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

In the Matter of [redacted]

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

COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA"), by its attorneys, hereby comments on the petitions for reconsideration, partial reconsideration, and clarification of the *First Report and Order* filed in the above-captioned docket on June 10, 1996.[1] As discussed below, PCIA continues to urge the Commission to allow existing paging licensees to file interim modification applications that involve locating a facility within 40 miles of any authorized facility, as long as the application underlying that authorization was filed in advance of the February 8, 1996, *Notice* adoption date.[2] PCIA also urges the Commission to modify the *First Report and Order* by: (i) limiting eligibility to file mutually exclusive applications during the freeze to incumbent licensees with co-channel facilities operating near a proposed facility; (ii) granting nationwide exclusivity to all licensees that had requests for

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[1]FCC 96-183 (Apr. 23, 1996) ("*First Report and Order*"), *reprinted at* 61 Fed. Reg. 21380 (May 10, 1996). *See also* Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 33742 (June 28, 1996).

[2]FCC 96-52 (Feb. 9, 1996) ("*Notice*").

nationwide exclusivity pending, that had completed construction of facilities by February 8, 1996, or had valid outstanding construction permits as of that date, and that otherwise are in compliance with the applicable Commission rules; and, (iii) allowing limited eligibility Part 90 applicants to file modification applications on the five 929 MHz channels designated for private carrier paging ("PCP").

A. Incumbents Should Be Permitted to File Interim Modification Applications for Sites Within 40 Miles of Facilities Applied for by February 8, 1996

To alleviate competitive hardships caused by the paging application freeze, the Commission's *First Report and Order* permitted paging carriers to file interim modification applications for sites within 40 miles of existing facilities in operation as of February 8, 1996. Since that time, the Commission also issued its *Order on Reconsideration* in this docket,[3] which further expanded incumbents' rights to modify existing systems. Based upon the backlog in processing paging applications, the Commission now permits the filing of interim modification applications by "incumbents to expand . . . 40 miles . . . from sites for which applications were filed as of September 30, 1995, whether or not such applications were granted prior to February 8, 1996."[4] While PCIA commends the Commission's expansion of interim rights for incumbents, PCIA continues to urge the Commission to extend modification rights to include incumbents that filed valid applications by February 8, 1996.

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[3]FCC 96-260 (June 11, 1996) ("*Order on Reconsideration*").

[4]*Order on Reconsideration* at ¶4.

As noted in the petitions of PCIA and others, the adoption date of the *Notice* -- February 8, 1996 -- is a more equitable and rational trigger for permitting interim modification applications.[5] The applications filed between September 30, 1996 and February 8, 1996 were filed well before any freeze was put into place, and cannot be characterized as speculative. Rather, these applications were filed largely by legitimate carriers seeking to serve pent up customer demands. Furthermore, the delays in processing these applications were not the fault of the applicants, but rather were due to the backlog in application processing by the Commission and the agency's changeover to computer-based application screening. Accordingly, PCIA urges the Commission to reconsider the *First Report and Order*, as modified by the *Order on Reconsideration*, and permit the filing of interim modification applications by incumbents for facilities within 40 miles of any site *applied for* by February 8, 1996.

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[5]The Personal Communications Industry Association Petition for Partial Reconsideration ("PCIA Petition"), WT Docket No. 96-18 (June 10, 1996) at 7-9; Petition for Clarification and/or Partial Reconsideration of Interim Rules of Ameritech Mobile Services, Inc. ("Ameritech Petition"), WT Docket No. 96-18 (June 10, 1996) at 1-3; Petition for Partial Reconsideration of Blooston, Mordkofsky, Jackson & Dickens ("BMJ&D Petition"), WT Docket No. 96-18 (June 10, 1996) at 2-4; Metrocall Inc. Petition for Clarification or Partial Reconsideration, WT Docket No. 96-18 (June 10, 1996) at 5-7; Petition for Partial Reconsideration of ProNet, Inc. ("ProNet Petition"), WT Docket No. 96-18 (June 10, 1996) at 3-4; Petition for Partial Reconsideration of Radiofone, Inc. ("Radiofone Petition"), WT Docket No. 96-18 (June 10, 1996) at 1.

B. Eligibility to File Applications Mutually Exclusive with Interim Modification Applications Should Be Limited to Incumbents with Co-Channel Facilities

PCIA concurs with those petitioners seeking to limit eligibility to file applications that are mutually exclusive with interim modification filings.[6] As previously noted, the *First Report and Order* permitted incumbent carriers to expand their facilities by allowing applications for new facilities within 40 miles of existing sites. These applications, however, are placed on public notice and thus are subject to the filing of mutually exclusive applications by any party. For the reasons discussed below, PCIA believes that rule should be amended to allow the filing of mutually exclusive applications *only* by other co-channel licensees.

As the Commission noted in the *First Report and Order*, the paging industry is "well-established, highly competitive, and experiencing rapid growth in consumer demand."[7] Thus, workable interim relief measures from the application freeze are critical if "existing paging carriers [are] to meet customer demands and improve service to the public while the rulemaking is pending."[8] PCIA, like other petitioners, does not believe that the freeze relief measures will allow legitimate carriers to meet real, pent up customer demand if interim applications can be "MXed" by any party and processing of the application stopped.

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[6]Ameritech Petition at 3-5; BMJ&D Petition at 5-6; Petition for Reconsideration of Paging Network, Inc. ("PageNet Petition"), WT Docket No. 96-18 (June 10, 1996) at 3-4; ProNet Petition at 4-8; Radiofone Petition at 1.

[7]*First Report and Order* at ¶3.

[8]*Id.*

Balancing the interests at stake, PCIA believes that threshold eligibility to file mutually exclusive applications should be limited to incumbents with a legitimate interest in the expansion area sought in an interim filing. In particular, eligibility to overfile, and thus halt processing of, an interim application should be limited to carriers that have existing facilities operating co-channel with the interim applicant's frequency in that area. This compromise balances the needs of existing carriers meeting their customer demands while protecting the rights of other carriers to expand their systems in a comparable fashion. This restriction of threshold eligibility for mutually exclusive application filing is consistent with *U.S. v. Storer Broadcasting*,[9] which held that the Commission may establish eligibility requirements in rulemaking proceedings, provided such requirements are supported by the record. In the present case, the need to restrict eligibility to co-channel licensees has been established in the record and modifications to the rules on reconsideration are warranted in the public interest.

C. Nationwide Exclusivity Should Be Granted to Qualified Carriers That Have Completed Construction by *or* Had Valid Outstanding Construction Permits on February 8, 1996

PCIA, and others, have also requested clarification and/or reconsideration of the *First Report and Order* provisions relating to qualification for nationwide exclusivity.[10] The *First Report and Order* explicitly granted nationwide exclusivity to those carriers that had completed

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[9]351 U.S. 192 (1956).

[10]PCIA Petition at 3-6; Petition for Clarification or Reconsideration of Diamond PagePartnerships, WT Docket No. 96-18 (June 10, 1996) at 1-3; Petition for Reconsideration of PageMart II, Inc., WT Docket No. 96-18 (June 10, 1996) at 1-8; Emergency Petition for Reconsideration of TSR Paging, Inc., WT Docket No. 96-18 (June 10, 1996) at 1-25.

construction of the requisite number of facilities by February 8, 1996, and were otherwise in compliance with the Commission's rules. The *First Report and Order*, however, did not discuss the status of applicants with pending requests for nationwide exclusivity who held outstanding construction permits on February 8, 1996, whose permits authorized installation of sites that, if completed under the terms of the permits, would satisfy the FCC's exclusivity benchmarks. As discussed below, these carriers should, as a matter of both law and equity, be permitted to obtain nationwide exclusivity if they are otherwise in compliance with the Commission's rules.

As documented by PageMart and others, carriers have made substantial investment and planning decisions in reliance on the Commission's nationwide exclusivity rules. Now, despite having applied for nationwide exclusivity, despite having proposed construction necessary to satisfy the nationwide exclusivity thresholds, despite having been frequency coordinated on a nationwide basis, and despite having made significant, timely efforts under those construction permits, the *First Report and Order* appears to abruptly terminate any pending exclusivity rights. Even worse, by proposing to auction the "whitespace" surrounding these systems, the *First Report and Order* exposes these carriers to greenmail applications and threatens legitimate customer expectations. PCIA, and others, therefore urge the Commission to clarify or reconsider its *First Report and Order* and grant nationwide exclusivity to those carriers who are otherwise in compliance with the rules and that, on February 8, 1996, either: (i) satisfied the construction thresholds to obtain exclusivity *or* (ii) had outstanding

construction permits that, if completed in a timely manner, would satisfy the nationwide exclusivity thresholds.[11]

D. Entities Satisfying the Limited Eligibility Criteria under Part 90 Should Be Exempted from the Application Freeze on the Five 929 MHz Private Carrier Paging Channels

In the *First Report and Order*, the Commission exempted from the paging freeze applications by entities in the Special Emergency Radio Service ("SERS"). The rationale for exempting SERS applicants was that, because SERS is a limited eligibility service, the Commission "see[s] no risk that allowing SERS applications will compromise the goals of this rulemaking or lead to speculation."[12] In a petition for reconsideration, Motorola has requested the Commission to extend this exemption to all entities meeting the limited eligibility service qualifications of Part 90, *i.e.*, all Public Safety Radio Service, Industrial Radio Service, and Land Transportation Radio Service eligibles.[13] PCIA supports this request for reconsideration as it applies to the five channels designated for PCP operation in the 929 MHz bands.

For the five 929 MHz PCP channels, PCIA believes the rationale underlying the SERS exemption also extends to other limited eligibility radio services.[14] Moreover, there are, as

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[11]Any carrier whose construction permits expire who has not met the exclusivity threshold, of course, would have its exclusivity rights revoked.

[12]*First Report and Order* at ¶38.

[13]Petition for Partial Reconsideration of Motorola, Inc., WT Docket No. 96-18 (June 10, 1996) at 1-15.

[14]Indeed, PCIA understands that the speculation on shared channels was limited to Business Radio Service eligibles, which include any commercial entity or individual.

Motorola has observed, valid public policy reasons for granting additional flexibility under the rules to allow implementation of the types of small, internal, private systems licensed in the limited eligibility services. PCIA accordingly urges the Commission to process applications by limited eligibility Part 90 applicants for the five PCP channels in the 929 MHz band.

E. Conclusion

In sum, PCIA supports efforts to recognize the legitimate needs and rights of carriers that have been serving, and continue to serve, public demand for paging services. These efforts should include: (i) allowing paging carriers to submit interim applications for new stations within 40 miles of facilities applied for prior to February 8, 1996; (ii) limiting eligibility to file competing mutually exclusive applications to incumbent licensees operating co-channel systems in the same area; (iii) granting nationwide exclusivity rights to carriers otherwise in compliance with the rules who, on February 8, 1996, either had already satisfied the construction thresholds for eligibility or had existing construction permits for facilities that would satisfy the construction thresholds; and, (iv) modifying the paging freeze to allow new applications by applicants meeting the qualification criteria for the limited eligibility Part 90

services on the five shared PCP channels in the 929 MHz band. These modifications would provide necessary flexibility to meet customer expectations without impairing the realization of the Commission's goals for this proceeding.

Respectfully submitted,

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Dated: July 15, 1996

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