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

In the Matter of	)	
	)	
Revision of Part 22 and Part 90	)	WT Docket No. 96-18
of the Commission's Rules to	)	
Facilitate Future Development	)	
of Paging Systems	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

Big Bend Telephone Company, Inc. (BBTC), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby requests reconsideration of the Commission's action regarding the geographic area licensing rules adopted in its Second Report and Order and Further Notice of Proposed Rulemaking ("the Order") in the above-captioned proceeding.<sup>1</sup> While the Commission is to be commended for providing a mechanism which allows licensees of Basic Exchange Telecommunications Radio Systems (BETRS) to expand their systems outside the auction process, albeit on a secondary basis, or through partitioning arrangements with the auction winner, it nevertheless appears that the Commission's final rules for BETRS will stifle the future establishment and development of this essential communications service. Accordingly, the rules should be modified to permit (i) the retention of site-by-site licensing of BETRS facilities on a co-primary basis with the geographic area paging licensee, or (ii) mandatory partitioning of rural areas, at no cost to the prospective BETRS licensee, of the geographic area license. Otherwise, the promise of

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<sup>1</sup> WT Docket No. 96-18 and PP Docket No. 93-253, 62 Fed. Reg. 11616 (March 12, 1997).

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BETRS, to bring about universal telephone service in rural America,<sup>2</sup> will be substantially undermined.

In support thereof, the following is shown:

**I. The Commission Has Ignored the Record Evidence Which Demonstrates that BETRS is an Essential Service Which Must Be Protected.**

1. The record developed in this proceeding clearly demonstrates that BETRS is an essential service, and that geographic area licensing of the two-way VHF and UHF spectrum, with its attendant auctions, will adversely affect the ability of rural telephone companies to satisfy requests for local exchange telephone service, in contravention of the universal service mandate of Section 1 of the Communications Act of 1934, as amended (the Act). See Reply Comments of Nucla-Naturita Telephone Company (NNTC) at 1; Comments of United States Telephone Association at 2; Comments of Border to Border Communications, Inc. at 2 - 4. BBTC submits that the Commission's auction scheme, as adopted, will seriously impair the ability of rural telephone companies to effectively respond to their customers' requests for local exchange telephone service in remote locations, where it is neither economically feasible nor physically possible to provide such service by wireline or fiber-optic cable (because the customer to be served is too far removed from the nearest central office station, or natural terrain features make it physically impossible or impracticable to string open wire or lay cable).

**A. Broadband PCS, and Cellular are Not Alternatives to BETRS for the Provision of Wireless Local Loop Services in Rural Areas.**

2. In reaching its decision that BETRS is no longer an essential service for the provision of local exchange telephone service in remote, rural areas, the Commission concluded that local exchange telephone service (via radio) can be effectively provided to

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<sup>2</sup> The Commission has previously defined rural areas in other regulatory proceedings. See e.g., Rule Sections 63.58 and 22.909(b). Therefore, the Commission should have no difficulty in fashioning a definition for the term "rural area" that would be appropriate in the BETRS context.

these remote, rural areas by cellular, broadband PCS, and other wireless means. Order at para. 32. In reaching this erroneous conclusion, the Commission stated that broadband PCS facilities will be sufficiently built out in rural areas so as to satisfy the need for local exchange service via radio. See NPRM at 30. BBTC submits that the Commission's conclusion is purely speculative, at best, and is contrary to the evidence of record. See Comments of NNTC at 6-7; Reply Comments of NNTC at 1-3; NPRM at para. 136.

3. The Commission conceded in the NPRM that the broadband PCS construction requirements indicate a different conclusion -- that some rural areas may not have PCS available for at least ten years from the commencement of PCS operations, if ever.<sup>3</sup> See e.g., NPRM at Para. 136. This conclusion is buttressed by the Commission's broadband PCS build-out requirements in Rule Section 24.203(a) and the fact that there has not been a flood of applications filed with the Commission to partition broadband PCS licenses to rural telephone companies, pursuant to Section 24.714(d) of the Commission's Rules.<sup>4</sup> Thus, combined with the high costs of acquiring broadband PCS spectrum, BBTC believes that the low level of partitioning activity exhibited thus far is indicative that broadband PCS will not be available in most rural areas for the foreseeable future, where BETRS is necessary for the provision of a cost-efficient local exchange telephone service. Moreover, even if broadband PCS and cellular were to become available in these remote areas, there is no indication that local exchange service could be provided in an economically feasible manner over cellular or PCS facilities as it is now being provided over BETRS frequencies. Thus,

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<sup>3</sup> Cellular telephone service, which is competitively similar to broadband PCS, has been licensed since the early 1980's, and is not sufficiently built out in remote, rural areas, particularly in those areas where BETRS is prevalent, due to the high costs of infrastructure and the likelihood of only nominal revenues being derived in those areas.

<sup>4</sup> The Commission may also take official notice that Poka-Lambro Telephone Cooperative was the only rural telephone company to win a broadband PCS license in the A and B-Block auction, which license was subsequently assigned to a subsidiary of GTE Corporation. Thus, other than the few A and B-Block PCS licenses which have been partitioned, no rural telephone companies hold A or B-Block PCS licenses.

because PCS and cellular are not likely to be sources of wireless local loop for the provision of local exchange telephone service (which the Commission presumes would supplant BETRS as an alternative communications source in most rural areas), the Commission should reconsider its action and either (i) exempt the two-way VHF and UHF frequencies from the geographic market area license auctions, or (ii) continue to license BETRS stations in the rural areas on the two-way VHF and UHF bands on a co-primary basis with paging.

## II. Paging Auctions Exceed the Commission's Statutory Authority.

4. The record demonstrates that the Commission's decision to issue geographic area paging licenses through competitive bidding is contrary to law. See Comments of NNTC at 9-10; Paging Licensees at 5-8. Section 309(j)(7)(A) of the Act, provides as follows:

(7) CONSIDERATION OF REVENUES IN PUBLIC INTEREST DETERMINATIONS. --

(A) CONSIDERATION PROHIBITED. -- In making a decision pursuant to section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph 4(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection. (underlining added).

In adopting the NPRM, the Commission stated that geographic licensing would serve the public interest by (1) enhancing regulatory symmetry between one-way paging and narrowband PCS, and (2) streamlining regulatory procedures and application processing rules. See NPRM at Para. 21. These reasons, which are not refuted in the Order, belie what appears to be the real reason for the Commission's proposal -- revenue for the federal treasury. This, taken with the Commission's use of economic areas that bear no relationship to the provision of local exchange telephone service in rural areas via BETRS,<sup>5</sup> is simply arbitrary and capricious. Since it appears that the proposed market definition is designed to

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<sup>5</sup> As hereinafter shown, a single frequency licensed over an Economic Area is of virtually no benefit in providing BETRS in rural areas.

create auction opportunities, where they might otherwise not exist, the Commission's market area licensing scheme is contrary to law.

### III. The Commission Should Continue Co-Primary Site-by-Site Licensing of BETRS Facilities.

5. BBTC submits that the Commission should continue to license BETRS stations on a co-primary site-by-site basis, rather than site-by-site licensing on a secondary basis, as of the effective date of the Order, in order to avoid a future loss of service. Under the Commission's new rules, any BETRS station licensed after the effective date of the Order, will be secondary to any facility to be installed by the geographic area paging licensee. Order at para. 34-35; new Rule Section 22.723. As such, a BETRS licensee will be required to discontinue a BETRS operation which is licensed on a secondary basis within six months of receiving notice from a geographic area licensee that the secondary BETRS facility "may" cause interference to the paging licensee's existing or "planned" facilities. Order at para. 35. This requirement is unduly burdensome for BETRS licensees, will result in the loss of essential communications services to the public in rural areas, and is contrary to the universal service mandate of Section 1 of the Act.

6. Under the Commission's geographic area licensing scheme, a geographic area licensee will effectively be able to terminate an essential local exchange telephone service (for which there is likely no alternative), merely on the supposition of harmful co-channel interference from the BETRS station, i.e., without any demonstration of actual harmful interference. This would leave the users of such BETRS facilities at great risk of losing their telephone service, merely because the geographic area licensee has the incentive to "clear" as much of the spectrum as possible for its own use, even if it never proposes to provide paging service in the rural area.<sup>6</sup>

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<sup>6</sup> In the western and southwestern regions of the country, where many urbanized areas are pockets surrounded by vast rural areas, it is not unusual to drive 30 minutes from the city center (e.g., Las Vegas, Nevada), and literally be in the middle of a desolate area

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7. Secondary licensing will further exacerbate the potential for loss of service since many rural telephone companies will not be willing to make significant investments in infrastructure, which are paid for by its rate payers, that will only have to be abandoned possibly a short time later due to the whim of the geographic area licensee.<sup>7</sup> Because the geographic area licensee could strand the rural telephone company's BETRS investment at any moment, subscriber requests for service will likely go unanswered. This result is contrary to the universal service mandate of Section 1 of the Act and the public interest considerations to preserve the continuity of communications services to public subscribers. See Otis Hale, 2 FCC Rcd. 7527 (MSD 1987) (the public interest is not be served by a disruption of an essential public communications service.); La Star Cellular Telephone Co., 4 FCC Rcd. 3777 (1989), aff'd sub nom., La Star Cellular Telephone Co. v. FCC, 898 F.2d 1233 (D.C. Cir. 1990); Public Notice, DA-97-78, 12 FCC Rcd. 792 (released January 13, 1997) (Wireless Telecommunications Bureau terminated the authorizations of MobileMedia Corporation et. al., and granted MobileMedia interim operating authority for

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<sup>6</sup>(...continued)

where the only practicable means for providing local exchange telephone service is via BETRS because cellular and broadband PCS have not been built-out in the area and, in fact, may never be built out. And because of the relatively short distance between many rural and urbanized areas in the western and southwestern U.S., it is unlikely that any such BETRS facility, licensed on a secondary basis, would be able to remain on the air if the geographic area licensee desired only to serve the major population center. Thus upon six month's notice, the BETRS licensee would be forced to terminate an essential communications service to its rural subscribers, that, for the reasons demonstrated above, are not likely to be replaced by cellular or broadband PCS. Such a result is contrary to the universal service mandate of Section 1 of the Act and the public interest.

If the Commission insists on retaining secondary site-by-site licensing for BETRS, the geographic area licensee should be required to provide a demonstration of harmful interference utilizing the engineering criterion of Rule Section 22.709(d). If the potential for harmful interference exists, the BETRS carrier should be given an opportunity to demonstrate interference free operation. Since BETRS operators typically use low-power transmitters and narrow beamwidth antennas, it is entirely possible that BETRS and paging will be able to co-exist.

<sup>7</sup> The Commission certainly cannot criticize a rural telephone company for making such an economic decision, when at a moment's notice, its expenditure of tens of thousands of dollars in planning, engineering, licensing, and equipment could be so easily lost.

those stations which were subsequently constructed and presently providing service to the public).

8. Because of the havoc that could be visited upon BETRS, BBTC urges the Commission to fully protect BETRS, consistent with the universal mandate of Section 1 of the Act and the public interest in preserving necessary communications services. Rather than issuing site-by-site licenses for BETRS on a secondary basis, such licenses should be issued on a co-primary basis with the geographic area licensee and incumbent co-channel licensees, immune from the whim of the geographic area licensee's uncertain future plans.

#### **IV. The Commission Should Have Adopted Mandatory Partitioning.**

9. The record demonstrates that the Commission ignored the alternative proffered by NNTC -- that the Commission adopt mandatory partitioning -- to the auction of the BETRS frequencies and imposition of secondary site-by-site licensing for BETRS facilities granted after the effective date of the Order, in order to safeguard the ability of rural telephone companies to provide necessary local exchange telephone service via radio. See Telocator of America, 691 F. 2d 525, 537 (D.C. Cir. 1982) ("We will demand that the Commission consider reasonably obvious alternative . . . rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.").<sup>8</sup> The Commission failed to provide a reasoned analysis in support of its decision -- to auction the BETRS

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<sup>8</sup> The Commission should not overlook the fact that it is totally impracticable for a rural telephone company or even a consortium of rural telephone companies to bid on BETRS spectrum in a market the size of an Economic Area (EA). The Commission overlooks the fact that unlike paging, which requires only a single frequency to provide service to tens of thousands of customers over a very wide area of service, BETRS requires, due to co-channel interference considerations, multiple frequencies to provide service to a relatively small handful of subscribers over a limited service area. Indeed, the Commission may take official notice of the fact that the typical BETRS application for authorization of a central office station at a single location typically requests assignment of two to four frequency pairs, and in some cases, ultimately 20 frequency pairs have been authorized. See Order at para. 34, n. 104. Given the number of frequencies that would be required for BETRS in the rural areas of virtually any EA, the Commission could not reasonably expect rural telephone companies to be able to bid on multiple-frequency spectrum in the EAs. To that extent, the Commission's auction rules unfairly discriminate against telephone companies serving rural America.

frequencies or continue site-by-site licensing of BETRS facilities on a secondary basis vis a vis mandatory partitioning. BBTC submits that these shortcomings render the Commission's decision arbitrary and capricious.

10. In the captioned proceeding, commenters urged the Commission to adopt numerous alternatives to the auction.<sup>9</sup> NNTC urged the Commission to provide rural telephone companies with the mandatory right to require, at no cost to themselves, that the geographic area licensee partition the rural portions of its market, as the Commission may define, which are required by the rural telephone company to provide BETRS. See Comments of NNTC at 11. Such a partition would be based upon the parameters of the rural telephone company's proposed BETRS central office station(s) that are necessary for the provision of local exchange telephone service in rural areas, but in no event could the partitioned area exceed the rural telephone company's certificated local exchange service area (except to the extent necessary to ensure that any BETRS central office station located within the rural telephone company's certificated service area would not receive harmful co-channel interference, nor cause such interference to the geographic area licensee). Without this right to partition, BETRS licensees would be required (i) to participate in the geographic area paging auctions for numerous channels in the market area,<sup>10</sup> or (ii) to seek partitioned

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<sup>9</sup> Other commenters urged the Commission to (i) allow BETRS licensees to expand their systems' existing interference contours without charge from the geographic area licensee, as necessary in order to extend local telephone service. See Ex parte comments of Puerto Rico Telephone Company dated September 6, 1996 at 2. And, NNTC also urged the Commission to adopt a procedure in order to ensure that the geographic area licensee did not cause harmful interference to "protected" co-channel BETRS facilities, which would include incumbent, subsequently licensed, and partitioned stations. The failure of the Commission to provide any substantive discussion of these alternatives and procedures is arbitrary and capricious. See Telocator of America, supra.

<sup>10</sup> This would lead to the unusual situation where a BETRS provider would be forced to bid on an entire market area without the intention of ever serving the population center, so that it can provide BETRS to a few customers in a small rural portion of the market. And, while potentially being forced to expend a substantial sum of money to acquire the market, there is no certainty that the BETRS provider would be able to recover its costs with respect to a partition of the rest of the market, as occurred following the C-block PCS auction.

(continued...)

licenses from the auction winners of the needed channels at a substantial cost for the rural geographic area, even though the auction winner would likely never have plans to provide service in the rural area.<sup>11</sup>

11. BBTC submits that these procedures will permit rural telephone companies to make necessary modifications to existing BETRS systems, as well as establish new BETRS systems, as subscriber demand warrants, in order to ensure that the Congressional mandate of universal service is met. As discussed above, the impact of this proposal on the winning market licensee would most likely be negligible, since the areas served by BETRS are sparsely populated and, due to their distance from urbanized areas and low population densities, are not typically served by paging carriers. Thus, even where the geographic area licensee would be required to protect a central office station located at the edge of the BETRS licensee's certificated area, the potential for harmful interference to the market licensee's paging system is remote, since BETRS stations typically operate at low power, with highly directionalized antenna systems.<sup>12</sup> Accordingly, it is respectfully submitted that

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<sup>10</sup>(...continued)

Additionally, if the BETRS provider could not promptly partition its market license, it could be left with substantial overhead (all for the purpose of providing service to a few customers), which would substantially drive its costs up to rate payers.

<sup>11</sup> The evidence introduced in the record does not support the Commission's supposition that geographic area licenses would be willing to enter into voluntary partitions with rural telephone companies for the provision of BETRS service. Without favorable rules from the Commission, BBTC expects such partitions would be costly, so that the geographic area licensee could recover as much of its auction costs for the market as possible. This is so, even though service benchmarks are based upon population and not land area. Taken in combination with the fact that most BETRS systems are multi-channel, BBTC submits that the likelihood a rural telephone company will be able to reach an acceptable partition agreement with the affected geographic area licensees is slight, as demonstrated in the recent relocation of fixed microwave licensees from the 2 GHz band. In that proceeding, the Commission was ultimately forced to take action on behalf of the new PCS licensees because many of the incumbent microwave licensees attempted to impose usurious demands as a condition of relocation. Nothing in the Commission's Order prevents the geographic area licensee from engaging in such behavior.

<sup>12</sup> Of course, the rural telephone company would not expect the Commission to force the geographic area licensee to partition its area if there are pre-existing, protected co-

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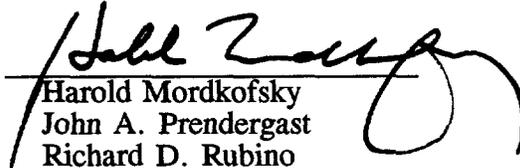
BETRS should (i) be exempted from the auction and (ii) receive full protection, in order to preserve universal telephone service to rural America.

**V. Conclusion.**

12. In light of the foregoing, it is respectfully requested that the Commission modify its paging geographic area licensing rules in the manner described above.

Respectfully submitted,

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