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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	)	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 THE PAGING COALITION ON MARKET AREA AUCTION PROPOSAL

John A. Prendergast
Richard D. Rubino
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20037
(202) 828-5540

Counsel for The Paging Coalition

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SUMMARY

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its common carrier and exclusive private carrier paging clients listed in Attachment A hereto (hereinafter "the Paging Coalition" or "the Coalition") hereby submits its reply 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. The vast majority of licensees participating in this proceeding strongly oppose MTA-based market area licensing. This scheme will not be practical (especially for the UHF and VHF bands), and will disrupt essential existing paging services. It will also have a severe adverse impact on small to mid-sized paging providers. Therefore, the Commission should abandon this approach (including the proposal to reduce the service area and interference protection of 900 MHz stations). The contour reduction proposal would appear to be an unconstitutional taking under the Fifth Amendment. The Commission should also ensure that exclusivity for 929 MHz licensees is retained.

If the market area licensing procedure is adopted nonetheless, the Commission should reduce the market size to state-wide coverage for 900 MHz (since regional exclusivity was based on a state-by-state basis), and should use Basic Trading Areas (BTAs) for the UHF and VHF bands. Several commentors support smaller market areas, with most suggesting BTAs. Commentors also expressed overwhelming support for exempting heavily-

licensed market areas from the auction. The Coalition and other commentors have proffered useful guidelines for such exemption.

The record also shows that the Commission should (1) use multiple round auctions; (2) exempt existing licensees from any spectrum cap where they are bidding on their own channels; (3) allow incumbents to form bidding consortia; and (4) adopt small business protections (such as bidding credits and installment payments). Most commentors strongly support allowing incumbent licensees to expand their existing systems within 40 miles of an authorized site, and fill in pockets within their coverage that could not possibly be useful to the auction winner. Rural telephone companies and small businesses should be allowed to partition service areas from the market area winner.

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The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its common carrier and exclusive private carrier paging clients listed in Attachment A hereto (hereinafter "the Paging Coalition" or "the Coalition") hereby submits its reply 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). The vast majority of licensees participating in this proceeding strongly oppose Major Trading Area (MTA) based market area licensing, especially for the UHF and VHF bands. Market area licensing will disrupt essential existing paging services. The record also shows that this scheme will have a severe adverse impact on small to mid-sized paging providers. 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.

I. The MTA Auction Scheme Is Opposed By Most Commentors.

The vast majority of commentors agree with the Paging Coalition that MTA-based market area licensing would harm the paging industry rather than helping it, and must be avoided. While a handful of very large carriers support MTA-based auctions,[1] more than fifty carriers are on record opposing this proposal. These carriers range in size from small sole proprietorships to giant companies like MobileMedia Communications, inc. (MobileMedia), Ameritech Mobile Services, Inc. (Ameritech), and Metrocall, Inc. (Metrocall). Aside from TeleBEEPER of New Mexico, Inc. (TeleBEEPER) and a few carriers affiliated with Diamond Page Partnerships, virtually every small business commentor adamantly opposes auctions, and many provide evidence that they will not be able to compete in such auctions.[2]

The Personal Communications Industry Association (PCIA) indicates that it "represents and serves the interests of tens of thousands of licensees." However, as demonstrated by the record in this proceeding, PCIA does <u>not</u> represent the industry consensus on the issue of market area auctions. In its

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[1] These carriers include industry giants like AT&T Wireless, Airtouch Paging, Paging Network, Inc. (PageNet), Mobile Telecommunication Technologies Corp. (MTel), Arch Communications Group and Westlink Licensee Corporation.

[2] The Coalition is separately submitting its reply comments regarding the Commission's Initial Regulatory Flexibility Analysis. As discussed therein, the Commission has woefully misinterpreted the potential adverse consequences of auctions on small businesses.

comments,[3] PCIA strongly supports market area licensing for the 931 MHz band, consistent with its previous position. However, PCIA does a startling about-face by also supporting auctions in the 929 MHz and VHF/UHF paging bands.

While PCIA indicates that it now "reluctantly" concurs in the Commission's auction proposal for these bands, its proffered justification for doing so is weak at best. PCIA's support of auctions in the 929 MHz band appears to be based primarily on its perception that the Commission will not likely adopt "differing regulatory regimes for each of the 931 MHz and 929 MHz bands." Comments of PCIA at pp. 10-11. In essence, PCIA is throwing in the towel on its previous valid regulatory concerns for the sake of expediency. While pragmatism has its place, the Coalition is not prepared to blindly submit to a licensing mechanism which will harm existing carriers and their customers.

While the Commission is under an obligation to implement regulatory parity, there are valid public interest reasons for refraining from market area licensing in the 929 MHz band. First, such auctions will strand the investment of numerous carriers who have only partially completed the buildout of their existing paging services, basing their system planning on existing rules. While this consideration justifies refraining from auctions in <u>both</u> the 929 and 931 MHz bands, the former will be especially harmed by auctions. As PCIA

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[3] Unless otherwise indicated, all references to "comments" herein refer to those comments filed in response to the March 18, 1996 deadline relating to the Commission's market area licensing proposal (as opposed to the comments on the interim licensing procedures).

acknowledges, exclusivity rules were adopted only a few years ago for the 929 MHz band, and licensees have spent millions of dollars to move toward compliance with the new rules. At the Commission's invitation, these carriers have established coverage in a pattern dictated by the exclusivity rules, rather than basing their buildout purely on customer demand. Therefore, these licensees have often completed less than half of the process of filling in their ultimate coverage footprint with the number of transmitters needed to provide reliable service. The record establishes that it would be arbitrary and capricious to now pull the rug out from under these licensees.

PCIA's rationale for now supporting auctions in the lower common carrier bands is even less defensible. PCIA acknowledges that use of these frequencies is more mature, and that overlaying market area licensing "would be highly complex and would have reduced regulatory benefits for licensees, the Commission, and the public." PCIA Comments at p. 13. Nonetheless, PCIA concludes that "the industry is better served by quick Commission resolution of this proceeding, permitting licensees to understand new processing policies and resuming the filing of applications for necessary authorizations." Id. In essence, PCIA appears willing to accept severely disruptive rules which will significantly harm the industry, for the sake of having the filing freeze lifted. This position only rewards the Commission for engaging in bad policy-making through the use of a filing freeze which holds the welfare of an entire industry hostage.

The Commission's auction proposal for the lower bands, and PCIA's concurrence, are particularly disturbing since there has been no backlog of

lower band applications, and no elaborate daisy chains of mutually exclusive proposals. The Commission itself has acknowledged that "[c]urrent licensing activity on the lower paging bands is confined largely to the addition of fill-in sites and minor expansion by existing licensees." NPRM at para. 13. The processing time for such applications has been reduced significantly in recent years.

Moreover, as the Commission's licensing records and the Paging Coalition's Comments demonstrate, the lower paging bands are characterized by local and smaller regional systems. Because there were few frequencies available when these bands were allocated and demand was high, licensees typically were not able to establish service over huge geographic areas such as MTAs. The Commission's auction proposal, and PCIA's endorsement of it, ignore this historic development of paging in the lower bands. Many small businesses (including several members of the Paging Coalition) operate in these bands. Therefore, the disparate impact of the auction proposal on small businesses will only be exacerbated if it is extended to the lower bands.

The Federal Trade Commission (FTC) indicates in its comments that market area auctions are necessary in order to stop application mills from defrauding unsuspecting consumers. FTC Comments at pp. 4-5. While consumer fraud is a problem which certainly warrants Commission attention, the FTC would have the Commission throw out the baby with the bath water. The record clearly demonstrates that market area auctions would severely harm small businesses, forcing many to go out of business because they could no longer expand or modify their systems as needed. This outcome would

hurt consumers, who will lose inexpensive, local paging options due to the Federally mandated consolidation of the paging industry that would result from auctions.[4] Higher paging prices and poorer service would quickly outstrip any harm to the economy from fraudulent licensing schemes. The economy would also be hurt by the loss of jobs as these smaller carriers exit the marketplace.

Moreover, it is not at all clear that auctions will eliminate consumer fraud. Indeed, some of the commentors indicate that application mills will benefit from auctions. See Comments of Datafon II, Inc. et al. at p. 2. Market area auctions would completely disrupt a mature, highly competitive industry for the sake of plugging one hole in the dike, only to have another immediately spring open. Application mills will be able to quickly adapt their pitch to sell unsuspecting consumers an interest in an auction applicant, which will bid on desirable MTAs. What the participants will not be told is that there is virtually no "white space" left in the MTA, and that their investment is therefore of little or no value. The more effective answer to fraudulent paging licensing is greater awareness through consumer alerts, modification of the application form to warn prospective applicants of their responsibilities, and greater enforcement of construction requirements and the Commission's trafficking rules.

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[4] It is respectfully submitted that this artificial consolidation of the paging industry should be of greater concern to the FTC than licensing scams. Such consolidation will lessen competition and consumer choices.

II. If Auctions Are Adopted, the Rules Must Be Fashioned to Protect Incumbent Licensees.

As discussed above, the Coalition and the majority of participants in this proceeding oppose market area auctions for the paging industry. The following are protections which would somewhat mitigate the harmful impact of such auctions. However, even if all of these protections are adopted, market area licensing would still have a harmful effect on existing paging services which far outweighs any benefits from this proposal.

A. Exemption for Heavily Licensed Market Areas.

The commentors in this proceeding virtually all agree with the Paging Coalition's proposal to exempt heavily licensed market areas from the proposed auctions. See Comments of the Paging Coalition at p. 8. While the Coalition would exempt market areas where incumbent licensees can demonstrate that two-thirds of the population is within their existing interference contours, other commentors offered variations of this idea: For example, Ameritech recommends that if the Commission adopts a market area licensing scheme, it should exempt from auctions any market area where 70 percent of the population is within the existing licensee's composite interference contour. Comments of Ameritech at p. 13. PCIA, MobileMedia and Airtouch advocate an exemption if 70 percent of the market area population is within the coverage of an existing system. See Comments of PCIA at pp. 28-9; Comments of MobileMedia at p. 21; Comments of Airtouch at pp. 40-1. PageNet proposes a benchmark similar to the suggestion of the Paging Coalition, namely, 66 percent population coverage. See Comments of PageNet

at pp. 39-40. However, it appears that PageNet would require coverage within the existing service area contour, rather than interference contour. Source One Wireless, Inc. (Source One) and Paging Partners Corporation (Paging Partners) propose an exemption if 70 percent of the geographic area of the MTA is covered. See Comments of Source One at p. 3; Comments of Paging Partners at p. 3. A+ Communications, Inc. (A+ Communications) advocates an exemption if 70 percent or more of the population is covered by an incumbent carrier or consortium of carriers that serve the market area. See Comments of A+ Communications at p. 8. Metrocall suggests a "substantial service" exemption for existing carriers within the market area. See Comments of Metrocall at pp. 8-9.

In light of the virtually unanimous support for this idea, the Commission should adopt an exemption which will grant a market area license to the incumbent carrier(s) that demonstrate substantial coverage to the MTA or other license area. Any competing bids made in such circumstances are likely to be submitted by unscrupulous competitors or speculators. The proposals in the record offer the Commission several viable benchmarks to use for the exemption.

B. Smaller Market Sizes Must Be Used.

As discussed above, a handful of large carriers support the Commission's proposal to use MTAs as the license area. However, the Coalition established in its comments valid justifications for using smaller market areas: Statewide areas should be used for 900 MHz frequencies, since 929 MHz exclusivity was based on coverage to states; and BTAs should be

used for the lower bands, since these systems were generally licensed as local services. Numerous commentors, large and small, agree with the concept of smaller market areas. MobileMedia, Metrocall, Caraway Communications, Consolidated Communications Mobile Services, Inc. and Rule Radiophone Service, Inc. propose Basic Trading Areas (BTAs) as the market area for all or most frequency bands, if auctions are to be held. TeleBEEPER supports statewide licenses as a possible alternative to MTAs. And Pass Word, Inc. supports the use of Economic Areas (EAs). All of these entities agree that market areas smaller than MTAs are necessary if small businesses are to have any hope of competing in the auctions. As MobileMedia points out:

> Many paging systems provide small-area services -- often centered on single locations, campus-type regions or small communities -- none of which approach in size the area covered by even the smallest Major Trading Area (MTA). If the Commission adopted MTA-based licensing, future demand for such small-area services will not be met on an efficient basis, if at all, and user driven growth of current small-area systems will be stymied.

Comments of MobileMedia at p. 3. Therefore, it is vital for the continued competitiveness of small businesses and the availability of low-cost, local paging service that MTAs be abandoned in favor of smaller market areas.

Indeed, use of MTA market areas would appear to violate the Commission's statutory auction authority. Section 309(j)(4)(C) of the Communications Act of 1934, as amended, requires that the Commission "<u>prescribe area designations</u> and bandwidth assignments that promote... economic opportunity for a wide variety of applicants, <u>including small businesses</u>..." (Emphasis added) By choosing MTAs, the Commission is prescribing an area designation which will preclude, rather than promote,

economic opportunity for small businesses. These entities cannot afford to outbid much larger companies for a huge geographic area, and commit themselves to a substantial buildout requirement at the same time.

C. No Spectrum Cap is Needed.

The Commission requested comments on whether a cap is needed on the number of paging frequencies held by a single entity in the same geographic area. Every commentor addressing this issue agreed with the Coalition that no cap was needed, and that if a cap was adopted, it should not apply to incumbent licensees bidding on frequencies they already hold. See, e.g., Comments of Metrocall at p. 18; Comments of PageNet at pp. 37-8; Comments of PCIA at p. 27; Comments of Ameritech at pp. 14-15. The record demonstrates that there are too many paging channels for any single entity to impact competition by aggregating frequencies. In the case of incumbents, a spectrum cap could prevent them from bidding on the market area license needed to expand and modify existing operations, resulting in a loss of service to the public.

D. Bidding Consortia Should Be Allowed Among Incumbents.

The Coalition advocated that incumbents should be allowed to form a consortium to bid on their frequency, in order to preserve existing intercarrier arrangements and to give small businesses a better opportunity to succeed in the auctions. See Comments of the Coalition at p. 17. All of the commentors addressing this issue have agreed that consortia should be allowed. See, e.g., Comments of PCIA at p. 18; Comments of Ameritech at p. 16; Comments of Priority Communications, Inc. at p. 6. In light of this consensus, and

the Congressional mandate to facilitate small business participation in wireless service auctions, the Commission should allow formation of consortia between co-channel licensees. See 47 U.S.C. §309(j)(3)(B).

E. Sealed Bids Should Not Be Used.

Various commentors suggest the use of simplified bidding procedures, such as oral outcry auctions or sealed bids. See, e.g., Comments of Metrocall at p. 20; Comments of Communications Sales and Service, Inc. at p. 10, n.12. The Coalition agrees that simplified bidding procedures are appropriate for paging auctions, if they involve site-by-site auctions between mutually exclusive applications. Because market area licensing will constitute a make-or-break situation for many smaller licensees, it is respectfully submitted that sequential multiple-round auctions must be held, on a frequency-by-frequency basis. Whether the auctions involve market areas or individual site applications, in no event should sealed bid auctions be used. As explained in the Coalition's comments at pp. 16-17, such auctions would require small business licensees to overbid, or risk being outbid by a competitor or speculator. Neither result would serve the public interest.

In this regard, the Coalition agrees with the proposals of PCIA and others that a market-by-market, frequency-by-frequency stopping rule should be used. See Comments of PCIA at p. 32; Comments of MobileMedia at p. 26; Comments of PageNet at p. 3. This procedure would help reduce the incidence of speculators who propose to bid on "all markets, all channels." This shotgun approach was widely used in PCS auctions, but would not be appropriate for paging auctions.

F. Small Business Protections.

PCIA, Airtouch, PageNet and other giant entities oppose bidding credits, installment payments and other benefits for small businesses. According to PCIA, "no special treatment is required for the Commission to comply with Congressional mandates to promote opportunities for participation by designated entities." Comments of PCIA at p. 33. The Coalition agrees that creating an "entrepreneur's block" does not make sense for paging, because carriers of all sizes have been licensed on virtually all of the frequencies.

However, the Coalition must disagree with PCIA and other commentors who argue that bidding credits, installment payments and similar benefits are not necessary for small businesses, and would harm the auction. Such benefits distorted bidding in the C Block PCS auction because virtually <u>all</u> bidders qualified for the same benefits; therefore, bid prices have been artificially inflated across the board. Bidding credits were also of questionable value in the regional narrowband PCS auctions, because they were restricted to particular frequency blocks. However, a straightforward bidding credit without restriction to certain frequencies, coupled with an installment payment option, would mitigate the disparity between small businesses and large entities bidding on the same frequency block.

The Coalition agrees that such benefits are unlikely to make a meaningful difference in most cases, since they will not overcome the inability of smaller carriers to bid on huge license areas such as the MTAs. However, this fact only dictates using smaller market areas, and does not justify putting

small businesses at a further disadvantage by denying them the few meager benefits which are available in the auction format.

III. Post Auction Protections Are Needed for Incumbent Licensees.

A. Interference Protection Must Be Maintained.

The vast majority of commentors oppose the Commission's proposal to adopt new formulas for calculation of service area and interference contours in the 900 MHz bands. See, e.g., Comments of PCIA at pp. 24-5; Comments of Airtouch at pp. 21-6; Comments of Ameritech at pp. 2-6; Comments of PageNet at pp. 11-26; Comments of Liberty Cellular, Inc. at pp. 3-6; Comments of TSR Paging, Inc. at p. 22. These comments, and the engineering analyses included with them, clearly demonstrate that the proposed new formulas would compromise existing coverage and thereby result in a net loss of service to the public. Coalition member Radiofone, Inc. has conducted preliminary studies of propagation under the proposed formulas, and has found that existing coverage will be lost in the manner discussed in the engineering studies sited above. Accordingly, the Commission must abandon its ill-founded proposal.

In its March 1, 1996 comments (at p. 22), the Coalition pointed out that the Commission's contour reduction proposal may constitute a "taking" under the Fifth Amendment of the United States Constitution. TSR Paging, Inc. and PageNet have provided further research demonstrating that the Commission's proposal would be unconstitutional. See Comments of TSR Paging, Inc. at p. 22; Comments of PageNet at pp. 18-26. This constitutional infirmity is but

one more reason (albeit a compelling one) for the Commission to abandon its proposal. Accordingly, the Commission should abide by the evidence in the record of this proceeding, and retain the current fixed radius method of protection for 900 MHz band operations embodied in its rules.

B. Expansion Rights for Incumbents.

The commentors of record strongly support expansion rights for incumbent licensees. See, e.g., Comments of ProNet, Inc. at pp. 12-15; Comments of Ameritech at pp. 17-18; Comments of Western Radio Services Company at pp. 3-4; Comments of Huffman Communications, Inc. at p. 4; Comments of Metrocall at pp. 10-11; Comments of PagePrompt at pp. 2-3. The only parties opposing such expansion rights are PCIA and some of the same large carriers favoring MTA-sized market area auctions. Again, the record indicates that PCIA does not represent the view of the industry on this issue. It is vital for small businesses to have expansion rights in the post-auction environment, since many of these entities will be unable to successfully bid on the huge market areas which the Commission proposes to auction. Without expansion rights, they will be unable to meet customer demands and unforeseen coverage problems. This outcome would violate the principle of Section 309(j)(3)(B), mandating that participation by small businesses in wireless telecommunications be facilitated. For businesses that have made substantial investments in reliance on the existing rules, the same Fifth Amendment "taking" issue is raised, especially where these entities have not been able to complete substantial buildout of their markets. Their

investment in such systems, encouraged by the Commission, will now be jeopardized.

C. Partitioning.

The record strongly supports the creation of partitioning rights for incumbent licensees and small businesses. See, e.g., Comments of PCIA at pp. 18; Comments of Metrocall at p.ii; Comments of the Coalition at p. 21. Commentors addressing this issue agree that partitioning rights will help to mitigate the potential harm of market area auctions on these entities, and will allow for the more efficient use of spectrum in areas that the market area licensee may not otherwise serve. However, the Coalition reiterates its observation that partitioning rights will not undo the severe disruption of the paging industry that will be caused by market area licensing.

IV. The Commission Must Honor Exclusivity and Slow Growth Rights Granted to Private Carrier Paging Systems.

The record confirms that the Commission must honor the exclusivity rights granted to 929 MHz private carrier paging licensees, since these carriers have made significant investments in reliance on the Commission's exclusivity rules. It is also vital that the Commission honor the slow growth schedules granted to such carriers. See Comments of PageMart, Inc. at p. 9. These carriers have made their business plans, organized their resources, ordered equipment, and in many cases have borrowed large sums of money on the basis of the approved schedule.

Indeed, as demonstrated in the separate comments of Coalition member Radiofone, Inc., some of these carriers have posted performance bonds of

several million dollars, and stand to lose significant amounts in the form of penalties if the current filing freeze and eventual market area licensing scheme prevent them from modifying their systems as necessary to complete their buildout. It would be arbitrary and capricious, and harmful to the public subscribers of these systems, to rescind their rights under the extended implementation rules. Id.

CONCLUSION

As discussed above, significant modifications to the proposed market area licensing rules are needed to ensure that existing services are not jeopardized. Accordingly, the Commission should revise its proposed licensing scheme in the manner detailed above.

Respectfully submitted,

By: John A. Prendergast
Richard D. Rubino
Attorneys for
The Paging Coalition

BLOOSTON, MORDKOFSKY, JACKSON
& DICKENS
2120 L Street, N.W., Suite 300
Washington, D.C. 20037
(202) 659-0830

Filed: April 2, 1996

ATTACHMENT A

Ameritel Paging, Inc.

Anserphone of Natchez, Inc.

CommNet Paging Inc.

Metro/Delta, Inc.

Oregon Telephone Corporation

Paging Systems Management, Inc.

Professional Answering Service, Inc.

Radio Paging Service

Radiofone, Inc.

RCC Paging, Inc.

Sema-Phoon, Inc.

Teletouch Licenses, Inc.

Ventures in Paging L.C.

Clifford D. and Barbara J. Moeller d/b/a Valley Answering Service

CERTIFICATE OF SERVICE

I, Elizabeth A. Ebere, hereby certify that I am an employee of Blooston, Mordkofsky, Jackson & Dickens, and that on this 2nd day of April, 1996, I caused to be delivered by first-class U.S. mail, postage prepaid, a copy of the foregoing **Reply Comments of the Paging Coalition on Market Area Auction Proposal** to the following:

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, NW Room 814
Washington, DC 20554

Commissioner James Quello*
Federal Communications Commission
1919 M Street, NW Room 802
Washington, DC 20554

Commissioner Andrew Barrett*
Federal Communications Commission
1919 M Street, NW Room 826
Washington, DC 20554

Commissioner Rachelle Chong*
Federal Communications Commission
1919 M Street, NW - Room 844
Washington, DC 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, NW - Room 832
Washington, DC 20554

Michelle Farquhar, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

David Furth, Acting Chief*
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

ITS
Room 246
1919 M Street, NW
Washington, DC 20554

* By Hand Delivery

A. Thomas Carroccia, Esq.
Bell, Boyd & Lloyd
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036
For: A+ Communications, Inc.

John L. Crump
d/b/a ACE Communications
11403 Waples Mill Road
P.O. Box 3070
Oakton, VA 22124

George V. Wheeler, Esq.
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
For: American Paging, Inc.

Donald J. Evans, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W., Suite 810
Washington, D.C. 20006
For: B & B Communications, Inc.

Jill Abeshouse Stern, Esq.
Robert J. Cynkar, Esq.
Janice H. Ziegler, Esq.
Edmund D. Daniels, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
For: Coalition for a Competitive Paging Industry

Veronica M. Ahern, Esq.
Nixon, Hargrave, Devans & Doyle
One Thomas Circle
Washington, D.C. 20005
For: Consolidated Communications Mobile Services, Inc.

Michael J. Shortley, III, Esq.
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Joseph Konopny, Esq.
William L. Fishman, Esq.
Sullivan & Worcester, LLP
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
For: Diamond Page Partnerships
AmericaOne
Northwest Pager
Metro Paging
West Virginia Pager
PagerOne

Alan S. Tilles, Esq.
Meyer, Faller, Weisman & Rosenberg
440 Jenifer Street, N.W., Suite 380
Washington, D.C. 20015
For: Glenayre Technologies, Inc.

Gene P. Belardi, Vice President
MobileMedia Communications, Inc.
2101 Wilson Boulevard, Suite 935
Arlington, VA 22201

Thomas Gutierrez, Esq.
J. Justin McClure, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
For: Mobile Telecommunication
Technologies Corporation

William J. Franklin, Esq.
William J. Franklin, Chartered
1200 G Street, N.W., Suite 800
Washington, D.C. 20005-3814
For: North State Communications Inc.
Rule Radiophone Service, Inc.
Rule Communications

Robert R. Rule
Rule Communications, Inc.
2232 Dell Range Boulevard
Cheyenne, WY 82009

Lucille M. Mates, Esq.
Pacific Bell
140 New Montgomery St., Rm 1526
San Francisco, CA 94105

James L. Wurtz, Esq.
Margaret E. Garber, Esq.
Pacific Telesis
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
For: Pacific Bell

Judith St. Ledger-Roty, Esq.
Paul G. Madison, Esq.
Reed, Smith, Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
For: Paging Network, Inc.

Phillip L. Spector, Esq.
Thomas A. Boasberg, Esq.
Paul, Weiss, Rifkind, Wharton
& Garrison
1615 L Street, N.W.
Washington, D.C. 20036
For: Pagemart, Inc.

John D. Pellegrin, Esq.
John D. Pellegrin, Chartered
1140 Connecticut Avenue, N.W.
Suite 606
Washington, D.C. 20036

Katherine M. Holden, Esq.
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
For: Personal Communications
Industry Association

Mark J. Golden
Vice President of Industry Affairs
Personal Communications Industry Assn
1019 19th Street, N.W., Suite 1100
Washington, D.C. 20036

George L. Lyon, Jr., Esq.
Pamela Gaary, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
For: Jon D. Word
Pioneer Telephone Cooperative

Terry J. Romine, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
For: Preferred Networks, Inc.

Ellen S. Mandell, Esq.
Pepper & Corazzini, LLP
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
For: Pagers Plus
Priority Communications, Inc.

Jerome K. Blask, Esq.
Daniel E. Smith, Esq.
Gurman, Blask & Freedman, Chartered
1400 Sixtheenth Street, N.W.
Suite 500
Washington, D.C. 20036
For: ProNet Inc.

Robert H. Schwaninger, Jr., Esq.
Brown and Schwaninger
1835 K Street, N.W., Suite 650
Washington, D.C. 20006

David L. Hill, Esq.
Audrey P. Rasmussen, Esq.
O'Connor & Hannan
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3483
For: Paging Partners Corporation
Source One Wireless, Inc.

Richard S. Becker, Esq.
James S. Finerfrock, Esq.
Jeffrey E. Rummel, Esq.
Richard S. Becker & Assoc., Chartered
1915 Eye Street, N.W., 8th Floor
Washington, D.C. 20006
For: TSR Paging Inc.

Raymond C. Trott, P.E.
Trott Communications Group, Inc.
1425 Greenway Drive, Suite 350
Irving, TX 75038

Steven S. Seltzer, President
Personal Communications, Inc.
RCC of Pennsylvania, Inc.
Modern Communications Corp.
P.O. Box One
Altoona, PA 16603-0001

Amelia L. Brown, Esq.
Henry A. Solomon, Esq.
Haley, Bader & Potts
4350 N. Fairfax Drive, Suite 900
Arlington, VA 22203-1633
For: Personal Communications, Inc.
RCC of Pennsylvania, Inc.
Modern Communications Corp.
Western Radio Services Co., Inc.

Frederick M. Joyce, Esq.
Christine McLaughlin, Esq.
Joyce & Jacobs, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
For: A+ Network
Brandon Communications
Merryville Investments
Metrocall, Inc.
Morris Communications, Inc.
Nationwide Paging, Inc.
Page-USA, Inc.
Pager One

George L. Lyon, Jr., Esq.
David Nace, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
For: Page Telelcommunications, LLC
Heartland Telecommunications

Alan R. Shark, President
American Mobile Telecommunications Association
1150 18th Street, N.W., Suite 250
Washington, D.C. 20036

Rick Hafla
Teton Communications, Inc.
545 South Utah Avenue
Idaho Falls, ID 83402

Pamela L. Gist, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 M Street, N.W., 12th Floor
Washington, D.C. 20036
Counsel for: Liberty Cellular, Inc.

Charles D. Cosson, Esq.
Mary McDermott, Esq.
Linda Kent, Esq.
U.S. Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

William Ciuffo
Comp Comm, Inc.
One Echelon Plaza, Suite 100
227 Laurel Road
Voorhees, NJ 08043-2331

Lloyd D. Huffman
Huffman Communications
2829 West 7th Avenue
P. O. Box 1753
Corsicana, TX 75151-1753

Caressa D. Bennet, Esq.
Michael R. Bennet, Esq.
Bennet & Bennet, PLLC
1831 Ontario Place, N.W., Suite 200
Washington, D.C. 20009
For: Border to Border Communications

Larry Shaefer, President
SMR Systems, Inc.
4212 Mt. Vernon
Houston, TX 77006-5416

Dallas Vanderhoof
General Manager
TeleBEEPER of New Mexico, Inc.
P.O. Box 25161
Albuquerque, NM 87125

Laura H. Phillips, Esq.
Christina H. Burrow, Esq.
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, NW
Suite 800
Washington, D.C. 20036-6802
For: Sunbelt Transmission Corp.
Snider Communications Corp.

Lawrence M. Miller, Esq.
Schwartz, Woods & Miller
1320 Connecticut Avenue, NW
Suite 300
Washington, D.C. 20036
For: Datafon II, Inc.
Zipcall Long Distance, Inc.

James F. Roberts, Esq.
Marsha Y. Reeves, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, NW
Suite 300
Washington, D.C. 20004-2505
For: PageAmerica Group, Inc.

Donald A. Fishman, Esq.
Kevin C. Boyle, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, NW
Suite 300
Washington, D.C. 20004-2505
For: MobileMedia Communications, Inc.

David C. Jatlow, Esq.
Young & Jatlow
2300 N Street, NW, Suite 600
Washington, D.C. 20037
For: AT&T Wireless

Dennis L. Myers, Vice President
Ameritech Cellular Services
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, IL 60195-5000