RICHARD S [redacted] SOCIATES

WASHING

RICHARD S BECKER
JEFFREY E RUMMEL

OF COUNSEL
JAMES S FINERFROCK

CONSULTING ENGINEERS
SIAMAK HARANDI
DEAKIN LAUER

RECEIVED
MAY - 6 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 6, 1996

DOCKET FILE COPY ORIGINAL

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

Re: WT Docket No. 96-18
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith on behalf of TSR Paging Inc. are an original and eleven (11) copies of an "Emergency Petition For Reconsideration" with respect to the First Report and Order, FCC 96-183 (released April 23, 1996) in the above-captioned proceeding.

Should any questions arise with respect to this matter, please communicate directly with undersigned counsel.

Respectfully submitted,

Richard Becker

Richard S. Becker
Attorney for TSR Paging Inc.

Enclosures

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

RECEIVED
MAY - 6 1996
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	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

EMERGENCY PETITION FOR RECONSIDERATION

Respectfully submitted,

TSR PAGING INC.

Richard S. Becker
James S. Finerfrock
Jeffrey E. Rummel
Richard S. Becker & Associates, Chartered
1915 Eye Street, N.W.; 8th Floor
Washington, DC 20006
(202) 833-4422

Its Attorneys

Date: May 6, 1996

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

RECEIVED
MAY - 6 1996
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	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

RECEIVED
MAY - 6 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

EMERGENCY PETITION FOR RECONSIDERATION

Respectfully submitted,

TSR PAGING INC.

Richard S. Becker
James S. Finerfrock
Jeffrey E. Rummel
Richard S. Becker & Associates, Chartered
1915 Eye Street, N.W.; 8th Floor
Washington, DC 20006
(202) 833-4422

Its Attorneys

Date: May 6, 1996

TABLE OF CONTENTS

Table of Contents i

Summary ii

I. Background 1

II. The Commission Impermissibly Adopted The First R&O Without Considering TPI's Interim Comments Or Interim Reply Comments 9

III. The First R&O Violates Explicit Commission Regulations 12

IV. The First R&O Violates The Purpose Underlying Applicable Commission Regulations 16

V. The First R&O Violates Section 316 Of The Act 18

VI. The First R&O Impermissibly Treats Similarly Situated Licensees Differently 23

VII. Conclusion 25

SUMMARY

By this Emergency Petition For Reconsideration, TSR Paging Inc. ("TPI") seeks **IMMEDIATE** reconsideration of the First Report and Order ("First R&O") in the above-captioned proceeding.

In its Notice Of Proposed Rulemaking ("NPRM"), the Commission proposed extensive revisions to its regulation of Part 22 ("CCP") and Part 90 ("PCP") paging services. The Commission also adopted an Interim Licensing Proposal, which included a freeze ("Freeze") on acceptance of new applications for paging channels as of February 8, 1996, and an exemption to the Freeze for nationwide exclusive CCP and PCP licensees. TPI filed Interim Comments and Interim Reply Comments in response to the NPRM, as well as Further Comments on the remainder of the proposals in the NPRM.

In its comments, TPI demonstrated that TPI is now licensed for a nationwide exclusive paging system ("TPI Nationwide System") on the PCP Channel 929.2125 MHz pursuant to authorizations ("TPI Nationwide System Authorization") coordinated as nationwide exclusive by PCIA and granted by the Commission. TPI made clear that TPI is now completing construction of this system pursuant to an extended implementation authorization ("Slow Growth Authorization") granted by the Commission on December 1, 1995, and that based on its extraordinary efforts thus far, TPI will complete construction of the remaining facilities specified in the Slow Growth Authorization ("Slow Growth Transmitters") well ahead of the authorized construction schedule.

The vast majority of TPI's comments were devoted to a single issue that is critically important to TPI -- i.e., TPI's nationwide exclusive PCP frequency 929.2125 MHz must be exempt from the Freeze because TPI's frequency must be recognized by the Commission as a nationwide exclusive PCP frequency that will be excluded from geographic licensing. In the First R&O, however, although the Commission slightly modified the Freeze ("Modified Freeze"), the Commission failed to address TPI's Interim Comments and Interim Reply Comments. The Commission has also failed to release the Public Notice promised in the NPRM that is supposed to list all nationwide exclusive PCP frequencies that are exempt from the Modified Freeze and excluded from geographic licensing.

As a result, the Commission must act **IMMEDIATELY** to reconsider the First R&O to make clear that TPI's frequency 929.2125 MHz qualifies as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze because it will be excluded from geographic licensing. Emergency reconsideration is required on the following independent grounds:

First, contrary to well-established precedent, the Commission failed to consider the TPI Interim Comments and Interim Reply

Comments, which set forth highly relevant and vital facts and arguments demonstrating that TPI's frequency 929.2125 MHz must be included as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing.

Second, the failure by the Commission to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze and excluded from geographic licensing is in direct violation of the Commission's own rules and decisions and the previously-articulated Commission purpose for those rules. Specifically, pursuant to 47 C.F.R. §§90.495(b), 90.495(c) and 90.496: (1) TPI was granted nationwide exclusivity on PCP frequency 929.2125 MHz "at the time of initial licensing;" (2) this exclusivity authorization included not only the right to construct and operate the transmitters identified in the TPI Nationwide System Application and Authorization, but also the right for a specified period of time to install 929.2125 MHz transmitters throughout the United States without any co-channel authorizations being granted to any other applicant; (3) based on TPI's Slow Growth Authorization, TPI's nationwide exclusivity was extended "for the duration of the construction period" and TPI still has a significant amount of time left in that construction period. The Commission violated these regulations by failing in the First R&O to identify TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing. This action also violated the intent behind these regulations to foster the development of nationwide systems.

Third, in violation of Section 316 of the Communications Act of 1934, as amended, the Commission unilaterally and impermissibly modified the TPI Nationwide System Authorization without a requisite hearing by: (1) terminating TPI's operational flexibility to complete construction of the remaining Slow Growth Transmitters; (2) terminating TPI's ability to expand the TPI Nationwide System beyond the remaining Slow Growth Transmitters; and (3) allowing other entities to apply for 929.2125 MHz in violation of the TPI Nationwide System Authorization and the Commission's Rules. The Commission's action also violated TPI's fundamental rights to due process of law and may constitute a "taking" within the meaning of the just compensation clause of the Fifth Amendment to the Constitution.

Fourth, by failing to address TPI's frequency 929.2125 MHz in the First R&O, the Commission also impermissibly treated TPI in a substantially different manner than other, similarly-situated licensees of nationwide exclusive CCP and PCP channels. All parties are licensed for frequencies on which no further licensing can occur throughout the country by operation of the Commission's Rules and the Commission did not, and can not, justify disparate treatment for TPI based on the fact that TPI did not complete construction of the TPI Nationwide System by the February 8, 1996, adoption date of the NPRM.

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

EMERGENCY PETITION FOR RECONSIDERATION

TSR Paging Inc. ("TPI"), by its attorneys and pursuant to 47 C.F.R. §1.429, hereby submits this Emergency Petition For Reconsideration ("Emergency Petition") of the First Report and Order, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-183 (released April 23, 1996) ("First R&O") in the above-captioned proceeding. Simultaneously herewith, TPI is submitting an Emergency Motion For Stay ("Emergency Motion") seeking Commission stay of the interim rule provisions adopted in the First R&O pending Commission action on this Emergency Petition. In support of this Emergency Petition, the following is respectfully shown.

I. Background

1. In its Notice Of Proposed Rulemaking[1] in the above-captioned proceeding, the Commission proposed extensive revisions to its regulation of common carrier paging ("CCP") services pursuant to Part 22 of the Commission's Rules and private paging ("PCP") services pursuant to Part 90 of the Commission's Rules.

---

[1]Notice Of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52 (February 9, 1996) (hereinafter "NPRM").

Specifically, the Commission proposed to move from the current site-specific regulatory approach to a geographic licensing approach where the Commission will issue single licenses for geographic areas that encompass many sites.[2] The Commission also proposed to adopt competitive bidding rules for mutually-exclusive ("MX") applications for geographic paging licenses.[3]

2. In addition to its geographic licensing and competitive bidding proposals, the Commission also adopted an Interim Licensing Proposal, which included numerous provisions regarding Commission acceptance and processing of applications for both CCP and PCP channels during the pendency of the above-captioned proceeding.[4] The Interim Licensing Proposal included the following provisions:

- A freeze ("Freeze") on acceptance of new applications for paging channels as of the February 8, 1996, adoption date of the NPRM (the "Adoption Date").[5]
- Exception from the freeze to allow "incumbent" CCP and PCP licensees (i.e., those CCP and PCP licensees authorized for paging systems as of the Adoption Date) to add co-channel transmitter sites and/or modify existing transmitter sites if the interference contour(s) of the new or modified transmitter sites do not expand the composite interference contour of the incumbent's existing system. NPRM at ¶¶140, 141.
- For CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel, the Commission permitted co-channel applications without restrictions. NPRM at ¶142.

---

[2]NPRM at ¶1.

[3]Id.

[4]Id. at ¶¶139-149.

[5]Id. at ¶139. TPI has been informally advised by the Commission and PCP Channel frequency coordinator, the Personal Communications Industry Association ("PCIA"), that the Freeze has applied to all CCP and PCP channels.

- With respect to processing of currently pending CCP and PCP applications, the Commission proposed to process any such applications that are not MX and for which the period for filing competing applications had expired as of the Adoption Date. NPRM at ¶¶144-149.

3. On March 1, 1996, TPI filed Comments ("Interim Comments") with respect to the Interim Licensing Proposal adopted by the Commission as part of the NPRM. On March 11, 1996, TPI filed Reply Comments with respect to the Interim Licensing Proposal ("Interim Reply Comments"). On March 18, 1996, in accordance with the bifurcated comment process specified in the NPRM,[6] TPI filed Comments ("Further Comments") in response to the remaining proposals specified in the NPRM.

4. In its Interim Comments, Interim Reply Comments and Further Comments,[7] TPI demonstrated that TPI is a communications company primarily engaged in the provision of one-way paging services. TPI currently provides wide-area, one-way paging service in numerous states, including New York, Connecticut, Rhode Island, Massachusetts, Maine, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, the District of Columbia, Texas, Wisconsin, Illinois, Indiana, New Mexico, Arizona, Nevada and California. TPI provides one-way paging service on both CCP Channels and 929 MHz PCP Channels. In point of fact, TPI is now licensed for a nationwide

---

[6]NPRM at ¶¶153-154.

[7]The TPI Interim Comments, Interim Reply Comments and Further Comments may be referred to collectively as the "TPI Comments."

exclusive paging system on the PCP Channel 929.2125 MHz[8] and TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization granted to TPI by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496.[9] TPI has made extraordinary strides in its efforts to complete construction of the TPI Nationwide System well ahead of the construction deadlines specified in the Slow Growth Authorization and TPI believes that it will be able to complete construction of the remaining facilities specified in the Slow Growth Authorization well ahead of the construction schedule now authorized in the Slow Growth Authorization.

5. The vast majority of the TPI Comments were devoted to a single issue that is critically important to TPI -- i.e., TPI's nationwide exclusive PCP frequency 929.2125 MHz must be exempt from the Freeze adopted in the Interim Licensing Proposal because TPI's frequency must be recognized by the Commission as a nationwide exclusive PCP frequency that will be excluded from geographic licensing. In this regard, in the NPRM, the Commission proposed:

> [T]o exclude from our [geographic licensing] plan those channels that already have been assigned to single licensees on a nationwide basis under our existing rules. We propose to exclude ... all PCP channels for which

---

[8]See, e.g., Station WPGD 501, File No. 674235. This system will be referred to hereinafter as the "TPI Nationwide System." The Commission authorizations for the TPI Nationwide System will be referred to collectively hereinafter as the "TPI Nationwide System Authorization." TPI's application package for the TPI Nationwide System will be referred to hereinafter as the "TPI Nationwide System Application."

[9]See Commission Letter 7110-162 dated December 1, 1995 (hereinafter "Slow Growth Authorization").

> licensees have met the construction requirements for nationwide exclusivity as of the [Adoption Date]. We will announce, by Public Notice, the specific PCP channels exclusive for nationwide use at a later time.
>
> NPRM at ¶26.

The Commission went on to propose as part of the Interim Licensing Proposal that:

> In the case of CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel, we will allow applications for additional sites without restrictions. Because we do not propose to apply geographic licensing to such channels, and no other applicant may apply for them, the addition of such sites by the nationwide licensee will not affect the spectrum available to others and is consistent with the goals of this rulemaking.
>
> NPRM at ¶142.

In the TPI Comments, TPI demonstrated conclusively that its nationwide exclusive PCP frequency 929.2125 MHz should be considered a nationwide exclusive PCP frequency which will be exempt from the Freeze and excluded from geographic licensing.

6. On April 23, 1996, the Commission adopted the First R&O, by which the Commission "adopt[ed] interim measures governing licensing of paging systems for the pendency of this rulemaking."[10] Specifically, the Commission:

- Modified the Freeze to allow incumbent licensees to file applications for additional CCP and PCP transmission sites if the applicant certifies that the proposed transmission site is within 65 kilometers (40 miles) of an authorized and operating transmission site which was licensed to the same applicant on the same channel as of the Adoption Date.[11]

---

[10] First R&O, ¶1. The interim rules adopted in the First R&O will be referred to as the "Interim Rules."

[11] First R&O at ¶26. For ease of reference, TPI will refer to: (1) the Freeze, as modified by the First R&O, as the "Modified Freeze;" and (2) any applications that may be filed pursuant to the

- Determined that CCP applications and applications for exclusive PCP frequencies filed pursuant to the Modified Freeze will be placed on Public Notice by the Commission.[12]

- Held that new applicants may file applications that compete with Modified Freeze Applications[13] "within the applicable filing window."[14]

- Held that the new Interim Rules will be effective upon publication of the First R&O in the Federal Register.[15]

7. In the First R&O, however, the Commission failed in any way to address the vital arguments raised by TPI in its Interim Comments and Interim Reply Comments regarding treatment of TPI's nationwide exclusive PCP frequency 929.2125 MHz as one of the nationwide exclusive PCP channels that are exempt from the Freeze. Although TPI's Interim Comments and Interim Reply Comments were listed at Exhibits A and B of the First R&O, the First R&O failed to address any of the arguments raised by TPI. In point of fact, aside from the listings at Exhibits A and B to the First R&O, there was no reference **WHATSOEVER** in the First R&O to TPI! Moreover, as of the date of filing of this Emergency Petition, the Commission has still failed to release the Public Notice promised at paragraph

---

Modified Freeze that could not have been filed pursuant to the original Freeze as "Modified Freeze Applications."

[12]First R&O at ¶26.

[13]For ease of reference, applications filed by new applicants to compete with Modified Freeze Applications will be referred to herein as "New Post-Freeze Applications."

[14]First R&O at ¶¶4, 26, 29, 41 (30 days for 150/450 MHz CCP channels, 60 days for 931 MHz CCP channels and similar procedures for PCP channels).

[15]First R&O, ¶47. This date will be referred to herein as the "Effective Date."

26 of the NPRM that will settle once and for all whether TPI's frequency 929.2125 MHz will be considered by the Commission as a nationwide exclusive PCP frequency that is both exempt from the Freeze and excluded from geographic licensing.[16] In the First R&O, the Commission did include a footnote that stated, in relevant part, that:

> The freeze affects approximately 135 paging channels. Three 931 MHz common carrier channels have been allocated to licensees on a nationwide basis. In addition, our records indicate that private carrier licensees have met our requirements for nationwide exclusivity on 19 channels in the 929 MHz band.
>
> First R&O at n.8.

The Commission did not, however, specify the licensees of these 19 nationwide exclusive PCP frequencies or whether TPI's frequency 929.2125 MHz is included in that group.

8. As demonstrated in this Emergency Petition, the Commission must act **IMMEDIATELY** to reconsider the First R&O to make clear that TPI's frequency 929.2125 MHz qualifies as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze because it will be excluded from geographic licensing. Emergency reconsideration is required because:

- In its First R&O, the Commission improperly failed to consider the arguments raised in the TPI Interim Comments and Interim Reply Comments. Moreover, by failing to release the PCP Nationwide Exclusive Frequency PN, the Commission failed to clarify whether TPI's frequency 929.2125 MHz must be included as one of the PCP nationwide exclusive frequencies that is

---

[16]This Public Notice will be referred to as the "PCP Nationwide Exclusive Frequency PN." It should be noted that pursuant to informal contacts with Commission staff, it is TPI's understanding that TPI's nationwide exclusive frequency 929.2125 MHz will not be included in the PCP Nationwide Exclusive Frequency PN.

both exempt from the Modified Freeze and excluded from geographic licensing.

- The failure by the Commission to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze and excluded from geographic licensing is in direct violation of the Commission's own rules and decisions and the previously-articulated Commission purpose for those rules.

- The Commission's failure to identify 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing constituted a unilateral modification of the TPI Nationwide System Authorization, which violated Section 316 of the Communications Act of 1934, as amended (the "Act"), fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems.

- By failing to address TPI's frequency 929.2125 MHz in the First R&O, the Commission also impermissibly treated TPI in a substantially different manner than other, similarly-situated licensees of nationwide exclusive CCP and PCP channels.

Accordingly, TPI respectfully submits that the Commission must act **IMMEDIATELY** in response to this Emergency Petition to reconsider the First R&O to clarify that TPI's frequency 929.2125 MHz is a nationwide exclusive PCP frequency that is exempt from the Freeze. The Commission must also act consistently by issuing the PCP Nationwide Exclusive Frequency PN to include TPI's frequency 929.2125 MHz and adopting final rules in the above-captioned proceeding making clear that TPI's frequency 929.2125 MHz is a nationwide exclusive PCP frequency exempt from geographic licensing, at least during the outstanding construction period authorized pursuant to TPI's Slow Growth Authorization.[17]

---

[17]In this regard, in TPI's Further Comments, TPI made clear that if TPI fails to comply with nationwide exclusivity construction requirements as of the date of expiration of TPI's Slow Growth Authorization, TPI's nationwide exclusivity on this

II. The Commission Impermissibly Adopted The First R&O Without Considering TPI's Interim Comments Or Interim Reply Comments

9. As demonstrated supra, in response to the Interim Licensing Proposal specified in the NPRM, TPI submitted the Interim Comments and the Interim Reply Comments, which demonstrated conclusively that TPI's nationwide exclusive frequency 929.2125 MHz should be included as a nationwide exclusive PCP frequency that is exempt from the Freeze and excluded from geographic licensing.[18] Although the Commission did list these TPI Comments at Exhibits A and B to the First R&O, the Commission in no way addressed the critical arguments raised in the TPI Interim Comments and Interim Reply Comments that TPI's nationwide exclusive PCP frequency 929.2125 MHz must be excluded from the Freeze because this frequency will be exempt from geographic licensing. The Commission made no reference or citation to TPI's Interim Comments or Interim Reply Comments. Moreover, in the one footnote that addressed nationwide exclusive frequencies, the Commission failed to find that TPI's frequency 929.2125 MHz will be included as a nationwide

---

frequency will terminate by operation of the Commission's Rules. Further Comments, ¶¶9, 12-14. In that highly unlikely event, the Commission would be free to geographically license 929.2125 MHz treating TPI's existing transmitter sites merely as incumbents. As specified above, however, TPI has already made extraordinary strides toward completion of construction of the TPI Nationwide System in full compliance with the Commission's nationwide exclusivity construction requirements and TPI fully expects to complete such construction in the immediate future, well ahead of the construction schedule specified in the Slow Growth Authorization.

[18] Interim Comments, p.8-12, 17-20; Interim Reply Comments, p.6-9.

exclusive frequency exempt from the Freeze. In point of fact, the Commission has still not released the PCP Nationwide Exclusive Frequency PN that could have clarified the Commission's determination on this issue so vital to TPI. In short, the Commission failed completely to take TPI's Interim Comments or Interim Reply Comments into account in the Commission's consideration and adoption of the Interim Rules in the First R&O.

10. It is well-established that in a notice and comment rulemaking proceeding such as the above-captioned proceeding, the Commission must consider all relevant comments submitted and issue a decision incorporating the Commission's finding and a brief statement of the reasons therefor.[19] In the First R&O, the Commission failed in any way to address the arguments raised by TPI in its Interim Comments and Interim Reply Comments despite the fact that TPI's arguments in those TPI Comments were highly relevant and of substantial importance to the Interim Rules being considered by the Commission. TPI respectfully submits, therefore, that the First R&O must be reconsidered because the Commission failed to consider or address the highly relevant facts and arguments presented in TPI's Interim Comments and Interim Reply Comments

---

[19] 5 U.S.C. §553; 47 C.F.R. §§1.399, 1.425; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1970); Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); Center for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C.Cir. 1985); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1424-1425 (D.C.Cir. 1983); Telocator Network of America, 691 F.2d 525, 537 (D.C.Cir. 1982); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C.Cir. 1977), cert. denied, 434 U.S. 829 (1977).

regarding the need to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Freeze and excluded from geographic licensing. The Commission's failure to consider TPI's Interim Comments and Interim Reply Comments was arbitrary and capricious and must be reversed immediately.

11. It should also be noted that in the First R&O, the Commission stated in a footnote that, "[i]ssues raised in the interim comments pertaining to final paging rules will not be discussed in this Order, but will be deferred to the final Report and Order in this docket."[20] This footnote might indicate that the Commission failed to consider the status of TPI's nationwide exclusive frequency 929.2125 MHz as raised TPI's Interim Comments and Interim Reply because the Commission felt that this issue related to the final rules that still must be adopted in the above-captioned proceeding.[21] This position is, however, incorrect.

12. In the NPRM, the Commission inextricably linked the issue of which PCP frequencies are subject to the Freeze to the issue of whether a specific PCP frequency qualifies as a nationwide frequency that will be exempt from geographic licensing.[22] This connection was maintained in the First R&O, where the Commission

---

[20]First R&O at n.1.

[21]For ease of reference, the final rules that still must be adopted by the Commission in the above-captioned proceeding will be referred to as the "Final Rules."

[22]NPRM at ¶142 (exemption from the Freeze applies to "CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel" because "we do not propose to apply geographic licensing to such channels, and no other applicant may apply for them....")

continued to permit filing and processing of applications for nationwide exclusive PCP frequencies as an exemption to the Modified Freeze.[23] Accordingly, the Commission's definition of which PCP channels qualify as nationwide exclusive PCP channels determines not only whether each frequency will be subject to geographic licensing in the as-yet-unadopted Final Rules, but also whether applications for that frequency may be filed and processed pursuant to an exemption to the Modified Freeze.

13. Accordingly, it is clear that the Commission must **IMMEDIATELY** reconsider the First R&O because the Commission failed to consider the TPI Interim Comments and Interim Reply Comments, which set forth highly relevant and vital facts and arguments demonstrating that TPI's Nationwide System frequency 929.2125 MHz must be included as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing.

III. The First R&O Violates Explicit Commission Regulations

14. By failing in the First R&O to identify 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing, the Commission violated the following explicit provisions of the Commission's own rules with respect to the TPI Nationwide System.

15. Section 90.495(c) of the Commission's Rules unequivocally provides that:

> A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section

---

[23] First R&O at ¶¶6, 7, 26, n.8.

> will be granted exclusivity under this section <u>at the time of initial licensing</u>. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.
>
> 47 C.F.R. §90.495(c) (emphasis added).

Accordingly, it is clear that upon grant of the TPI Nationwide System Authorization, TPI was granted nationwide exclusivity on PCP frequency 929.2125 MHz. The TPI Nationwide System Application had been properly coordinated by PCIA and PCIA had certified the TPI Nationwide System as qualifying for nationwide exclusivity pursuant to 47 C.F.R. §90.495(a)(3).[24] By granting the TPI Nationwide System Application, the Commission granted TPI nationwide exclusivity on the PCP frequency 929.2125 MHz. This grant of exclusivity occurred by operation of Section 90.495(c) of the Commission's Rules.

16. Moreover, Section 90.495(b) of the Commission's Rules explicitly states that:

> If a paging licensee qualifies for exclusivity under paragraph (a) of this section, no co-channel authorization may be granted to another applicant except in compliance with the separation requirements set forth in this paragraph.
>
> 47 C.F.R. §90.495(b).

With respect to nationwide exclusive channels, Section 90.495(b)(3) goes on to state that:

> No co-channel authorization will be granted in the continental United States, Alaska, Hawaii, or Puerto Rico on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section.

---

[24] <u>See</u> PCIA No. 940000360.

47 C.F.R. §90.495(b).

These unambiguous regulations, by their plain meaning, confirm that "at the time of initial licensing" of the TPI Nationwide System, TPI obtained nationwide exclusivity on 929.2125 MHz and that this frequency became protected from co-channel licensing anywhere in the United States.[25] In point of fact, once TPI qualified for nationwide exclusivity on 929.2125 MHz as confirmed by PCIA's coordination of the TPI Nationwide System Application, no further 929.2125 MHz authorizations could be coordinated by PCIA or authorized by the Commission.

17. The only limitation on the nationwide exclusivity rights granted "at the time of initial licensing" pursuant to 47 C.F.R. §§90.495(b) and 90.495(c) is that the exclusivity will expire "unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date."[26] Section 90.496 goes on to provide that certain PCP exclusive licensees may request extended implementation authorization to allow for construction of the authorized exclusive PCP system for a period of up to three (3) years.[27] In either case, however, failure to comply with the applicable construction requirement results in "loss of authorizations for facilities not constructed and loss of

---

[25] 47 C.F.R. §§90.495(b) and (c).

[26] 47 C.F.R. §90.495(c).

[27] 47 C.F.R. §90.496.

exclusivity as provided in §90.495(c)."[28]

18. It must also be emphasized that Section 90.496(d) of the Commission's Rules clearly states that:

> If an extended construction schedule is authorized under this section, channel exclusivity under §90.495 will be extended for the duration of the construction period.

47 C.F.R. §90.496(d) (emphasis added).

Accordingly, once an extended implementation authorization (like the Slow Growth Authorization issued to TPI on December 1, 1995) is granted by the Commission, the exclusivity granted "at the time of initial licensing" pursuant to 47 C.F.R. §90.495(c) is extended "for the duration of the construction period."[29]

19. Accordingly, pursuant to the explicit provisions of Sections 90.495(b), 90.495(c) and 90.496 of the Commission's Rules, TPI was granted nationwide exclusivity on PCP frequency 929.2125 MHz "at the time of initial licensing." This exclusivity authorization included not only the right to construct and operate the transmitters identified in the TPI Nationwide System Application, but also the right for a specified period of time to install 929.2125 MHz transmitters throughout the United States without any co-channel authorizations being granted to any other applicant.[30] Based on the Commission's December 1, 1995, grant of TPI's Slow Growth Authorization, TPI's nationwide exclusivity was

---

[28] 47 C.F.R. §90.496(e); see also 47 C.F.R. §§90.495(c)(1) and (2).

[29] 47 C.F.R. §90.496(d).

[30] 47 C.F.R. §§90.495(b), (b)(3).

extended "for the duration of the construction period" and TPI still has a significant amount of time left to complete construction of the TPI Nationwide System as specified in TPI's Slow Growth Authorization. The Commission violated these regulations by failing in the First R&O to identify TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing.

IV. The First R&O Violates The Purpose Underlying Applicable Commission Regulations

20. In establishing nationwide exclusivity and bestowing on nationwide exclusive licensees the right to construct nationwide systems without any co-channel applicants during a specified period of time, the Commission clearly articulated its intent to foster the development of nationwide systems.[31] This regulatory intent was also reflected in the Commission's stated justification for requiring that all Phase II PCP applicants comply with either local, regional or nationwide exclusivity requirements and establishing a dispositive eligibility preference in MX situations in favor of existing licensees expanding PCP systems over new

---

[31]In its decision adopting PCP exclusivity requirements, the Commission stated that:

> The purpose of nationwide exclusivity is not only to prevent interference with existing operations, but to provide an incentive for future expansion of coverage by nationwide licensees.

Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8323 (1993) (hereinafter "R&O"), recon., Memorandum Opinion and Order, FCC 96-53 (February 13, 1996).

licensees seeking to establish initial PCP systems.[32]

21. The unmistakable effect of the Commission's failure in the First R&O to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing is to terminate TPI's ability to complete construction of the TPI Nationwide System as efficiently and rapidly as possible pursuant to the Slow Growth Authorization and to further expand the TPI Nationwide System throughout the nation as authorized pursuant to the above-specified provisions of Sections 90.495 and 90.496 of the Commission's Rules. Instead of allowing TPI to retain its already-authorized ability to install the widest-possible area paging system (i.e., a nationwide paging system), failure to include 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and

---

[32]Specifically, the Commission stated that:

> First, the restriction will tend to encourage development of systems that cover a larger area over those that cover a smaller area. Because increased coverage allows customers greater mobility without loss of access to service, we believe that wider-area systems are generally more beneficial to paging customers and more responsive to the rising demand for paging services. Second, allowing existing licensees to expand their service area will result in broader coverage for existing users of those systems, whereas authorizing a new competing system would prevent such users from obtaining expanded coverage without subscribing to both services. Third, by encouraging expansion of existing systems, the restriction will promote rapid access to wide-area service for new users as such systems reach new areas, whereas applicants who have yet to construct any portion of their systems would generally require more time to make wide-area service available.

R&O at 8330.

excluded from geographic licensing will allow other licensees (including applicants filing Modified Freeze Applications and New Post-Freeze Applications) the opportunity to establish new, smaller paging systems, thereby fragmenting operation on 929.2125 MHz and precluding the establishment of the very nationwide paging systems that the Commission's PCP exclusivity requirements were specifically intended to foster.

V. The First R&O Violates Section 316 Of The Act

22. It is well-established that a Commission authorization "requiring - as it does - substantial investment is more than a mere privilege or gratuity. [It] is a thing of value to the person to who it is issued and a business conducted under it may be the subject of injury."[33] Consistent with this maxim, Section 316 of the Act explicitly provides licensees with the right to a hearing before their licenses may be modified unilaterally by the Commission.[34]

---

[33]See L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C.Cir. 1948).

[34]Section 316 provides, in relevant part, that:

> (a) Any station license ... may be modified by the Commission ... if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States.... No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue.

23. As set forth above, the Commission granted to TPI the TPI Nationwide System Authorization, which authorizes not only the individual 929.2125 MHz transmitter sites specified in the TPI Nationwide System Application, but also includes authorization to establish additional 929.2125 MHz transmitter sites throughout the country without competition from co-channel applicants during a specified construction period.[35] By granting to TPI the December 1, 1995, Slow Growth Authorization, that construction period has now been extended and both the construction period and TPI's nationwide exclusivity are still outstanding and in force.[36] In point of fact, TPI is taking all possible steps to complete construction of the TPI Nationwide System as quickly as possible and TPI fully expects: (1) to complete construction of a sufficient portion of the system to comply with nationwide exclusivity construction requirements in the immediate future and well before expiration of the outstanding construction period; and (2) to go far beyond this construction minimum to implement an unequalled, comprehensive, nationwide paging service that will compete directly with other PCP and CCP nationwide paging systems.

24. By failing in the First R&O to include TPI's frequency

---

47 U.S.C. §316(a).

Similarly, Section 312 of the Act allows for revocation of Commission licenses only for specified reasons and only after providing the licensee an opportunity for a hearing. 47 U.S.C. §312.

[35]47 C.F.R. §§90.495(b), (b)(3). See also 47 C.F.R. §90.495(c).

[36]47 C.F.R. §§90.495(b), 90.496.