

929.2125 MHz in the definition of nationwide exclusive PCP frequencies exempt from the Modified Freeze and excluded from geographic licensing, the Commission unilaterally modified the TPI Nationwide System Authorization in two devastating ways:

- First, as of the Effective Date, TPI will no longer have the operational flexibility to modify or relocate any of the 929.2125 MHz transmitters ("Slow Growth Transmitters") specified in the Slow Growth Authorization if such modification/relocation would be precluded under the Modified Freeze.<sup>37</sup> TPI requires this operational flexibility in order to complete construction of the Slow Growth Transmitters in the most efficient and rapid manner possible to ensure prompt, high-quality service to its subscribers.
- Second, as of the Effective Date, TPI will no longer be able to expand the TPI Nationwide System throughout the United States as currently authorized pursuant to the above-specified provisions of Sections 90.495 and 90.496 of the Commission's Rules.<sup>38</sup> Instead, TPI will be limited to expansion the TPI Nationwide System only in accordance with the Modified Freeze.

25. Moreover, by implementing the Modified Freeze in the First R&O, the Commission also terminated TPI's rights to expand the TPI Nationwide System on 929.2125 MHz throughout the country without any applications by other applicants for expanded 929.2125 MHz authorizations. Specifically, under the Modified Freeze, PCIA

---

<sup>37</sup>For example, TPI's Slow Growth Transmitter at Omaha, Nebraska (Station WPGD 504) cannot be modified because it has not yet been built. Moreover, even if constructed at the original site, this Slow Growth Transmitter could then only be modified if the modification application could be filed under the Modified Freeze. See also TPI's Emergency Motion.

<sup>38</sup>For example, prior to adoption of the First R&O, TPI could have expanded the TPI Nationwide System by installing additional 929.2125 MHz transmitters throughout the State of Kansas. As a result of the First R&O, TPI cannot now expand the TPI Nationwide System into the State of Kansas beyond the single Slow Growth Transmitter site at Wichita (Station WPGD 501) and any slight modification thereof that could be authorized pursuant to the Modified Freeze. See also TPI's Emergency Motion.

and the Commission must now accept and process Modified Freeze Applications and New Post-Freeze Applications on 929.2125 MHz by entities other than TPI. These applications will allow entities other than TPI to serve new territory on 929.2125 MHz and, as such, these applications could not have been filed pursuant to Commission Rules and procedures in effect prior to the First R&O. Indeed, such applications violate the TPI Nationwide System Authorization and the rights granted to TPI pursuant to the above-specified provisions of Sections 90.495 and 90.496 of the Commission's Rules.

26. The above-described unilateral modification of the TPI Nationwide System Authorization and the rights granted to TPI pursuant thereto by Sections 90.495 and 90.496 of the Commission's Rules was illegally undertaken by the Commission in the First R&O in violation of Section 316 of the Act without any demonstration (or even consideration) that the modification "will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States...." Moreover, the Commission adopted the First R&O without in any way affording TPI the due process hearing rights guaranteed to TPI pursuant to Section 316 of the Act.<sup>39</sup>

27. In point of fact, TPI must observe that the only conceivable justification for Commission 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

---

<sup>39</sup>47 U.S.C. §316. In point of fact, as specified at paragraphs 9-13, supra, the Commission failed even to consider the TPI Comments on this issue.

geographic licensing would be an attempt by the Commission to increase revenues by making as many PCP frequencies as possible subject to geographic licensing and competitive bidding. In other words, by excluding TPI's frequency 929.2125 MHz, the Commission is implementing its strategy to subject 929.2125 MHz to geographic licensing in the Final Rules in order to reap as much revenue as possible from the auctions for geographic licenses that would then occur for this frequency.

28. As the Commission is surely aware, this motivation would be in direct violation of Section 309(j)(7)(A) of the Act, which explicitly provides that:

In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this section.

47 U.S.C. §309(j)(7)(A) (emphasis added).

Obviously, therefore, this motivation would not meet the Section 316 standard allowing unilateral Commission modification of licenses only if such modification will "promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States...."<sup>40</sup> Moreover, Commission action based on such an illegal motivation would clearly be arbitrary and capricious. Arent v. Shalala, 70 F.3d 610, 616 (D.C. Cir. 1995).

---

<sup>40</sup>47 U.S.C. §316.

29. TPI must also emphasize that by unilaterally modifying the TPI Nationwide System Authorization as specified above, the Commission in its First R&O violated TPI's fundamental rights to due process of law, including, but not limited to, the hearing rights guaranteed by Section 316 of the Act. This action by the Commission may also constitute a "taking" within the meaning of the just compensation clause of the Fifth Amendment to the Constitution.<sup>41</sup>

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

30. Commission 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 also violates vital principles of fundamental fairness repeatedly articulated in Commission precedent. It is well-established that it is arbitrary and capricious for the Commission to treat similarly situated parties differently and that such disparate treatment must be adequately justified by the Commission.<sup>42</sup>

---

<sup>41</sup>See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (hereinafter "MacDonald"); Hodel v. Irving, 107 S.Ct. 2076 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419 (1982). Although there is no fixed formula for determining where regulation ends and taking begins, courts consider the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action, as having particular significance. See MacDonald, 470 U.S. at 340.

<sup>42</sup>Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172-1173 (D.C.Cir. 1994); New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C.Cir. 1987); Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C.Cir. 1985); Public Media Center v. FCC, 587 F.2d

31. In the instant case, those CCP and PCP nationwide licensees who are unquestionably exempt from the Modified Freeze and excluded from geographic licensing are in exactly the same situation as TPI -- i.e., all parties are licensed for frequencies on which no further licensing can occur throughout the country by operation of the Commission's Rules.<sup>43</sup> TPI's existing exclusivity rights are currently in effect regardless of the fact that TPI could theoretically lose those rights for failure to timely construct the TPI Nationwide System.<sup>44</sup> In point of fact, TPI has repeatedly assured the Commission, both in connection with TPI's Slow Growth Authorization and in the TPI Comments in the above-captioned proceeding, that TPI will meet and exceed nationwide exclusivity construction requirements in a timely fashion. As a result, the Commission cannot justify disparate treatment of TPI's nationwide exclusive frequency based on the fact that TPI did not complete construction of the TPI Nationwide System by the Adoption Date. Failure by the Commission in the First R&O to include TPI's frequency 929.2125 MHz in the definition of nationwide exclusive PCP frequencies exempt from the Modified Freeze and excluded from geographic licensing is arbitrary and capricious in that it treats similarly situated nationwide exclusive licensees differently based

---

1322, 1331 (D.C.Cir. 1978).

<sup>43</sup>In the case of TPI and other nationwide PCP licensees, this nationwide exclusivity is embodied in 47 C.F.R. §§90.495(b), (b)(3) and 90.496. In the case of CCP nationwide exclusive licensees, nationwide exclusivity is embodied in 47 C.F.R. §22.531(b).

<sup>44</sup>47 C.F.R. §90.495(c); see also note 17, supra.

on an inadequate -- and indeed illegal -- construction requirement.

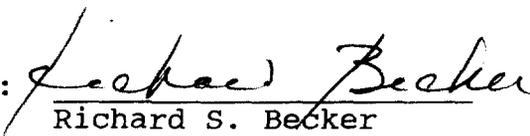
**VII. Conclusion**

32. For all of these reasons, TPI respectfully submits that the Commission must **IMMEDIATELY** reconsider the First R&O that failed to in any way consider the highly-relevant issue specified in the TPI Interim Comments and Interim Reply Comments regarding inclusion of TPI's frequency 929.2125 MHz in the definition of nationwide exclusive PCP frequencies that are exempt from the Modified Freeze and excluded from geographic licensing. The Commission must: (1) include TPI's nationwide exclusivity on 929.2125 MHz in the PCP Nationwide Exclusive Frequency PN; and (2) clarify the First R&O to make clear that TPI's 929.2125 MHz qualifies as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze and excluded from geographic licensing.

**WHEREFORE,** TPI respectfully requests **IMMEDIATE** Commission action to reconsider the First R&O as specified in this Emergency Petition.

Respectfully submitted,

**TSR PAGING INC.**

By:   
Richard S. Becker  
James S. Finerfrock  
Jeffrey E. Rummel

Its Attorneys

Richard S. Becker & Associates, Chartered  
1915 Eye Street, NW; Eighth Floor  
Washington, DC 20006  
(202) 833-4422

Date: May 6, 1996

CERTIFICATE OF SERVICE

I, Jeffrey E. Rummel, an associate in the law firm of Richard S. Becker & Associates, Chartered, hereby certify that I have on this 6th day of May, 1996, caused to be hand delivered copies of the foregoing "**EMERGENCY PETITION FOR RECONSIDERATION**" to the following:

Reed E. Hundt, Chairman  
Federal Communications Commission  
1919 M Street, NW; Room 814  
Washington, D.C. 20554

James H. Quello, Commissioner  
Federal Communications Commission  
1919 M Street, NW; Room 802  
Washington, D.C. 20554

Rachelle B. Chong, Commissioner  
Federal Communications Commission  
1919 M Street, NW; Room 844  
Washington, D.C. 20554

Susan Ness, Commissioner  
Federal Communications Commission  
1919 M Street, NW; Room 832  
Washington, D.C. 20554

William E. Kennard, General Counsel  
Federal Communications Commission  
1919 M Street, NW; Room 614  
Washington, DC 20554

Michele C. Farquhar, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, NW; Room 5002  
Washington, DC 20554

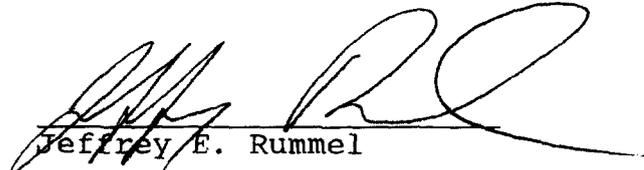
David Furth, Chief  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, NW; Room 7002  
Washington, DC 20554

Mika Savir, Attorney  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, NW; Room 7002  
Washington, DC 20554

Terry L. Fishel, Chief\*  
Land Mobile Branch, Licensing Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA 17325-7245

Michael Regiec, Deputy Chief\*  
Land Mobile Branch, Licensing Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA 17325-7245

Gary Devlin, Technical Engineer\*  
Land Mobile Branch, Licensing Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
1270 Fairfield Road  
Gettysburg, PA 17325-7245



Jeffrey E. Rummel

---

\* Via United Parcel Service overnight courier.