RICHARD S. BECKER & ASSOCIATES
CHARTERED
1915 EYE STREET N.W.
EIGHTH FLOOR
WASHINGTON, D.C. 20006

(202) 833-4422

TELECOPIER
(202) 296-7458

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OFFICE OF SECRETARY

RICHARD S. BECKER
JEFFREY E. RUMMEL

OF COUNSEL
JAMES S. FINERFROCK

CONSULTING ENGINEERS
SIAMAK HARANDI
DEAKIN LAUER

May 23, 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 a "Second Supplement To 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 S. Becker
Attorney for TSR Paging Inc.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

SECOND SUPPLEMENT TO
EMERGENCY PETITION FOR RECONSIDERATION

TSR Paging Inc. ("TPI"), by its attorneys and pursuant to 47 C.F.R. §1.429, hereby submits this Second Supplement to the "Emergency Petition For Reconsideration" ("Emergency Petition") filed by TPI on May 6, 1996, with respect to 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.[1] In support of this Second Supplement, the following is respectfully shown.

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[1]On May 6, 1996, TPI also submitted an "Emergency Motion For Stay" ("Emergency Motion") requesting Commission stay of the interim rule provisions ("Interim Rules") adopted in the First R&O pending Commission action on TPI's Emergency Petition. The Commission has not yet affirmatively acted on TPI's Emergency Motion. However, on May 10, 1996, the First R&O was published in the Federal Register. 61 Fed. Reg. 21380 (May 10, 1996). Pursuant to the explicit terms of the First R&O, the Interim Rules became effective on May 10, 1996. First R&O at ¶47. Accordingly, even though the Commission has not acted on TPI's Emergency Motion, the Commission has de facto denied TPI's Emergency Motion by failing to stay the Interim Rules prior to their May 10, 1996, effective date. As a result, TPI is not supplementing its Emergency Motion simultaneously herewith. TPI is, however, considering its options in response to the Commission's de facto denial of TPI's Emergency Motion, including immediate appeal to the Court of Appeals for emergency relief.

1. In its Emergency Petition, TPI demonstrated that the Commission must act **IMMEDIATELY** to reconsider the First R&O to make clear that TPI's frequency 929.2125 MHz[2] qualifies as a nationwide exclusive PCP frequency that is exempt from the Modified Freeze[3] because it will be excluded from geographic licensing.[4] TPI

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[2]TPI demonstrated that TPI is licensed for a nationwide exclusive paging system ("TPI Nationwide System" authorized pursuant to Commission licenses collectively referred to as "TPI Nationwide System Authorization") on Private Carrier Paging ("PCP") channel 929.2125 MHz and that TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization ("Slow Growth Authorization") granted to TPI by the Commission pursuant to 47 C.F.R. §90.496 in accordance with Commission Letter 7110-162 (December 1, 1995). Emergency Petition, p.3-4.

[3]In its Notice Of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52 (February 9, 1996) (hereinafter "NPRM") in the above-captioned proceeding, the Commission, inter alia, adopted a freeze ("Freeze") on acceptance of new applications for PCP and common carrier paging ("CCP") channels as of the February 8, 1996, adoption date of the NPRM (the "Adoption Date"). NPRM, ¶139. In its First R&O, the Commission modified the Freeze (the "Modified Freeze") to allow incumbent (i.e., pre-Adoption Date) CCP and PCP licensees to file applications ("Modified Freeze 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. First R&O, ¶26. The Commission also permitted the filing of applications ("New Post-Freeze Applications") by new applicants that compete with Modified Freeze Applications within a specified time frame after Public Notice of acceptance of Modified Freeze Applications. Id.

[4]Emergency Petition at 7-25. In the NPRM, the Commission made clear that CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel will be permitted to file co-channel applications without regard to the Freeze. NPRM at ¶142. The Commission also promised to release a Public Notice ("PCP Nationwide Exclusive Frequency PN") which will list PCP nationwide exclusive frequencies that will be exempt from the Freeze. NPRM at ¶26. The First R&O failed to clarify whether TPI's frequency 929.2125 MHz would be considered by the Commission as a nationwide exclusive PCP frequency that is both exempt from the Freeze and excluded from geographic licensing and as of the date of TPI's

demonstrated that emergency reconsideration of the First R&O is required because:

- In its First R&O, the Commission improperly failed to consider the arguments raised in TPI's Interim Comments and Interim Reply Comments filed with respect to the Interim Licensing Proposal proposed in the NPRM. 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.

Emergency Petition at 7-25.

2. By its first Supplement ("First Supplement") to the Emergency Petition filed by TPI on May 14, 1996, TPI updated its Emergency Petition to reflect the fact that on May 13, 1996, the

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Emergency Petition, the Commission had still not released the PCP Nationwide Exclusive Frequency PN. Emergency Petition at 6-7.

Commission released the PCP Nationwide Exclusive Frequency PN.[5] Unfortunately, TPI's nationwide exclusive frequency 929.2125 MHz was not listed on the PCP Nationwide Exclusive Frequency PN.[6] As a result, in its First Supplement, TPI expanded its request for reconsideration in the Emergency Petition to include the PCP Nationwide Exclusive Frequency PN, which TPI believes improperly failed to identify 929.2125 MHz as a nationwide exclusive PCP frequency excluded from geographic licensing and exempt from the Modified Freeze.

3. By this Second Supplement, TPI further supplements its Emergency Petition to seek reconsideration with respect to two aspects of a second Public Notice released by the Commission on May 13, 1996, establishing interim procedures for filing of CCP and PCP Modified Freeze Applications and New Post-Freeze Applications.[7]

4. First, at note 2 of the Interim Procedures PN, the Commission stated that the interim procedures specified:

> [D]o not apply to applications on 931.8875, 931.9125 and 931.9375 MHz, or to applications on those 929 MHz nationwide channels identified by separate Public Notice released today. Applications on these channels will be

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[5] PCP Nationwide Exclusive Frequency PN, DA 96-748 (May 10, 1996). The date specified on the PCP Nationwide Exclusive Frequency PN was May 10, 1996, but the document was not released to the public until May 13, 1996.

[6] PCP Nationwide Exclusive Frequency PN, p.1-2.

[7] Public Notice, "Wireless Telecommunications Bureau Establishes Interim Procedures For Filing Of Common Carrier And Private Carrier Paging Applications," DA 96-749 (May 10, 1996) ("Interim Procedures PN"). As with the PCP Nationwide Exclusive Frequency PN, the Interim Procedures PN specified a release date of May 10, 1996, but the document was not released to the public until May 13, 1996.

> processed in accordance with the applicable rules in effect prior to the adoption date of the [NPRM].
>
> Interim Procedures PN, note 2.

For the reasons specified in TPI's Emergency Petition and First Supplement, TPI respectfully submits that this aspect of the Interim Procedures PN must be reconsidered to the extent that TPI's frequency 929.2125 MHz has not been included as a nationwide exclusive PCP frequency exempt from the interim procedures adopted in the Interim Procedures PN.

5. Second, TPI respectfully submits that in the Interim Procedures PN, the Commission improperly modified the conditional licensing provisions of Section 90.159 of the Commission's Rules[8] that are applicable to PCP applicants without requisite notice and comment and in violation of the explicit statutory and regulatory requirement that PCP operations remain subject to regulation as Private Mobile Radio Service ("PMRS") until August 10, 1996, at which time PCP operations will lose their "grandfathered" status and become subject to the full panoply of Commercial Mobile Radio Service ("CMRS") regulation.

6. Specifically, Section 90.159(b) currently provides that PCP licensees may commence operation of PCP facilities proposed in applications once those applications have been coordinated by the Personal Communications Industry Association ("PCIA") and provided that certain other conditions are met that are not relevant to the

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[8] 47 C.F.R. §90.159.

instant issue.[9] The Commission has stated that conditional licensing of PCP operations will terminate on August 10, 1996, when PCP operations will lose their "grandfathered" PMRS status and become regulated as CMRS.[10] On the other hand, CMRS applicants and licensees, whether regulated under Part 90 or Part 22 of the Commission's Rules: (1) cannot even construct proposed facilities until thirty-five (35) days after Public Notice of acceptance for filing of the underlying application; and (2) cannot operate the subject facilities until the Commission grants the underlying application.[11]

7. In the Interim Procedures PN, however, the Commission held that:

> Applicants for exclusive 929 MHz channels may operate conditionally under Section 90.159 <u>only after the applicant has been on Public Notice for 60 days and if no competing applications are filed</u>.
>
> <u>Interim Procedures PN</u> at 2-3 (emphasis added).

In other words, by its Interim Procedures PN, the Commission has now revised 47 C.F.R. §90.159(b) to require that PCP applicants can no longer commence conditional operation upon PCIA coordination, but instead must wait until their underlying applications are

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[9]47 C.F.R. §90.159(b). This type of operation is referred to as "conditional licensing" or "conditional operation." It must also be noted that there is no restriction regarding the time at which a Part 90 PMRS applicant may commence construction of the proposed facilities, provided that the applicant does not begin operating prematurely. <u>See</u> <u>Third Report and Order</u>, GN Docket No. 93-252, 9 FCC Rcd 7988, ¶374 (1994) (hereinafter "<u>Third R&O</u>").

[10]<u>Third R&O</u> at ¶384.

[11]47 C.F.R. §90.169 (Part 90 CMRS); 47 C.F.R. §22.143 (Part 22 CMRS).

coordinated by PCIA, filed with the Commission, placed by the Commission on Public Notice as accepted for filing, pass through the 60-day cut-off period now applicable to such PCP exclusive channel applications and remain free from any mutually-exclusive applications. TPI respectfully submits that this rule change was improperly adopted without requisite notice and comment and also violates the statutory and regulatory "grandfathering" of PCP regulation, which requires regulation of PCP operations as PMRS until August 10, 1996.

8. First, in the Interim Licensing Proposal in the NPRM, the Commission in no way proposed to modify the conditional licensing provisions of Section 90.159(b) that PCP licensees are subject to until August 10, 1996. The Interim Licensing Proposal made no reference to or proposal to change Section 90.159 conditional licensing requirements and the Commission failed to provide any discussion or justification for such a rule change.[12] Moreover, in the First R&O that adopted Interim Rules, the Commission failed to modify the conditional licensing provisions of Section 90.159(b) or to in any way discuss a change to these provisions.[13] In point of fact, the very first time that the Commission mentioned a change in the conditional licensing provisions of Section 90.159(b) was the above-cited passage in the Interim Procedures PN.

9. It is well-established that the Commission must conduct a notice and comment rulemaking proceeding before modifying its

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[12]NPRM at ¶¶139-149.

[13]First R&O, ¶¶1-46.

rules.[14] It is equally well-established that the Commission must provide adequate notice of any proposed rule changes and provide the public the opportunity to comment thereon.[15] The Commission failed utterly to meet these obligations when it modified, for the first time in the Interim Procedures PN, the conditional licensing provisions of 47 C.F.R. §90.159(b) without in any way including such rule change proposal in the NPRM and without adopting or addressing such rule change in the First R&O.

10. TPI must also emphasize that by imposing new conditional licensing requirements on PCP operations that more closely resemble CMRS requirements, the Commission appears to be violating the statutory and regulatory requirements that the Commission continue to regulate PCP operations as PMRS until August 10, 1996. Section 6002(c)(2)(B) of the Omnibus Budget Reconciliation Act of 1993 requires that certain PMRS licensees that are reclassified as CMRS, including PCP licensees, must continue to be regulated as PMRS on a "grandfathered" basis until August 10, 1996.[16] This requirement

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[14] 5 U.S.C. §553(b); 47 C.F.R. §1.425; Small Refiner Lead Phase-Down Task Force v. USEPA, 705 F.2d 506, 546-547 (D.C.Cir. 1983); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C.Cir. 1977) (hereinafter "HBO"), cert. denied, 434 U.S. 829 (1977).

[15] 5 U.S.C. §553(b)(3), (c); 47 C.F.R. §§1.413, 1.415, 1.425; National Black Media Coalition v. FCC, 791 F.2d 1016, 1022-1024 (2nd Cir. 1986); American Federation of Labor and Congress of Industrial Organizations v. Donovan, 757 F.2d 330, 338-340 (D.C.Cir. 1985); HBO, 567 F.2d at 35-36; Wagner Electric Corporation v. Volpe, 466 F.2d 1013, 1019-1020 (3rd Cir. 1972); Memorandum Opinion and Order, 5 FCC Rcd 2723, 2724 (1990).

[16] Pub. L. No. 103-66, Title VI, §6002(c)(2)(B) 107 Stat 312 (1993) (the "Budget Act").

is reflected both in Commission regulations[17] and previous Commission decisions.[18] Based on these requirements, TPI respectfully submits that the Commission must continue to regulate exclusive PCP operations as PMRS and the Commission cannot circumvent the statutory and regulatory "grandfathering" provisions regarding PCP operations by imposing new conditional licensing requirements that more closely resemble CMRS requirements.

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[17] 47 C.F.R. §20.9(c); see also Note preceding 47 C.F.R. §90.160.

[18] Third R&O at ¶384.

WHEREFORE, for all of the foregoing reasons, TPI respectfully further supplements its Emergency Petition to:

- Include in its appeal the Interim Procedures PN, which: (1) impermissibly failed 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; and (2) impermissibly modified the 47 C.F.R. §90.159(b) conditional licensing requirements applicable to exclusive PCP applicants and licensees.

- Reiterate TPI's request for **IMMEDIATE** reconsideration of the First R&O, the PCP Nationwide Exclusive PN and the Interim Procedures PN 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.

Respectfully submitted,

TSR PAGING INC.

By: Richard Becker

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 23, 1996

CERTIFICATE OF SERVICE

I, Emily Luther, a secretary in the law firm of Richard S. Becker & Associates, Chartered, hereby certify that I have on this 23rd day of May, 1996, caused to be hand delivered copies of the foregoing **"SECOND SUPPLEMENT TO 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

Emily Luther

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* Via United Parcel Service overnight courier.