incumbent paging licensees, who are unwilling or unable to meet newcomers' terms for geographic expansion, will turn to the FCC for relief. If spectrum auctions produce inflated bid prices, winners may find it difficult if not impossible to satisfy build-out requirements with the result that authorizations will be forfeited. Forfeitures will occur after three years, instead of after the one-year period specified for in 47 C.F.R. § 22.142, thereby creating unintended warehousing of spectrum since the spectrum can be taken for three years instead of one year.

It is also to be noted that artificial demand for spectrum in an auction very likely will not match the real-world demand for spectrum by consumers. On the one hand, an incumbent who loses at auction and needs to expand its system, will be forced to deal with the geographic licensee overlaying the incumbent's service area. The geographic license holder, who very possibly may be a competitor, may not deal fairly

⁴ The recent trend toward consolidations of CCP and PCP ownership into large, aggressive companies such as PageNet and MobileMedia, increases the burden on small entities such as Pass Word who wish remain independent. Auctions will exacerbate this burden by compelling them bid for spectrum they need in order to remain competitive.

with the incumbent. On the other hand, a bidder -- most likely an incumbent -- who as a defensive measure wins a market in which demand has not fully ripened, will have to invest capital without any expectation of near-term financial return. Thus, auctions may well have the effect of constraining licensees to make current investments in unneeded facilities in order to protect their future ability to remain competitive.

Lastly, Pass Word is aware that some parties who filed comments in connection with interim processing contended that auctions are inconsistent with the revenue-only restriction in 47 U.S.C. § 22.142 -- the expectation of federal revenues may not be the basis of a finding that the auction would serve the public interest, convenience and necessity. Pass Word believes that these parties have raised a valid legal issue and that if auction rules are adopted, the Commission must provide a reasoned analysis justifying them.⁵

Pass Word believes that another statutory issue should be addressed in connection with auctions of CMRS spectrum where, as here, the spectrum involved does not represent a new allocation and where there exists a mature communications industry with scores of licensees serving the public as communication common carriers. The issue, from the standpoint of CCP licensees, is whether spectrum auctions square with Title II of the Communications Act. Specifically, 47 U.S.C. § 201(a) states that the duty of every common carrier is to furnish communications service upon reasonable request therefor. The interim licensing policies imposed by the NPRM have, in Pass Word's view, already subverted § 201(a). Put simply, incumbent CCP licensees such

⁵ See *Association of Public Safety Communications Officials-International, Inc. v. F.C.C.* (D.C. Cir. decided Feb. 16, 1996) Slip Op. at 7.

as Pass Word have been foreclosed from responding to their subscribers' requests for service expansions. Spectrum auctions, as they relate to incumbents, will have precisely the same effect in many instances. Absent deep pockets, common carriers may be unable to furnish paging communications upon reasonable request therefor. Lacking the means to pay premiums at auction, these licensees are likely to become supplicants, attempting to negotiate with successful bidders for access to expansion areas needed by their subscribers. As a common carrier who has consistently responded to its subscriber's demands for additional coverage, Pass Word simply cannot reconcile its duty of service to the public with the reality that if auction rules are enacted, the depth of its pockets will determine whether it can fulfill that duty. In Pass Word's view auction rules would have the proximate effect of modifying the unconditional duty imposed by statute and would be unlawful. *See AT&T v. F.C.C.*, 978 F.2d 2d 727 (D.C. Cir. 1992).

Pass Word now comments on specific proposals in the NPRM relating to auctions of paging spectrum.

III. If The Commission Adopts Market-Area Licensing For Exclusive Lower Band CCP And PCP Channels, It Should Use BEA Economic Areas.

Pass Word urges the Commission to use BEA economic areas ("EA's") in licensing lower band PCP and CCP channels. EA licensing is preferable to the MTA approach because EA's more accurately reflect areas and populations actually served by paging operators. Indeed, the EA definition procedure requires that, as far as possible, each area include both the place of work and the place or residence of its labor force.⁶ As an example, Pass Word's shared VHF PCP channel serves

⁶ *Final Redefinition of the BEA Economic Areas*, 50 FR 13114, Mar. 10, 1995.

significant portions of the Inland Pacific Northwest Region which includes three EA's.⁷ EA licensing would also obviate the need from auction winners to negotiate licensing arrangements with Rand McNally to use the MTA or BTA designations.

IV. Auctions Of PCP Channels Would Not Serve the Public Interest Because Lower Band PCP Spectrum is Already Heavily Developed.

Pass Word's shared PCP system on 152.480 MHz is heavily developed. It covers, or will cover when additional licenses are granted, at least 93% of the population in EA 147, 84% of the population in EA 169, and 52% of the population in EA 168. Pass Word understands that other lower band shared systems throughout the country, including systems on 152.480 MHz, also cover significant geographic areas and populations and are thus well developed operations. In light of the foregoing, there is little unlicensed spectrum in the lower PCP (and, as the Commission has already concluded, in the CCP bands)⁸ for additional systems to justify spectrum auctions in these bands.

Alternatively, and in light of the foregoing, if the Commission enacts competitive bidding rules, those rules should provide that auctions will not be held where in the geographic area involved (EA, MTA, etc.) the relevant channel is serving at least fifty percent of that area or the population therein.

⁷ Nos. 168, 169 & 147. According to the Spokane Economic Development Council, the region Pass Word serves, known as the "Inland Pacific Northwest" ("IPN"), includes 36 counties. The IPN includes central and eastern Washington, northern Idaho, and western Montana. It does not include western Washington or eastern Montana. It is physically separated from western Washington, where Seattle is located, by the Cascade Mountains. However, the Seattle MTA includes central Washington. In terms of demographics, climate, terrain and economics, and in other significant respects, western Washington is distinct from central and eastern Washington and northern Idaho. Furthermore, the Spokane-Billings MTA excludes central Washington, and yet includes eastern Montana. The IPN is thus split in half by the MTA boundaries.

⁸ See NPRM at 13 ("CCP channels are heavily licensed, particularly in major markets.")

V. The Commission Should Retain The *Status Quo* With Respect To Shared Lower Band Frequencies: Alternatively, It Should Adopt Objective Need Standards To Assist It In Determining Whether The Public Interest Would Be Served By Licensing New Entities Through Auctions.

Pass Word is one of two licensees on channel 152.480 MHz in the Spokane area. It gained its license in 1987. Sharing has been relatively trouble-free. Sharing clearly maximizes the efficient use of spectrum and facilitates market entry. Cooperative use of spectrum can result in licensees being able to offer regional paging service by sharing equipment as well as spectrum. The recent experience in Atlanta is a prime example of how sharing has served the public interest. Several small licensees and a major national carrier implemented state-of-the art automatic monitoring using a shared terminal. The sharing arrangement began in the late 1980s, at a time when the incumbents, all small entities, were serving a handful of subscribers. By the mid-1990s, each participant in the sharing arrangement was serving well in excess of ten thousand pagers, efficiently, economically, and over a geographic area consisting of thousands of miles. Sharing has worked well in Spokane, in Atlanta, and in many other large and small markets.

Accordingly, of the three options listed at paragraph 32 of the NPRM, Pass Word supports the third--retention of the *status quo*. The second option (limiting the number of licensees on a given channel and requiring newcomers to compete for access via competitive bidding) lacks a rational basis. The number of licensees sharing a channel does not necessarily impair service quality. Instead, channel *occupancy* should be considered as the principal measure of the channel's ability to accommodate new licensees without degrading existing service. Hence, Pass Word would, as an alternative to the first option, support a variant of the second option: Incumbent licensees could be permitted to submit

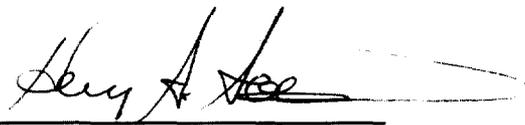
traffic data to the FCC. The Commission, in turn, could determine whether additional users would impair service quality.⁹ Formulae similar to those used in former § 22.16 of the Rules in order to determine “objective” need for new and additional channels, can be developed.

VI. CONCLUSION

Auctions have their place, but auctions of common carrier paging spectrum will destabilize the industry and will not achieve any of the goals supported by the Commission. If auctions are held, the rules should be narrowly tailored in terms of geographic area. Shared PCP channels in the lower frequency bands should not be subject to competitive bidding.

Respectfully submitted,

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⁹ In certain situations the Commission may conclude that new licensees must be limited as to the number and type of pagers they can place on the channel without compromising overall quality. Bidders would be informed of any such limitations in advance.