

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

DOCKET FILE COPY ORIGINAL

TO: The Commission

**COMMENTS OF RADIOFONE, INC.
ON MARKET AREA AUCTION PROPOSAL**

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Rule Section 1.415(a), hereby submits its comments on the market area auction proposal contained in the Commission's February 9, 1996 Notice of Proposed Rulemaking (NPRM) in WT Docket No. 96-18 and PP Docket No. 93-253 (61 Fed. Reg. 6199, February 16, 1996). Radiofone is simultaneously participating in comments submitted by the Paging Coalition, which address issues of general applicability. In these separate comments, Radiofone addresses the particular impact which the Commission's market area licensing proposal will have on Radiofone's existing 929 MHz regional exclusive paging systems. As demonstrated below, the MTA-based market area licensing scheme will not be practical, and will disrupt Radiofone's valuable existing paging services. It will also prevent full implementation of these needed services, and place Radiofone at a significant competitive disadvantage. Therefore, the Commission should abandon this approach (including the proposal to reduce the service area and interference protection of 900 MHz stations). The Commission should also ensure that exclusivity for 929 MHz licensees is retained,

and should clarify the rights of licensees who have already been granted extended implementation schedules.

I. Interest of Radiofone.

Radiofone is licensed to operate two systems in the 929 MHz band, both of which have qualified for regional exclusivity. Radiofone is in the process of building out these systems, and has been granted authority for an extended implementation schedule due to the scope of these systems. Radiofone has accordingly posted a bond of \$1,680,000, and is implementing its authorized transmitters in accordance with the schedule, as provided for by Rule Section 90.496. In some of the states making up its 12-state exclusivity area, licensing and construction have progressed far enough that Radiofone has adequate transmitters to "saturate" the necessary coverage areas with a reliable signal. In other states making up the exclusive region, Radiofone has only been licensed for the initial stage of construction. In these areas, Radiofone will likely need to implement several additional transmitters in the coming years, as customers demand extended coverage, and as "dead spots" in the coverage are discovered.

In some portions of the system, there are gaps between licensed transmitters, which will eventually have to be filled. These gaps will only be exacerbated by the Commission's proposal to recalculate the service area and interference protection for 929 MHz stations. The Commission's failure to license 929.6875 MHz because of the pending Greenline Partners, Inc. waiver request (discussed below) has made the situation even worse on that frequency. The Commission's auction proposal would also eliminate Radiofone's regional exclusivity on both frequencies. Moreover, if Radiofone is unable to win certain MTAs at the auction, it may be unable to implement necessary relocations, modifications and expansions. Accordingly, Radiofone will be adversely impacted by the Commission's auction proposal.

II. The Commission Must Honor Extended Implementation Schedules, and Allow Necessary Modifications To These Systems.

The Commission indicates that all pending requests for an extended implementation schedule will be dismissed. However, the Commission does not address the impact of the NPRM on granted extended implementation schedules, such as those granted to Radiofone. First, the Commission should clarify that it does not intend to rescind existing extended implementation grants. Rescission would be completely at odds with any notion of the public interest and administrative fairness. These carriers have substantially revised their business plans in reliance on the extended implementation grants. Moreover, nothing in the record has undermined the Commission's finding, based on strong industry support, that the extended implementation schedule would serve the public interest, by allowing smaller carriers to participate in the provision of regional paging services. See Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8325-26, 8334, paras. 22-24, 43, 47 (1993).

Assuming that rescission is not intended, then the Commission should recognize that its auction proposal could have significant adverse consequences for such licensees. The freeze will prevent Radiofone from relocating stations when it is unable to utilize an originally authorized site. This will not be an uncommon occurrence for extended implementation licensees, since the availability of space on any given tower is likely to change significantly over a three-year period. For this reason, Radiofone confirmed with the Commission's staff, during the approval process for its extended implementation schedules, that it would be able to make necessary changes in the location of authorized sites. See attached November 28, 1995 Letter to Michael Regiec, Federal Communications Commission, from John A. Prendergast, Esquire. As a result of the filing freeze imposed by the NPRM, and the ensuing auctions, Radiofone may be unable to meet its construction schedule where

sites are lost, and will therefore lose authority to operate in the lapsed areas. Moreover, Radiofone could be required to forfeit the \$20,000.00 portion of its bond for each lapsed site. This problem is likely to arise again and again, since site availability is becoming increasingly scarce as PCS and other new licensees are leasing available antenna sites at a record pace.

The only apparent exception will be when Radiofone can relocate to a site which does not expand its composite interference contour. However, given the Commission's proposal to decrease 929 MHz interference contours, and since several Radiofone sites are located in areas not immediately adjacent to other granted sites, relocations within the system contour will not always be possible. It is also not clear that such relocations will be entitled to full interference protection. Radiofone notes that the Commission proposes to allow construction of sites outside of the composite interference contour, but on a secondary basis only. The auction winner could force Radiofone to shut down such sites on little or no notice, so the secondary site option does not offer a realistic solution.

More importantly, Radiofone's regional systems may be of little value if Radiofone is unable to complete the buildout of the systems as originally planned. The Commission has in essence invited Radiofone to invest what will ultimately amount to tens of millions of dollars, only to change the rules in mid-stream in a way that could strand much of this investment. Therefore, it is crucial that the Commission either abandon its auction proposal in general, or create relocation and expansion rights for the buildout of exclusive regional systems.

III. The Commission Must Resolve Existing Licensing Disputes Outside of the Market Area Scheme.

The Commission's auction proposal would have an unforeseen adverse impact on the buildout of Radiofone's 929.6875 MHz system, over and above the

difficulties already described. In particular, the Commission proposes to "hold in abeyance" any applications which are mutually exclusive, and then dismiss these applications if it adopts the auction proposal. It is not clear from the NPRM how this proposal would apply to 929.6875 MHz, which has been the subject of an April 21, 1994 waiver request by Greenline Partners, Inc. (Greenline). This request seeks nationwide exclusivity to use the channel for a medical data service, despite not having nearly enough sites to justify exclusivity under the rules. If granted, the waiver request would displace Radiofone and other existing licensees who have already been granted exclusivity. Its mere pendency has tied up licensing on 929.6875 MHz for nearly two years, to the detriment of the existing licensees and their customers.

If Greenline's waiver request for nationwide exclusivity on 929.6875 MHz were to be viewed as mutually exclusive to all of Radiofone's pending 929.6875 MHz proposals, all of these applications could ultimately be dismissed under the market area licensing proposal. This would be a particularly unfair result, since Greenline failed to propose the necessary number of sites to qualify for regional exclusivity, and did not adequately justify why its medical service proposal warrants nationwide exclusivity on that frequency. Moreover, the Commission has failed to act on the Greenline waiver request for approximately two years, during which time Radiofone has had applications for bona fide expansions of its system pending without action. In most cases there are no pending Greenline sites that conflict directly with proposed Radiofone sites, and many of the Radiofone applications are thus not "mutually exclusive." Therefore, these applications are not subject to auction authority. The Commission should dismiss the Greenline request (rather than classifying it as a "mutually exclusive application"), and should grant Radiofone's pending applications accordingly.

Similarly, Radiofone has petitions for reconsideration pending relating to several sites which were erroneously left off its extended implementation schedules, apparently due to mistaken grants of other applications by the Commission, or other oversights. The erroneous grants to other licensees have likewise been protested.¹ Again, the pendency of these petitions (some of which have been before the Commission for more than one year) should not result in the dismissal of Radiofone's applications, or failure to rectify the erroneous actions. Radiofone has acted in a diligent and timely fashion in bringing these matters to the Commission's attention, and it should not suffer retroactive dismissal of its applications due to administrative delays beyond its control.

IV. Nationwide Licensees Should Not Have an Undue Competitive Advantage.

The Commission requests comment on whether nationwide paging channels should be subject to market area licensing. NPRM at para. 26. Because nationwide 929 and 931 MHz systems offer local and regional coverage, they directly compete with licensees such as Radiofone, which will become subject to market area licensing. It is vital that all direct competitors be on a level playing field, so that the nationwide carriers do not gain an undue advantage in the marketplace. This goal can best be met by retaining the Commission's existing licensing scheme with the modifications described in the Paging Coalition's simultaneously filed comments. Radiofone wishes to emphasize that in order to ensure competitive and administrative

¹ On December 13, 1994, Radiofone protested the grant for station WPFN852 issued to Nationwide Paging, Inc. On April 7, 1995, Radiofone protested the proposed pending application filed by AmericaOne Partnership under FCC File No. 679454. On October 30, 1995, Radiofone requested partial reconsideration to include additional stations on the frequencies 929.6375 and 929.6875 MHz on its extended implementation grant.

fairness, it is imperative that the Commission preserve the regional exclusivity it has granted to qualified licensees such as Radiofone.

Regional carriers have invested substantial resources into the establishment of these regional systems, with the Commission's urging and pursuant to its rules. Because the Commission adopted a regional licensing scheme centered around transmitter count and presence within a given number of states, many licensees applied first to establish the requisite number and geographic distribution of sites, with the full intention of completing the buildout as time and budgetary constraints allowed. Now, carriers such as Radiofone may be prevented from completing a thorough buildout, because of the market area licensing scheme.

V. The Commission Should Retain the Existing Service Area and Interference Contours.

The Commission proposes to adopt an "eight radial contour method" for calculating the protected service area and interference contours for 900 MHz stations. NPRM at para. 52. The current "fixed radius method" protects an assumed service area that is generally 20 miles, based on an assumed interference contour that is generally 50 miles (for a minimum mileage separation of 70 miles for most stations). However, the new formulae would result in co-channel licensees being able to establish facilities much closer than the previous separation. Comment is requested on applying the new standards to govern protection that the market area licensee will have to provide to existing systems. NPRM at para. 53.

For the same reasons that the Paging Coalition opposes the new standards, Radiofone repeats its vehement opposition to the use of these formulae to recalculate its contours. If the formulae are adopted, 900 MHz licensees will find that the auction winner's co-channel facilities will degrade the existing system's signal and will result in gaps in the licensed coverage. Since Radiofone serves

medical and other emergency personnel with its paging service, such disruption of service could threaten public safety.

Since the new contour calculation method, and elimination of regional exclusivity would be applied retroactively to stations already licensed and operating, these actions fail the balancing test for retroactivity discussed in the Paging Coalition's March 1, 1996 comments and March 11, 1996 reply comments, given the harm caused to existing carriers, and their strong reliance on the present standard. See Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (When balancing harm against benefit of a retroactive rule change, courts consider inter alia the reliance of parties on the former rule, and the burden imposed on these parties by the new rule.); Bowen v. Georgetown University Hospital, 488 U.S. 208 (1988) (Retroactively is not favored in law.); Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and noted its troubling nature.") Existing licensees have invested hundreds of millions of dollars on their systems, and it would be grossly unfair to change the interference protection and exclusivity rules retroactively, especially since the filing freeze prevents existing carriers from modifying their systems to adapt to these changes.

Moreover, both the reduction of 900 MHz interference protection and the elimination of regional exclusivity would appear to suffer the same statutory infirmity as the filing freeze. These changes will not benefit existing carriers or their customers. Instead, they will only result in a disruption of paging services. The only apparent reason for the revised contour calculations and stripping of exclusivity rights would be to increase potential auction revenues. This purpose contravenes Sections 309(j)(7)(A) and (B) of the Communications Act of 1934, as amended, which prohibit the Commission from making its spectrum allocations and designing

regulations based "on the expectation of Federal revenues" from the use of auctions. "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, . . ." Arent v. Shalala, 70 F.3d 610, 616 (D.C. Cir. 1995) [quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)]. Since Congress has expressly prohibited the Commission from basing its spectrum allocations and licensing regulations on the potential for auction revenues, adoption of the new contour formula would be arbitrary and capricious.

CONCLUSION

As discussed above, the Commission should clarify the proposed market area licensing rules, to ensure that existing exclusivity grants and extended implementation plans are not jeopardized. Accordingly, the Commission should revise its proposed licensing scheme in the manner detailed above.

Respectfully submitted,

By: 
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Filed: March 18, 1996

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Attention: Michael Regieo

**Re: Radiofone, Inc.
Extended Implementation Schedule for Regional
PCP Systems Operating on 929.6375 and 929.6875 MHz**



Dear Mr. Fishel:

Pursuant to Rule Section 90.496(b), we hereby wish to notify the Commission that Radiofone, Inc. established an escrow fund on November 3, 1995, pursuant to its October 5, 1995 grant of extended implementation authority for the regional private carrier paging systems licensed to Radiofone on the frequencies 929.6375 and 929.6875 MHz. A total of \$1,680,000 has been placed in the fund, which equals \$20,000 per transmitter reflected on the authorized construction schedule. The escrow account has been established with the Whitney National Bank, Trust Department - Suite 206, 228 St. Charles Avenue, New Orleans, Louisiana 70130. The account number is provided in the attached sealed envelope. Confidentiality is requested for this account number pursuant to Rule Section 0.459, since it has no relevance to other members of public; and the risk of fraudulent withdrawals or other problems associated with public disclosure of bank account numbers is well know. The account number is clearly financial information not customarily made public under Rule Section 0.459.

Radiofone notes that the extended implementation schedule grant letter issued by the Commission on October 5, 1995 (copy enclosed) instructed Radiofone to establish an escrow fund of \$1,180,000. However, this appears to be a typographical error, because this amount would provide a \$20,000 escrow for only one of the authorized frequencies. Therefore Radiofone has increased the amount of the escrow fund, in

Terry Fishel, Chief Land Mobile Branch
November 28, 1995
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order to cover both frequencies. Radiofone also notes that the grant letter deleted certain licensed transmitter sites from the extended implementation schedule, indicating that these sites were not entitled to exclusivity. Radiofone has subsequently submitted a showing that many of these sites are entitled to exclusivity, and should be included on the extended implementation schedule. Pursuant to advice of Michael Regiec of your staff, Radiofone will await Commission action on this request for partial reconsideration, and will deposit appropriate additional funds upon reinstatement of any of these sites on the schedule. In the meantime, Radiofone has reduced the amount of the deposited funds to reflect the Commission's deletion of these sites.

Mr. Regiec also clarified the following:

- (1) The FCC need not be a party to the escrow agreement, and any payment for non-construction can be made directly to the United States Treasury. He recommended that a copy of any such payment be forwarded to the FCC with an explanation of how it was calculated (although this is not explicitly required by the rules).
- (2) The construction schedule can be modified to relocate transmitters, and change the construction deadline based on the grant of such relocation authority.

Thank you for your assistance in this matter. Please direct any questions or correspondence to the undersigned.

Sincerely,



John A. Prendergast
Counsel for Radiofone, Inc.

JAP/ee

Atch.

CONFIDENTIAL

Bank account number for Radiofone, Inc.
Extended Implementation Schedule:

Account No. ~~XXXXXXXXXX~~ at Whitney National Bank.

CERTIFICATE OF SERVICE

I, Elizabeth A. Ebere, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 18th day of March, 1996, I caused to be delivered by first-class U.S. mail, postage prepaid, a copy of the foregoing **Comments of Radiofone, Inc. on Market Area Auction Proposal** to the following:

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