

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

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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 )  
)  
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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COMMENTS OF NUCLA-NATURITA TELEPHONE COMPANY

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## Summary

Rural telephone companies, particularly in western states, utilize radio to provide local exchange telephone service in areas of rugged terrain, where it is otherwise economically impracticable to provide service by landline. Accordingly, the Commission should not impose market area licensing on the two-way VHF and UHF channels utilized by rural telephone companies to provide Basic Exchange Telecommunications Radio Service (BETRS). To do so, would compromise the universal service mandate of Section 1 of the Communications Act of 1934, as amended. This is evidenced by the likelihood that, contrary to the Commission's tentative conclusion, broadband Personal Communications Service (PCS) will not be available in many rural areas for the foreseeable future. The cellular experience bears that out.

The Commission has correctly concluded that the common carrier VHF and UHF frequency bands are heavily congested, such that there is little, if any, spectrum left in the larger or medium size markets for new entrants. As such, it appears that the Commission's proposed auction of the paging channels would contravene Section 309(j)(7)(A) of the Act since the only purpose for market area licensing would be to auction spectrum to raise revenue for the federal treasury.

In the event that the Commission decides nevertheless to auction BETRS frequencies, reasonable alternatives should be instituted to safeguard the ability of rural telephone companies to provide local exchange telephone service via radio. In this

regard, the Commission should provide rural telephone companies with the mandatory right to require, at no cost to itself, the market area licensee to partition those portions of its market that are required by the rural telephone company to provide BETRS. Additionally, to ensure that the market area licensee does not cause harmful interference to "protected" co-channel BETRS facilities, the Commission should require the market area licensee to: (1) identify all co-channel BETRS licensees within a set radius of the proposed base station; (2) notify each of those BETRS licensees; and (3) if requested by the BETRS licensee, test the proposed base station prior to placing it in service. In this way, the Commission will be able to minimize the potential for harmful interference between co-channel paging transmitters and BETRS central office stations, and thus avoid a severe degradation or loss of telephone service in rural America.

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To: The Commission

**COMMENTS OF NUCLA-NATURITA TELEPHONE COMPANY**

Nucla-Naturita Telephone Company (NNTC), by its attorneys and pursuant to Section 1.415(a) of the Commission's Rules, hereby submits its comments in the above-captioned proceeding.

**I. Statement of Interest**

NNTC is a small independent telephone company which provides local exchange telephone service to over 1,300 subscribers in a 2,500 square-mile area of rural southwest Colorado. Aside from its landline plant, NNTC is a licensee in the Rural Radiotelephone Service and provides Basic Exchange Telephone Service (BETRS) to its rural subscribers, where local exchange telephone service cannot otherwise be provided economically by landline.<sup>1</sup> In that the Commission is proposing to auction the two-way VHF and UHF frequencies which are currently allocated to BETRS on a co-primary basis with the Paging and Radiotelephone

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<sup>1</sup> Facilities licensed in BETRS are typically located in areas of rugged terrain where it is impracticable to string open wire or to bury cable, primarily in the western states.

Service, NNTC's subscribers would be adversely affected if these channels are subject to market area licensing. NNTC is concerned that such action would result in it being unable to license additional BETRS facilities, or make necessary modifications to existing BETRS facilities, in order to meet future demands for local exchange telephone service via BETRS, thereby seriously compromising the Congressionally mandated universal service goals.

The future demand for local exchange service via BETRS is not based on speculation or supposition. To the contrary, NNTC is currently experiencing an influx of people into its service area literally from all over the country -- people who want to get away from the problems of the big city and are looking for a little solitude out in the country. They are buying up properties in remote areas but still want the comfort and convenience of having a telephone for emergencies as well as contact with the outside world. These properties are as far as 20-30 miles from the nearest landline central office and often over very treacherous unpaved roads.

NNTC is doing its best to satisfy the demand for service in these areas which is expected to continue indefinitely. To this end, NNTC has been applying for additional BETRS facilities. However, the Commission's auction proposal poses a definite threat to NNTC's ability to continue to meet the demand for local exchange telephone service in the future.

**II. The Auction of BETRS Frequencies is Contrary to the Public Interest.**

**A. The Imposition of Market Area Licensing Would Compromise Section 1 of the Act.**

NNTC submits that the imposition of market area licensing on the two-way VHF and UHF channels, utilized by rural telephone companies to provide BETRS service, would be patently unfair to the residents of rural America. The auction, as proposed, will disrupt the ability of rural telephone companies to respond to their customers' requests for local exchange telephone service in remote locations, where it is either economically not feasible or physically impossible to provide such service by wireline or fiber-optic cable (e.g., because the customer to be served is too far removed from the nearest central office, or natural terrain features make it physically impossible or impracticable to lay the required copper wire or fiber-optic cable).

The Commission has correctly recognized that BETRS is an extension of basic exchange telephone service, Basic Exchange Telecommunications Service, First Report and Order, 3 FCC Rcd. 214, 217 (1989), in that this service is utilized to provide local exchange telephone service by using radio loops to take the place of open wire or cable in remote areas throughout the country.<sup>2</sup> Id. at 217. Section 1 of the Communications Act of 1934, as amended (the Act), provides in pertinent part, that the Commission was created "for the purpose of regulating

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<sup>2</sup> BETRS is generally provided only by small rural telephone companies, as an adjunct to their landline local exchange telephone service.

communications so as to make available, so far as possible, to all of the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . for the purpose of promoting safety of life and property through the use of wire and radio communication." (underlining added). The Commission has previously stated that, in establishing its policies and regulations, "we are guided by the mandate and fundamental statutory purpose set out in Section 1 of the Act." Competitive Common Carrier Services (Resale Deregulation), 91 FCC 2d. 59, 64 (1982) (underlining added), and previously declined to use competitive bidding between mutually exclusive BETRS and paging applicants as being contrary to the public interest in extending basic telephone service to sparsely populated areas. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd. 2348, 2356 Para. 46 (1994). By implementing market area licensing in a manner that would prevent rural telephone companies, such as NNTC, from providing needed local exchange telephone service, through the use of BETRS, the Commission would frustrate this fundamental mandate of Section 1 of the Act, as well as circumvent the goal of universal service, which underlies that mandate.<sup>3</sup>

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<sup>3</sup> Universal service is "a primary goal of the Federal telecommunications policy." Effects of Federal Decisions on Universal Telephone Service, 57 RR 2d 721, 734-25 (1985). The rationale behind the goal of universal service includes both  
(continued...)

NNTC submits that subjecting BETRS to auction would be inimical to the universal service mandate of Section 1 of the Act.<sup>4</sup> Given the use of BETRS as the primary means of communications for many rural area inhabitants to reach help in the event of a life-safety emergency, the detrimental impact of market area licensing on the acceptance of future BETRS applications, especially in rural areas, would likewise frustrate the Act's "purpose of promoting safety of life and property through the use of wire and radio communication." Accordingly, NNTC urges the Commission to exclude the two-way VHF and UHF frequencies which are allocated to BETRS on a co-primary basis with paging, from its market area licensing proposal. In this way, rural telephone companies such as NNTC will be in a position to continue meeting the demands for local exchange telephone service in rural areas through the provision of BETRS.

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<sup>3</sup> (...continued)

societal benefits (such as the importance of a nation-wide network to the economy and our quality of life) as well as individual benefits (such as the ability to reach an ambulance, the police or the fire department in the event of an emergency). See Id. at 726.

<sup>4</sup> The Commission's purpose for subjecting BETRS to auctions is to maximize the revenues which might be derived from an auction. As applied to BETRS, an auction, without appropriate safeguards to ensure the continued provision of BETRS, would produce the ridiculous result that the market area paging licensees would have the ability to provide paging service (something of a luxury) to NNTC's rural area subscribers, but NNTC would not have the ability to provide the more basic local exchange telephone service needed to respond to a page.

**B. Broadband PCS is Not an Alternative to BETRS.**

The Commission has proposed, in the captioned Notice of Proposed Rulemaking (NPRM), to include BETRS frequencies in the auctions (since these frequencies may also be used for paging services). NPRM at Paras. 29 and 30. The Commission suggests that broadband PCS facilities will be sufficiently built out in rural areas so as to satisfy the need for local exchange service via radio. Id. at 30. NNTC respectfully submits that this conclusion is purely speculative by the Commission; it is not based on any evidence of record.

The Commission, in fact, concedes that the broadband PCS construction requirements indicate a different conclusion -- that some rural areas may not have PCS available for at least ten years from the commencement of PCS operations, if ever. See e.g., NPRM at Para. 136. This conclusion is buttressed by the Commission's broadband PCS build-out requirements in Rule Section 24.203(a) and the fact that there has not been a flood of applications filed with the Commission to partition broadband PCS licenses to rural telephone companies, pursuant to Section 24.714(d) of the Commission's Rules.<sup>5</sup> Thus, combined with the high costs of acquiring broadband PCS spectrum, NNTC believes that the low level of partitioning activity exhibited thus far is indicative that broadband PCS will not be available in most rural areas for the foreseeable future. Thus, because PCS is not

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<sup>5</sup> The Commission may also take official notice that Poka-Lambro Telephone Cooperative was the only rural telephone company to win a broadband PCS license in the A and B-Block auction.

likely to supplant BETRS in most rural areas as an alternative communications source, the two-way VHF and UHF frequencies, allocated for the provision of BETRS, should be excluded from the auction. Moreover, there is no indication that local exchange service could be provided in an economically feasible manner over PCS facilities as it is now being provided over BETRS frequencies.

Further, in this regard, NNTC notes that many of the rural cellular service areas are not completely built out, despite licensing that began ten years ago. This provides further support for the likelihood that the provision of broadband PCS will likewise be substantially delayed in rural areas. Indeed, PCS providers will have little incentive to operate in rural areas with established cellular service providers due to low population densities and the high cost of infrastructure. Accordingly, because NNTC does not expect broadband PCS to be available in most rural areas for the foreseeable future, including Mesa, Montrose, and San Miguel Counties, in Colorado, the Commission is urged not to include the BETRS frequencies in its market area licensing scheme so that BETRS may continue to be licensed on a primary basis, as the primary means of providing local exchange telephone service to those subscribers who cannot be reached by conventional wire.

**C. Frequency Congestion in the Larger and Medium Size Urbanized Areas Makes Auctions Impractical.**

The Commission readily admits that the two-way VHF and UHF frequencies, allocated for BETRS, are heavily licensed for paging

in the urbanized areas, such that there is little or no spectrum available for new systems. NPRM at Para. 13. As a result, the vast majority of filings, in recent years, have involved applications to complete existing systems, e.g., fill-in transmitters and minor expansions. Id. The Commission also notes, conversely, that in the sparsely populated rural areas, such as those served by NNTC, there has been little or no demand for paging. Id. at Para 29. Thus, while not likely, it is at least theoretically possible that a BETRS application and a paging application could be mutually exclusive. Id.

The current congestion on the two-way VHF and UHF bands is the result of the paging industry's maturation since its inception some 45 years ago. See Id. at Para. 4. The Commission has correctly recognized the paging industry to be mature, competition to be robust, and spectrum to be scarce. Id. at Paras. 5 - 6, 13. In light of these factors, especially the Commission's statement that "there is little desirable spectrum that remains available for licensing on these channels," id. at 13, NNTC cannot understand why the Commission would now propose auctions to license, on a market area basis, the two-way VHF and UHF channels (which are allocated both for paging and BETRS on a co-primary basis). NNTC is especially perplexed since, as the Commission readily admits, there is little or no spectrum available to license for new systems in the populated areas of

the various markets.<sup>6</sup> Thus, while NNTC applauds the Commission's desire toward regulatory streamlining, it appears rather transparent that the Commission's motivation for market area licensing is driven solely by the desire to auction the frequency spectrum.

**D. Paging Auctions Exceed the Commission's Statutory Authority.**

The Commission's proposal to issue market area paging licenses through competitive bidding is contrary to law. Section 309(j)(7)(A) of the Act, provides as follows:

(7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS. --

(A) CONSIDERATION PROHIBITED. -- 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 not 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 subsection. (underlining added).

In adopting the NPRM, the Commission stated that geographic licensing would serve the public interest by (1) enhancing regulatory symmetry between one-way paging and narrowband PCS, and (2) streamlining regulatory procedures and application processing rules. See NPRM at Para. 21. These reasons belie what appears to be the real reason for the Commission's proposal -- revenue for the federal treasury. This taken with the Commission's proposal to use arbitrary markets (i.e., markets

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<sup>6</sup> The Commission has tentatively concluded that it will license paging systems based upon the Rand McNally Major Trading Areas. NPRM at Para. 34.

based upon Rand McNally Major Trading Areas) which bear no relationship to the logical growth pattern of existing wide-area paging systems,<sup>7</sup> is simply arbitrary and capricious. Since it appears that the proposed market definition is designed to create auction opportunities, where they might otherwise not exist (e.g., if market areas were created based upon footprints of existing wide-area systems), the Commission's market area licensing scheme is contrary to law.

**III. In the Event that the Commission Auctions BETRS Frequencies, It Must Consider Reasonable Alternatives.**

In the event that the Commission determines that it will auction the BETRS frequencies, NNTC submits that the Commission must consider less restrictive alternatives to safeguard the ability of rural telephone companies to provide necessary local exchange telephone service via radio. See Telocator of America, 691 F. 2d 525, 537 (D.C. Cir. 1982).<sup>8</sup> NNTC, while urging the

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<sup>7</sup> Traditionally, the development and expansion of paging systems has been on a site-by-site basis to meet subscriber demands for service in particular areas as they arise.

<sup>8</sup> The Commission should not overlook the fact that it would be totally impracticable for a rural telephone company or even a consortium of rural telephone companies to bid on BETRS spectrum in a market the size of an MTA. Unlike paging which requires only a single frequency to provide service to tens of thousands of customers over a very wide area of service, BETRS requires, due to co-channel interference considerations, multiple frequencies to provide service to a relatively small handful of subscribers over a limited service area. Indeed, the Commission may take official notice of the fact that the typical BETRS application for authorization of a central office station at a single location typically requests assignment of two to four frequencies. Given the number of frequencies that would be required for BETRS in the rural areas of virtually any MTA, the Commission could not reasonably expect rural telephone companies

(continued...)

Commission to suspend any proposal to auction the BETRS frequencies, recommends, in the alternative, that the Commission provide rural telephone companies with the mandatory right to require, at no cost to itself, the market area licensee to partition those portions of its market that are required by the rural telephone company to provide BETRS. NNTC proposes that the partitioned area be based upon the proposed parameters of the rural telephone company's proposed BETRS central office station(s), but in no event could the partitioned area exceed the rural telephone company's certificated local exchange service area (except to the extent necessary to ensure that any BETRS central office station located within the rural telephone company's certificated service area would not receive nor cause harmful co-channel interference). Conversely, to ensure that the market area licensee does not cause harmful interference to "protected" co-channel BETRS facilities (which would include incumbent and partitioned stations), NNTC urges the Commission to adopt the following procedure: (a) prior to installing a new facility or making what otherwise would be a "major modification" to existing facilities, the market area licensee must identify all co-channel BETRS licensees; (b) the market area licensee must then notify each BETRS licensee with a central office station located within a 50-mile radius of the proposed paging station;

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<sup>8</sup>(...continued)  
to be able to bid on multiple-frequency spectrum in the MTAs. To that extent, the Commission's auction proposal unfairly discriminates against telephone companies serving rural America.

and (c) if requested by the BETRS licensee, the market area licensee must test the proposed facility prior to placing it in service. NNTC believes that these precautions are necessary in order to prevent harmful interference between co-channel paging transmitters and BETRS central office stations, and thus a severe degradation or loss of basic telephone service.

NNTC submits that these procedures will permit rural telephone companies to make necessary modifications to existing BETRS systems, as well as establish new BETRS systems, as subscriber demand warrants, in order to ensure that the Congressional mandate of universal service is met. NNTC believes that the impact of this proposal on the winning market licensee would most likely be negligible since the areas served by BETRS are sparsely populated and, due to their distance from urbanized areas, are not typically served by paging carriers. Thus, NNTC submits that even where the market licensee is required to protect a central office station located at the edge of its certificated area, the potential for harmful interference to the market licensee's paging system is remote.<sup>9</sup>

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<sup>9</sup> Of course, the rural telephone company would not expect the Commission to force the market area licensee to partition its area if there are pre-existing, protected co-channel stations in the area which could not be protected by the rural telephone company's BETRS station. In this regard, NNTC suggests that any co-channel paging station, which is constructed after the rural telephone company files its written request to partition the market area license, would not be entitled to protection. In order to afford adequate notice to the market area licensee, NNTC suggests that any such request be required to be served on the market area licensee, by telecopier and U.S. mail, first-class postage prepaid.

**IV. The Commission Should Clarify that Incumbent BETRS Facilities Are Entitled to Co-Channel Interference Protection from the Winning Market Area Licensee.**

NNTC supports the Commission's proposal to require that market area licensees protect incumbent co-channel paging licensees. NPRM at Para. 45-48. However, having reviewed the captioned NPRM, NNTC is concerned that it is not entirely clear that the Commission has proposed to provide full protection to incumbent BETRS licensees. NNTC presently provides local exchange service via BETRS to 28 subscribers and has over \$300,000 invested in its existing system. This investment would be stranded if the Commission does not provide co-channel interference protection to incumbent BETRS licensees. While NNTC believes that the Commission intends to afford the same protections to incumbent BETRS licensees as are afforded to incumbent paging licensees, NNTC requests confirmation by the Commission.

**V. Conclusion.**

The Commission should not subject any of the BETRS channels to market area licensing or competitive bidding, even though such frequencies are shared, on a co-primary basis, with the Paging and Radiotelephone Service. Because of high infrastructure costs and low population densities in rural areas, broadband PCS will not be the alternative communications service for BETRS that the Commission expects. Thus, the imposition of market area licensing, with its attendant auction, would be inimical to the universal service mandate of Section 1 of the Act, and would be

contrary to the basic purpose for creating BETRS -- to provide local exchange telephone service via wireless facilities. Further, because of the apparent underlying financial motivation for implementing market area licensing -- auctions -- NNTC submits that the market area licensing scheme is contrary to Section 307(j)(7)(A) of the Act, which prohibits a public interest determination based upon " the expectation of Federal revenues from the use of [auctions]."

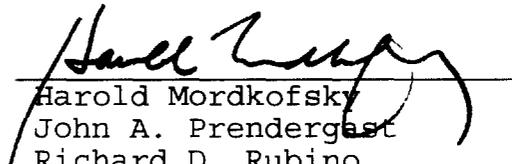
Licensing the two-way VHF and UHF frequencies on a market area basis is likewise impractical since little, if any spectrum remains in those areas where the demand for paging service exists. While spectrum appears to be available in the more sparsely populated rural areas, where BETRS is required, the availability of spectrum, for BETRS, is still very much limited in certain areas of the country; and, in any event, rural telephone companies are effectively precluded from bidding on BETRS spectrum in MTAs due to the number of frequencies required. Superimposing a market area licensing scheme, which does not follow the natural progression of paging systems will likely hinder the provision of BETRS. Accordingly, NNTC urges the Commission, if it insists on proceeding with market area licensing, to ensure that adequate protections are afforded to rural telephone companies so that BETRS will not be foreclosed. NNTC thus recommends that the Commission consider a modified partitioning plan which is based upon the rural telephone company's certificated local exchange service area. Finally, the

Commission should clarify that incumbent BETRS licensees will be entitled to the same co-channel interference protection as incumbent paging licensees.

Respectfully submitted,

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