may *not* cause interference to operations on a primary basis . . ."[36] Because Rule 22.723 could be interpreted as authorizing non-compliant secondary operations for up to six months, the Commission should either add clarifying language to the Rule 22.723's text or merely state on reconsideration that the Rule does not expand or extend the rights of RRS licensees whose operations cause actual interference to primary co-channel geographic licensees.

B. The "Substantial Service" Standard Must Be Revised

While acknowledging that holding geographic licensees to strict coverage requirements will deter speculation, restrict frequency stockpiling, and promote rapid deployment of service, the 2nd R&O establishes a subjective, alternative coverage standard that is bound to foment litigation while undermining the laudable policy goals the requirements are designed to secure. Under the "substantial service' standard, a geographic licensee can disregard the objective one-third, two-thirds population coverage requirements in the hope that the licensee can demonstrate that the service it is providing is: (a) sound; (b) favorable; and (c) substantially above a level of mediocre service that would barely warrant renewal.[37] ProNet respectfully submits that these three indicia of "substantial service" are intrinsically subjective; "sound," "favorable" and "substantially above mediocre" service, like Shakespeare's idea of beauty, is entirely in the eye of the beholder. By adopting this standard, the Commission is signaling that it is ready, willing and eager to define the contours of this standard through litigation.

Compounding the "substantial service" standard's debilitating flaws is the provision in Rule

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[36] Section 90.7 of the Commission's Rules, 47 C.F.R. §90.7 (1996) (emphasis added).

[37] *See* Section 22.503(k)(3) of the Rules.

22.503(k)(3) giving the geographic licensee five years to make the "substantial service" showing. Thus, the "substantial service" standard is not only wholly subjective but, relative to the objective standard alternative, extends the deadline for demonstrating compliance by two years. By combining subjectivity with a five year grace period for compliance showings, the "substantial service" standard virtually guarantees that geographic license auctions will become a spawning ground for speculators, "rent seekers" and other insincere types the Commission vowed to exclude from paging licensing.

Because the 2nd R&O imposes no restrictions on transferring geographic licenses other than those relating to recapture of benefits granted to small businesses, speculators will acquire these licenses for the express purpose of assigning, transferring or partitioning them at a profit prior to the five year deadline for establishing "substantial service."[38] Stated simply, this subjective standard will attract to the auction bidders whose sole intention is to become brokers (or master brokers) for the property rights conveyed by geographic licenses.

If the Commission desires to deter "rent seeking" in its licensing process, the "substantial service" criteria must be redefined to embody objective criteria that the Commission will assess at both three and five year intervals. For example, "substantial service" could be defined as construction and operation of transmitters whose service contours cover fifty percent (at three years) and seventy-five percent (at five years) of the geographic area not covered by incumbent co-channel licensees in the subject MTA or EA. Alternatively, the Commission could require licensees attempting to prove "substantial service" to satisfy specified levels of infrastructure investment by the three and five year deadlines.

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[38] The incentives for speculation and coercion created by the 2nd R&O's failure to impose alienability restrictions on non-incumbent geographic licensees is discussed separately below.

C. Interference Between Adjacent Co-Channel Geographic Licensees

Regarding the issue of co-channel interference between adjacent geographic licensees, the solution provided by the 2nd R&O (at ¶73) is simply a duty to negotiate in "good faith." Again, the Commission has identified a critical issue, but elected to resolve it by employing a subjective standard that is prone to dispute and litigation. Under such an indefinite framework, service to the public will inevitably suffer.

Objective criteria for dealing with this issue were proposed during the course of this proceeding. Comp Comm proposed allowing the geographic licensee's service contour to extend up to, but no further than, the geographic area boundary, but this concept was never discussed in the 2nd R&O. In ProNet's view, the CompComm solution is preferable to the vagaries of a "good faith" duty to negotiate. Alternatively, it is reasonable to conclude that this matter has been insufficiently addressed (due to the large number of issues raised by the NPRM) and that a separate proceeding is therefore warranted to consider all pertinent ramifications.

D. Interference Protection For Grandfathered

929 MHz Non-Exclusive Incumbents

Apparently through inadvertence, the 2nd R&O and corresponding rules extend greater interference and operating rights to grandfathered, non-exclusive 929 MHz incumbents who are licensed on the 35 exclusive 929 MHz channels than these licensees enjoyed under previous Part 90 rules. Specifically, new Rule 90.493 subjects a grandfathered, non-exclusive 929 MHz licensee to the "construction, operation and notification rules and requirements set forth in Part 22 of this chapter for paging stations operating in the 931-32 MHz band . . ." One of the Part 22 rules cross-

referenced by Rule 90.493 is Rule 22.503(i), which requires geographic licensees to provide interference protection to *all* co-channel facilities within the geographic area that were authorized on the effective date of the new rules. Thus, this formulation will afford full interference protection to grandfathered 929 MHz licensees who failed to qualify for exclusivity under the pre-existing Part 90 rules; those same rules, however, compelled such grandfathered licensees to share their 929 MHz channel with subsequent licensees who satisfied 929 MHz exclusivity standards.

Unless the relevant rule sections are revised, grandfathered, non-exclusive 929 MHz incumbents operating on exclusive 929 MHz spectrum will be able to evict co-channel geographic licensees from the channel *even if* the geographic licensee had previously qualified for local, regional or nationwide exclusivity on that channel. Such a result will completely undermine the rights of existing 929 MHz exclusive incumbents, and will modify their licenses without notice and an opportunity for a hearing. Moreover, the NPRM provided no notice that the Commission was contemplating such a radical proposal. For all these reasons, the Commission should reconsider Rule 90.493 to make plain that it excludes grandfathered, non-exclusive 929 MHz incumbents licensed on the 35 exclusive 929 MHz channels.

E. Limitations On Assignment, Transfer, and Partition Rights Of Non-Incumbent Geographic Licensees

As crafted by the 2nd R&O, the geographic licensing rules will allow auction winners an unconstrained right to sell or partition their EA or MTA authorizations.[39] As a result, a non-incumbent geographic licensee, immediately after grant, can seek to "flip" its authorization (either

[39] Existing rules enable the Commission to recapture bidding credits extended to small business geographic licensees. The protection afforded by these rules, however, are irrelevant to the concerns raised here.

in whole or in part) to incumbent, co-channel operators in the subject geographic area. In ProNet's view, this unfettered right creates inordinately attractive opportunities for gaming, speculation and extortion by entities that have no demonstrable interest in providing service to the public by constructing and operating facilities. Unlike certain other services where the Commission has introduced geographic licensing, the likelihood of such insincere activity is particularly acute in paging, with its extensive operating history and unique roster of long-term incumbent carriers.

On reconsideration, the Commission should take action to prevent this unintended result. A non-incumbent geographic licensee should be required to demonstrate its commitment to public service before being allowed to extract "rents" from co-channel operators in the same EA or MTA market. Specifically, the Commission should require this particular class of licensees to provide actual service to a significant portion of the geographic area's population or territory, probably at least ten percent, before enjoying an unconstrained right to "flip" or partition the license. Alternatively, the Commission should require the non-incumbent geographic licensee to satisfy the three year population coverage requirement set forth in Rule 22.503(k)(1) as a precondition to any assignment, transfer or partition of the license.

V. FOR PAGING, THE ANTI-COLLUSION RULES ARE UNREASONABLY HARSH

As described in the 2nd R&O, the anti-collusion rules are excessively burdensome and fail to reflect the current financial and economic position of the paging industry. Specifically, numerous commenting parties urged the Commission to grant some relief to the verbal straightjacket imposed by Section 1.2105 of the Rules on applicants bidding in the same license areas (but not necessarily the same spectrum blocks) so that they can conduct discussions regarding acquisitions,

mergers and even intercarrier arrangements. These requests were flatly rejected (at ¶156) on the ground that the Commission lacked "a sufficient record at this time to make such a decision."

This lack of flexibility will prove unnecessarily detrimental to the paging industry, which currently finds itself in particularly difficult circumstances. Thus, as the Commission has previously acknowledged, the industry's second largest carrier has filed for bankruptcy protection and now confronts a hearing with respect to its basic character qualifications. In addition, virtually all publicly- traded carriers have experienced substantial declines in market value during the past six to twelve months, while traditional sources of private and public debt and equity capital appear extremely reluctant to make new commitments to this sector. Indisputably, the paging industry finds itself in an era of unprecedented challenge.

It is in circumstances like these that incumbents require maximum flexibility to analyze and discuss reorganizations, consolidations and other combinations that may allow carriers to increase return on assets and help enhance paging's financial and economic prospects. The anti-collusion rules unnecessarily prohibit carriers from engaging in this activity. ProNet respectfully submits that the record is comprehensive and convincing. Relief from those aspects of the anti-collusion rules that preclude merger, acquisition, intercarrier and related dialog among carriers is urgently needed and the 2nd R&O must be revised accordingly.

CONCLUSION

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

Respectfully submitted,

PRONET INC.

By: _____
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Daniel E. Smith

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Its Attorneys

April 11, 1997

EXHIBIT 1

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April 10, 1996

Sandra K. Danner, Deputy Chief - Legal Branch
Commercial Wireless Division
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Federal Communications Commission
2025 M Street, N.W., Room 7002
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RECEIVED
APR 11 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: WT Docket No. 96-18
April 5, 1996 Clarifying Public Notice
EX PARTE PRESENTATION

Dear Ms. Danner:

Pursuant to Rule Section 1.1202 et seq., this is to confirm our conversation today concerning the Commission's Public Notice, Mimeo No. DA96-538, released April 5, 1996. This Public Notice clarified paragraph 140 of the Commission's Notice of Proposed Rulemaking (NPRM) in WT Docket No. 96-18, by indicating that the Commission will continue to apply current rules to define the interference contour of existing paging systems. You have confirmed that, while licensees can use the current rules to define the composite interference contour of their existing system, these licensees may utilize the proposed 21 dBuV/m formula to define the interference contour of fill-in transmitters implemented pursuant to paragraph 140 of the NPRM. This will give incumbent licensees maximum flexibility in establishing such fill-in transmitters, since they can use directional antennas and other measures to keep the fill-in contour within the composite system contour.

You also confirmed that this policy clarification will be in effect throughout the pendency of WT Docket No. 96-18, rather than the pendency of only that part of the rulemaking devoted to establishing interim licensing procedures. Finally, you indicated that the Commission generally intends for 929 MHz licensees to have the same ability to modify their systems as 931 MHz licensees, under the interim rules. We shall

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explore with the Licensing Division in Gettysburg how specific modifications are currently treated, and seek their input on proposed future modifications.

Thank you for your assistance in this matter.

Sincerely,

John A. Prendergast

John A. Prendergast

cc: Office of the Secretary, FCC
Jonady Hom, Esq.

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April 18, 1996

Ms. Mika Savir
Legal Branch - Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

RECEIVED
APR 18 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte
WT Docket No. 96-18
Interim Policy Regarding 900 MHz "Fill-in" Transmitters

Dear Ms. Savir:

This will confirm our April 15, 1996 conversation regarding the Commission's April 5, 1996 Public Notice clarifying Paragraph 140 of the Notice of Proposed Rule Making ("NPRM") in the above-referenced proceeding. Specifically, you confirmed that, at present, the fixed radii interference contour specified in Section 22.537 of the Commission's Rules constitutes the outer perimeter or composite boundary of wide-area 929/931 MHz paging systems; the 21 dBμV/m formula proposed in the NPRM (at ¶52), however, may be employed to derive an interference contour for a proposed "fill-in" transmitter to determine whether such transmitter is wholly within a co-channel system's outer perimeter (or composite boundary) and, as a result, can be constructed and operated without prior approval by or notification to the Commission.

Based on this conversation, our clients are installing transmitting sites on a permissive basis provided the conditions set forth in Sections 22.165(a)-(c), where applicable, have been satisfied. We are advising these clients that such construction conforms with the Commission's Interim Licensing Proposal, as set forth in the NPRM (at ¶¶140-141).

Should the foregoing be inaccurate in any respect, or should you have any questions regarding this matter, please contact me immediately.

Very truly yours,

Daniel E. Smith

Daniel E. Smith

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 96-538

News media information 202/418-0500.

April 5, 1996

WIRELESS TELECOMMUNICATIONS BUREAU CLARIFIES DEFINITION OF INTERFERENCE CONTOUR FOR INTERIM PAGING RULES

In the *Notice of Proposed Rulemaking* released on February 9, 1996 in WT Docket No. 96-18 (*Notice*), the Commission stated that incumbent paging licensees could add sites to existing systems or modify existing sites during the pendency of the rulemaking proceeding if the addition or modification did not expand the interference contour of the incumbent's existing system. *See Notice* at para. 140. In a footnote, the Commission referenced a proposal in the *Notice* to base the interference contour on a median field strength of 21 dBμV/m. *Id.* at n. 271. Some parties have interpreted this reference as adopting a change in our rules with respect to the interference contour definition for paging systems.

We clarify that during the pendency of this rulemaking proceeding, the Commission will continue to apply current rules to define the interference contour of existing paging systems. *See* 47 CFR § 22.537. Therefore, pursuant to the *Notice*, paging licensees should use the interference contour as defined for their particular frequencies under our current rules to determine whether internal sites may be added or modified. In the case of licensees on 929 MHz exclusive channels, the rules defining interference contours for 931 MHz systems should be used. *See* 47 CFR § 22.537(f).

Action by Michele C. Farquhar, Acting Chief, Wireless Telecommunications Bureau.

For further information contact Mika Savir, Wireless Telecommunications Bureau, Commercial Wireless Division, at (202) 418-0620.

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June 19, 1996

Laura Smith, Esquire
Legal Branch - Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

RECEIVED
JUN 19 1996

Re: WT Docket No. 96-18
Ex Parte

Dear Ms. Smith:

This is written pursuant to Rule Section 1.1202 to confirm our conversation today clarifying the procedure to determine the interference contour of proposed fill-in transmitters for existing paging systems during the pendency of the Notice of Proposed Rulemaking (NPRM) in WT Docket No. 96-18. While we understand that licensees should define the composite interference contours comprising the outer perimeter of their existing systems based on Section 22.537 of the rules, we asked for clarification as to whether licensees may use the 21 dBuV/m formula discussed at ¶52 and n. 271 of the NPRM to define the interference contour of fill-in transmitters added to existing systems pursuant to ¶140 of the NPRM. You advised that you have conferred with Mika Savir of the Legal Branch regarding this matter, and the Bureau has an internal policy which allows licensees to elect whether to use Section 22.537 or the 21 dBuV/m formula to define the interference contour of fill-in transmitters added during the pendency of WT Docket No. 96-18.

Should the foregoing be inaccurate in any respect, or should there be any questions regarding matter, please contact me immediately. Thank you for your assistance in this matter.

Very truly yours,

PEPPER & CORAZZINI, L.L.P.

By Ellen S. Mandell
Ellen S. Mandell

cc: Sandra K. Danner
Mika Savir
James S. Gumbert

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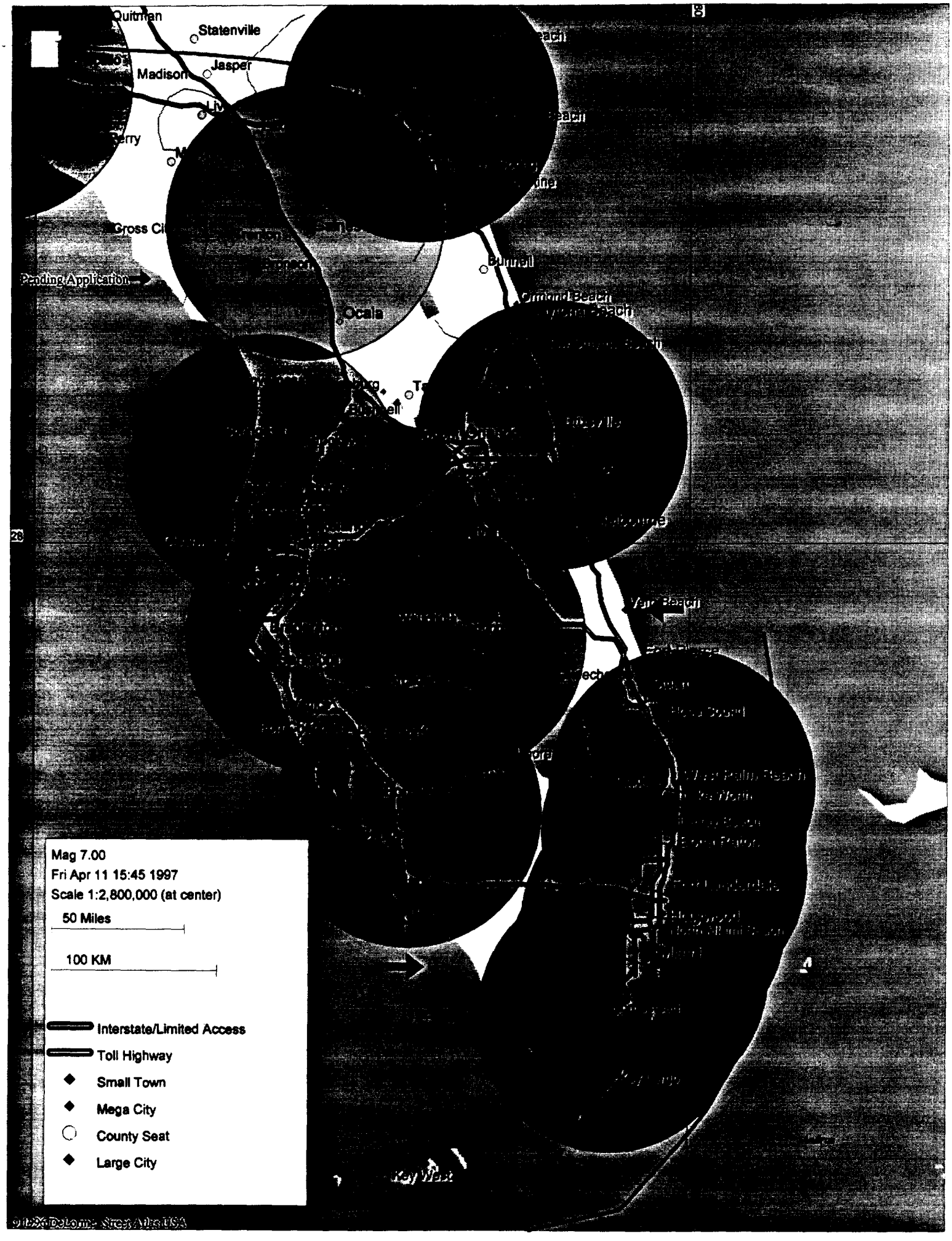
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