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FEDERAL COMMUNICATIONS COMMISSION
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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

Implementation of
Section 309(j) of the
Communications Act--
Competitive Bidding

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, hereby petitions the Commission to reconsider its First Report and Order (the "R&O"),^{1/} which established interim procedures to govern paging licensing pending final outcome of the above-captioned rulemaking proceeding ("NPRM"). In support of this petition, ProNet respectfully shows the following:

I. INTRODUCTION AND SUMMARY

In the NPRM, the Commission instituted an across-the-board freeze on paging applications, and suspended processing of applications for which the statutory petition to deny period, as of

^{1/} The R&O was released April 23, 1996, and was published in the Federal Register on May 9, 1996.

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February 8, 1996 (the "Freeze Date"), had yet to expire. In its initial Comments, and again in its Reply Comments,^{2/} ProNet demonstrated that the application and processing freeze had an immense adverse affect on the paging industry's response to the legitimate communications needs of existing and prospective customers. As a consequence, the freeze was diminishing competition, lessening consumer choice and repressing technological advances in paging.

Responding to ProNet and other commenters, the R&O partially lifted the freeze for incumbents, by:

- (1) permitting them to construct and operate additional transmitters without Commission approval or notification, provided there is no increase in existing composite interference contours;
- (2) allowing them to apply for additional facilities located within forty miles of an operational site authorized on or prior to the Freeze Date; and
- (3) instructing the staff to resume processing applications filed with the Commission prior to the Freeze Date.

Notwithstanding these important concessions, the R&O leaves certain key restrictions and limitations associated with the freeze intact. To cure these infirmities, the Commission, on further reconsideration, should:

^{2/} ProNet's Comments on Interim Licensing Proposal ("Comments") were filed on March 1, 1996; its Reply Comments were filed March 18, 1996.

- Enable forty mile expansion applications to be based upon licenses for which applications were pending as of the February 8, 1996 Freeze Date;
- Limit the right to "MX" forty mile expansion applications strictly to co-channel incumbents with operations the same or contiguous as the expansion application; and
- Allow applicants to resolve mutual exclusivity under existing rules.

II. CONSTRAINTS ON FORTY MILE EXPANSION APPLICATIONS MUST ACCOUNT FOR THE 931 MHz PROCESSING BACKLOG

As acknowledged above, the R&O accorded incumbents an important right during the pendency of the auction rulemaking--namely, to file applications within forty miles of authorized and constructed, co-channel sites. This right was subject to two conditions: (1) the existing site must have been authorized on or before the Freeze Date; and (2) the site must be constructed and operating when the forty mile application is filed.^{3/} Unfortunately, the first qualification devitalizes the benefits the rule was intended to convey and, as a result, must be reconsidered and revised.

Due to difficulties involving conversion to new processing software, 931 MHz applications have already been subject to a de facto freeze since early 1995. As of February 22, 1996, two weeks after the Freeze Date, the Commission had yet to finish processing

^{3/} Moreover, incumbents and newcomers alike can "MX" forty mile applications, thereby ensuring that the underlying frequency assignment will be determined by auction.

931 MHz applications filed prior to January 1, 1995;^{4/} only in May 1996 was this task completed.^{5/}

Incumbents in the 931 MHz band may, therefore, apply to expand their systems, but only as these systems were configured as far back as the autumn of 1994! Consequently, the Commission's use of the Freeze Date is patently unfair to local and regional 931 MHz incumbents vis-a-vis incumbents on other channels.^{6/} To remedy this defect in the R&O, the Commission should amend the first condition on forty mile expansion applications to require merely that an application for the existing site was filed by the Freeze Date.^{7/}

III. THE RIGHT TO "MX" FORTY MILE APPLICATIONS MUST BE SIGNIFICANTLY CURTAILED

Assuming the Commission mitigates the condition requiring forty mile expansion applications to originate from a site authorized on or before the Freeze Date, these applications will

^{4/} Public Notice, "FCC Completes First Run of its New Software for the Processing of 931 MHz Paging Applications," DA 96-219, released February 22, 1996.

^{5/} Public Notice, "FCC Completes Processing of 931 MHz Paging Applications Based on First Software Run, Announces Results of Second Run," DA 96-776, released May 16, 1996.

^{6/} In addition, because Section 22.537 of the Rules forbids the filing of applications for multiple channels in the same service area, ProNet has been unable to build out certain systems obtained through its acquisition program. Absent the long processing delay, sites would have been constructed on the first channel, and additional applications filed.

^{7/} The Commission should acknowledge that a "fill-in" site can also constitute the origin for a forty mile application, in which case a Form 489 must be filed on or before the date the expansion application is filed.

still be subject to another debilitating flaw-- the right of incumbents and newcomers alike to "MX" these applications. If an MX is filed, the R&O (at ¶26) strongly implies that the conflicting applications will be suspended; the underlying frequency assignment will eventually be decided by competitive bidding. By imposing absolutely no limits on "MX" filings, the R&O encourages speculative and extortionate filings while offering no rationale as to why these filings are necessary.

Although there are circumstances where legitimate MX applications may be filed, ProNet respectfully submits that they are limited to situations involving incumbent, co-channel licensees with operations in the same or a contiguous geographic area. The R&O, however, will allow:

- deliberate blocking of a competitor's system expansion on different channel;
- "strike" applications designed to extort cash or other consideration from legitimate service providers; and
- speculative applications by unwitting consumers implored to file by application mills and other promoters with dubious motives.

Considering the inevitability of these filings, the R&O's decision to allow "MX" applications without restriction is simply illogical. On the one hand, the R&O stresses the Federal Trade Commission's ("FTC's") concerns with fraudulent paging applications as a principal force impelling a freeze while auction rules are being established. The Chairman has personally stated that a goal of the freeze is to "prevent spectrum warehousing and deter

application fraud."^{8/} In addition, the R&O (at ¶27) underscores the authority accorded the Commission under Section 309(a) of the Act^{9/} to limit applicant eligibility to deter such abusive filings.

Notwithstanding these unambiguous statements of Commission policy (to curb abusive applications) and Commission power (to restrict eligibility for that purpose), the R&O fails to recognize that unconstrained mutual exclusivity is bound to cause speculative, extortionate and abusive "MX" applications.

As noted above, the sole basis proffered for the R&O's liberal acceptance of these applications is protecting potential interests in territory requested by incumbents. The Commission has already determined, however, in the R&O itself, that such potential interests need not preclude restrictions on interim eligibility:

In this case, the comments and ex parte submissions of the FTC demonstrate the likelihood that lifting the freeze without restrictions on eligibility would lead to a flood of speculative applications and increased opportunities for application mills to promote fraudulent investment schemes Therefore, we conclude that it is reasonable to limit eligibility for initial applications to incumbents.

R&O at ¶27.^{10/}

^{8/} See Letter from Chairman Hundt to The Honorable Kay Bailey Hutchison, dated May 28, 1996, p.2.

^{9/} 47 U.S.C. §309(a).

^{10/} The Commission's authority to set such eligibility limits is firmly established by statute, see 47 U.S.C. §309(j)(6)(E), and by judicial precedent, U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956).

Nor would eligibility restrictions for competing applications violate the principles of Ashbacker Radio Corp. v. FCC.^{11/} It is well settled that Ashbacker rights are not afforded to mere prospective applicants.^{12/} Further, prohibiting the filing of mutually exclusive applications by non-incumbents would in no way prevent new entrants from bidding for geographic licenses; it would simply reduce the available white space available to non-incumbent auction winners, based upon the Commission's determination that the public's interest in allowing limited expansion by incumbents outweighs the speculative interests of newcomers.^{13/}

With no other available rationale, the Commission's permissive treatment of competing applications suggests an alternative and impermissible motive: the deliberate preservation of spectrum to increase auction revenue. This form of warehousing by the Commission is expressly forbidden by the Section 309(j)(7)(B) of the Act:

. . . the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

47 U.S.C. §309(j)(7)(B).

The Act also compels the Commission to use various means at its disposal "to avoid mutual exclusivity in application and

^{11/} 326 U.S. 327 (1945) ("Ashbacker").

^{12/} See Reuters Ltd. v. FCC, 781 946, 951 (D.C. Cir. 1986) ("Reuters").

^{13/} See Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1320 (D.C. Cir. 1995).

licensing proceedings." 47 U.S.C. §309(j)(6)(E) (emphasis added). Here, the Commission has done the exact opposite, promoting mutual exclusivity, in clear contravention of the Act's plain meaning.

By allowing unlimited "MXing" of expansion applications, the R&O creates a counter-intuitive disparity. Regarding filing of forty mile expansion applications, incumbent licensees of shared PCP channels are actually accorded superior rights relative to their 931 MHz counterparts. Shared PCP incumbents can file expansion applications with the universe of potential "copycat" applicants limited to the number of licensees sharing the underlying site (which may in certain cases be zero). By contrast, the 931 MHz incumbent who avails itself of the same forty mile expansion right faces potentially innumerable conflicting applications.

Accordingly, it is imperative that the Commission reconsider its failure to restrict eligibility to file competing applications. Specifically, pending adoption of auction rules, the right to "MX" incumbent forty mile expansion applications should be limited to other incumbents holding co-channel licenses either in the same or a geographic area that is contiguous to that specified in the underlying application.

IV. PARTIES SHOULD BE ALLOWED TO RESOLVE LEGITIMATE APPLICATION CONFLICTS

According to the R&O (at ¶26), all mutually exclusive applications will be held in abeyance pending ultimate resolution of the NPRM, at which time they will be processed pursuant to the

new (presumably auction-based) rules. As a result, legitimate application conflicts that are amenable to negotiated resolutions will be preserved in order to maximize the quantity of spectrum available for auction.

Grounds for allowing settlements among legitimate, "MXed" applicants are persuasive. First, allowing good faith competing applicants to resolve frequency conflicts will accelerate the delivery of paging services to the public. Second, such resolutions of mutual exclusivity are expressly favored by statute and by the Commission's Rules. Section 309(j)(6)(E) of the Act explicitly requires the Commission to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."^{14/} By failing to provide for amendments and other arrangements for resolving mutual exclusivity, the Commission has violated Congress' unambiguous mandate in the Act, which constitutes reversible error.^{15/}

Similarly, Section 22.122 of the Rules provides that applications not designated for hearing or listed in a Public Notice for a random selection or auction process can be amended "as a matter of right"-- which amendments are effective upon filing--

^{14/} 47 U.S.C. §309(j)(6)(E). In approving a similar provision of the Act, the House Budget Committee "encourage[d] the Commission to avoid mutually exclusive situations, as it is in the public interest to do so." House Report No. 111, 103 Cong., 1st Sess., May 23, 1993, at pp. 258-259 (emphasis added).

^{15/} See Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995).

and that amendments to applications that resolve mutual exclusivity may be filed at any time, subject to the requirements of Section 22.129. Identical provisions governing commercial mobile radio service applicants are found in Sections 90.161 and 90.162 of the Rules.^{16/}

The Commission can point to no valid basis for refusing to consider amendments and/or settlement agreements to remove mutual exclusivity. The Commission should therefore modify the R&O to provide for amendments and settlements to resolve mutual exclusivity under existing rules among or between applicants filing legitimate conflicting applications as discussed in Section II. above.

V. THE COMMISSION SHOULD PERMIT CERTAIN PERMISSIVE MODIFICATIONS TO EXISTING SYSTEMS

In the NPRM (at ¶140), the Commission indicated an inclination to allow certain modifications by incumbents in order to avoid disruption of existing operations. The R&O, however, disregards completely such necessary modifications, which are not adequately addressed by the forty mile expansion rule.

A. Sites Not Subject to Valid MX Applications

The R&O ignores ProNet's request in its Comments (at 9-10) that the Commission allow additional transmitters on a permissive basis where existing interference contours do not wholly encompass the new transmitters but nevertheless preclude a valid MX application. Examples of such situations include creases or

^{16/} Sections 90.160-90.168 of the Rules will become effective August 10, 1996.

"doughnuts" formed by composite contours, and small gaps in system coverage along coastlines. Allowing incumbents to provide additional coverage within such limited parameters would clearly serve the public interest; absent such an exception, unserved pockets within existing systems remain indefinitely. Moreover, because no valid MX application could be filed, there is no basis for restricting expansion of service in such cases.

The Commission should therefore modify the R&O to also permit additional transmitters to be installed on a permissive basis provided that any extension beyond existing composite interference contours would not be subject to MX applications.^{17/}

B. Clarification Regarding §22.142(d) of the Rules

The R&O also fails to address requests for relocation pursuant to Section 22.142(d) of the Rules. Relocation of existing or authorized (but not yet constructed) transmitters due to unanticipated, changed circumstances-- such as loss of a tower site or new construction nullifying coverage from an existing location-- are essential to carriers, particularly those engaged in system build-out. The Commission itself acknowledged such situations in soliciting comments in the NPRM (at ¶39). Accordingly, the Commission should clarify the R&O to affirm that it will accept and process applications compliant with Section 22.142(d).

^{17/} Incumbents should be required to file FCC Form 489 for such sites, accompanied by a certification with respect to the extension.

VI. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission's First Report and Order should be modified and clarified as requested herein.

Respectfully submitted,

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