



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)	WT Docket No. 96-18
of the Commission's Rules to)	
Facilitate Future Development)	
of Paging Systems)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act -)	
Competitive Bidding)	

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To: The Commission

**COMMENTS OF TELETOUCH LICENSES, INC. ON
THE COMMISSION'S MARKET AREA LICENSING PROPOSAL**

Teletouch Licenses, Inc. (Teletouch), 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.

Teletouch is a licensee in the Paging and Radiotelephone Service and the Business Radio Private Carrier Paging Service, with facilities located principally in Texas, Arkansas, Mississippi, and Tennessee. Teletouch will be adversely affected by the Commission's market area licensing proposal, especially as applied to the private carrier shared channels on which Teletouch is licensed. Teletouch is currently in the process of building out its systems. The imposition of market area licensing in the shared frequency bands threatens Teletouch's ability to complete its systems, and expand as necessary to respond to market forces and to meet customer demands. These restrictions could ultimately force Teletouch to withdraw from certain markets, since it will not be able to compete effectively.

II. The Commission Should Not Implement Its Market Area Licensing Proposal.

Teletouch has reviewed the Commission's captioned Notice of Proposed Rule Making (NPRM), including the Commission's recognition that the paging industry is mature, competition is robust, and spectrum is scarce. Id. at Paras. 5 - 6, 17. In light of these

factors, Teletouch cannot understand why the Commission would propose market area licensing for the shared private carrier VHF and UHF channels. The Commission's premise, that the shared channels can be converted to exclusive use, is misplaced given the co-channel environment in most large and medium size markets, and even in many of the smaller markets. Therefore, Teletouch urges the Commission to abandon its proposal to license what is currently shared spectrum, on a market area basis. Abandoning such auctions would be in the public interest, in order to preserve the current level of quality service to the public, and to avoid stranding millions of dollars invested in existing systems.

A. The Paging Industry is Highly Competitive.

Private carrier paging operators provide the public with a significant alternative to the traditional common carrier paging services. Because of lower costs associated with private carrier paging operations, carriers have been able to attract new subscribers, who might otherwise forgo paging services. In the captioned NPRM, the Commission points out that the paging industry grew by approximately 29 percent in calendar year 1993, and 38 percent in calendar year 1994, bringing the total subscribership in the United States to more than 27 million. NPRM at Para. 6. Analysts predict that by the year 2000, 15 percent of the population (or 41.5 million people) will carry pagers. Id. If market area licensing is adopted for the shared private carrier paging channels below 929 MHz, the Commission will permanently hamstring many existing carriers and jeopardize the growth of this very mature and vibrant industry. In most cases, existing carriers who do not win the market area license for a particular channel will be left to "wither on the vine" because they cannot adequately respond to their customers' demands for improved service.

B. Unlike Other Services Where Auctions to Implement Market Area Licensing Have Been Imposed, Private Carrier Paging is a Mature Industry.

The Commission indicates that the imposition of auctions and market area licensing in the paging services is consistent with actions that the Commission has taken in other

commercial mobile radio services where it has sought to implement market area licensing. See NPRM at Para. 19. As discussed below, while the Commission seeks to grant relief to existing carriers, by allowing them to make certain modifications within their composite interference contours, Teletouch submits that the paging industry is significantly different from the 38 GHz, and even the 800 MHz SMR¹ services, where the Commission has proposed to apply market area licensing auctions to existing services. Unlike the 800 MHz SMR and 38 GHz services, the paging service is a very mature and competitive industry, as evidenced by ongoing price reductions and increases in market penetration. Further, unlike the 800 MHz SMR proceeding, the Commission is not proposing to implement a new paging technology or to relocate existing licensees to new spectrum, in order to make way for market area licensing. In the 38 GHz band, there has been much application activity, and more recently several licenses have been issued. However, the industry is not mature, in terms of having established operators that will be as significantly harmed by the conversion to market area licensing. Indeed, the 38 GHz proceeding will make available a large block of unlicensed spectrum for auction, in addition to the current allocation. Thus, the 38 GHz applicants will, on the whole, benefit from market area licensing.

In contrast, shared paging channels are crowded with licensees, many with transmitters in the same market. Carefully planned sharing arrangements have been made, involving monitoring and installation of disabling circuits between licensee's terminals. On some frequencies, elaborate intercarrier relationships (such as Network USA) have developed to allow interference free service over large geographic areas. The proposed auctions would disrupt this situation, to the detriment of the carriers and their customers. As a result, for shared paging licenses, the so-called "cure" of a conversion to exclusive

¹ In the 800 MHz SMR services, the Commission proposed to relocate existing facilities to new spectrum. Such is not the case with the paging services.

licensing on a market area basis (and its attendant auctions) will prove more fatal than the perceived "disease" of less flexible licensing.

Thus, because the paging service can be easily distinguished from other existing services where auctions have been imposed to implement market area licensing, and because of the devastating effect that market area licensing would have on the industry, the Commission should rescind its proposal to convert the shared-private carrier VHF and UHF paging frequencies to exclusive channels subject to auctions.

C. The Commission Should Not Convert the Shared Private Carrier VHF and UHF Channels to Exclusive Licensing.

As demonstrated above, the paging industry is highly competitive, and as a result, has brought much technological innovation to the market place in order to attract and retain customers.² To implement licensing on an exclusive basis now, after the channels are heavily licensed in a shared fashion, see NPRM at Para. 17, would be highly disruptive. The Commission has recently concluded, in a separate proceeding, that converting the shared VHF and UHF paging frequencies to exclusive use would not be appropriate, given the significant differences in the licensing environment between the shared VHF and UHF bands and the 929 MHz paging band, as well as the propagation characteristics of the band. See PCP Exclusivity Order, Report and Order, 8 FCC Rcd. 8318 (1993). In that the shared VHF and UHF paging bands have only become more heavily licensed in the two years since the Commission has reached this conclusion, Teletouch submits that conversion of the shared

² Technological improvements over the past decade include the advent of numeric paging (with message recall on demand), alpha-numeric paging, reduction in size of paging receivers, etc. No longer is paging service something that is principally relied upon by doctors who, upon being paged, would call an answering service in order to retrieve messages. Instead, paging receivers are used in virtually every segment of society, from medical personnel who are on call for life-threatening medical emergencies, to public safety personnel who are alerted for emergency calls, to service technicians who must remain in contact with their offices, to computer operators who must be notified immediately of a computer system crash (as paged by an automatic alarm via computer), to parents who want ready communications with their children at all times. This proliferation has been made possible only because of the technological advancements which have made the service more desirable, and the competition which has reduced the costs of service to the public.

VHF and UHF bands to exclusive licensing at this late date is even less appropriate than when first considered.

D. Shared Paging Auctions Would Exceed the Commission's Statutory Authority.

The Commission's proposal to convert the shared VHF and UHF paging bands to exclusivity, for the purpose of licensing by competitive bidding, is contrary to law. Section 309(j)(7)(A) of the Communications Act of 1934, as amended (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. In the context of shared use PCP channels, these justifications do not apply. The only other reason for converting the shared channels to exclusive use for licensing on a market area basis would be to garner revenue for the U.S. treasury. Pursuant to Section 309(j) of the Act, this is an impermissible justification for market area licensing. Indeed, the idea of imposing an auction scheme on shared users, taken together with the Commission's proposal to create arbitrary markets which bear no relationship to the logical growth pattern of existing shared paging systems,³ is plainly arbitrary and capricious.

The shared VHF and UHF bands have been desirable to paging licensees, even though they were forsaking the advantages of exclusive license grants, because of the

³ Traditionally, the development and expansion of paging systems has been on a site-by-site basis, dictated by subscriber demands for service in particular areas.

expedient licensing process and added flexibility in system expansion. By establishing one-way paging systems on the private carrier shared channels, licensees could plan system expansions without regard to the co-channel environment, perhaps even creating a de facto nationwide PCP system if desired. The only operational restriction is that each licensee must share the channel with its co-channel neighbors. Because there is no mutual exclusivity on shared channels, competing carriers have even been free to locate co-channel transmitters in the same building. Given the proliferation of licensees on the shared VHF and UHF frequencies under these circumstances, it is impracticable to now convert these channels to exclusive licensing.

The Commission's first goal (symmetry between paging and narrowband PCS) is questionable at best, especially in the context of shared private carrier paging. One-way paging is fundamentally different from narrowband PCS (i.e., two-way response paging and data transfer), so that the Commission's goal of imposing a disruptive licensing scheme for the sake of regulatory symmetry between these two distinct services is inappropriate. Narrowband PCS licensees have full use of their channel, so that customers can use the service for sending E-mail, data streams, documents, etc. Shared-use licensees vie for time on what is often a congested channel, and therefore generally provide more simple, low cost paging service.

And unlike the shared private carrier paging service, narrowband PCS was licensed from the beginning on clear spectrum, on an exclusive basis, so that all licensees will be able to locate their transmitters at virtually any site within their respective market areas. On the other hand, as discussed above, any market area licensee obtaining a license on what is now shared spectrum in the VHF and UHF private carrier paging bands will not have the luxury of implementing exclusive service at will. Rather, the market area licensee will either be required to protect the numerous shared co-channel licensees in its market area, or will be subject to interference from those licensees. Thus, market area licensing would

actually lessen symmetry between shared PCP and narrowband PCS (assuming this was a valid goal to begin with); while the narrowband PCS licensee may locate transmitters anywhere in its market area, shared PCP licensees that previously enjoyed the same freedom will now have it taken away, either because they lost the auction and can no longer expand, or because they won the auction and must protect incumbents.⁴

Mixing exclusive and shared licensees on the same channel in the same market will actually frustrate the Commission's second goal of streamlining its regulatory procedures, since the Commission will be required to devote resources to ensure that the market area licensee protects incumbent licensees and adjacent channel licensees. The only way that the Commission will be able to achieve this is through some form of site-by-site licensing of the market area licensee's proposed base stations.

In this regard, the Commission requests comment on whether shared channel incumbents should be afforded interference protection by the market area licensee. NPRM at Para. 56. If the market area licensee wishes to occupy the channel on an exclusive basis (i.e., full time) in the "white space" within the MTA, such protection would be required. However, even if such protection is not adopted, the market area licensee will have difficulty implementing a wide-area system with any sort of "exclusivity" -- paging batches on exclusive area transmitters would be constrained by whatever time is available on its shared transmitters. This may be little time at all, given the cumulative 95 percent channel occupancy in many markets. See e.g., AACS Communications, Inc., 8 FCC Rcd. 4788 (Licensing Division, 1993) (96 percent channel usage in Dallas area); Arch Capitol District, Inc., 3 FCC Rcd. 6191 (PRB, 1988) (severe channel congestion in upstate New York area). In other words, the auction winner will either be buying full time use of the channel only in

⁴ Regulatory symmetry with nationwide paging carriers would be a more appropriate goal, since both services are one-way. However, whereas every shared PCP system can currently expand to at least theoretically provide nationwide coverage, market area licensing will block all but one from doing so -- an unacceptable price for "symmetry."

the little unlicensed area left in the MTA, or will be buying only part-time use of the channel throughout the MTA (since simulcast paging batches will have to use what little airtime is left in congested areas). These are hardly worthwhile objectives in exchange for disrupting the paging industry by depriving most existing licensees of expansion rights.

Indeed, because certain PCP frequencies must be coordinated for adjacent channel interference problems, pursuant to Rule Section 90.175, it would appear that much of the current licensing activity would still have to take place even if market area licensing is imposed. To the extent that this licensing process could be streamlined for the market area licensee, the Commission could also streamline it for all shared users without the need for defined market areas or auctions. In this respect, market area licensing will have no impact on licensing flexibility.

Since market area licensing does not support the Commission's regulatory goals of symmetry with narrowband PCS or reduced regulatory burdens, it appears that there is really only one goal for converting to exclusive use what has always been shared spectrum - the generation of auction revenue. Implementation of this goal would violate Section 309(j) of the Act.

E. The Auction Proposal Would be Arbitrary and Capricious.

Since the market area licensing proposal would be applied retroactively to PCP systems already licensed on the shared VHF and UHF channels, the Commission's proposal fails the balancing test for retroactivity, given the harm caused to existing carriers and their strong reliance on the Commission's current rules to establish and plan their systems. See Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972) (When balancing the harm against the 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) (Retroactivity 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, at this late stage, to change the licensing regime (i.e., from shared use to exclusive use on a market area basis) retroactively, especially since the filing freeze prevents existing carriers from modifying their systems to adapt to a new licensing format. Many shared PCP licensees have only partially completed their buildouts, and all need flexibility to respond to new requests for service from new or existing customers.⁵

III. Auctions Do Not Make Sense for Shared Channels.

Teletouch urges the Commission to abandon its proposal to license paging channels on a market area basis due to the severe disruption that such licensing will cause to an otherwise highly competitive and robust industry. In the context of exclusive-use paging channels, Teletouch, as part of a coalition of paging carriers, is simultaneously submitting comments giving numerous suggestions for auction rules which would mitigate the adverse impact of market area licensing, including: use of smaller market areas, eligibility limitations, use of multiple round auctions, exceptions to spectrum cap and bidding consortia limitations for incumbent licensees, adoption of small business protections, and expansion rights for incumbents in the post-auction period. However, in the context of the shared VHF and UHF private carrier paging channels, these protections are not discussed since the market area licensing concept is simply too far-fetched.

⁵ The Commission asked for comment on whether it should "issue only a certain number of licenses per shared channel and use competitive bidding to chose among mutually exclusive applications once the limit is reached." NPRM at Para. 32. Teletouch agrees that there may be circumstances where the Commission should cap further licensing on a shared frequency because it is severely congested with existing traffic. However, the corollary of this licensing cap is not to "use competitive bidding to choose among mutually exclusive applications once the limit is reached." Instead, once the limit is reached, further licensing should Stop! Thus, there is no room for an auction in this scenario.

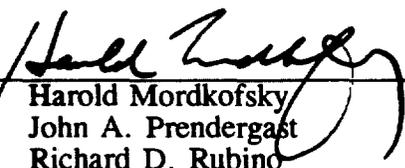
IV. Conclusion.

Teletouch implores the Commission not to adopt its proposed market area licensing scheme for the shared private carrier paging bands. In that these frequency bands are heavily licensed and congested with traffic, and subject to complex non-interference arrangements by multiple licensees (including internal use operators), conversion of these frequencies to exclusive use and market area licensing would make no sense. Further, the imposition of market area licensing will paralyze the shared channel paging industry so that it can no longer respond effectively to subscriber and market demands. As a result, subscribers will experience reduced coverage, especially where a licensee is not able to replace a lost site, or install an additional transmitter in order to meet subscribers' coverage requirements.

Respectfully submitted,

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