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

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| In the Matter of | ) | |
| | ) | |
| Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems | ) | WT Docket No. 96-18 |
| | ) | |
| Implementation of Section 309(j) of the Communications Act -- Competitive Bidding | ) | PP Docket No. 93-253 |

**To: The Commission**

**REPLY 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(c) of the Commission's Rules, hereby submits its reply comments in the above-captioned proceeding.

## I. The Record Shows That The Commission Should Not Implement Its Market Area Licensing Proposal.

The record developed by the Commission in this proceeding, through comments filed by small, medium, large, and even some very large paging carriers, demonstrates overwhelming support for the proposition that implementation of the Commission's market area licensing proposal (and the attendant auctions) is not in the public interest. See e.g. Comments of Teletouch Licenses, Inc. at 2-9; Comments of Jon D. Word and Pioneer Telephone Cooperative, Inc. at 3-4; Comments of the Paging Licensees at 1-10; Comments of Ameritech Mobile Services, Inc. at 1; Comments of Mobilemedia Communications, Inc. at 4; Comments of The Paging Coalition at 2-7; Comments of Datafon II, Inc. and Zipcall Long Distance, Inc. at 2-4; Comments of Supercom, Inc. at 3-9; Comments of A+ Network at 17-18; and Comments of Mashell Connect, Inc. at 2-8. Teletouch notes that all of the support for the Commission's market area licensing proposal, however limited, comes

mainly from only the nation's largest paging carriers, such as Paging Network, Inc. and Airtouch Paging, as well as the Personal Communications Industry Association (PCIA) (which on this issue does not appear to represent the viewpoint of a majority of the more than 600 or so licensees in the paging industry).

### A. The Commission Should Not Convert the Shared Private Carrier VHF and UHF Channels to Exclusive Use to Establish Auctions.

Teletouch is concerned that the Commission will convert the shared private carrier VHF and UHF paging frequencies to exclusive use solely for the purpose of creating auctions. Such action would be contrary to the public interest in that it is undisputed in the record that the paging industry is highly competitive and that the shared private carrier paging frequencies are heavily licensed. See Notice of Proposed Rulemaking (NPRM) at Para. 17; Comments of Teletouch Licenses, Inc. at 2-5; Comments of the Paging Licensees at 2-5; Comments of A+ Network at 17-18. Thus, any attempt to license the shared VHF and UHF frequencies by auctions would be highly disruptive to primarily small businesses since carriers would not be able to meet future subscriber demands for service improvements. In a separate proceeding, the Commission recently concluded 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 these bands and the 929 MHz paging band, as well as the differing propagation characteristics between the two bands. See PCP Exclusivity Order, Report and Order, 8 FCC Rcd. 8318 (1993). PCIA and Airtouch Paging now urge the Commission to reconsider that decision and convert the shared VHF and UHF frequencies to exclusive use (or a hybrid form of exclusive use similar to the local and regional licensing schemes adopted by the Commission for the 929 MHz paging bands), consistent with the Petition for Rule Making of the Association for Private Carrier Paging Section of the National Association of Business and Educational

Radio, Inc. filed July 11, 1994. Comments of PCIA at 15; Comments of Airtouch Paging at 13.[1]

Teletouch believes that the regulatory scheme adopted for the 929 MHz paging band is not appropriate for the shared VHF and UHF frequencies since many of the shared VHF and UHF channels are heavily loaded with traffic and fully occupied during peak hours.[2] Teletouch believes that conversion of these shared frequencies to exclusive licensing at this late date is now even less appropriate than when first considered by the Commission. Comments of Teletouch Licenses, Inc. at 5; Comments of the Paging Licensees at 5. Since 1993, when the Commission declined to convert the shared use VHF and UHF frequencies to exclusive use in its PCP Exclusivity Order, significant licensing has occurred on these channels as carriers have attempted to build out their systems or establish additional paging systems in order to meet subscriber demands for service. This licensing activity has created additional congestion in this already heavily licensed spectrum which most carriers, to their credit, have efficiently managed. The result is that most pages can be transmitted in a reasonable amount of time.[3] Accordingly, because the spectrum is heavily licensed, conversion to exclusive use licensing and overlay auctions would be imprudent.

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[1] Airtouch Paging takes its proposal one step further and urges the Commission to adopt market area licensing for the shared VHF and UHF frequencies, presumably using the Rand McNally Major Trading Areas to define market size. Comments of Airtouch Paging at 13-15.

[2] In fact, some systems have so many subscribers that paging calls are transmitted continuously during virtually the entire business day.

[3] In many instances where co-channel systems are located nearby, the carriers have taken steps to prevent transmitting on top of each other by either tying their terminals together or by purchasing monitoring equipment which ensures that the channel is not occupied prior to transmitting and, if necessary, shutting the transmitter off after a pre-set period of time.

The record also reflects that market area licensing of shared spectrum would extend beyond the Commission's auction authority. The Commission may only auction spectrum to choose between mutually exclusive applicants. In that the private carrier VHF and UHF spectrum is shared, by definition there can be no mutual exclusivity between applications for this spectrum. Moreover, this heavily licensed spectrum is of little value to new entrants. See Comments of A+ Network at 18. Implementing exclusivity for the purpose of artificially creating mutual exclusivity in order to justify auctions is contrary to the authority granted to the Commission in Section 307(j)(7)(A) of the Communications Act of 1934, as amended (the Act). This portion of the auction statute prohibits the Commission from using competitive bidding for the primary purpose of creating revenues for the Federal treasury. It also contravenes Section 309(j)(6)(E) of the Act, which directs the Commission to make every effort "through engineering solutions, negotiation, threshold qualifications, service regulations, and other means, in order to avoid mutual exclusivity in application and licensing proceedings." (underlining added). Shared use licensing is a method of avoiding mutual exclusivity in the application and licensing proceedings for the shared VHF and UHF frequencies. By adopting market area licensing for these channels, the Commission would flout the purpose and intent of Section 309(j)(6)(E) of the Act by artificially creating mutual exclusivity rather than avoiding it. Accordingly, Teletouch urges the Commission not to adopt Airtouch Paging's suggestion that auctions be used for the shared VHF and UHF paging spectrum.

## II. The Commission Should Take Steps to Cap Further Licensing of New Entrants Once the Channel is Saturated.

Teletouch has reviewed the comments of PCIA and agrees, in principle, that the Commission should take affirmative steps to preclude the licensing of new carriers on the shared VHF and UHF frequencies where the channels have become so congested as to be virtually saturated. See e.g., Comments of PCIA at 15; Amendment of the Commission's

Rules and Regulations Concerning Shared Use of 150 MHz and 460 MHz Paging Frequencies, Petition for Rule Making of the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (filed July 11, 1994) (hereinafter Petition for Rule Making), at 9. While Teletouch does not support the conversion of this "shared" spectrum to "exclusive" licensing, it believes that the Commission should issue, where necessary, moratoriums on licensing additional carriers where incumbent licensees are able to demonstrate, through empirical traffic load studies, that at least 80 percent of the channel capacity is in use during the busiest hours of the day. This cap would not change the shared nature of the channels since multiple entities would continue to use the frequencies in an efficient manner. Instead, the cap would merely prevent harmful interference due to destructive congestion.

Teletouch recognizes, however, that incumbent carriers licensed on a particular frequency, which is subject to a licensing moratorium, must retain the capability to "grow" their systems in order to meet subscriber demand. Such expansion rights would include the right to establish additional co-channel transmitters within a 40-mile radius of the carrier's nearest co-channel transmitter. Thus, for example, if an incumbent carrier has a transmitter in Arlington, Virginia, Teletouch would not dispute the incumbent carrier's right to establish additional co-channel transmitters as far south as Fredericksburg, Virginia, as far west as Broad Run, Virginia, and as far north as Baltimore, Maryland, in order to meet subscriber demand. This is so because many residents of the Washington, D.C. metropolitan area regularly travel within this region. On the other hand, Teletouch proposes that an expansion request of a carrier licensed on the same frequency in New Jersey, to establish a transmitter in Washington, D.C. would be barred by the moratorium. In this way, the Commission would be able to ensure the carriers' ability to provide quality paging service to the public.

## III. The Commission Should Adopt Key-up Overlap Standards.

The record before the Commission supports the need for key-up overlap devices to prevent a degradation in the quality of paging service on the shared VHF and UHF paging frequencies. Accordingly, Teletouch concurs with Airtouch Paging and PCIA that the Commission should act to ensure that co-channel paging licensees do not cause harmful interference to each other. Comments of PCIA at 17, n. 32; Petition for Rule Making at 13-14. In this connection, Teletouch believes that the most efficient means for preventing key-up overlap (i.e., simultaneous seizure of the channel by two or more unrelated co-channel transmitters within a particular service area) is to tie each carrier's terminal to a single arbitrator, which regulates when, and for how long, a particular system may transmit its paging traffic. See Petition for Rulemaking at 14. In this way, each co-channel licensee will have an equitable opportunity to transmit its paging batches without causing harmful interference to the other co-channel licensees.[4]

The costs for implementing key-up overlap devices could be quite substantial. Teletouch proposes that, where there are multiple co-channel licensees in a particular area, the costs should be shared equally among the incumbent carriers. Where, following the close of this proceeding, the need arises to implement key-up overlap devices because of a new co-channel licensee in the area, Teletouch submits that the new carrier, as the newcomer, should be responsible, financially and otherwise, for acquiring and installing the key-up overlap device. Likewise, where incumbent carriers already have their systems tied together and a new carrier is licensed in the market, the new carrier should be financially responsible for tying its system to the incumbent systems.

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[4] Of course, in the event that a carrier has no paging traffic, the arbitrator would permit the next carrier in the sequence to broadcast its traffic, thereby minimizing any dead air time.

## IV. The Federal Trade Commission's Conclusion that Auctions are the Cure-all to Mail and Wire Fraud is Misplaced.

The Federal Trade Commission (FTC) has filed comments in the captioned proceeding supporting the Commission's market area licensing proposal for all frequency bands, including the shared VHF and UHF paging frequencies. The FTC's support for the Commission's proposal is premised, not on a conclusion that market area licensing and auctions would be best for the paging industry and its customers as a whole, Comments of the FTC at 2. Rather, the FTC supports market area licensing based solely on its conclusion that market area licensing will deter consumer fraud and speculation because: (1) there would be fewer licenses, and (2) entry into the auctions would be more difficult for speculators than the current site-by-site licensing process. Id. at 8.

While Teletouch agrees with the FTC that speculation and application mills and the speculators they attract have harmed the paging industry by making it more difficult for legitimate carriers to obtain license grants, it believes nonetheless that auctioning the shared VHF and UHF paging channels to combat speculation and consumer fraud is unwarranted. Teletouch agrees that steps should be taken to preclude fraudulent activities. However, utilizing market area licensing and auctions for this purpose pales in comparison to the harm to the paging industry and its customers that will surely result. The fact is that less drastic steps are available to combat speculation and consumer fraud.[5] Market area licensing and its attendant auctions would disrupt the highly competitive and innovative paging industry for

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[5] These steps include public education through mass-media public service announcements, clear warnings on applications located just above the signature blocks which advise applicants that (a) stations must be constructed and placed in operation prior to the expiration of the construction period, and (b) that trafficking in licenses (i.e., acquisition of licenses for the sole purpose of profitable resale) is prohibited by the Commission's Rules.

the sake of preventing a comparably small amount of fraudulent activity. Even if the FTC is correct that telemarketing fraud has cost consumers hundreds of millions of dollars since 1990, see Comments of the FTC at 2, the cost to legitimate paging companies, their personnel, their suppliers, and their subscribers is far greater. Implementation of the Commission's market area licensing proposal would preclude needed system expansion by a majority of incumbent carriers (since only one carrier can win in each market area), such that subscriber demands for service will not be met. This "freeze" on expansion will result in economic hardships for paging carriers and equipment vendors, thereby resulting in significant employee cutbacks. These steps will have a severe impact on the economy as orders for transmitters and related equipment are cancelled, which could total hundreds of millions of dollars; and employees are forced into the unemployment lines. Teletouch respectfully submits that the resulting harm to the paging industry is far more severe than any ills which the FTC believes would be cured. Moreover, it is doubtful that auctions will significantly impact fraud. Application mills are capable of "packaging" market area licenses for "investment groups" or other market speculators. Unsophisticated investors appear to have been involved in the Commission's recent IVDS auction where numerous bidders have defaulted on their bids. Accordingly, it is respectfully submitted that adoption of the Commission's market area licensing proposal would be ill advised.

## V. Conclusion.

Like most commentors in this proceeding, Teletouch opposes the Commission's market area licensing proposal to subject any of the share VHF and UHF paging frequencies to competitive bidding. 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 makes no sense, other than to raise revenues for the Federal treasury -- an activity forbidden under the Communications Act in these circumstances. Likewise, the FTC's concerns regarding consumer fraud would not be adequately addressed by market area licensing, and as a result, the imposition of market area licensing will only serve to paralyze the shared channel paging industry, so that it can no longer respond effectively to subscriber and market demands. Accordingly, the Commission should not adopt its market area licensing proposal for the shared VHF and UHF channels.

Respectfully submitted,

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