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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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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

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION PETITION FOR RECONSIDERATION

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SUMMARY

The Personal Communications Industry Association ("PCIA") seeks reconsideration of a number of aspects of the Commission's *Second Report & Order* concerning the adoption of geographic service areas and competitive bidding procedures for paging/messaging services. At present, the overall effect of the Commission's decision is to create an environment highly conducive to the submission of filings by speculators and applicants induced to participate by promises of high returns by fraudulent application mills. Without significant changes as suggested in this petition, the Commission's conduct of auctions for geographic authorizations in the paging services will likely lead to disruptions in the service currently relied upon by American consumers and businesses. The decision fails to recognize and accord appropriate treatment to incumbent operators that have demonstrated their commitment to serving the public by building out systems and providing competitive services to the public. The plan adopted in the *Second Report & Order* also does not fully account for the fact that paging is provided in a highly competitive market, with service offered by a range of small, medium, and large entities, and with well-established systems already covering large areas in the new geographic service areas.

In hopes of remedying PCIA's concerns and ensuring that the Commission's ultimate goal of providing quality service to the public is not undermined, PCIA urges the Commission to take the following steps on reconsideration:

- The Commission should balance its interest in promoting opportunities for new entrants to participate in the paging auctions with a full recognition of the efforts and resources already expended by incumbents to provide service to the public by revising its decision to permit complete open eligibility for the auctions and instead allow incumbents serving 70 percent or more of a market to have sole eligibility during the initial round of filings for geographic area licensees.

- The Commission should remove the opportunity for geographic licenses to meet required coverage requirements by make a showing they are providing "substantial service;" this option, as currently defined, would allow a market area licensee to prevent expansion of an incumbent's service area while the market area licensee provides virtually no service to the public for nearly five years.

- The Commission should require applicants to post an upfront payment for each license for which they wish to be eligible to bid; this will help to ensure that applicants give careful consideration to their business plans and will help to deter use of the "all" box on applications, thus potentially diminishing the number of mutually exclusive situations that otherwise would result.

- Instead of conducting a blind auction, the Commission should provide bidders with full information about competing bidders, consistent with the practice in previous auctions; this information is needed to permit bidders to make fully informed decisions and should lead to a more effective and equitable auction.

- The Commission should clarify that the co-channel interference protection provided to 929 MHz incumbent non-exclusive licensees operating on the exclusive channels will be no greater than the protection they currently possess under the Commission's Rules.

- In the interests of equity and consistent with standards applied by the Court of Appeals for the D.C. Circuit, the Commission should process all applications pending as of the date of adoption of the *Second Report & Order* under existing rules.

- The Commission should hold the auctions for the lower band frequencies first, followed by the auctions for the 929 MHz and 931 MHz frequencies.

- The public interest would be better served by using MEAs instead of MTAs.

- Bidding credits and installment payment plans are not needed in the paging services and in fact will distort the auction process.

- The Commission should adopt rules to permit inter-carrier discussions and transactional negotiations to proceed during the conduct of the auctions.

- Finally, the Commission should make clear that a market area licensee that does not meet the applicable coverage requirements will lose all facilities constructed pursuant to the market area license.

Adoption of the revisions suggested in this petition for reconsideration will substantially improve the licensing plan adopted by the Commission for the paging services.

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PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
PETITION FOR RECONSIDERATION

The Personal Communications Industry Association ("PCIA"),[1] by its attorneys, hereby petitions the Commission to reconsider significant aspects of the Second Report and Order and Further Notice of Proposed Rulemaking in the above-captioned docket.[2] The market area licensing plan and competitive bidding structure adopted by the Commission in this docket — if not dramatically altered in numerous respects — will be highly disruptive to

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[1] PCIA is the international trade association created to represent the interests of both the commercial and private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

[2] *Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems*, FCC 97-59 (Feb. 24, 1997) (Second Report and Order and Further Notice of Proposed Rulemaking) ("*Second Report & Order*"). A summary of the *Second Report & Order* was published at 62 Fed. Reg. 11616 (Mar. 12, 1997).

the operations of messaging companies and will thus interfere with the existing services currently relied upon by over 43 million subscribers, their families, and their businesses. In addition, contrary to the Commission's stated goals, the cumulative effect of the provisions adopted by the Commission in this docket will be to delay service to the public and to promote speculation and the activities of fraudulent applications mills that take advantage of unsuspecting members of the public.

I. INTRODUCTION

PCIA has participated throughout all phases of this proceeding, repeatedly and emphatically stating that any plans for market area licensing and the implementation of competitive bidding must be designed to "not interfere with or undercut established service arrangements used by the public."[3] Instead, however, the *Second Report & Order* adopts rules and policies that will disrupt existing service offerings relied upon by consumers, may hinder extension of service to underserved areas, and will not achieve the goals articulated by the Commission.

In the absence of substantial changes, the auction structure mandated by the *Second Report & Order* is contrary to the public interest. Despite repeated statements about deterring speculation, the adopted policies and processes not only do not further that goal but in fact are likely to promote speculation at the expense of the public. The auction rules adopted for the paging/messaging services must take into account the fact that the subject frequencies involve

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[3] *E.g.*, Reply Comments of the Personal Communications Industry Association on Geographic Licensing and Competitive Bidding Proposals, WT Dkt. No. 96-18, at 2 (filed Apr. 2, 1996) ("PCIA Reply Comments").

systems that are generally well-established, with substantial portions of any given service area on any given frequency already encompassed within an authorized service area. The Commission also must do more to address the findings of the Federal Trade Commission ("FTC") concerning the activities of fraudulent application mills.

The paging industry is unlike any other service in which the Commission has adopted market area licensing and competitive bidding. In contrast to a number of auctioned services, the Commission is confronted with numerous well-established systems (many of which are wide area in nature) already providing service to the public in a highly competitive marketplace.[4] This differs from, for example, both broadband and narrowband personal communications service ("PCS"), which entail the construction of virgin wireless communications systems, impeded only by the relocation of incompatible fixed uses.

The paging service also is unique when compared to other services where the Commission has overlaid a market area licensing plan on top of existing operations, such as specialized mobile radio ("SMR") or 220 MHz services. Thus, a paging license entails operation on a single channel, whereas services such as SMR (whether 800 MHz or 900 MHz) involve licenses covering multiple channels. Paging operations are significantly more built out, and include many more transmitters than in the 900 MHz SMR service. Similarly, 220 MHz systems are much less extensively constructed and operational than is the case with

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[4] The Commission's recent report on CMRS competition indicates that large metropolitan areas have an average of over 18 paging licensees, including some nationwide operators but not including resellers. *In the Matter of Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC 97-75, at 31 & n.145 (Mar. 25,

(continued . . .)

paging frequencies. Also, the Commission is not planning a dramatic change in the operational nature of paging systems; this contrasts with the proposals for 800 MHz SMR.

These differences, particularly the reliance of the public on existing services, must be more carefully taken into account by the Commission in redesigning the rules applied to paging services. In fact, these very real distinctions require the Commission to evaluate independently what policies and procedures applied in this service will best further the public interest, and argue against the automatic imposition of particular requirements simply because similar policies were employed in other auction contexts.

The *Second Report & Order*, considered in its entirety, will lead to results and effects contrary to the public interest and thus contrary to the Commission's mandates under the Communications Act of 1934, as amended, and accordingly must be revised and improved. The Commission must bear in mind the considerations described above in evaluating and acting on the proposals of PCIA and other entities for revision of the *Second Report & Order*, in order to adopt a sounder set of procedures for the future licensing of messaging systems.

II. THE COMMISSION SHOULD REVISE ITS DECISION CONCERNING ELIGIBILITY AND ACCORD INCUMBENTS SOME MEASURE OF PREFERENCE

In addition to applications from entities legitimately interested in serving the public (incumbents and otherwise), the rules and policies adopted by the *Second Report & Order* create an environment that is highly conducive to the filing of fraudulently-induced and speculative applications. One critical element contributing to this environment is the

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(. . . continued)
1997) (Second Report). In smaller metropolitan areas, there are an average of over 11 paging licensees. *Id.*

Commission's refusal in the geographic license application process to recognize the significant activities of incumbents that already provide coverage in the geographic service area at levels exceeding those required by the new rules.[5] Instead, the Commission will allow any entity meeting minimal eligibility qualifications to apply for market area licenses.[6]

PCIA and other commenters had urged the Commission to provide that, at least during the initial round of applications for market area licenses, only existing licensees already serving 70 percent or more of the population of a particular geographic service area be eligible to submit an application for the market area license.[7] The Commission's rejection of these proposals is contrary to the public interest. The approach adopted in the *Second Report & Order* will promote speculative filings and will likely increase the number of individuals defrauded by the sales pitches of applications mills. This is particularly the case when the Commission's "open eligibility" policy is considered in combination with its substantial service alternative for meeting the required coverage requirements. Thus, contrary to the Congressional directive to seek methods for minimizing the filing of mutually exclusive applications,[8] the Commission's decision will encourage the filing of unnecessary and illegitimate competing applications.

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[5] *See Second Report & Order*, 62 Fed. Reg. at 11634 (to be codified at 47 C.F.R. § 22.503(k)(1), (2)).

[6] *Second Report & Order*, ¶¶ 45, 85.

[7] Comments of the Personal Communications Industry Association on Geographic Licensing and Competitive Bidding Proposals, WT Dkt. No. 96-18, at 28-29 (filed Mar. 18, 1996).

[8] 47 U.S.C. § 309(j)(6)(E) (1994).

PCIA understands that the Commission desires to ensure that all parties legitimately interested in providing service in a particular market will have the opportunity to do so. This objective, however, must be balanced against the real harm to the public interest that will result from the widespread filing of applications for anticompetitive or speculative purposes as well as applications filed at the behest of fraudulent mills, and the winning of market area licenses by such entities. Moreover, the Commission cannot, consistent with the public interest, favor new entrants, who have made no effort to serve a market, over those carriers who have invested substantial resources in bringing service to the public.

There are numerous harms about which PCIA is concerned. Initially, the mere participation of insincere applicants in the auctions will drive up the price of geographic service area licenses, even if the incumbent is successful in obtaining the license. Unnecessarily high license costs have clear implications for carrier activity to meet customer needs most effectively with advanced technologies.

The Commission's records reflect the widespread filing of applications by speculators and uninformed individuals who have been led to believe that they can make a lot of money in the paging market with a limited investment. This history, as well as the experience in the IVDS auctions, suggests that there is no reason to believe that adoption of a competitive bidding process is a complete solution to the filing of speculative applications. Some of these applicants just will not have enough knowledge to understand the implications of participating in the paging auctions.

Moreover, if one of these applicants wins the market area license, it can impede service to the public. For example, an uninformed applicant, induced to participate by promises of a large return on its investment, may not realize until it holds the license that a substantial

portion of the market is already covered by a protected incumbent. The non-incumbent geographic licensee may seek to rely upon the "substantial service" coverage test by building a single transmitter. Even if the Commission ultimately concludes that the licensee has failed to meet the license requirements and cancels the license, for five years that non-incumbent geographic licensee will be able to prevent expansion by incumbents serious about providing service to the public. Thus, contrary to the Commission's unsupported conclusion that its policy should promote further wide area coverage of paging services,[9] so-called "open eligibility" could in fact detract from further wide area coverage.

The Commission accordingly must give greater recognition to the highly developed, competitive marketplace that exists in the paging services. It further must acknowledge the very real expenditure of resources by incumbents striving to serve the public and the harm that can result from the submission of speculative and other ill-considered applications. PCIA believes that the balancing of competing goals can best be achieved by adopting the proposal to permit an incumbent licensee providing coverage to 70 percent or more of the population of a geographic service area to have sole initial eligibility to seek the market area license.

III. THE COMMISSION SHOULD REMOVE THE OPPORTUNITY FOR MARKET AREA LICENSEES TO MEET COVERAGE REQUIREMENTS BY MAKING A "SUBSTANTIAL SERVICE" SHOWING

The *Second Report & Order* concludes that adoption of coverage requirements for market area licensees can serve a number of significant objectives.[10] In support of these goals, the *Second Report & Order* requires a geographic area licensee to "provide coverage to one-

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9 *Second Report & Order*, ¶ 45.

10 *Id.*, ¶ 63.

third of the population within three years of the license grant, and to two-thirds of the population within five year of the license grant."[11] Undercutting the chance to attain these objectives, however, the Commission also would permit market area licensees to meet their construction obligations by demonstrating that they "provide substantial service to the geographic license area within five years of license grant."[12] The sole definition of "substantial service" is that it is "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal."[13]

PCIA strongly opposes the "substantial service" alternative for market area licensees to meet applicable coverage requirements. The availability of this option provides the incentive and opportunity for both speculators and fraudulent application mills to take advantage of the Commission's auction process to profit at the expense of the public interest. Even where pre-existing paging operations in a market preclude the deployment of an effective paging system on a particular frequency, an application mill can advertise paging applications on the basis of being able to meet the substantial service test. As suggested in the preceding section, failure to construct and operate a system meeting the substantial service requirement would not even be determined until five years after the grant of the authorization, by which time the application mill perpetrators or other insincere applicants will be long gone (and service will have been delayed to the public in the interim).

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[11] *Id.*

[12] *Id.*

[13] *Id. See also Second Report & Order*, 62 Fed. Reg. at 11634 (to be codified at 47 C.F.R. § 22.503(k)(3)).

Similarly, speculators and others could take advantage of the standard in order to block expansion of an incumbent system within the service area for a period of up to five years, even if the market area licensee fails to construct any facilities. This leverage could be used to force a "fire sale" of the incumbent's operations if expansion is sufficiently restricted and the incumbent cannot effectively meet the needs of existing and future customers.

These adverse effects are aggravated by the fact that the Commission's definition of "substantial service" is virtually meaningless. It is absolutely unclear what showing of service would be required to meet the substantial service test, and what level of service would be inadequate. This lack of definitional clarity suggests that the Commission's substantial service test could easily be satisfied. Moreover, this lack of specificity likely will invite litigation as to a licensee's compliance with the requirement.

The record before the Commission reflects strong and substantiated opposition to the substantial service option. Although this opposition is noted in the *Second Report & Order*, the Commission has failed to explain the rationale for rejecting this opposition.

The Commission may view the substantial service option as a mechanism for promoting niche services or the deployment of new technologies by a non-incumbent geographic licensee. Regardless whether this objective should be elevated over a recognition of the substantial efforts of incumbent operators to provide service to the public, the Commission must also confront the fact that the substantial service alternative provides plenty of opportunity for mischief in promoting the filing of speculative or fraudulently induced applications. As discussed in the preceding section, harm results from the mere participation in the auctions by insincere applicants as well as from the award of geographic licenses to entities with no intent

or no ability to build out a viable paging system. Retention of this coverage standard will promote the filing of unnecessary mutually exclusive applications, contrary to statutory mandate.[14] The Commission accordingly should delete new Section 22.503(k)(3) of its Rules, and rely solely on the coverage benchmarks contained in new Sections 22.503(k)(1) and (2). Because of the unique circumstances surrounding the paging marketplace, it is appropriate to exclude the substantial service option even though it has been adopted in other services. Specific coverage requirements alone will, as the Commission set out to do, ensure that paging service is provided to meet public need, maximize coverage within service areas and deter spectrum warehousing, and deter the activities of speculators and fraudulent applications mills.

IV. APPLICANTS SHOULD BE REQUIRED TO POST AN UPFRONT PAYMENT FOR EACH AND EVERY LICENSE ON WHICH THEY PROPOSE TO BID

The *Second Report & Order* requires only that

> [a] prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. Although a bidder may file applications for every license being auctioned, the total upfront payment submitted by each applicant will determine the combinations on which the applicant will actually be permitted to be active in any single round of bidding.[15]

As a result, an applicant may simply check the "all" box on its Form 175, thus creating mutual exclusivity for all licenses, but submit only a minimal upfront payment that permits the applicant to bid on only a handful of licenses per round. The *Second Report & Order* acknowledges that PCIA and others had urged the Commission to require "an upfront payment

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[14] 47 U.S.C. § 309(j)(6)E).

[15] *Second Report & Order*, ¶ 136.

for each license in order to ensure that bidders are sincere, deter speculation and, to some extent, ensure that bidders are qualified."[16] Nonetheless, the Commission provided no explanation for its rejection of this proposal.

In fact, the Commission's upfront payment policy, particularly when combined with the ability of applicants to check a single box in order to apply for all frequencies in all service areas, will promote participation in auctions by speculators and others lacking a legitimate intent to provide service to the public. Likewise, this approach serves as an open invitation to application mills to "ply their trade" by enabling their participation in the auctions.

The Commission instead should adopt a requirement that each applicant submit an upfront payment for each and every authorization on which it seeks to bid. Including such a requirement will help to ensure that every applicant has given some consideration to the licenses for which it seeks to bid. This assurance is particularly significant in light of the fact that, for most of the frequencies in most of the geographic service areas, existing licensees already are providing service throughout a large portion of the market. Moreover, given the likely level of the required upfront payments, applicants could still pursue backup strategies.

Without this requirement, particularly when combined with the application "all" box, an existing operator may find itself confronted with a mutual exclusivity situation for the duration of the auction involving the geographic license encompassing its existing service area. It may be that, in some cases, no competitive bidding occurs except sporadically (at least during the early stages of the auction) so that an applicant can satisfy the required activity level associated with its minimal upfront payment. The existing operator nonetheless will have

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[16] *Id.*, ¶ 133 (footnote omitted).

expended funds in support of its preparations for the auction, and may find that it must pay a higher amount for the authorization than would have been the case if the Commission had required some indication of the licenses in which an applicant was actually interested. PCIA's concern that numerous applicants will simply check the "all" box and submit a much smaller upfront payment is borne out by the history of prior auctions for wireless spectrum.

Moreover, the Commission's approach would promote the filing of mutually exclusive applications, contrary to the statutory mandate.[17] Even where the filing of so-called "phantom" mutually exclusive applications does not result in the eventual licensee paying more for its authorization than otherwise would be the case, it would delay the licensee in receiving the geographic area authorization and in taking full advantage of the rights associated with such license.

Requiring upfront payments for each authorization on which an applicant will be permitted to bid also will help to deter participation by individuals persuaded to apply by fraudulent application mills. If such applicants must submit only a minimal upfront payment (collected by the application mill), they can more readily be induced to invest in "the chance of a lifetime." In contrast, if potential investors solicited by the application mills must make an initial payment for each license on which they might bid, at least some of them would have greater insight into what is implicated by participating in the auction. Moreover, the increased level of investment alone might well prevent application mills from being able to defraud unwitting investors.

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[17] 47 U.S.C. § 309(j)(6)(E).

The record before the Commission demonstrates that it should require applicants for market area licenses in the paging services to submit an upfront payment for each authorization (per market/per frequency) on which they intend to bid. On reconsideration, the Commission accordingly should take the steps necessary to replace the policy adopted in the *Second Report & Order* with a requirement for individualized upfront payments.

V. THE COMMISSION SHOULD PROVIDE COMPLETE BIDDING INFORMATION, SPECIFICALLY INCLUDING THE IDENTITY OF COMPETING BIDDERS, DURING THE COURSE OF THE AUCTIONS

Despite a general policy of maximizing the amount of information to be provided to bidders during auctions,[18] the Commission has decided to do otherwise in the context of the paging auctions.[19] PCIA urges the Commission to reverse this determination and instead provide detailed information about the identity of the high bidder in each round for each license at stake in the auction. As part of this identification process, competing applicants as well as the public should have access to applicant ownership information as set forth in the Forms 175 as well as any amendments thereto.

The Commission's general presumption in favor of maximizing information flow during auctions is soundly based. Recently — indeed, concurrently with the Commission's action in this docket — the Commission has stated that "[d]isclosure of ownership information

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[18] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 9 FCC Rcd 7245, 7252 (1994) (Second Memorandum Opinion and Order) ("*Competitive Bidding Second MO&O*").

[19] *Second Report & Order*, ¶ 106.

also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to [the] anti-collusion rules."[20]

The rationales offered by the Commission for withholding information previously released prior to and during the course of auctions do not square with the policy justifications previously relied upon by the Commission in support of maximum information disclosure requirements. Moreover, the justifications supplied in the *Second Report & Order* simply are not convincing. *First*, completing the auctions in a timely fashion should not be pursued at the expense of conducting an equitable and effective auction. As the Commission has recognized, auction theorists have concluded that access to maximum information is more likely to result in bidding that will reflect the "true" value of the authorization.[21]

Second, the Commission has offered no basis for its determination that "gaming" is less likely to occur if it withholds bidder and related information during the course of the auction. PCIA is concerned that, if bidder information is withheld during the course of the auction rounds, incumbent operators will in fact be placed at a disadvantage. Where an incumbent already covers a substantial portion of the geographic service area, it is rational to expect that entity to participate in the auction for that market license. Other applicants may be able to determine the incumbent's bid (or at least make an educated guess), but the incumbent

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[20] *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, FCC 97-60, ¶ 51 (Feb. 28, 1997) (Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking) ("*Part 1 Competitive Bidding NPRM*"). PCIA's comments in that docket supported the Commission's ownership disclosure proposals. Comments of the Personal Communications Industry Association, WT Dkt. No. 97-82, at 4 (filed Mar. 27, 1997) ("PCIA Part 1 Comments").

[21] *E.g.*, *Competitive Bidding Second MO&O*, 9 FCC Rcd at 7752.

will have no information about the entities against which it is bidding. This disparity in access to information would appear likely to skew the auction results.

Third, in concluding that there will be little in the way of lost efficiencies as a result of concealing bidder information, the Commission found that there was no roaming and little uncertainty about technologies.[22] While there may be no roaming, a number of carriers, particularly those with smaller service areas or whose customers travel over a wide region, have entered into agreements with adjacent operators in order to facilitate receipt of wide area paging by their customers. Moreover, the *Second Report & Order* directs licensees in adjacent service areas to work with one another regarding avoidance of interference at market area boundaries. In both cases, information about the identity of the entities participating in the auctions involving adjacent geographic areas on the same frequency is significant.

Also, the Commission's analysis ignores the many paging systems that overlap market boundaries. Bidding strategies by such operators may be significantly impacted by information about the competing bidders in both markets, particularly if the operator has limited resources.

Thus, contrary to the determinations contained in the *Second Report & Order*, information about competing bidders as well as bidders in adjacent service areas is necessary to permit applicants to participate most effectively in the auctions. The Commission thus should disclose maximum ownership information during the paging auctions consistent with its prior practices.

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[22] *Second Report & Order*, ¶ 106.

VI. BECAUSE THE PROTECTION TO BE AFFORDED 929 MHZ INCUMBENT NON-EXCLUSIVE LICENSES BY MARKET AREA LICENSEES WOULD EFFECTIVELY GRANT THEM EXCLUSIVITY WHERE IT HAS NOT BEEN EARNED, THE COMMISSION SHOULD REVISE THE STANDARD

The Commission has commendably sought to ensure that existing operators are provided with full co-channel protection from subsequent geographic area licensees.[23] The language adopted by the Commission, however, has the effect of extending equal interference protection to exclusive 929 MHz channel systems as well as non-exclusive 929 MHz operations on the exclusive channels. This result provides an inappropriate "windfall" to those operators that had not met the standards previously established in the Commission's Rules for obtaining exclusivity.

The Commission adopted specific procedures allowing licensees on 35 of the 929 MHz channels to attain exclusivity on a local, regional, or nationwide basis.[24] Some licensees operating on the exclusive 929 MHz channels did not obtain, by choice or otherwise, exclusivity for their systems. Despite this fact, however, the co-channel incumbent protection standards would grant to such licensees exclusive rights, at least vis-à-vis the market area licensee.

The effect of this action is to give such non-exclusive licensees greater protection rights than they had previously attained under the Commission's rules, an outcome nowhere explained or justified by the Commission, and probably not intended. The policy should be

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[23] *Second Report & Order*, ¶ 69; *Second Report & Order*, 62 Fed. Reg. at 11634 (to be codified at 47 C.F.R. § 22.503(i)).

[24] 47 C.F.R. § 90.495 (1996) (repealed 1997).

revised so that licensees operating on a non-exclusive basis are entitled to maintain their operations on the same basis as at present and without a windfall grant of *de facto* exclusivity.

VII. THE COMMISSION SHOULD PROCESS ALL APPLICATIONS PENDING AS OF FEBRUARY 19, 1997 UNDER THE RULES IN EFFECT PRIOR TO THE ADOPTION OF THE *SECOND REPORT & ORDER*

The Commission has decided that "[a]ll pending mutually exclusive applications for paging licenses filed with the Commission on or before the adoption date of [the] *Order* will be dismissed" and that "[a]ll applications (other than applications on nationwide and shared channels) filed after July 31, 1996 will be dismissed."[25] As a result of this ruling, applicants that relied upon the prior rules in preparing and prosecuting their applications — in some cases, before market area licensing was even proposed by the Commission — will simply see them dismissed. PCIA believes that this action is inequitable and inconsistent with standards enunciated by the Court of Appeal for the D.C. Circuit. Accordingly, PCIA urges the Commission to process all applications on file as of February 19, 1997, under the rules in effect prior to the adoption of the *Second Report & Order*.

The Commission is effectively applying its new rules retroactively to previously pending applications, many of which have been fully cut off under the Commission's procedural rules. In determining whether the retroactive application of new rules is appropriate, the Court of Appeals for the D.C. Circuit has indicated that the test is whether the "'ill effect of the retroactive application' of the rule outweighs the 'mischief' of frustrating the

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[25] *Second Report & Order*, ¶ 2. To the best of PCIA's knowledge, the Chief of the Wireless Telecommunications Bureau has not yet acted under the delegation of authority to dismiss any pending paging applications. *See id.*, ¶ 227.

interests the rule promotes."[26] In this case, the retroactive application of the rule has a substantial adverse effect for numerous applicants whose applications may have been pending for years, and where the processing was not previously completed due to the backlog of applications before the Commission.[27] Such applicants reasonably relied upon the procedures in place, and now their business plans will be further disrupted.

Moreover, to the extent such applications have been fully cut off under the Commission's processing rules, the Court of Appeals' recent decision in *McElroy Electronics Corporation v. FCC*, 86 F.2d 248 (D.C. Cir. 1996), indicates that such licenses should be processed. In that case, the Court required the Commission to complete the processing of certain cellular unserved area applications that had been effectively cut off without the acceptance of additional applications. Similarly, in the paging services, the Commission at the least should process to grant or dismissal all pending applications that have passed their respective cut-off dates.

VIII. THE COMMISSION SHOULD HOLD AUCTIONS FOR THE LOWER BAND FREQUENCIES FIRST, FOLLOWED BY AUCTIONS FOR THE 929/931 MHZ FREQUENCIES

The *Second Report & Order* indicates that the Commission will hold a series of simultaneous multiple round auctions, with the groupings to be based on interdependency and

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[26] *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[27] *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589, 9630 (1995).

operational feasibility.[28] PCIA urges the Commission to proceed first with the auctions for the lower band frequencies, and then proceed with the auctions for the 929 MHz exclusive and 931 MHz frequencies.

As the Commission has recognized, many of the carriers operating on the lower band frequencies are smaller businesses. They thus are likely to suffer greater hardship that cannot be economically tolerated during an extended application freeze that would be in place from now until the auctions for such frequencies could be conducted if the Commission begins with the 929 MHz and 931 MHz authorizations. Holding the auctions for the lower band frequencies at an earlier date would grant such operators relief sooner, so that they could expand their operations to meet customer need and fulfill business plans (to the extent such operators obtain the applicable geographic service area license).

Conducting the auctions in the order proposed herein clearly would further the public interest. In addition, it would aid in achievement of the Commission's objective of promoting participation in wireless services by diverse entities, including small businesses.

IX. THE COMMISSION SHOULD REPLACE MTAS WITH MEAS AS THE BASIS OF GEOGRAPHIC LICENSE AREAS FOR EXCLUSIVE 929 MHZ AND 931 MHZ FREQUENCIES

The *Second Report & Order* adopted major trading areas ("MTAs"), as defined by Rand McNally and modified by the Commission, as the basis for granting geographic service area licenses for exclusive 929 MHz and 931 MHz frequencies.[29] PCIA had supported the Commission's proposal to use MTAs for these frequencies. In light of developments

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[28] *Second Report & Order*, ¶ 97.

[29] *Id.*, ¶ 16.

subsequent to the filing of its comments in this docket over a year ago, PCIA now urges the Commission to replace MTAs with Major Economic Areas ("MEAs").

The Commission for the first time defined and prescribed the use of MEAs in the recent *WCS Report & Order*. The MEAs consist of aggregated Economic Areas ("EAs").[30] Because of the recent definition of MEAs and their implementation for another wireless service, PCIA believes that revisiting the issue of the appropriate service areas for the 931 MHz and exclusive 929 MHz frequencies is now warranted.

MEAs are reasonable license areas that correspond to the service areas that have developed in the marketplace while not being excessively large. MEAs are similar in many respects to MTAs. Moreover, because EAs are used in the lower bands subject to geographic licensing under the *Second Report & Order*, imposing an MEA-based standard for the 929 MHz and 931 MHz frequencies would provide more parallelism than would MTAs. Licensees that have operations in lower band frequencies and 929/931 MHz frequencies will be able to obtain some efficiencies in their operations as a result of any EA being wholly encompassed within an MEA.

Aside from their value as rational service areas in the 929/931 MHz bands, using MEAs means that carriers avoid having to make royalty payments (directly or indirectly) to

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30 *Amendment to the Commission's Rules To Establish Part 27, the Wireless Communications Service ("WCS")*, FCC 97-50, ¶ 54 (Feb. 19, 1997) (Report and Order), *modified*, FCC 97-112 (Apr. 2, 1997) (Memorandum Opinion & Order). There are 172 EAs developed by the Bureau of Economic Analysis of the U.S. Department of Commerce. In WCS, the Commission defined 52 MEAs. *Id.*