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

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Federal Communications Commission
Office of Secretary

In the Matter of:	)	
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Replacement 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

METROCALL, INC.
PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

Frederick M. Joyce
Christine McLaughlin
Its Attorneys

JOYCE & JACOBS, Attys. at Law, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
(202) 457-0100

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SUMMARY

The FCC should reconsider its decision not to grant MTA/EA licenses to paging incumbents who have already built out their geographic areas sufficiently to meet or exceed the MTA/EA coverage benchmarks. Failure to do so will lead to inefficient use of the spectrum, deprive the public of efficient and cost-effective wide-area services, and create artificial mutually exclusive situations in violation of Section 309(j) of the Act. Moreover, this decision will impact the service provided by existing transmitters at the borders of incumbents' service areas; the effect will be to subject incumbents to harmful interference and unlawfully modify their licenses. Finally, the failure to exempt built-out service areas from auction is contrary to the weight of evidence submitted in this proceeding; the FCC's failure to explain a decision that conflicts with the rule making record renders this decision arbitrary and capricious.

The dismissal of pending paging applications is also unlawful as applied to previously cut-off applicants. There are equities attendant to cut-off status, and the FCC may not retroactively apply its new licensing rules to deprive applicants of that status without balancing the harm to those applicants against the benefits of retroactivity. The dismissal of pending applications here will delay service to the public, and render the substantial investments made by existing businesses worthless; on the other hand, processing those applications will not materially affect the FCC's wide-area licensing and auction scheme. Enforcement of the cut-offs here will serve the statutory goals of expediting service and avoiding mutual exclusivity.

The "substantial service" alternative to the FCC's construction benchmarks is vague and readily subject to abuse. This rule gives insincere applicants a five-year "grace period" within which to "greenmail" incumbents who need to expand legitimate paging services, while forcing

any legitimate "niche" service provider to incur substantial costs without any guarantee that it will be able to make the required showing at the five-year benchmark. The "substantial service" requirement should be eliminated; in the alternative, the FCC should provide clear guidelines as to what constitutes "substantial service."

The FCC should have addressed shared frequency issues in the Second R&O, rather than once again deferring consideration on shared channel licensing. Particularly now that other paging frequencies are "frozen" pending auction, further delay in addressing shared-frequency issues will only add to congestion and chaos on those frequencies.

The FCC's decisions to permit incumbents to obtain a single, system-wide license, and to allow 929 MHz licensees to operate with 3500 watts ERP, will serve the public interest. Nonetheless, the procedures for licensees to take advantage of the much-needed flexibility provided by those decisions should be clarified.

With regard to auction design, the FCC should reconsider its decision not to reveal bidder identities. Secrecy is more likely to benefit those who would abuse the auction process, while depriving *bona fide* bidders of relevant information. There is no reason to treat the paging industry differently than other auctionable services, where bidder identities have been revealed.

Metrocall supports the use of MEAs, rather than MTAs, for 929 MHz and 931 MHz licensing. MEAs are also large service areas, but are slightly less extensive than MTAs; the use of MEAs will also avoid complicating this proceeding with copyright issues. The FCC should also adopt a simpler, market-by-market stopping rule. Alternatively, the FCC should give the Wireless Telecommunications Bureau discretion to close bidding on individual licenses from the beginning of the auction, and allow bidders to request that bidding close on individual licenses.

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METROCALL PETITION FOR PARTIAL RECONSIDERATION AND CLARIFICATION

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C.§ 405 (a), and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby submits this Petition for Partial Reconsideration and Clarification of the FCC's "Second Report and Order" ("Second R&O") in the above-captioned rule making proceeding.[1]

I. Statement of Interest

Metrocall is one of the largest paging companies in the nation. Metrocall previously filed Comments in this radio-paging rule making proceeding with respect to the FCC's "Interim Licensing" proposal, and with respect to the wide-area licensing/auction proposal itself. Metrocall also sought clarification or partial reconsideration of the First Report and Order in this proceeding. Consequently, Metrocall is an "interested party" in these proceedings.

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[1] The Second R&O was published in the Federal Register on March 12, 1997; thus, this Petition is timely. See 62 Fed. Reg. 11616.

II. Summary of the Second R&O

In the Second R&O, the FCC adopted final rules for geographic area licensing for both non-nationwide and nationwide exclusive channels. The geographic areas licenses for non-nationwide 931 MHz radio common carrier ("RCC") and exclusive 929 MHz private carrier paging ("PCP") channels will consist of 51 Major Trading Areas ("MTAs"): the 47 Rand McNally MTAs, plus three added MTAs for the U.S. Territories of (1) Guam, and the Northern Mariana Islands; (2) Puerto Rico and the U.S. Virgin Islands; and (3) American Samoa. Alaska will be licensed as its own MTA, separate from the Seattle, WA MTA. See Second R&O at ¶ 16. All mutually exclusive applications for non-nationwide 931 MHz channels and exclusive non-nationwide 929 MHz channels will be subject to competitive bidding. Id. at ¶ 19.

Geographic area licenses will also be granted for the 931 MHz and 929 MHz nationwide channels. The three nationwide RCC channels identified in 47 C.F.R. § 22.531(b) and the 23 nationwide 929 MHz channels of licensees who had sufficient authorizations as of February 8, 1996 to qualify for nationwide exclusivity under 47 C.F.R. § 90.945, are to be awarded nationwide licenses for these channels and will be excluded from competitive bidding. Id. at ¶ 54.

All remaining RCC channels will be subject to competitive bidding for geographic area licenses in 172 Economic Areas ("EAs") for each channel. Id. at ¶ 23. Shared Part 90 paging channels will not be subject to geographic area licensing or competitive bidding. Id. at ¶ 40. The FCC lifted the filing "freeze" for "incumbents" on the shared channels; incumbents may apply for these channels without regard to geographic restrictions (*i.e.*, the "40-mile" rule). Id. at ¶ 43.

The FCC denied commenters' request that a geographic license be automatically granted to any incumbent that is already serving 70% or some "substantial portion" of the MTA/EA. Id. at ¶ 45. Nonetheless, incumbents will be entitled to exchange their site-specific licenses for a "wide area" license that covers the licensee's composite interference contours, based upon the aggregate of the incumbents' contiguous sites operating on the same channel. Id. at ¶ 58.

For each MTA or EA received, the non-nationwide licensee will be required to provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant. In the alternative, the MTA or EA licensee may provide "substantial service" to the geographic license area within five years of the license grant. Id. at ¶ 63. If the MTA or EA licensee fails to meet those coverage requirements, the geographic area license will automatically be terminated and subject to auction; however, the licensee may retain any sites that were previously authorized, constructed, and operating (in the Executive Summary, the Second R&O indicates that the licensee may retain sites operating at the time the geographic area license was *granted*; at ¶ 64, it indicates the licensee may retain sites operating at the time the MTA/EA license is *terminated*).

The Second R&O adopted new rules for protecting exclusive paging systems from co-channel interference. The fixed distances in Tables E-1 and E-2 of Section 22.537 of the Commission's Rules will govern service and interference contours for incumbent licensees in the 900 MHz paging bands. Id. at ¶ 69. The formulae for calculating the service and interfering contours of RCC channels below 900 MHz have not been changed. Id. In addition, the FCC amended the rules to allow 929 MHz stations to operate at 3500 watts ERP, as is the case for 931 MHz stations. Id. at ¶ 78.

Auction winners of geographic area licenses will have to provide co-channel protection to all incumbent licensees. Id. at ¶ 69. Conversely, incumbents that do not ultimately obtain the MTA or EA license for the frequencies on which they operate in their existing service areas will not be able to make any modifications that expand their interfering contours, unless the geographic area licensee consents. Id. at ¶ 57. Geographic licensees in adjacent areas will be expected to cooperate with one another to resolve interference at the borders of their geographic areas; the FCC declined to adopt specific standards for those situations. Id. at ¶ 73.

The Second R&O also sets out the procedures for competitive bidding, although many of the details will be announced by subsequent Wireless Telecommunications Bureau ("WTB" or "Bureau") Public Notice(s), and/or at the time of a decision in the Further Notice of Proposed Rule Making ("FNPRM") in this docket.

No restrictions were imposed on eligibility to participate in competitive bidding, and no spectrum or channel aggregation caps on the number of paging licenses that a licensee can be awarded. Id. at ¶¶ 85, 88. The FCC has preliminarily determined that it will *not* reveal bidder identities during this auction, and will announce by a future Public Notice what types of information will be available to bidders. Id. at ¶ 106.

The bidding will consist of simultaneous multiple round auctions, based on the FCC's general auction rules. Id. at ¶ 92. Due to the number of licenses, the FCC announced that it will hold a series of multiple round simultaneous auctions, with the licenses to be auctioned in groups "based upon interdependence and operational feasibility." Id. at ¶ 97.

The FCC retained the discretion of varying the duration of the bidding rounds or the intervals at which bids are accepted in order to move the auction to closure quickly. Id. at ¶ 116.

The FCC adopted a "hybrid" stopping rule, that divides the auction into three Phases: Phase I will employ a simultaneous stopping rule (if a bid is placed for any license, the auction stays open for all licenses); Phase II may, in the WTB's discretion, use a license-by-license stopping rule; in Phase III, a license-by-license stopping rule will be used. Id. at ¶¶ 103-104. The Milgrom-Wilson activity rules, used in prior FCC auctions, will apply to paging auctions. Id. at ¶¶ 109-113.

Bidders will be allowed to submit bids remotely either electronically or by telephone; but, in order to bid electronically, an applicant must have filed its "short form" electronically. Id. at ¶ 120.

The Second R&O also adopted application and payment procedures. The FCC will announce an upcoming auction for various paging licenses by Public Notice; that Public Notice will list the licenses to be auctioned and their associated upfront payments, and establish the date that the auction will begin, along with the deadlines for filing the "short form" application, and for submitting upfront payments. Id. at ¶¶ 119, 136. After the short-form deadline, a Public Notice will be released to establish a deadline for making minor corrections to the "short form." Id. at ¶ 131. The FCC's anti-collusion rules will apply to paging auctions, and the FCC has declined to create an exemption for negotiations concerning mergers and acquisitions in the ordinary course of business. Id. at ¶¶ 155-159.

After the auction closes, winning bidders will be subject to down payment requirements and will also be required to file a "long form" application for their licenses. Id. at ¶¶ 139-140, 147. The long form applications will be subject to the petition to deny procedures contained in Parts 22 and 90 of the rules. Id. at ¶ 150. Obligations concerning down payment and full

payment differ depending upon whether the bidder is a small business qualified for installment payments.[2] Id. at ¶¶ 140, 187. Additionally, the FCC will impose penalties for withdrawn high bids, default in payment obligations, and disqualification of a winning bidder. Id. at ¶¶ 143-145.

The Second R&O stated that all pending mutually exclusive applications for paging licenses filed with the FCC on or before February 19, 1997 will be dismissed. Id. at ¶ 6. In addition, all applications, other than applications on nationwide and shared channels, filed after July 31, 1996 will be dismissed. Id. All non-mutually exclusive applications filed with the FCC on or before July 31, 1996 will be processed. Id. The FCC will not accept any more applications for non-shared frequencies. Id. In addition, the Second R&O dismissed all pending finder's preference requests. Id. at ¶ 18.

III. The FCC Erred in Opening Highly Encumbered Markets for Auction

The FCC's failure to adopt automatic MTA/EA licensing for incumbents that already serve the vast majority of the geographic area[3], see, Second R&O at ¶ 45; was arbitrary and capricious, and contrary to the public interest. Moreover, that action may be beyond the FCC's limited statutory auction authority.

A. Auctioning Previously-Licensed Areas is Ultra Vires.

Sections 309(j)(2)(B) and (3) of the Act provides that the FCC may award licenses by

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[2] The FCC has adopted two "small business" definitions for this auction. Entities with not more than $15 million in average gross revenues for the preceding three years will be entitled to a 10% bidding credit at the auction. Entities with not more than $3 million in average gross revenues for the preceding three years will be entitled to a 15% bidding credit. Both categories of small business will be entitled to pay their winning bids in quarterly installments over the course of the license term.

[3] Metrocall suggested a two-thirds coverage benchmark for incumbents to qualify for automatic MTA licensing. See Metrocall Comments at 9.

competitive bidding if doing so will promote certain specified objectives; *i.e.*, "the development and rapid deployment of new technologies, products and services for the benefit of the public...without administrative or judicial delays;" "promoting economic opportunity and competition[;]" "recovery for the public of a portion of the value of the public spectrum resource... and avoidance of unjust enrichment[;]" and "efficient and intensive use of the electromagnetic spectrum." See 47 U.S.C. § 309(j)(3). The FCC's auction authority is not to be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations and other means to avoid mutual exclusivity[.]" See 47 U.S.C. § 309(j)(6)(E).

The FCC has failed to heed the statutory limits on its auction authority. By opening substantially built-out areas to auction, the FCC will create artificial mutual exclusivity and disserve the objectives of Section 309(j)(3). Opening these areas to bidding will not make new services available more rapidly, nor will it promote competition. The FCC's decision all but guarantees inefficient use of the spectrum in these already saturated markets, and will hamper system development by incumbents and newcomers alike. And, the ultimate burden will be borne by the public in the form of less competitive rates and less efficient service options.

By opening heavily encumbered service areas to competing bidders, the FCC serves no one's interests. Incumbent operators will be forced to bid on areas that they have already made a substantial investment in building out and serving. If they lose, their ability to expand in response to subscriber demand will be severely curtailed, if not completely eliminated. The "newcomer" winning bidder will be faced with building out the "scraps" of the MTA or EA--the major population centers will most likely already be served by the incumbent. The "winning"

bidder will thus be left with sparsely populated areas which may not even be geographically proximate to each other. Such a licensee will have a difficult time building a viable paging service, and, it will be virtually impossible for them to meet the FCC's population coverage requirements.

Moreover, subscribers to existing services in the major population centers will not be able to obtain coverage when they travel to smaller areas of the MTA/EA without subscribing to two distinct paging services, and *vice versa*. Consequently, consumers will suffer from limited service options and/or uneconomical requirements of obtaining multiple subscriptions.

The only possible beneficiaries of this scheme are unscrupulous bidders, who may bid simply to raise an incumbent-competitor's costs, or application mills, who may attempt to "greenmail" the incumbent in the aftermarket when the incumbent needs to expand. These threats are compounded by the FCC's decision not to reveal bidder identities. See, *infra*.

On the other hand, adoption of Metrocall's proposed "two-thirds rule," or a similar provision as proposed by numerous other commenters, will allow incumbents who have already invested considerable time and money into an MTA/ETA to expand their systems in response to public demand. Such a rule will not inhibit the development of small-area, "niche" services; the current rules allow for partial assignments and the new rules adopted allow for partitioning. Under either procedure, if there are areas in the MTA/EA that the incumbent does not care to serve (or wishes to discontinue service), it will be able to sell the right to serve those areas to a party that wishes to do so.

Automatic MTA/EA licensing, with the ability to engage in partitioning or partial assignments, will also benefit the legitimate, prospective "niche" service provider (which is

likely be a small business). Rather than having to enter a "bidding war" with a competitor that may have far greater resources, the would-be "niche" provider may simply pay the incumbent for the value of the portion of the MTA/EA it wants. This approach avoids unnecessary costs to existing and prospective service providers, allowing them to concentrate their resources on providing paging services to the public. By avoiding unnecessary mutually exclusive situations, decreasing the costs to small businesses, and allowing for the prompt initiation or expansion of services to the public, the immediate grant of MTA/EA authorizations to licensees already exceeding the construction benchmarks adopted in the Second R&O complies with the mandates of Section 309(j) of the Act. The FCC should reconsider its decision in this regard.

B. The Effect on Incumbents will be a *De Facto* Modification of Licenses.

The FCC's decision completely ignores the impact that opening built-out areas will have on incumbent licensees, not only in the loss of opportunities to expand their systems, but more fundamentally, in terms of limitations that will be imposed on existing, licensed transmitters. If the MTA/EA licensee in fact constructs, its system and the incumbent's system will need to find ways to co-exist at their borders. Harmful interference between the co-channel systems is likely to occur at the border areas; and, even if the incumbent undertakes technical adjustments to its system (*e.g.*, decreasing power), its coverage will be adversely affected.

It is well-settled that the grant of an authorization that will cause interference to an existing licensee constitutes a modification of license under Section 316 of the Act. See, *e.g.*, Western Broadcasting Co. v. FCC, 674 F.2d 44 (D.C.Cir. 1982); see also, L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 799 (D.C.Cir. 1948) ("to alter the rules so as to deprive [a licensee] of what has been assigned to it, and to grant an application which would create interference...was in fact

and in substance to modify [its] license"). Such degradations of existing service have long been held contrary to both the public interest, and the private interests recognized by the Act. See Journal Company v. Federal Radio Commission, 48 F.2d 461, 463 (D.C.Cir. 1931) (where a radio station "has been constructed and maintained in good faith, it is in the interests of the public and the common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons").

In this case, the FCC has offered no "compelling reasons" for "injuriously affect[ing]" those licensees who have invested the most in providing paging services to the public. Instead, the FCC dismissed the concerns raised by numerous licensees in a single paragraph, holding the it "believes open eligibility...will result in a more competitive auction and potentially will result in further wide-area coverage of paging systems." Second R&O at ¶ 45. This mere statement of the FCC's "belief" falls far short of providing affected paging licensees with the hearing to which they are entitled under Section 316 of the Act before their licensed operations are adversely impacted.

C. Opening Encumbered Areas to Auction Conflicts with the Record Evidence.

The FCC's mere "belief" that opening built-out areas to auction will "potentially" improve competition and wide-area services is contrary to the record in this proceeding, and is thus arbitrary and capricious. "[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency,* or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." See Motor Vehicle Manufacturers Assoc'n. of the

United States v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983) (emphasis added). Despite the overwhelming support for granting geographic licenses to incumbents who already meet or exceed the coverage benchmarks, and a complete lack of opposition to that proposal, the FCC refused to adopt that proposal with a brief statement of the FCC's belief that open eligibility will be better.

Although the FCC's "predictive judgments are entitled to a fair degree of deference...[i]t must supply a reasoned basis explaining why it chose to adopt a certain rule or rules." Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 763 (6thCir. 1995). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicles Manufacturing Assoc'n., 463 U.S. at 43 (citations omitted). In this case, the FCC has utterly failed to provide any factual basis for its decision; it should reconsider this issue and adopt rules consistent with the vast weight of the comments in this proceeding.

IV. The Dismissal of Pending Applications is Contrary to Law

The Second R&O instructed the FCC's staff to dismiss all pending mutually exclusive applications for non-nationwide, exclusive paging frequencies, and all applications for those frequencies filed after July 31, 1996, regardless of mutual exclusivity. Second R&O at ¶ 6. The FCC's dismissal of cut-off applications pursuant to the Second R&O is unlawful; those applications should be maintained on file and processed.[4]

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[4] Concurrently herewith, Metrocall has submitted a Motion for Stay with respect to this and other problems with the Second R&O. It would be a pointless waste of the FCC's time and resources to dismiss these applications while the FCC considers arguments for continued processing of them.

The FCC's cut-off rules for paging, 47 C.F.R. §§ 22.131(b) and 90.165(b), are validly adopted *rules*; and an agency is bound to follow its own rules. See Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C.Cir. 1986) (*ad hoc* departures from the published cut-off rules, "even to achieve laudable ends" cannot be sanctioned). While the FCC may adopt new rules, as it has done here, giving new rules retroactive effect is an extraordinary measure, and one that has often been frowned upon by the courts. See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745 (D.C.Cir. 1986). In order to retroactively apply its new processing rules to divest previously cut-off applicants of the protection of that status, the FCC must balance the mischief of retroactive application with the harm of undermining the new rules that would occur otherwise. See, id. at 746; McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1365 (D.C.Cir. 1993) ("McElroy I"). The Second R&O does not even attempt to balance these issues.

Here, no harm would result from giving wide-area licensing prospective application only. The interim rules adopted in the First Report and Order provided only for limited expansion, and specifically prohibited "leap-frogging" of successive expansion applications. See First Report and Order in WT Docket No. 96-18 and PP Docket No. 93-253, FCC 96-183 at ¶ 26 (released April 23, 1996). Consequently, encroachment by pending applications, into whatever "white space" remains to be auctioned, will be quite limited. Moreover, interested parties had an opportunity to file competing applications against incumbents. Retroactive application of the wide-area licensing rules is therefore not necessary to protect the FCC's new wide-area scheme or to advance competition.[5]

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[5] The FCC's action here is also inconsistent with recent decisions in other services, such as MDS, to continue processing existing mutually exclusive applications under pre-auction rules. The Second R&O does not even attempt to explain this disparate treatment.

On the other hand, the harm of the retroactive application of the new rules is great. Many of the applications to be dismissed were filed by existing businesses, in an extremely competitive industry, who need sites to serve existing and prospective subscribers. Some of the soon-to-be dismissed applications have been pending for years, through no fault of the applicants. Indeed, the paging industry invested substantial resources in assisting the FCC in developing its 931 MHz processing algorithm, to expedite the application process. The paging industry has thus made substantial investments in those pending filings, beyond the normal costs involved in preparing and filing an application. The FCC has rendered those investments worthless, and is now requiring those diligent applicants to be re-subjected to competing proposals, and to invest still greater amounts of time, money and resources. That is inequitable, offensive to any fundamental notion of fair play, and contrary to the interests of millions of paging subscribers.

Courts have consistently recognized the importance of adherence to the adopted cut-off rules, and the equities in favor of cut-off applicants. See, *e.g.*, McElroy Electronics Corporation v. FCC, 86 F.3d 248, 257 (D.C.Cir. 1996) ("McElroy II") (timely filers have "an equitable interest in the enforcement of the cut-off rules" and the FCC "may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors"); Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C.Cir. 1992) (cut-off applicants "certainly have an equitable interest [in that status] whose weight it is 'manifestly within the Commission's discretion to consider'") (citations omitted). See also, State of Oregon, 11 FCC Rcd. 1843, ¶ 11 (1996). Abiding by the cut-off rules serves the public interest in the expeditious initiation of service, as well as the private interests of those applicants who undertake the effort and expense of diligently preparing and filing their applications. See e.g.,

Florida Institute of Technology, 952 F.2d at 554 (noting that "diligent applicants have a legitimate expectation that the cut-off rules will be enforced" and that the "essential basis of the cut-off rules is...the public's interest in having broadcast licenses issued (and service provided) without undue delay").

The auction authority contained in Section 309(j) of the Act does not undermine the importance of the cut-off rules; indeed, Section 309(j) instructs the FCC to heed the very policy concerns that have long supported the cut-off rules. Dismissal of pending, cut-off paging applications contravenes both the traditional policies behind cut-offs, and the express directives of Section 309(j).

Section 309(j)(3)(A) mandates that one of the factors the FCC must consider before instituting auctions is whether doing so will expedite service to the public. See 47 U.S.C. § 309(j)(3)(A). Cut-off rules serve that statutory goal of expediting service to the public by setting a date certain by which competing applicants must file. See Florida Institute of Technology at 554. If none are filed, and the first applicant is otherwise qualified, its application is ready for grant, dependent only on staff processing times. By dismissing cut-off paging applications, and leaving it to some point in the future to set new filing dates for auction "short forms," the Second R&O guarantees that it will be many months before service can be commenced in the affected service areas. Moreover, the FCC has conceded that it cannot auction all paging licenses at once, see Second R&O at ¶ 97; it may therefore be *years* before some service areas in pending, cut-off proposals finally obtain service. In the case of post-July 31, 1996 applications, the Second R&O will impose that delay in instituting service even where the application in question is not mutually exclusive and is otherwise ready for grant. That delay is contrary to the

public interest and to the express mandate of Section 309(j)(3)(A) of the Act.

Moreover, Section 309(j)(6)(E) instructs the FCC to take measures to avoid mutual exclusivity, see 47 U.S.C. § 309(j)(6)(E); but, the Second R&O does precisely the opposite. Prospective competitors had ample opportunity under the existing and interim "cut-off" rules to file mutually exclusive applications. In cases where they did file, those diligent competitors have equities which the courts have long acknowledged. See, e.g., McElroy II at 257. There is no statutory or judicial authority to re-open the "window" for those service areas to increase the number of competing parties. If the FCC finds that the statutory criteria for resolving those pending mutually exclusive situations by competitive bidding are met, it should establish an auction schedule that is limited to those legitimate mutually exclusive situations. See, *e.g.*, McElroy II at 259 (FCC prohibited from "opening window" and allowing post-cut-off applicants to file on top of reinstated, cut-off applicants).

In the case of non-mutually exclusive, post-July 31, 1996 applications, any legitimate competitor has had ample opportunity to file under the interim processing rules. To open these applications up to competing proposals -- for a wider geographic area -- simply increases the odds that the formerly "cut off" proposal will find itself mutually exclusive with a new proposal, even though the now "competing" applicants have little or no interest in providing paging services to the same areas. That is, simply, the creation of artificial mutual exclusivity. In granting the FCC auction authority, Congress specifically instructed the FCC to avoid mutually exclusive situations, not create them. See 47 U.S.C. § 309(j)(6)(E). Allowing for such additional, artificial mutual exclusivity directly contravenes the FCC's statutory mandate.

Consequently, the FCC should continue to process, to grant, all applications filed prior to

the adoption of the Second R&O. For any mutually exclusive applications, the FCC should schedule auctions to be held for those service areas, between those pending, mutually exclusive applications.

V. The "Substantial Service" Alternative is Vague and Insufficient to Deter Speculation

The FCC adopted two forms of coverage requirements for geographic licensees. Under the first, the geographic licensee must provide coverage to one-third of the population of the MTA/EA within three years of license grant, and to two-thirds of the population within five years.[6] See Second R&O at ¶ 63. Alternatively, the FCC is permitting geographic licensees to demonstrate "substantial service" to the MTA/EA at the five-year benchmark date. Id. The Second R&O does not state what specifics would be required to make a showing of "substantial service."

Metrocall submits that the "substantial service" alternative should be eliminated, or at least clarified. As written, a geographic area licensee could conceivably make minimal investments in constructing facilities simply to "block" incumbents within the market. This provision provides an insincere auction winner with a long-term opportunity to "greenmail" incumbent, co-channel paging operators who need to expand their services; the prospective "greenmailer" will not be called to account for its own failure to provide a legitimate paging service for five years. That result does not serve the public interest. Moreover, even at the five-

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[6] As noted in Section II, *supra*, the Second R&O is internally contradictory on the matter of what facilities a geographic licensee failing to meet these benchmarks will be permitted to continue operating. Paragraph 64 states that the licensee may continue operating the facilities it had on the date of grant of the MTA/EA license; the Executive Summary indicates that the date of termination of the MTA/EA license is controlling. The Commission should clarify this point.

year benchmark, the Second R&O provides no guidance as to the showing that incumbent or other interested parties should make before the FCC in challenging a claim of "substantial service."

Metrocall assumes that the FCC intended to allow a geographic licensee in a heavily-encumbered market to meet its coverage requirements by building a legitimate "niche" service area. However, that is not what the "substantial service" alternative does. As previously stated, where a market is all but covered by an incumbent, the public interest would be better served by granting that incumbent a geographic license; the FCC's partitioning rules would allow for the development of "niche" services in remote sections of the market area if the public truly desires such services. As with opening heavily-encumbered MTAs and EAs to auction, the "substantial service" alternative does not serve the needs of legitimate small businesses desiring to serve small geographic areas. The costs of an auction are likely to be prohibitive in light of the small populations to be served by such "niche" providers. Moreover, a reasonable small businessperson would likely be hesitant to bid on an MTA/EA, and invest funds in building a paging system, without any guidance from the FCC as to whether its services will be sufficient to qualify as "substantial service." Under this rule, a *bona fide* licensee would risk losing its entire investment after five years, if the FCC's idea of what constitutes "substantial service" differs from the licensee's.

In short, as with the FCC's decision to put heavily-encumbered service areas "on the auction block" in the first place, the "substantial service" requirement serves no one's interests, except for prospective "greenmailers." The FCC should therefore eliminate this vague, easily-abused alternative construction benchmark. See, *e.g.*, Radio Athens (WATH) v. FCC, 401 F.2d

398, 404 (D.C.Cir. 1968) (the communications industry is "entitled to expect rules defining the required content of applications that are reasonably comprehensible to men acting in good faith"). In the alternative, the FCC should adopt clear standards as to the minimum showing required to demonstrate "substantial service," including a demonstration of the extent of the geographic licensee's coverage of the MTA/EA area not served by the incumbent licensee(s); number of subscribers (as demonstrated by contracts for service or other tangible evidence); a demonstration of channel usage during "busy hours;" and other quantifiable evidence indicating that the geographic licensee has constructed and is operating a legitimate paging business.

VI. Not Revealing Bidder Identities Will Encourage Speculation

The FCC's determination not to reveal bidder identities will not further the FCC's goal of deterring speculative or bad faith filings; indeed, it is more likely to encourage abuse of the auction process.

The FCC has generally revealed bidder identities before and during auctions. See, *e.g.*, Report & Order in MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230 at ¶ 134 (released June 30, 1995) (MDS/MMDS); Public Notice, Report No. AUC-04-04 at 12 (released September 19, 1994) (broadband PCS A and B blocks). The FCC has noted that revealing bidder identities provides auction participants with the most information as to the value of the spectrum up for bid, and allows bidders to pursue more informed, intelligent backup strategies. See, *e.g.*, Second Memorandum Opinion & Order in PP Docket No. 93-253, FCC 94-215, ¶ 40 (released August 15, 1994). Providing bidders with greater information serves the public interest by ensuring that spectrum goes to those who value it most highly (and realistically). See id. Moreover, as the FCC has previously observed, revealing bidder identities may deter anti-

competitive conduct by ensuring that all bidders have equal access to information about their competitors. Id.

The FCC offers no persuasive justification for departing from this standard auction practice in the context of paging auctions. Contrary to the FCC's bald assertion that keeping bidder identities confidential will prevent abuse of the auction process, secrecy increases the threat of abusive behavior. Paging is an established industry. It is already a matter of public record which paging companies are operating on which frequencies; if a party wishes to know the frequencies and areas a particular company may be interested in, it already has the means to find out. Should an auction participant want to engage a particular company in a bidding war for anti-competitive purposes (*e.g.*, to raise the costs of the auction process for a competitor), they will very likely be able to accomplish that goal, even if bidder identities are not disclosed.

Moreover, with non-disclosure of bidder identities, legitimate bidders will be "fighting blind." They will have no way of knowing whether they are bidding against an application mill, or an unscrupulous competitor, or a *bona fide* applicant with a legitimate, competing interest in the subject of frequency and service areas. Nor will a bidder be able to discern whether a competing bidder's resources are such that the bidder should pursue a back-up strategy. These considerations would almost surely affect a legitimate bidding strategy.

In short, secrecy will most benefit those insincere bidders whom the FCC claims it wishes to discourage. The FCC should follow the procedures from its prior auctions and disclose the identities of the auction participants before and during the paging auctions.

VII. Shared Frequency Interference Protection Should be Addressed Now

Metrocall (through its wholly-owned subsidiary A+ Network) and other shared frequency

licensees went to great lengths in this rule making proceeding to explain the critical importance of adopting some form of interference and/or exclusivity protection for shared frequency licensees. Metrocall explained that these issues must be addressed *at the same time* that the FCC implemented such rules for "exclusive use" paging channels, otherwise, the FCC would be heightening the potential for harm to "unfrozen", "unauctionable" shared channels. (A+ Network Comments at pp. 4-6).

Unfortunately, the issue of shared-channel interference on commercial PCP stations merited only passing reference in the FCC's more than 100 page Second R&O. See Second R&O at ¶ 41-42. Moreover, some of the statements made therein were simply inaccurate. For instance, the FCC stated that the number of licensees on a shared frequency does not affect available channel time. Id. at ¶ 42. That is simply not true. The more licensees there are on a shared frequency in any given market, the more airtime must be devoted to multiple call sign identifications, and to co-channel monitoring; these actions take up available airtime without transmitting *any* paging signals. This is common knowledge among shared-frequency licensees.

Metrocall's broader concern here is that the FCC has lifted the "freeze" on shared frequencies, without even attempting to address the interference and congestion problems that Metrocall and others previously brought to this agency's attention, in detail, in their prior comments. Before the FCC can even consider licensing additional carriers on these already congested shared-use frequencies, it has a statutory duty to ensure that its additional licensing schemes do not injure incumbent licensees and their hundreds of thousands of subscribers. The Second R&O essentially ignored these crucial concerns, or at best deferred these issues for another round of comments. Metrocall submits that the record and the FCC's statutory

obligations amply support immediate rule making action on these issues, rather than deferring these actions for another round of comments.

One of the FCC's primary responsibilities is to "prevent interference between stations." See 47 U.S.C. § 303(f). It was settled long ago in Journal Company v. Federal Radio Commission, 48 F.2d at 463, that where a radio station "has been constructed and maintained in good faith, it is in the interests of the public and the common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons."

The D.C. Circuit Court of Appeals thus laid the foundation for subsequent FCC licensing decisions in the public interest: "No station that has been operated in good faith should be subjected to a change of frequency or to a reduction of its normal and established service area, except for compelling reasons." Id. at 463. That Court succinctly stated that prevention of harmful interference runs to the very heart of the Communications Act: "The purpose of this regulation obviously is to prevent chaos and to insure satisfactory service" particularly since the "installation and maintenance" of radio stations "involve a very considerable expense." Id.

These fundamental statutory considerations -- the protection of incumbent paging licensees against harmful interference, the avoidance of "chaos" in the licensing of paging stations, and the protection of the considerable sums of money and labor that have been invested in these paging systems -- were clearly presented to the FCC in this rule making proceeding. Any further delays in addressing these issues will likely lead to harmful interference and perhaps irreparable damage to incumbent shared frequency licensees.

The FCC ought to immediately adopt some form of shared frequency interference rules, and provide shared frequency licensees with some form of exclusivity protection, should they