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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 6, 1996

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

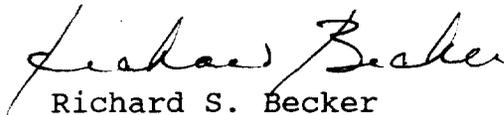
Re: WT Docket No. 96-18
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith on behalf of TSR Paging Inc. are an original and eleven (11) copies of an "Emergency Motion For Stay" 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 S. Becker
Attorney for TSR Paging Inc.

Enclosures

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

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In the Matter of)
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Revision of Part 22 and)
Part 90 of the Commission's)
Rules to Facilitate Future)
Development of Paging Systems)
)
Implementation of Section)
309(j) of the Communications)
Act -- Competitive Bidding)

WT Docket No. 96-18

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PP Docket No. 93-253

To: The Commission

EMERGENCY MOTION FOR STAY

Respectfully submitted,

TSR PAGING INC.

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Its Attorneys

Date: May 6, 1996

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SUMMARY

By this Emergency Motion For Stay, TSR Paging Inc. ("TPI") seeks **IMMEDIATE** Commission stay of the First Report and Order ("First R&O") in the above-captioned proceeding pending Commission decision on an "Emergency Petition For Reconsideration" ("Emergency Petition") filed simultaneously herewith by TPI.

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 in accordance with applications ("TPI Nationwide System Application") submitted to PCIA in February, 1994. 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 ("PN") 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 shown in the Emergency Petition, Commission failure to act in the First R&O or to release the PN to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing must be reconsidered. Pending Commission action on the Emergency Petition, the Commission must **IMMEDIATELY** stay the Interim Rules adopted in the First R&O based on the following factors:

First, TPI is likely to prevail on the merits of its Emergency

Petition because: (1) in its First R&O, the Commission improperly failed to consider the arguments raised in the TPI Interim Comments and Interim Reply Comments; (2) by failing to include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing, the Commission violated its own rules and the previously-articulated purpose for those rules; (3) the First R&O constituted a unilateral modification of the TPI Nationwide System Authorization, which violated Section 316 of the Communications Act of 1934, as amended, fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems; and (4) the Commission impermissibly treated TPI in a substantially different manner than similarly-situated licensees of nationwide exclusive channels.

Second, TPI will suffer the following forms of irreparable injury if the Commission imposes the Interim Rules without granting TPI's Emergency Petition: (1) termination of the operational flexibility that TPI currently has pursuant to the TPI Nationwide System Authorization and 47 C.F.R. §§90.495 and 90.496 to complete construction of the remaining Slow Growth Transmitters with modifications from the parameters originally specified in the TPI Nationwide System Application submitted 27 months ago; (2) termination of TPI's existing flexibility pursuant to the TPI Nationwide System Authorization and 47 C.F.R. §§90.495 and 90.496 to expand the TPI Nationwide System beyond the remaining Slow Growth Transmitters; and (3) for the first time since PCIA coordination of the TPI Nationwide System Application in June, 1994, members of the public other than TPI will be allowed to submit applications on 929.2125 MHz to serve previously-unserved territory in violation of the TPI Nationwide System Authorization and 47 C.F.R. §§90.495 and 90.496.

Third, stay will not harm other parties. Prior to the First R&O, no entities other than TPI could have filed on 929.2125 MHz in unserved area. Accordingly, these parties cannot now be harmed by stay of the new authority impermissibly granted to them in the First R&O in violation of the TPI Nationwide System Authorization and 47 C.F.R. §§90.495 and 90.496.

Fourth, the public interest favors stay. The need for rapid and full resolution of the issues raised by the NPRM and First R&O demand stay of the Interim Rules until that TPI's Emergency Petition is acted upon. Failure to stay will subject the Commission's proposed geographic licensing scheme to reversal upon the judicial review, will throw the Commission's licensing processes into confusion, and will subject the proposed auction of geographic paging licenses to severe uncertainties that will dramatically affect the manner in which such licenses are issued and the amounts that will be generated from such auctions. Stay also serves the public interest goals of establishment of paging systems that serve a wider geographic area and fostering the development of nationwide paging systems.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

EMERGENCY MOTION FOR STAY

TSR Paging Inc. ("TPI"), by its attorneys and pursuant to 47 C.F.R. §§1.43, 1.429(k), hereby submits this Emergency Motion For Stay ("Emergency Motion") 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 pending Commission decision on an "Emergency Petition For Reconsideration" ("Emergency Petition") filed simultaneously herewith by TPI seeking reconsideration of the First R&O. As demonstrated in this Emergency Motion, good cause exists for **IMMEDIATE** Commission action to stay the interim rule provisions ("Interim Rules") adopted in the First R&O pending Commission action on TPI's Emergency Petition. The Interim Rules will become effective upon publication of the First R&O in the Federal Register.¹ TPI has been advised that such publication will occur in the next few days. Accordingly, it is imperative that the Commission act **IMMEDIATELY** on the instant Emergency Motion to stay the Interim Rules pending

¹First R&O, ¶47. This date will be referred to herein as the "Effective Date."

Commission decision on the Emergency Petition.

In support of this Emergency Motion, the following is respectfully shown.

I. Background

1. In its Notice Of Proposed Rulemaking² 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. 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.³ The Commission also proposed to adopt competitive bidding rules for mutually-exclusive ("MX") applications for geographic paging licenses.⁴

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.⁵ The Interim Licensing Proposal included the following provisions:

²Notice Of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52 (February 9, 1996) (hereinafter "NPRM").

³NPRM at ¶1.

⁴Id.

⁵Id. at ¶¶139-149.

- 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").⁶
- 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.
- 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,⁷ 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,⁸ TPI demonstrated that TPI is a communications

⁶Id. 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.

⁷NPRM at ¶¶153-154.

⁸The TPI Interim Comments, Interim Reply Comments and Further Comments may be referred to collectively as the "TPI Comments."

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 exclusive paging system on the PCP Channel 929.2125 MHz⁹ 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. §90.496.¹⁰ 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 Authorization¹¹ and TPI believes that it will be able to complete construction of the remaining Slow Growth Transmitters well ahead

⁹See, 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."

¹⁰See Commission Letter 7110-162 dated December 1, 1995 (hereinafter "Slow Growth Authorization").

¹¹For example, as reported in a status report submitted by TPI on April 23, 1996 ("April 23 Status Report"), of the 202 929.2125 MHz transmitter sites originally included in TPI's Slow Growth Authorization ("Slow Growth Transmitters"), there are only 94 remaining Slow Growth Transmitters.

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 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."¹²

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.¹³
- 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.¹⁴
- Held that new applicants may file applications that compete with Modified Freeze Applications¹⁵ "within the applicable filing window."¹⁶

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.

¹²First R&O, ¶1.

¹³First 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 Modified Freeze that could not have been filed pursuant to the original Freeze as "Modified Freeze Applications."

¹⁴First R&O at ¶26.

¹⁵For ease of reference, applications filed by new applicants to compete with Modified Freeze Applications will be referred to herein as "New Post-Freeze Applications."

¹⁶First 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).

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 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.¹⁷ 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 the Emergency Petition, Commission failure to act in the First R&O or to release the PCP Nationwide

¹⁷This 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.

Exclusive Frequency PN that would include TPI's frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing must be reconsidered. Pending Commission action on the Emergency Petition, however, the Commission must **IMMEDIATELY** stay the Interim Rules for the following good cause shown.

**II. The Commission Must Stay
The Effective Date Of The First R&O**

9. The standard for a stay is well established. The Commission engages in a balancing of the following four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C.Cir. 1977). As TPI demonstrates below, consideration of each of these factors leads to the conclusion that the Interim Rules as adopted in the First R&O must be stayed.

A. TPI Is Likely To Prevail On The Merits

10. As demonstrated in TPI's simultaneously-filed 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 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.

11. TPI's complete arguments with respect to each of these independent grounds for reconsideration of the First R&O are set forth in TPI's Emergency Petition and are hereby incorporated herein in their entirety by reference. Applying the relevant legal standards to the facts and circumstances of this case, it is likely that TPI will prevail on all specified grounds.

B. TPI Will Suffer Irreparable Injury From The Commission's Imposition Of The Interim Rules

12. If the Commission does not reconsider the First R&O to make clear that TPI's frequency 929.2125 MHz is a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing, TPI will suffer irreparable harm to TPI's ongoing efforts to complete construction of the TPI

Nationwide System both in accordance with the TPI Nationwide System Authorization and the Slow Growth Authorization and otherwise. This harm is not compensable after imposition of the Interim Rules and, therefore, this harm should be prevented by the Commission.

13. Specifically, as set forth above,¹⁸ TPI is in the process of completing construction of the TPI Nationwide System pursuant to the TPI Nationwide System Authorization and the Slow Growth Authorization issued by the Commission on December 1, 1995. In point of fact, of the 202 Slow Growth Transmitters originally authorized in the Slow Growth Authorization, there are only 94 remaining Slow Growth Transmitters.¹⁹ As also set forth above, TPI is rapidly completing construction the remaining Slow Growth Transmitters and TPI fully expects that construction of all of these transmitters will be completed in the immediate future -- well ahead of the construction schedules authorized in the Slow Growth Authorization.

14. Moreover, TPI is not limiting construction of the TPI Nationwide System solely to completing construction of the remaining 94 Slow Growth Transmitters specified in the Slow Growth Authorization. Ever since June, 1994, when PCIA coordinated TPI's Nationwide System Application as a nationwide exclusive system pursuant to 47 C.F.R. §90.495(a)(3),²⁰ TPI has intended to construct the TPI Nationwide System to serve as much of the country

¹⁸See paragraph 4, supra.

¹⁹See TPI's April 23 Status Report.

²⁰See PCIA No. 940000360.

as possible in order to provide its subscribers with high-quality paging service over the widest possible geographic area. Although TPI will shortly complete construction of the remaining Slow Growth Transmitters, thereby confirming compliance with the construction requirements specified at 47 C.F.R. §§90.495(c), 90.496, TPI has been including in its construction efforts additional 929.2125 MHz transmitters that extend the TPI Nationwide System far beyond the remaining Slow Growth Transmitters whose construction period is still outstanding pursuant to the Slow Growth Authorization.

15. In view of these facts, and as demonstrated below, TPI will suffer the following three types of irreparable harm if the Interim Rules are allowed to become effective on the Effective Date.

**1. Termination Of TPI's Flexibility
To Complete Construction Of The
Remaining Slow Growth Transmitters**

16. In completing construction of its Slow Growth Transmitters pursuant to the Slow Growth Authorization, TPI has relied upon the flexibility granted in the Commission's Rules to modify the Slow Growth Transmitters from the parameters originally specified in the TPI Nationwide System Authorization to complete construction of these facilities in the most efficient and rapid manner possible to ensure prompt, high-quality service to TPI's subscribers. As the Commission is aware, TPI originally submitted the TPI Nationwide System Application to PCIA on February 16, 1994, and over the past 27 months, circumstances have changed and TPI has found it necessary to relocate and otherwise modify the 929.2125

MHz transmitters originally specified in the TPI Nationwide System Application in order to complete construction of the Slow Growth Transmitters in the most rapid and efficient manner possible.

17. The flexibility that TPI has relied upon in completing construction of the Slow Growth Transmitters is set forth in Sections 90.495 and 90.496 of the Commission's Rules. Specifically, upon PCIA coordination of the TPI Nationwide System Application and Commission grant thereof and issuance of the TPI Nationwide System Authorization, TPI was the only entity that could expand service on 929.2125 MHz into unserved areas.²¹ As a result, TPI was able to relocate or otherwise modify any of its Slow Growth Transmitters without restriction as long as TPI protected pre-October 14, 1993, exclusive licensees and previously authorized Phase II exclusive co-channel systems.²²

18. If the Commission allows the Interim Rules as adopted in the First R&O to become effective on the Effective Date without first granting TPI's Emergency Petition, TPI will immediately lose this operational flexibility that TPI has relied upon in completing construction of the remaining Slow Growth Transmitters in

²¹47 C.F.R. §§90.495(b)(3) ("[n]o co-channel authorization will be granted in the continental United States ... on any frequency assigned to a nationwide paging system"); see also 47 C.F.R. §90.495(c) (TPI's nationwide exclusivity granted "at the time of initial licensing"); 47 C.F.R. §90.496(d) (TPI's nationwide exclusivity "extended for the duration of the construction period" authorized in TPI's Slow Growth Authorization).

²²47 C.F.R. §90.495(b); see also Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8324-8325, 8330-8331 (1993) (hereinafter "R&O"), recon., Memorandum Opinion and Order, FCC 96-53 (February 13, 1996).

accordance with the Slow Growth Authorization. Specifically, TPI will no longer be able to relocate or otherwise modify remaining Slow Growth Transmitters to maximize rapid and efficient construction of the TPI Nationwide System. Rather, TPI will only be able to relocate or otherwise modify remaining Slow Growth Transmitters if such change can be authorized pursuant to an exemption to the Modified Freeze. Although the Commission's change from the Freeze to the Modified Freeze does provide TPI some limited latitude in making changes to the Slow Growth Transmitters, this latitude is dramatically less than the flexibility that TPI is entitled to pursuant to the TPI Nationwide System Authorization and the expansion rights attendant thereto as granted by Sections 90.495 and 90.496 of the Commission's Rules.

19. For example, prior to the First R&O, TPI could construct TPI's Slow Growth Transmitter at 10510 F Plaza, Omaha, Nebraska,²³ either pursuant to the originally authorized parameters specified in the TPI Nationwide System Application and authorized in the TPI Nationwide System Authorization or, upon Commission authorization, pursuant to modified parameters that TPI determined would allow TPI to more rapidly and efficiently complete construction to maximize service to subscribers. If the Interim Rules take effect on the Effective Date, however, TPI's flexibility to construct the Omaha Slow Growth Transmitter is limited to changes that could be specified in an application that would be permissible pursuant to

²³Station WPGD 504, File No. 674240 (hereinafter "Omaha Slow Growth Transmitter").

the Modified Freeze.²⁴ Moreover, in view of the fact that TPI has not yet constructed the Omaha Slow Growth Transmitter, TPI's flexibility would be even further limited because the additional 65-kilometer (40-mile) leeway authorized by the Commission in the Modified Freeze can only be taken advantage of if TPI first constructs and operates the Omaha Slow Growth Transmitter at the originally authorized parameters.²⁵

20. This example makes clear, therefore, that if the Commission allows the First R&O to become effective on the Effective Date without first granting TPI's Emergency Petition and including TPI's nationwide exclusive frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing, TPI will immediately suffer irreparable damage because TPI will lose its operational flexibility to complete construction of the remaining Slow Growth Transmitters pursuant to the TPI Nationwide System Authorization and Sections 90.495 and 90.496 of the Commission's Rules.

²⁴See First R&O at ¶26.

²⁵In adopting the Modified Freeze, the Commission stated that:

[W]e will resume accepting applications for additional transmission sites on a primary basis only if (1) the applicant is an incumbent paging licensee on a non-nationwide CCP channel or an incumbent paging licensee who has earned local or regional exclusivity on a PCP channel; and (2) the applicant certifies that the proposed site is within 65 kilometers (40 miles) of an authorized transmission site that was licensed to the same applicant on the same channel on or before February 8, 1996, and which is operational as of the date the application for the additional transmitter site is filed.

First R&O at ¶26 (emphasis added).

**2. Termination Of TPI's Ability To Expand
The TPI Nationwide System Beyond The
Remaining Slow Growth Transmitters**

21. As set forth above,²⁶ TPI is not limiting construction of the TPI Nationwide System solely to completing construction of the remaining 94 Slow Growth Transmitters specified in the Slow Growth Authorization. Prior to the First R&O, in response to perceived subscriber demand and in accordance with TPI's proven expertise in constructing and operating wide-area one-way paging systems, TPI was able, upon Commission authorization, to construct and operate numerous additional 929.2125 MHz transmitters above and beyond the Slow Growth Transmitters. Upon PCIA coordination of the TPI Nationwide System Application and Commission grant thereof and issuance of the TPI Nationwide System Authorization, TPI was the only entity that could expand service on 929.2125 MHz into unserved areas.²⁷ TPI relied upon these rights granted by the Commission pursuant to the TPI Nationwide System Authorization and Sections 90.495 and 90.496 of the Commission's Rules to establish additional transmitters in order to expand the TPI Nationwide System beyond the minimum number of transmitters specified in the Slow Growth Authorization. In point of fact, this ability played a vital role in TPI's overall plan for installation and operation of the TPI Nationwide System.

22. If the Commission allows the Interim Rules as adopted in the First R&O to become effective on the Effective Date without

²⁶See paragraph 14, supra.

²⁷See note 21, supra.

first granting TPI's Emergency Petition, TPI will no longer be able to expand the TPI Nationwide System throughout the country pursuant to the TPI Nationwide System Authorization and the attendant expansion rights granted pursuant to 47 C.F.R. §§90.495 and 90.496. Specifically, TPI will only be able to seek Commission authorizations for additional 929.2125 MHz transmitter sites if the applications for such sites are permissible under exemptions to the Modified Freeze. Once again, although there is some flexibility for expansion of the TPI Nationwide System beyond the remaining Slow Growth Transmitters pursuant to the Modified Freeze, this flexibility is dramatically less than the flexibility to which TPI is entitled pursuant to the TPI Nationwide System Authorization and Sections 90.495 and 90.496 of the Commission's Rules.

23. For example, prior to the First R&O, TPI could have expanded the TPI Nationwide System by installing additional transmitters throughout the State of Kansas. Specifically, pursuant to the Slow Growth Authorization, TPI has an authorization to construct a single Slow Growth Transmitter at 9401 E. Kellogg, Wichita, Kansas.²⁸ Prior to the First R&O, upon Commission authorization, TPI could have installed additional 929.2125 MHz transmitters throughout the State of Kansas far beyond the single Wichita Slow Growth Transmitter if TPI believed that such additional transmitters would allow TPI to provide a higher-quality

²⁸Station WPGD 501, File No. 674235 (hereinafter "Wichita Slow Growth Transmitter").

service to its subscribers.²⁹ If the Interim Rules take effect on the Effective Date, however, TPI's ability to construct 929.2125 MHz transmitters throughout the State of Kansas in addition to the Wichita Slow Growth Transmitter would be severely limited to the ability to construct only additional 929.2125 MHz transmitters that could be specified in applications that would be permissible pursuant to the Modified Freeze.³⁰ Moreover, in view of the fact that TPI has not yet constructed its Wichita Slow Growth Transmitter, TPI's flexibility would be even further limited because the additional 65-kilometer (40-mile) leeway authorized by the Commission in the Modified Freeze can only be taken advantage of if TPI first constructs and operates the Wichita Slow Growth Transmitter at the originally authorized parameters.³¹

24. This example makes clear, therefore, that if the Commission allows the First R&O to become effective on the Effective Date without first granting TPI's Emergency Petition and including TPI's nationwide exclusive frequency 929.2125 MHz as a nationwide exclusive PCP frequency exempt from the Modified Freeze and excluded from geographic licensing, TPI will immediately suffer irreparable damage by losing its vital ability to expand the TPI Nationwide System by constructing additional 929.2125 MHz transmitters throughout the country in addition to TPI's 94 remaining Slow Growth Transmitters.

²⁹47 C.F.R. §§90.495(b), R&O at 8324-8325, 8330-8331.

³⁰See First R&O at ¶26.

³¹See note 25, supra.

3. Other Entities Can Apply For 929.2125 MHz In Violation Of The TPI Nationwide Authorization And Sections 90.495 And 90.496 Of The Commission's Rules

25. Pursuant to the TPI Nationwide Authorization and Section 90.495 and 90.496 of the Commission's Rules, prior to the First R&O, the only entity that could apply for 929.2125 MHz in unserved areas was TPI.³² TPI could expand its coverage on this frequency into unserved areas without the filing of competing applications by any other applicant.³³ If the First R&O is allowed to become effective on the Effective Date, however, PCIA and the Commission would have to accept and process Modified Freeze Applications, which could be filed by pre-Adoption Date licensees on 929.2125 MHz proposing extensions of existing systems as long as the 65-kilometer (40-mile) extension standard adopted in the Modified Freeze is met.³⁴ Moreover, upon Public Notice of any such Modified Freeze Applications, completely new entrants could file New Post-Freeze Applications proposing 929.2125 MHz transmitting facilities that compete with the Modified Freeze Applications.³⁵ In either case, these applications will allow entities other than TPI to serve new, previously-unserved territory on 929.2125 MHz. Pursuant to the TPI Nationwide System Authorization and Sections 90.495 and 90.496 of the Commission's Rules, these applications could not have been filed with PCIA or the Commission prior to the adoption of the

³²See footnote 21, supra; see also R&O at 8324-8325.

³³Id.

³⁴First R&O at ¶26.

³⁵Id.

First R&O.

26. Accordingly, the third form of irreparable injury that TPI will suffer if the First R&O and the Interim Rules are allowed to become effective on the Effective Date is that entities other than TPI will be allowed to submit Modified Freeze Applications and New Post-Freeze Applications to serve previously-unserved territory on 929.2125 MHz in direct violation of the TPI Nationwide Authorization and Sections 90.495 and 90.496 of the Commission's Rules.

27. For these three independent reasons, TPI respectfully submits that it will be irreparably injured if the Commission allows the First R&O to become effective on the Effective Date without first granting TPI's Emergency Petition and confirming that TPI's frequency 929.2125 MHz is a nationwide exclusive PCP frequency that is exempt from the Modified Freeze and excluded from geographic licensing.

C. Stay Will Not Harm Other Parties

28. As set forth above,³⁶ prior to the First R&O, no entities other than TPI could have filed applications seeking authorization for 929.2125 MHz transmitting facilities that would have served unserved area. Implementation of the Interim Rules adopted in the First R&O would, for the first time since PCIA coordination of the TPI Nationwide System Application in June, 1994, allow members of the public to file applications (i.e., Modified Freeze Applications and New Post-Freeze Applications) that would allow service on

³⁶See paragraphs 25-26, supra.