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

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In the Matter of:	)	
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Replacement 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

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METROCALL INC.
PETITION FOR CLARIFICATION OR PARTIAL RECONSIDERATION

Frederick M. Joyce
Christine McLaughlin
Its Attorneys

JOYCE & JACOBS, Attys. at Law, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
(202) 457-0100

Date: May 31, 1996

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SUMMARY

Metrocall, Inc., by this Petition for Clarification or Partial Reconsideration, has four specific suggestions or requests. The first suggestion is that the FCC adopt a uniform 30 day cut-off period for all Part 22 applications. The second suggestion is that the FCC clarify that the new "40 mile modification rule" applies to all assignees of "qualified" transmitter sites. The third suggestion is that the "40 mile modification rule" should apply to all paging applications that were pending at the FCC on the date that it initiated this rulemaking proceeding. The fourth request is that the FCC clarify what information should be maintained by licensees who elect to make "permissive" modifications or construct "fill in" stations during this interim licensing period.

A grant of this request will expedite the processing of paging applications, promote "symmetry" throughout the radio paging services, alleviate some questions and concerns raised by the FCC's decisions to date in this rulemaking proceeding, and promote better paging services for millions of paging subscribers. These ends are all in harmony with the FCC's objectives in this rulemaking proceeding. Accordingly, this petition should be granted in the public interest.

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METROCALL PETITION FOR CLARIFICATION
OR PARTIAL RECONSIDERATION

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C.§ 405 (a), and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby submits this Petition for Clarification or Partial Consideration of the Commission's "First Report and Order" ("Order") in the above-captioned rulemaking proceeding.[1]

I. Statement of Interest

Metrocall is one of the largest paging companies in the nation. Metrocall previously filed Comments in this radio-paging rulemaking proceeding with respect to the FCC's "Interim Licensing" proposal, and with respect to the wide-area licensing/auction proposal itself. Consequently, Metrocall is an "interested party" in these proceedings.

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[1] The Order was published in the Federal Register on May 10, 1996; thus, this Petition is timely. See 61 Fed. Reg. 21380.

II. Summary of Petition

Metrocall has four specific suggestions or requests for clarification in this proceeding, all with the intention of expediting the FCC's processing of paging applications. The first suggestion is that the FCC adopt a uniform 30 day cut-off period for all Part 22 applications. The second suggestion is that the FCC clarify that the new "40 mile modification rule" applies to all assignees of "qualified" transmitter sites. The third suggestion is that the "40 mile modification rule" should apply to all paging applications that were pending at the FCC on the date that it initiated this rulemaking proceeding. The fourth request is that the FCC clarify what information should be maintained by licensees who elect to make "permissive" modifications or construct "fill in" stations during this interim licensing period.

III. The "Cut-Off" Period Should be 30 Days

At ¶41 of the Order, the Commission states that its rules provide a 30-day Public Notice (ie, "cut-off") for 150 and 450 MHZ channel applications, and 60-day Public Notice period for competing 931 MHZ applications. In fact, that is not what the Rules say. Section 22.541 of the Rules, which was adopted in 1994 as part of the "Part 22 Rewrite", expressly adopted a 30-day cut-off period for 931 MHZ applications. See 47 C.F.R. 22.541(a)(3); *and see*, Report and Order ("Part 22 Rewrite"), 9 FCC Rcd 6513 (Sept. 9, 1994).

For reasons never clearly explained to the public, the FCC subsequently "stayed" the implementation of the 30-day cut-off Rule for 931 MHZ applications in response to a petition for reconsideration of the Part 22 Rewrite. Ever since then, the FCC has been processing 931 MHZ applications with a 60 day cut-off, and all other Part 22 applications with a 30 day cut-off period.

The subject Order perpetuates the confusion about the cut-off rules, without any

justification or explanation. The maintenance of this 30/60 dichotomy is bound to lead to confusion among licensees and applicants, while also heightening the risk of "speculative" applications. For these and other reasons briefly stated below, Metrocall submits that the FCC should employ a 30 day cut-off rule for all paging applications, in all frequency bands.

A. **A 30-day cut-off rule will deter speculators.**

The Commission has repeatedly stated that the deterrence of speculative applications is one of the foremost concerns permeating this rulemaking proceeding. See Order at ¶3. Nevertheless, this Order has, presumably unintentionally, opened the door to speculative filings, by unnecessarily adopting a 60-day cut-off period.

Two years ago, the vast majority of the paging industry supported the FCC's proposal to reduce the cut-off period for all Part 22 applications from 60 to 30 days. This was viewed as a sound way of expediting application processing, while minimizing speculative "MX" applications. With little or no opposition, that change was incorporated into the Part 22 Rewrite.[2]

The same rationale that animated the Part 22 Rewrite should apply during this interim licensing period. Indeed, in light of recent heightened concern about speculative filings, it makes more sense today than it did two years ago to have a 30 day, rather than a 60 day cut-off period for all Part 22 applications, the 931 MHZ band included. A shorter cut-off period would surely help to deter application "mills" from preparing frivolous 931 or 929 MHZ "MX" applications.

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[2] Although some parties requested reconsideration of certain aspects of the Part 22 Rewrite, Metrocall does not recall seeing any request to reconsider the 30 day cut-off period.

B. A 30 day cut-off period will expedite licensing.

The Commission's proposal to adopt wide-area licensing rules for paging authorizations is intended to expedited the processing of licenses, ease administrative burdens, and promote regulatory "symmetry" in the CMRS services. See Order at ¶ 6. All of these policy objectives would be better served with a 30 day, not a 60 day, filing window.

Obviously, there should be fewer paging applications to process if the MX period is shortened by half. So, from the perspective of administrative ease, it makes perfect sense to adopt a 30 day, rather than a 60 day cut-off period. Also, it makes no sense to employ different cut-off periods within the same radio service; the 30/60 dichotomy cannot be justified on the basis of any intrinsic operational differences between the 929/931 MHZ paging band and the "lower" frequency bands. Finally, the shorter 30 day cut-off period will result in quicker license grants; these frequencies will be put into use far sooner than would be the case with 60 day cut-offs.

C. A 30 day cut-off rule might be required under the APA.

Right now, the FCC's Rules state that 931 MHZ applications will have a 30-day cut-off period. Although arguably that rule may have been stayed pending reconsideration, the subject Order has certainly made substantive changes to the processing of paging applications. Thus, the FCC may be required by statute and case precedents to explain why it is adopting a 60 day, rather than a 30 day, cut-off period during this rulemaking proceeding. See, e.g., See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971) (when an agency changes a policy, it must articulate its reasons for doing so).

It is reasonable to assume from the absence of any analysis of this issue in the Order that

the agency simply didn't give this "30/60" day matter any consideration. For the foregoing reasons, Metrocall respectfully submits that this is an important processing matter, and it is one that warrants agency reconsideration.

IV. Assignees Should Qualify for the 40 Mile Rule

The Order partially lifted the "freeze" on paging applications. Incumbent licensees on "exclusive" paging channels may apply for additional sites within 40 miles of a site that was licensed to the applicant on or before February 8, 1996, provided that the licensed site is operational as of the date the application for an additional site is filed. See Order at ¶26 (hereinafter called, the "40 mile rule").

Metrocall requests that the Order be clarified to expressly state that the 40 mile rule also applies to the assignees or transferees of qualifying authorized sites; this request is necessitated by conflicting information from the FCC on this important point. As the Commission is well aware, the paging industry is undergoing substantial consolidation and assignment of authorizations. In many cases, the assignees are acquiring stations with the intention of infusing additional capital to expand the seller's coverage areas. If the sellers would qualify for 40 mile modifications, it makes perfect sense for the assignees of these stations to qualify for 40 mile modifications. Since assignees and transferees still face the risk of mutually exclusive applications, there is no reason why they should be denied the right to file for modifications to qualified stations that are acquired during the course of this rulemaking proceeding.

V. The 40 Mile Rule Should Apply to Pending Applications

As written, the 40 mile rule would not apply to any paging applications that were pending as of February 8, 1996. Metrocall submits that extension of the 40 mile rule to include pending

applications would in no way undermine the FCC's policy objectives in this rulemaking proceeding, and would promote the needs of millions of paging subscribers.

First of all, Metrocall and many other legitimate paging companies have been patiently waiting for 931 MHZ application grants for anywhere from one to five years. During that time, these paging companies have assisted the Commission's staff in cleaning up its database, and working through the "bugs" in its application processing protocol. These were not the efforts of "speculators," these efforts were meant to assist the FCC in licensing paging frequencies, so that they could be put to use as soon as possible. It would be the height of irony and inequity if these applicants, who have worked the hardest to comply with the FCC's Rules and to use scarce paging spectrum for the public's good, should arbitrarily be precluded from making the most of their license grants when they eventually arrive.

It would not undermine the Order 's policy objectives in the least to allow applicants who obtain license grants during the course of this rulemaking proceeding the right to apply for 40 mile modifications. Speculators do not construct paging stations; hence, only legitimate paging operators would even bother to apply for additional 40 mile sites. Moreover, the applications that have been pending at the FCC the longest are the ones that have the greatest need for the 40 mile rule. If those applications had been granted earlier, the licensees would have had ample time to build out these stations long before the FCC "froze" all paging applications. Finally, many of these applications have been on file for far longer than the FCC has had auction authority; thus, allowing these eventual licensees to apply for 40 mile sites would not undermine the FCC's auction authority.

Paging operators that elect to build additional transmitter sites to expand signal coverage

incur significant costs, while rarely seeing a concomitant increase in paging revenue for their efforts. In fact, while the construction of additional sites immediately improves paging signal coverage for customers, carriers rarely charge customers additional fees for that improved coverage. In other words, the FCC should extend the 40 mile rule to include all pending applications because it is a sensible, small measure that will improve paging service for millions of customers.

VI. Station Requirements for Permissive Modifications

The FCC's Order leaves intact the NPRM's determination that paging licensees may make "internal system changes so long as they do not expand the composite circular interference contour of their existing stations as defined in ... our rules." Order at ¶ 35. Both the NPRM and the Order leave unanswered many practical questions and concerns for licensees who elect to make such "permissive modifications." Discussions with FCC staffers have not answered all of these questions. Consequently, Metrocall respectfully requests clarification on the following points.

A. Shared frequency modifications.

The Order expressly states that 931 and 929 MHZ licensees may make permissive modifications by reference to the 931 MHZ definition of "interference contours." There is no discussion of permissive modifications for shared frequency paging licensees, such as 150 and 470 MHZ "private carrier paging" licensees. Since Part 90 of the Rules does not have any "interference contour" rules for these frequencies, it is by no means clear what a shared frequency licensee may do with regard to modifications to their facilities.

In fairness, the FCC ought to allow shared frequency licensees to make permissive

modifications; after all, this rulemaking proceeding is intended to create "regulatory symmetry" between Part 90 and Part 22 licensees. Part 90 licensees who wish to make permissive modifications could be directed to employ the interference contour calculations applicable to their Part 22 counterpart frequencies. Of course, shared frequency licensees would still be obligated to operate their systems in a manner that would avoid causing co-channel interference.

B. Station records for permissive modifications.

In the Part 22 Rewrite proceeding many commenters, Metrocall included, expressed concern over the proposal to eliminate the requirement that licensees notify the FCC when they make "permissive" modifications to their stations or add new "internal" or "fill-in" transmitters to existing systems. The concern was that facilities built without notice to the FCC would not appear on the FCC's database, and would thus not be entitled to interference protection. See Report and Order (Part 22 Rewrite), 9 FCC Rcd. 6513 at ¶ 26. The FCC did not find any "practical" problems with its proposal, since it assumed that any "permissive" sites would be surrounded by other licensed stations. Nevertheless, the FCC compromised and allowed licensees that wanted a new transmitter or modification to appear in the FCC's database, the option of filing a Form 489 for that permissive modification. Id.

That recent rule change has been at least implicitly reversed by the NPRM and the Order in this pending rulemaking proceeding. FCC staffers have unanimously stated that the agency will not accept any "permissive modification" Form 489 requests or notices during this interim licensing period. That fact, combined with the FCC's expansion of the definition of a "permissive modification" during this interim period (permissive modifications now may expand the licensed service contours, so long as they do not expand interference contours), is causing a

general feeling of concern among Metrocall and many other paging companies.

Problems may arise as an adjacent system licensee on the same channel begins expanding toward the other carrier's system. absent an accurate FCC database or stations records, it may be difficult to prove when and where a licensee is entitled to interference protection. These problems will not disappear if the FCC adopts wide-area licensing and auction rules: successful "bidders" for wide-area licenses will be required to protect "grandfathered" base stations. It will be difficult for bidders to know what to protect unless station licensees file their permissive modifications with the FCC, or, at least maintain appropriate records for these transmitter sites at a control point or in the station files.

Other interference problems that routinely occur to paging operations will be rendered very difficult to resolve, unless the FCC allows licensees to file or maintain appropriate base station records. For instance, some interference problems arise from "intermodulation"; that is, the unintentional combination of different frequency signals that results in interference to a third frequency. If this type of interference problem is caused by a "fill in" or permissive modification site, the FCC's field engineers, and the carriers receiving the harmful interference, will have a very difficult time identifying the source of the problem.

Carriers are also concerned about what information must be maintained in their station files in the event of FCC compliance or interference inspections. The Order is utterly silent with respect to fill-in and permissive modification stations. It seems odd, at least, that a licensee could be fined for not maintaining station license and authorization information for "major" sites; see 47 C.F.R. §22.303; but, no such requirements apply to permissive or fill-in stations under this most recent Order.

Metrocall has no interest in increasing paperwork burdens for paging operators; however, it is concerned that an utter absence of records for these fill-in and permissive sites could ultimately lead to harmful interference and operational problems for all carriers. A "happy medium" solution to this problem seems eminently appropriate and reasonable. Metrocall still maintains that licensees who wish to have fill-in sites or permissive modifications listed on their licenses, should have the option of doing so through a Form 489 filing. Those operators who eschew such filings could at least be required to maintain basic operational information about fill-ins and permissive modifications at their main offices, so that it would be available in the event of interference complaints or other problems. Indeed, that is what the current Rules require. See 47 C.F.R. §22.303

CONCLUSION

For all the foregoing reasons, Metrocall respectfully requests that the Commission reconsider or clarify its Order in this rulemaking proceeding consistent with the foregoing recommendations.

Respectfully submitted,

METROCALL, INC.

By: _____
Frederick M. Joyce
Christine McLaughlin

Its Attorneys

JOYCE & JACOBS, Attorneys at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor - PH2
Washington, D.C. 20036
(202) 457-0100

May 31, 1996

CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 31st day of May, 1996, copies of the foregoing Petition for Clarification or Partial Reconsideration were mailed, postage prepaid, to the following:

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Commissioner Rachelle B. Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

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

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

Mika Savir, Esq.*
Legal Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Jay Kitchen, President
PCIA
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

ITS *
1919 M Street, N.W., Room 246
Washington, DC 20554

A. Thomas Carroccio, Esq.
Bell, Boyd & Lloyd
1615 L Street, NW., Suite 1200
Washington, D.C. 20036

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

George V. Wheeler, Esq.
Koteen & Naftalin
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

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

Jill Abeshouse Stern, Esq.
Robert J. Cynkar, Esq.
Janice H. Ziegler, Esq.
Edmund D. Daniels, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Veronica M. Ahern, Esq.
Nixon, Hargrave, Devans & Doyle
One Thomas Circle
Washington, D.C. 20005

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

William L. Fishman, Esq.
Sullivan & Worcester, LLP
1025 Connecticut Avenue, N.W
Suite 1000
Washington, D.C. 20036

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

Jeanne M. Walsh, Esq.
Kurtis & Associates, P.C.
2000 M Street, N.W, Suite 600
Washington, D.C. 20036

Jack Richards, Esq.
Keller and Heckman
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

Thomas Gutierrez, Esq.
J. Justin McClure, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., 12th Floor
Washington, D.C. 20036

William J. Franklin, Esq.
William J. Franklin, Chartered
1200 G Street, N.W., Suite 800
Washington, D.C. 20005-3814

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

James L. Wurtz, Esq.
Mariyaret E. Garber, Esq.
Pacific Telesis Group - Washington
1275 Pennsylvania Avenue, N. W.
Suite 400
Washington, D.C. 20004

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

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

Amelia L. Brown, Esq.
Henry A. Solomon, Esq.
Haley, Bader & Potts
4350 N. Fairfax Drive, Suite 900
Arlington, VA 22203-1633

George L. Lyon, Jr.. Esq.
David Nace, Esq.
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., 12th Floor
Washington, D.C. 20036

Timothy E. Welch, Esq.
Hill & Welch
1330 New Hampshire Ave., NW, Suite 1 13
Washington, D.C. 20036

Carl W. Northrop, Esq.
1299 Pennsylvania Ave., N.W.
10th Floor
Washington, D.C. 20004

Kevin O'Brien, Pres.
O'Brien Communications
5054 Rapidan Place
Annandale, VA 22003

Harold Mordkofsky, Esq.
John Prendergast, Esq.
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Regina Wingfield

* Denotes Hand Delivery

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