Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

MAY 2 0 1996

The Honorable Dianne Feinstein
United States Senator
525 Market Street, Suite 3670
San Francisco, California 94105

DOCKET FILE

Dear Senator Feinstein:

Thank you for your letter of April 23, 1996, on behalf of your constituent, David J. Bessey, regarding the Commission's decision to freeze acceptance of paging applications. Mr. Bessey expresses concern that his paging application has not been granted because of the implementation of the freeze.

The Commission is currently conducting a rulemaking proceeding that proposes to transition from licensing paging frequencies on a transmitter-by-transmitter basis to a geographic licensing approach, using auctions to award licenses where there are mutually exclusive applications. In conjunction with that proceeding, the Commission initially froze processing of applications for paging frequencies. On April 23, 1996, the Commission released a First Report and Order in WT Docket 96-18 and PP Docket 93-253, which adopted interim measures governing the licensing of paging systems and partially lifted the interim freeze for incumbent paging licensees. For your convenience and information, enclosed is a copy of the Press Release concerning the First Report and Order, which includes a summary of the principal decisions made. Specifically, small and medium sized incumbent paging companies will be permitted to expand their service areas if the proposed new site is within 65 kilometers (40 miles) of an authorized and operating site. These interim rules will remain in effect until the Commission adopts final rules in the paging proceeding.

Thank you for your inquiry.

Sincerely,

David L. Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

Enclosure

cc: Commercial Wireless Division
File Copy
Dockets
j:\congress\9602151

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON FOREIGN RELATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-0504

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April 23, 1996

Ms. Lauren J. Belzin
Acting Director, Office of Legislative Affairs
Federal Communications Commission
1919 M Street, N.W.
Room 808
Washington, D.C. 20554

Dear Ms. Belzin:

Enclosed is a letter from David J. Bessey regarding the denial of his application for two 931 MHZ licenses. I am sending the enclosed documents from the constituent to assist you with your review.

I would appreciate a written reply as soon as possible so that I can respond to my constituent. If you have any questions, please contact Maureen Singleton of my San Francisco office at 415/536-6859.

Thank you for your attention to this matter.

Sincerely yours,

Dianne Feinstein
United States Senator

DF:mps

FRESNO OFFICE:
1130 "O" STREET
SUITE 2446
FRESNO, CA 93721
(209) 485-7430

LOS ANGELES OFFICE:
11111 SANTA MONICA BLVD.
SUITE 915
LOS ANGELES, CA 90025
(310) 914-7300

SAN DIEGO OFFICE:
750 "B" STREET
SUITE 1030
SAN DIEGO, CA 92101
(619) 231-9712

SAN FRANCISCO OFFICE:
525 MARKET STREET
SUITE 3670
SAN FRANCISCO, CA 94105
(415) 536-6868

March 12, 1996

Senator Dianne Feinstein:

I am respectfully requesting your assistance in obtaining two 931 MHZ licenses, which I applied for from the FCC. I now find them blocking retroactively my obtaining the 931 MHZ licenses. I have complied with FCC guidelines at no small expense approximately fourteen thousand dollars, which included cost for reviews and engineering studies as well as engineering station design patterns.
In an effort to protect the public and the application process, the FCC with the retroactive rule making and in effect a freeze has deprived myself and other applicants of our investments and our expected chance of serving the public in the communication business.
Thank you for your consideration and assistance.

Respectfully Yours,

David J. Bessey
11699 Malden St.
Cypress, CA 90630

LAW OFFICES

John D. Pellegrin

CHARTERED

1140 CONNECTICUT AVENUE NW

SUITE 606

WASHINGTON, D.C. 20036

TELEPHONE (202) 293-3831

FACSIMILE (202) 293-3836

March 12, 1996

Dear Paging Applicant: DAVID BESSET

This letter is to advise you that we have followed up on our recently-filed Comments on your behalf with an administrative appeal of the recent Federal Communications Commission action imposing a filing freeze on all new paging applications and adopting arbitrary and unfair interim processing rules. This appeal, in the form of a Petition for Reconsideration, a copy of which is attached, was filed with the FCC on March 11, 1996. This Petition specifically requests the FCC to end the freeze and to process applications such as yours which are already on file with the Commission.

The pre-eminent paging trade association, Personal Communications Industry Association (PCIA), as well as approximately 45 of 50 other parties filing Comments in this proceeding, opposed the FCC application freeze. The comments of all these parties support our position that the freeze is wrong and should be lifted for those applications already on file.

We continue to think the Commission's action is an impermissible attempt to impose <u>retroactively</u> new rules and processing procedures on properly-filed paging applicants, as demonstrated by the legal positions taken in the attached Petition.

For your benefit, we have pursued this matter vigorously through the filing of the above pleadings. You can also help your own case by contacting your U.S. Senators and Congressional representative, and informing them of the FCC's improper and inequitable action in this case. You might send copies of the pleadings we have filed on your behalf to your elected officials. Please send us any copies of correspondence with your elected officials, so we know of your efforts to correct this FCC action.

Sincerely,

John D. Pellegrin

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

CONSOLIDATED PETITION FOR RECONSIDERATION

Filed By:

JOHN D. PELLEGRIN, CHARTERED

Law Offices of John D. Pellegrin, Chartered
1140 Connecticut Avenue, N.W.
Suite 606
Washington, D.C. 20036
(202) 293-3831

Dated: March 11, 1996

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SUMMARY

Petitioners, several 931 MHz paging applicants, submit their Consolidated Petition for Reconsideration regarding the Notice of Proposed Rulemaking ("*Notice*") issued by the Commission in the above-referenced proceeding. The proposed interim processing rules, as applicable to certain previously-filed applications, are arbitrary and capricious. Insofar as the proposed rules would bar the processing of applications which were properly filed under the Commission's own pre-existing rules, the proposed rules impose an unjustifiable retroactive effect on those previously-filed applications. Such retroactive rulemaking is not authorized. In addition, the Commission has failed to subject these new substantive rules to the required notice and comment procedures. Also, the interim processing rules violate the provision of the Communications Act which bar the consideration of the value of frequency as the basis for implementing auction rules, as well as other provision of the Act as it relates to competitive bidding. Furthermore, the Commission has computed the date of the imposition of the application freeze incorrectly. All of the foregoing constitutes illegal, arbitrary and capricious behavior by the Commission.

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

CONSOLIDATED PETITION FOR RECONSIDERATION

Melvia Mae Woods, *et al.* ("Petitioners"),[1] herewith request, pursuant to Section 1.106 of the Commission's Rules, reconsideration of the actions taken in the Notice of Proposed Rulemaking ("*Notice*") issued by the Commission in the above-referenced proceeding.[2] The proposed interim processing rules, as applicable to certain previously-filed applications, are arbitrary and capricious. Insofar as the proposed rules would bar the processing of applications which were properly filed under the Commission's own pre-existing rules the proposed rules impose an

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[1] The 931 MHz paging applicants listed in the attached Exhibit One have filed applications which are currently pending before the Commission, and which will be directly and adversely affected by the Commission's proposed filing freeze and interim processing rules. These parties participated in this proceeding through the filing of the Comments of John D.Pellegrin, Chartered, filed in WT Docket No. 96-18 and PP Docket No. 93-253, on March 1, 1996

[2] The date of public notice for the purpose of filing this Petition for Reconsideration is the release date, February 9, 1996. See 47 C.F.R. Section 1.4(b)(3). Consequently, this Petition for Reconsideration is timely filed.

unjustifiable retroactive effect on those previously-filed applications. The Commission has failed to subject these new substantive rules to the required notice and comment procedures. In addition, the interim processing rules violate the provision of the Communications Act which bar the consideration of the value of frequency as the basis for implementing auction rules. In support whereof, the following is submitted.

I. Background

In its *Notice*[3], the Commission's stated purpose was to establish a comprehensive and consistent regulatory scheme that would simplify and streamline licensing procedures and provide a flexible operating environment for all paging services. Proposed were rules for a geographic licensing approach, whereby licenses for a specified area would be issued through competitive bidding procedures.

The Commission briefly described the regulatory history of paging services, comparing the development of private carrier paging (PCP) and common carrier paging (CCP) services. In the description the Commission focused on the so-called rewrite of its Part 22 Rules governing 931 MHz paging frequencies (*Part 22 Rewrite Order*):

> In the *Part 22 Rewrite Order*, the Commission revised its licensing rules for all Part 22 services and specifically adopted new licensing rules for 931 MHz paging frequencies, which were intended to correct the problems the had impeded licensing under the old rules (footnote omitted). The *Part 22 Rewrite Order* provided that, as of

[3] The *Notice* was adopted February 8, 1996, and released February 9, 1996.

> January 1, 1995, all 931 MHZ applicants (including those who had applications pending under the old rules) would be required to specify channels in their applications. (footnote omitted). The *Part 22 Rewrite Order* further provided that after a 60-day filing window for such channel-specific applications, the Commission would grant those applications that were not mutually exclusive and use competitive bidding to select among the mutually exclusive applications. (footnote omitted). The *Part 22 Rewrite Order* did not establish competitive bidding procedures for mutually exclusive applications. Thus, pending mutually exclusive applications cannot be resolved until such rules are adopted.
>
> However, on December 30, 1994, the Commission stayed the effective date of new Section 22.131 (formerly C.F.R. § 22.541) of our rules as it applies to 931 MHz paging, as well as the opening of the 60-day filing window for amendment of pending 931 MHz applications. (footnote omitted). <u>In addition, we will use a 30-day filing window to define mutually exclusive applications as provided under our old paging rules, rather than the 60-day filing window adopted in the *Part 22 Rewrite Order*</u>. *Notice*, at ¶ 11-12. (<u>emphasis supplied</u>)

Purportedly to facilitate this transition, the Commission adopted interim processing rules in the *Notice*. First, the Commission suspended acceptance of new applications for paging channels as of the adoption date of this *Notice*. (There were exceptions made for existing licensees making certain modifications to their systems.)

The Commission addressed the status of pending applications:

> With respect to processing of pending applications that were filed prior to the adoption of this *Notice* and that remain pending, we will process such applications provided that (1) they are not mutually exclusive with other applications as of the adoption date of this *Notice*, and (2) the relevant period for filing competing applications has expired as of the adoption date of this *Notice*...Processing of mutually exclusive pending applications and applications for which the relevant period for filing competing applications has not expired will be held in abeyance until the conclusion of this proceeding." *Notice*, at ¶ 144.

The Commission then set out the interim "standards" by which

applications would be processed:

> By this *Notice*, we retain the existing stay of the new Part 22 licensing rules until competitive bidding procedures are established in this proceeding. We will therefore process 931 MHz CCP applications which were pending prior to the adoption of this *Notice*, and for which the 60-day window for filing competing applications has expired, under the application procedures in effect prior to January 1, 1995. Consequently, pending 931 MHz CCP applications that are not mutually exclusive with other applications will be processed, while mutually exclusive applications will be held pending the outcome of this proceeding. *Notice*, at ¶ 144.

II. Standard of Substantive "Arbitrary and Capricious" Review

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, expressly vests a reviewing court with the right to hold unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA particularly proscribes the failure to draw reasoned distinctions where reasoned distinctions are required.[4] An agency is required to take a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action.[5] A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious. *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993). An agency changing its course must supply

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[4] *American Trucking Associations, Inc. v. I.C.C.*, 697 F. 2d 1146, 1150 (D.C. Cir. 1983).

[5] *Neighborhood Television Co. v. F.C.C.*, 742 F. 2d 629, 639 (1984); *Telocator Network v. F.C.C.*, 691 F. 2d 525, 545 (D.C. Cir. 1982) (agency must consider all relevant factors); *Action For Children's Television v. F.C.C.*, 564 F. 2d 458, 478-79 (D.C. Cir. 1977) (agency must give relative factors a "hard look").

reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms. *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (D.C. Cir. 1986). See also *Achernar Broadcasting Co. v. FCC*, 62 F. 3d 1441 (D.C. Cir. 1995) (the Commission must fully articulate a new policy if it has truly adopted one).

III. The Commission Must Follow Its Own Rules

It is a well-settled rule of law that an agency must adhere to its own rules and regulations.[6] In addition, once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar.[7] It is patently unfair to allow disparate treatment of similarly-situated applicants.[8]

IV. Prior Notice Required

Generally, the Administrative Procedure Act requires that each

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[6] "A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations"

Reuters Ltd. v. F.C.C, 781 F. 2d 946, 947, 950 (D.C. Cir. 1986). See also *Schering Corp. v. Shalala*, 995 F. 2d 1103, 1105 (D.C. Cir. 1993).

[7] *Green County Mobilephone, Inc. v. F.C.C*, 765 F. 2d 235, 237 (D.C. Cir 1985).

[8] *Melody Music, Inc. v F.C.C.*, 345 F. 2d 730 (D.C. Cir. 1965).

agency give notice of substantive rules of general applicability, as well as statements of general policy or interpretation formulated by an agency.[9] This Court has held that when the sanction imposed by a stringent processing standard is as drastic as dismissal, elementary fairness requires explicit notice of the conditions for dismissal.[10] The less forgiving the FCC's processing standard, the more precise its requirements must be. *Id.*[11] Consequently, substantive rules can only be created through the rulemaking process.[12]

V. Date of Imposition of Freeze is Incorrectly Computed

The Commission stated in the *Notice* that the effective date of the freeze was the date of the adoption of the *Notice*. This is erroneous. By application of law, notice occurred on February 9, 1996, when the *Notice* was released.

The Commission's Rules state that public notice of rulemaking documents occurs either on the date of publication in the Federal

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[9] 5 U.S.C. § 552(A)(1)(D), (E). The section further provides that "a person may not in any manner.. be adversely affected by ... a matter required to be published in the Federal Register and not so published." *Id.*

[10] *Salzer v. F.C.C*, 778 F. 2d 869, 875 (D.C. Cir. 1985)

[11] *See also Bamford v. F.C.C*, 535 F. 2d 78, 82 (D.C. Cir.) ("Elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected."), *cert. denied*, 429 U.S. 895, 97 S. Ct. 255, 50 L. Ed 2d 178 (1976); *Radio Athens, Inc. v. F.C.C*, 401 F. 2d 398, 404 (D.C. Cir. 1968) ("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.")

[12] 5 USC 553 (B) and (C). See also *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979); *Lindz v. Heckler*, 800 F. 2d 871, 878 (9th Cir. 1986).

Register or on the release date of the document itself.[13] No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy.[14] Consequently, any attempt to preclude applicants' rights pursuant to the interim rules may not pre-date February 9, 1996.

VI. The FCC's Interim Rules Proposal Is Illegal

A. Interim Rules Are Impermissibly Retroactive

The Commission's action with respect to applications filed in accordance with existing FCC Rules is unfair and constitutes an unreasonable retroactive application of the Commission's own Rules. It is well-settled that the retroactive application of administrative rules and policies is looked upon with great disfavor by the courts.[15] When implementing regulations or policies and procedures with retroactive application, the Commission must balance the "mischief" caused by such regulation against the "salutary" or beneficial effects, if any, which reviewing courts, in turn, must critically review on appeal to ensure that competing considerations have been properly

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[13] 47 C.F.R. Section 1.4(b)(1) and (3).

[14] 47 CFR §0.445(e).

[15] *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988)(retroactivity is not favored in law); *Yakima Valley Cablevision v. FCC*, 794 F. 2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and have noted its troubling nature.")

considered.[16]

The retroactive extension of the freeze and interim processing rules to pending 931 MHz paging applications, filed as they were in accordance with the Rules and policies of the Commission then in effect at the time of filing, does not comply with the policy just articulated. This action would not appropriately strike the balance between the significant mischief of disrupting the normal and routine 931 MHz paging licensing process and depriving applicants of their rights and equitable expectancies, versus the dubious benefit of auctioning spectrum which, as the Commission itself admits in the *Notice*,[17] is already heavily licensed.

Under the interim proposal, Commission action will be withheld on any pending 931 MHz or lowband CCP application that, as of February 8, 1996, the *Notice* adoption date, was within the period for filing mutually exclusive applications. As a result, all 931 MHz applications accepted for filing after the Public Notice released December 6, 1995, are frozen until WT Docket No. 96-18 has been resolved. This freeze is impermissibly retroactive and patently arbitrary and capricious.

The freeze has an impermissible retrospective effect. It will prevent the processing of applications filed as long ago as November, 1995! It will certainly prevent the processing of

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[16] *Yakima Valley Cablevision*, 794 F. 2d 745-46; *See Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947).

[17] See *Notice*, at ¶13 ("According to our records, CCP channels are heavily licensed, particularly in major markets.")

applications filed by Petitioners, all of whom were filed and/or placed on Public Notice between November 22, 1995 and February 8, 1996. When these applications were filed, however, there was absolutely no basis provided by the Commission for anticipating that they would ever be subject to an *ex post facto* freeze.

The interim processing rules constitute a "rule" under the APA.[18] Thus the interim processing rules' legal consequences must be wholly prospective, unless Congress expressly conveyed the power to promulgate retroactive rules to the Commission.[19] The Communications Act conveys no such express power, and no other statutory basis for such power is cited in the *Notice*. Thus the Commission's attempt to impose a retroactive freeze is illegal.

Indeed, the courts have ruled that the Commission cannot dismiss applications which were timely filed in accordance with the rules prior to the effective date of a freeze. Such applications are entitled to consideration under the doctrine of *Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). In *Kessler*, the U.S. Court of Appeals for the D.C. Circuit concluded, in the context of a freeze

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[18] The APA's definition of a "rule" states in pertinent part that a rule

> means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...

5 U.S.C. §551(4) (emphasis added).

[19] *Bowen v. Georgetown University Hospital*, 488 US 204, 208 (1988) (retroactive rulemaking prohibited unless authorized by statute).

on the acceptance of new AM applications, that applicants who tendered their applications prior to the first day of a freeze were entitled to participate in a comparative hearing on that application and that the Commission could not deprive them of this right when their applications were timely but were rejected only because of a temporary freeze. *Id.*, at 688.

B. No Notice and Comment As Required

The Commission cannot argue that the interim processing rules are procedural in nature, and thus are exempt from the notice and comment requirements of the APA. The exception for procedural rules must be construed very narrowly and is plainly inapplicable where the rule in question alters substantive rights and interests.[20] In determining whether an agency rule is substantive and thus subject to the notice-and-comment provisions of Section 553(b), courts must look at the rule's effect on those interests ultimately at stake in the agency proceeding.[21]

The interim processing rules, which include the application freeze, are substantive in nature because they fail the test articulated in *Pickus*, i.e., these rules will have a direct effect

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[20] National Association of Home Health Agencies v. Schweiker, 690 F. 2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205, 103 S. Ct. 1193, 75 L. Ed. 2d 438 (1983) (APA exemption from the notice and comment requirement does not apply to agency action which as a substantial impact on substantive rights and interests);

[21] Neighborhood TV CO., Inc. v. F.C.C, 742 F. 2d 629 (1984), citing Pickus v. United States Board of Parole, 507 F. 2d 1107 (D. C. Cir. 1974) (parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the ultimate parole decisions" (emphasis supplied).

on the ultimate disposition of the subject applications. The Commission has made it clear that it will adopt auction rules.[22] In fact, the Commission announced its intention to adopt auction rules in its *Part 22 Rewrite Order*, supra. The Commission has also made it clear that once it has adopted the new auction rules, it will dismiss applications still pending, in order to clear the way for such auction. *Notice* at ¶ 144.[23] The Commission could not hold applications in abeyance and then dismiss them as part of the auction process without the imposition of a freeze. In fact, the only reason a freeze is necessary at all is to accomplish this effect.[24] Since the ultimate effect of the freeze, used in conjunction with the final auction rules ultimately adopted, will be the dismissal of Petitioners' applications, applications which were not subject to dismissal for such reasons on the date they were filed, these new rules will have a substantial effect on the Commission's ultimate disposition. Consequently, the interim rules

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[22] See Notice at ¶¶ 1, 71-136.

[23] The Commission indicates in the *Notice* that it has used this procedure with other existing services. See *Notice*, at footnote 270.

[24] See Comments of John D.Pellegrin, Chartered, filed in WT Docket No. 96-18 and PP Docket No. 93-253, on March 1, 1996 ("there is no valid reason to institute a freeze at all in this situation. The Commission could simply announce it will utilize auctions for those applications which proved ultimately to be mutually exclusive after the new rules are established.") In addition, the Commission has previously stated its approval of the general use of public notices and cut-offs, with auctions to resolve mutual exclusivity as it occurs, for CMRS services. *See In The Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Third Report and order, 9 FCC Rcd 7988, 8135 (1994).

are substantive, and the failure to subject them to notice and comment is illegal.

VII. Interim Processing Rules Violate Communications Act

A. Value of Frequency

The Commission's interim processing rules, and particularly the filing freeze, are admittedly driven by its desire to make applicants pay for paging frequencies. The proposed rules will have the direct effect of either preserving the number of licenses currently issued or in fact reducing that number, making geographic paging licenses available at auction in the future more valuable to prospective bidders.

Section 309(j)(7)(A) of the Communications Act provides that, in making a decision to prescribe area designations and bandwidth assignments:

> ... the Commission may not base a finding of public interest, convenience and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (emphasis supplied)

It is manifestly clear that the Commission is doing just that if it establishes rules in contemplation of the value of paging spectrum, while at the same time it penalizes applicants already on file in favor of potential, as yet unidentified bidders for paging licenses.[25]

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[25] In fact, since the Commission is forbidden by statute to consider the revenues generated by auctions when instituting competitive bidding rules for a service, there is no reason why the Commission should institute a freeze at all. The Commission could simply utilize auctions for those applications which proved ultimately to be mutually exclusive after a date certain. Seen in this light, the only reason for a freeze is to maintain the "value" of the paging spectrum for future bidders, and to attempt to

Furthermore, what concern is it of the Commission's whether there is a great deal of spectrum available or, as observed in ¶13 of the *Notice*, that "there is relatively little desirable spectrum that remains available for licensing" on VHF and UHF paging channels in the 152 and 454 MHz bands.[26] Substitute the term "valuable" for "desirable", a reasonable synonym in this context, and the Commission's consideration of the worth of the spectrum is clear.

B. Statutory Objectives

In addition to the foregoing, to freeze paging applications for the sake of instituting paging auctions further contravenes the letter and spirit of the competitive bidding provisions in the Communications Act. Specifically, these provisions list statutory objectives such as the following:

1. "[D]evelopment and rapid deployment of new technologies, products and services.. without administrative or judicial delays.." See 47 U.S.C. § 309(j)(3)(A). Paging is not a new service, but rather, by the Commission's own admission, a mature industry.[27] Freezing paging applications to preserve the few paging frequencies remaining will not bring any "new technology, products or services" to the public. A paging freeze is simply an administrative delay, which Congress has specifically instructed

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increase federal revenues from auctions in impermissible fashion.

[26] The Commission notes that channels in the 931 MHz band "also are scarce in virtually all major markets and most mid-sized markets." *Notice* at ¶14.

[27] See *Notice*, ¶¶ 4-8.

the FCC to avoid.

2. "[P]romoting economic opportunity and competition.. and disseminating licenses among a wide variety of applicants." See 47 U.S.C. § 309(j)(3)(B). Paging is already a highly competitive industry, as the FCC itself has observed in the *Notice*. (See footnote 27, *supra*.) Licenses are already "disseminated among a wide variety of applicants", as there are numerous paging operators in nearly all markets. On the other hand, the freeze has erected barriers to new entrants into the paging marketplace. Consequently, the freeze will have the direct effect of decreasing competition in the paging industry.

VIII. Commission's Action is Arbitrary and Capricious

In defense of its own actions, the Commission states in the *Notice* that:

> We believe that after the public has been placed on notice of our proposed rule changes, continuing to accept new applications under the current rules would impair the objectives of this proceeding. We also note that this is consistent with the approach we have taken in other existing services where we have proposed to adopt geographic area licensing and auction rules. *Notice*, at ¶ 139. (emphasis supplied)

However, this approach is not consistent with the Commission's prior action taken with respect to 931 MHz paging licenses. The Commission in the *Part 22 Rewrite Order* established new rules specifically for the 931 MHz paging service. It proposed a solution which properly looked forward by establishing rules for applications filed in the future, while simultaneously proposing processing rules handling previously filed applications. No filing freeze was imposed, despite the fact that notice was given that

auction procedures would be established for applications filed in the future.

The Commission's treatment of applications pursuant to the recent *Part 22 Rewrite Order* completely belies the rationale for establishing an application freeze in the instant case, at least with respect to 931 MHz paging applications. Nor, as demonstrated above, is there any need for an application freeze in this case, as there was no need in the *Part 22 Rewrite* situation.

The Commission's proposed Rules are also a radical departure from the practice established in two recent Commission decisions.[28] In both cases, the Commission decided that equitable considerations barred the retroactive application of new rules to previously filed applications. The same equitable considerations are applicable in the instant situation, and the Commission should extend the same type of treatment to bar retroactivity in this case.

The Commission's specific language in its decision to implement auctions for the Multipoint Distribution Service underscores the arbitrary nature of the Commission's interim processing rules.[29] Commissioner Quello says quite forcefully and

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[28] *Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules)*, 78 RR 2d 856 (1995) ("MDS Order"); *Memorandum Opinion and Order* in PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) ("Cellular Unserved Order").

[29] *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multichannel Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, 10 FCC Rcd 9589, 9754-57 (1995).

persuasively:

> The record does not evince any *mal fides* or intent to deceive by not constructing on the part of the applicants. We must therefore conclude that these applications were filed in good faith with the expectation that they would be processed under the rules in existence at the time of filing. Even though we have decided to modify the service somewhat we should not punish those applicants who were caught in the transition through no fault of their own. I believe that they have a significant vested equitable interest in having the applications that they paid fees to file processed in accordance with their expectations and the rules at that time.

Id., at 9754.

As the foregoing language illustrates, procedural fairness requires that the Commission process in accordance with its rules, any applications for paging facilities that were on file prior to the imposition of the freeze. These applicants followed the Commission's Rules, and expended significant efforts and resources in the preparation of their applications, including engineering studies and legal review. Each applicant also paid a filing fee to the FCC. Dismissal of these applications would be particularly unfair to the applicants because the combination of holiday leave, government furloughs, and closings due to winter weather no doubt delayed many applications from reaching Public Notice in a timely fashion. Therefore, the commencement of several relevant cut-off periods were delayed for reasons beyond the control of the Petitioners. The result is the arbitrary and capricious processing of the subject applications.

Wherefore, the above premises considered, it is respectfully requested that the Commission should reconsider its decision to

impose a freeze and adopt the interim processing rules, and accept and process Petitioners' applications at the earliest possible time.

Respectfully submitted,

JOHN D. PELLEGRIN, CHARTERED

By: _____
John D. Pellegrin
Robert E. Kelly

Law Offices of John D. Pellegrin, Chartered
1140 Connecticut Avenue, N.W. - Suite 606
Washington, D.C. 20036
(202) 293-3831

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