COPY

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

RECEIVED
JUL 17 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

PETITION FOR RECONSIDERATION

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider its Order on Reconsideration of First Report and Order (the "Reconsideration Order"),[1] which modified this docket's First Report and Order ("R&O") establishing interim procedures to govern paging licensing pending final outcome of the above-captioned rulemaking proceeding. In support of this petition, ProNet respectfully shows the following:

I. INTRODUCTION

In its Notice of Proposed Rule Making ("NPRM"), the Commission instituted an across-the-board freeze on paging applications, and suspended processing of applications for which the

[1] The Reconsideration Order was released June 11, 1996, and was published in the Federal Register on July 2, 1996, 61 Fed. Reg. 34375 (1996).

statutory petition to deny period, as of February 8, 1996 (the "Freeze Date"), had yet to expire.

Responding to ProNet and other commenters, the Commission partially lifted its freeze in the R&O, by: (1) permitting incumbent licensees to construct and operate additional transmitters without Commission approval or notification, provided there is no increase in existing composite interference contours; (2) allowing incumbents to apply for additional facilities located within forty miles of a site authorized on or prior to the Freeze Date; and (3) resuming processing applications filed with the Commission prior to the Freeze Date.

As ProNet pointed out in its Petition for Partial Reconsideration of the R&O ("June 10 Petition"),[2/] however, the R&O left key restrictions and limitations associated with the freeze intact, and failed to deter speculation as intended by the NPRM. ProNet therefore urged the Commission to:

- Enable forty mile expansion applications to be based upon licenses for which applications were pending as of the Freeze Date;
- Strictly limit the right to "MX" forty mile expansion applications to co-channel incumbents in the same area (or a contiguous area) as that proposed in the expansion application;
- Allow applicants to resolve mutual exclusivity under existing rules; and
- Allow permissive modifications where no valid "MX" application could be filed, or where sites are "lost" due to circumstances beyond the licensee's control.

The Reconsideration Order, released the same day petitions for reconsideration of the R&O were due, grants only partial relief regarding ProNet's first above-stated concern by allowing 40 mile expansion from operational sites for which applications were filed on or before

---

[2/] ProNet's Petition was filed June 10, 1996, and is incorporated herein by this reference. Petitions for Reconsideration of the *R&O*, including ProNet's, were announced in the Commission's *Public Notice*, Report No. 2139, released June 25, 1996, and were published in the *Federal Register* on June 28, 1996, 61 Fed. Reg. 33742 (1996).

September 30, 1995. Moreover, the Reconsideration Order completely fails to address ProNet's other concerns, leaving in place interim licensing rules that block incumbent system development and invite speculative "MX" applications. For these reasons, the Reconsideration Order should be revised as indicated herein.

II. NOTWITHSTANDING THE RECONSIDERATION ORDER, FORTY MILE EXPANSION APPLICATIONS REMAIN NEEDLESSLY CONSTRAINED

The Reconsideration Order acknowledged what ProNet and others pointed out in their petitions for reconsideration: that the R&O's restriction of 40 mile expansion applications from sites granted before the Freeze Date failed to account for the 931 MHz processing backlog. The R&O therefore caused disparate treatment of 931 MHz licensees (by restricting their expansion to 40 miles beyond 1994 system configurations). Accordingly, the Commission modified its interim rules to allow 40 mile expansion from authorized, operational sites for which applications had been filed on or before September 30, 1995.

While the Reconsideration Order somewhat mitigates the disparity between 931 MHz and other frequency bands under the R&O's 40 mile expansion rule, the former's September 30, 1995 cut-off date still needlessly constrains incumbents, particularly those with 931 MHz channels, from responding to customer demand. Due to the substantial delay in 931 MHz application processing, and the uncertainty surrounding those applications, ProNet and other carriers were forced to postpone filing applications for build-out of certain local and regional systems until after September 30, 1995. As ProNet noted in its June 10 Petition (at 4, n.6), the "one-to-a-market" restriction in Section 22.537 of the Rules delayed by months ProNet's filing of applications to build out multiple systems obtained through its acquisition program.

Precluding expansion from these sites will exacerbate the competitive disadvantage already faced by carriers such as ProNet due to the 931 MHz processing delay.[3]

The Reconsideration Order's selection of September 30. 1995 as the filing date cut-off for forty mile expansion sites is illogical and superfluous. Pursuant to the R&O and Reconsideration Order, forty mile expansion applications may be filed only upon certification that the underlying site was constructed and is providing public service.[4] Speculative and strike applicants invariably avoid constructing and operating their proposals. For that reason, the September 30 cutoff is irrelevant as a deterrent to speculation, and serves no other policy or public interest objective.[5] Accordingly, the September 30 cut-off must be rejected and replaced with the Freeze Date, when the Commission ceased accepting new applications and

---

[3] Section 22.537 does not have the same limiting effect on nationwide 931 MHz or PCP licensees.

[4] *R&O* at ¶26, ¶32; *see also* Public Notice, *Wireless Telecommunications Bureau Establishes Interim Procedures for Filing of Common Carrier and Private Carrier Paging Applications,* DA 96-749, released May 10, 1996. Consistent with this requirement of operational status, the Commission should acknowledge that a "fill-in" site can be the predicate for a forty mile application, in which case a Form 489 must be filed on or before the date the expansion application is filed.

[5] Admittedly, the three weeks preceding the Freeze Date saw a dramatic increase in the number of paging applications filed with the Commission. *See* Letter from Chairman Hundt to The Honorable Richard J. Durbin, dated May 28, 1996, p.1. To the extent attributable to incumbent filings, this increase was a natural, foreseeable response to the Commission's roughly five week shutdown from mid-November 1995 to mid-January 1996. During the subject period, the Commission was closed 4 days because of inclement weather and 17 days due to the budget impasse. In addition, information regarding the freeze was leaked to the public approximately one week prior to the Freeze Date, leading legitimate paging operators to accelerate their filing schedules for already-planned system expansion.

imposed interim rules.[6]

III. THE COMMISSION MUST LIMIT THE RIGHT TO "MX" FORTY MILE APPLICATIONS

In its June 10 Petition, ProNet characterized the unfettered right of third parties to "MX" forty mile expansion applications as *debilitating*, because conflicting applications under the R&O (at ¶26) will be suspended until competitive bidding rules are adopted. Without limits, however, speculators and extortionists will be encouraged to file MX applications even though such activity is clearly antithetical to the Commission's purposes in instituting this rulemaking.[7]

ProNet and other commenters have raised these concerns at each stage of this proceeding, and the Commission itself repeatedly cited the Federal Trade Commission's ("FTC's") concerns with fraudulent paging applications as a principal force impelling the freeze.[8] Yet, as presently structured, the interim rules will allow:

---

[6] *See* ProNet's June 10 Petition (at 3-4); Petitions for Reconsideration of First Report and Order filed by Personal Communications Industry Association ("PCIA") (at 9); Ameritech Mobile Communications Corp. (at 2-4).

[7] The only explanation proffered for liberal acceptance of MX applications is protecting *potential* interests of third parties in territory requested by incumbents. The *R&O* itself (at ¶27), acknowledges, however, that accommodating these interests in no way precludes 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.

[8] *R&O* at ¶3, 16-17, 19, 28, 31. Further, the Chairman has personally stated that a goal of the freeze is to "prevent spectrum warehousing and deter application fraud." *See* May 28, 1996 Letter from Chairman Hundt to The Honorable Kay Bailey Hutchison, p.2 (filed in this proceeding June 13, 1996).

- "strike" applications designed to extort cash or other consideration from legitimate service providers;
- speculative applications by unwitting consumers implored to file by application mills and other promoters with dubious motives;
- disparate treatment of CCP and shared PCP incumbents, because the latter's 40 mile expansion applications cannot be MXed, and are limited only by a finite number of potential competing applications who share the underlying transmitting site; and
- a carrier to block a competing system from expanding on a non-common channel.

As ProNet observed in its June 10 Petition, the Commission's permissive treatment of competing applications suggests an alternative and impermissible motive: preservation of unlicensed 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.[9]

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

It is indisputable that the Commission possesses the legal authority to limit applicant eligibility,[10] and that eligibility restrictions for competing applications would not violate the

---

[9] 47 U.S.C. §309(j)(7)(B).

[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 47 U.S.C. §309(a)-- and by judicial precedent, *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

principles of Ashbacker Radio Corp. v. FCC.[11] The Commission's failure to impose such restrictions here is illogical, contrary to its own stated objectives in this proceeding, may violate the Communications Act, and should be reconsidered immediately. Specifically, pending implementation of auction rules, the right to "MX" incumbent 40 mile expansion applications should be limited to other incumbents holding co-channel licenses either in the same or in a contiguous area as 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 rules. This policy undermines Section 309(j)(6)(E) of the Act which (as cited above) obliges the Commission to avoid mutual exclusivity whenever possible. The R&O, by contrast, explicitly preserves MX situations that may be amenable to technical or other negotiated resolutions.

As ProNet demonstrated in its June 10 Petition, grounds for allowing settlements among legitimate, "MXed" applicants are compelling. First, good faith resolution of frequency conflicts will accelerate the delivery of paging services to the public. Second, as shown above, such

---

[11] 326 U.S. 327 (1945) ("*Ashbacker*"). Prospective applicants have no claim to *Ashbacker* rights. *Reuters Ltd. v. FCC*, 781 946, 951 (D.C. Cir. 1986) ("Reuters"). Further, prohibiting MX applications by non-incumbents will in no way prevent new entrants from bidding for geographic licenses; it simply reduces white space available to non-incumbent auction winners, based upon the Commission's determination that the public's interest in allowing limited incumbent expansion outweighs benefits from maximizing the quantity of auctionable spectrum. *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1320 (D.C. Cir. 1995).

resolutions of mutual exclusivity are expressly required by statute[12] and the Commission's Rules.[13]

No valid basis exists for refusing to consider amendments and/or settlement agreements to remove mutual exclusivity.[14] The Commission must address this issue on reconsideration of the R&O, and should 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.

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

In the NPRM (at ¶140), the Commission acknowledged the importance of certain modifications by incumbents in order to avoid disruption of existing operations. ProNet and other commenters supported this position, and provided specific examples of modifications that should be permitted. The R&O and Reconsideration Order, however, never addressed the critical need for such modifications. ProNet again requests that the Commission acknowledge the real world needs of incumbent paging operators, and modify its interim rules accordingly.

---

[12] 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. *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

[13] 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-- 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, which will become effective August 10, 1996.

[14] As long as the Commission limits eligibility to file MX applications, as discussed above, speculators and extortionists will be unable to exploit settlement provisions.

A. Sites Not Subject to Valid MX Applications

In its initial Comments (at 9-10), and again in its June 10 Petition (at 10-11), ProNet noted that existing paging networks contain gaps in coverage which cannot be filled under existing "fill-in" rules, but where an incumbent's coverage nevertheless precludes a valid MX application.[15] ProNet demonstrated that transmitters covering these gaps will be indistinguishable from "fill-ins" as defined by the interim rules, and should be permitted on the same basis.[16] Because no valid MX application can be filed, there is no conceivable justification for restricting expansion of service in such cases, or requiring prior approval. No auctionable "white space" is involved, as only the incumbent could provide service to the affected area without causing harmful interference.

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 could not be subject to a valid MX application.[17]

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

The R&O and Reconsideration Order are also silent regarding requests for relocation pursuant to Section 22.142(d) of the Rules notwithstanding the NPRM's explicit

---

[15] Examples of such situations include creases or "doughnuts" formed by composite contours, and small gaps in system coverage along coastlines.

[16] 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 will remain indefinitely.

[17] Incumbents should be required to file FCC Form 489 for such sites, accompanied by a certification with respect to the extension.

acknowledgement (at ¶39) of situations requiring such relocation.[18] The Commission's official silence is particularly troubling because the staff has informally discouraged incumbents from filing Section 22.142(d) applications, even in severe circumstances. Accordingly, ProNet hereby renews its request[19] that the Commission clarify its interim rules to affirm that it will accept and process applications compliant with Section 22.142(d).

VI. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission should reconsider its Reconsideration Order, address the issues raised herein and modify its interim licensing rules accordingly.

Respectfully submitted,

PRONET INC.

By: _____

Jerome K. Blask
Daniel E. Smith

Gurman, Blask & Freedman,
Chartered
1400 16th Street, N.W. - Suite 500
Washington, D.C. 20036
(202) 328-8200

Its Attorneys

Dated: July 17, 1996

---

[18] Such situations include loss of a tower site or new construction nullifying coverage from an existing location.

[19] ProNet has raised this issue on four separate occasions in this proceeding.