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

APR 11 1997

Federal Communications Commission  
Office of Secretary

In the Matter of: )  
)  
Replacement of Part 22 and Part 90 )  
of the Commission's Rules to )  
Facilitate Future Development of )  
Paging Systems )  
)  
Implementation of Section 309(j) )  
of the Communications Act -- )  
Competitive Bidding )

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

**NATIONWIDE PAGING, INC.**  
**PETITION FOR PARTIAL RECONSIDERATION**  
**AND CLARIFICATION**

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**SUMMARY**

The dismissal of pending paging applications is 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 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.

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To: The Commission

**NATIONWIDE PAGING PETITION FOR PARTIAL  
RECONSIDERATION AND CLARIFICATION**

Nationwide Paging, Inc. ("Nationwide"), 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.<sup>1</sup>

**I. Statement of Interest**

Nationwide is a small, independent paging company operating in California and the Southwestern U.S.; its affiliated company, 800 Page USA, Inc. provides paging services in the State of Florida. Nationwide previously filed Comments in this radio-paging rule making proceeding with respect to the FCC's "Interim Licensing" proposal. Consequently, Nationwide is an "interested party" in these proceedings.

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<sup>1</sup> 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.<sup>2</sup> 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 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.

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

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<sup>2</sup> 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.

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 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").

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.

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 grossly inequitable, and offensive to any fundamental notion of fair play.

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

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.

**IV. The Procedures for Wide-Area Licensing  
of Incumbents Should be Clarified.**

The Second R&O stated that incumbents will be permitted to retain their current licenses, or alternatively, to trade in their site-specific licenses "for a single system-wide license demarcated by the aggregate of the interference contours around each of the incumbent's contiguous sites operating on the same channel." Second R&O at ¶ 58. Nationwide agrees that incumbents should be afforded the flexibility of system-wide licensing; however, it requests clarification on some points of the new rules.

Most fundamentally, the Second R&O does not define "contiguous sites" for the purposes of determining an incumbent's "aggregate interference contours." Nationwide submits that any definition of these terms must be sufficiently broad to avoid creating "gaps" in existing systems. For example, there may be situations where the interference contours of an incumbent's transmitters do not overlap or even meet, but where no other party could place a co-channel transmitter consistent with the separations criteria of 47 C.F.R. 22.537. Any definition of "contiguous sites" should take such situations into account, so that incumbents can fill in such gaps to provide seamless coverage to their subscribers.

Additionally, the Second R&O does not establish procedures for incumbents to trade in their site-specific licenses, nor does it indicate that those procedures will be announced by a future public notice. Nationwide respectfully requests that the FCC clarify this issue.

**V. Permitting Power Increases by 929 MHz Licensees  
will Serve the Public Interest, but the Procedures for such  
Power Increases Should be Clarified.**

The Second R&O eliminates the Part 90 height-power limits on 929 MHz stations, and increases the maximum permitted ERP for 929 MHz stations to 3500 watts. See Second R&O at

¶ 78. Nationwide applauds this decision as an important step toward regulatory parity between 929 MHz licensees and 931 MHz licensees. Nonetheless, Nationwide requests that the procedures for 929 MHz licensees seeking to increase their power be clarified.

The Second R&O is silent as to whether 929 MHz licensees may automatically raise their current ERP to 3500 watts, or whether a modification application will be required. If the FCC intends the latter, it will presumably treat such applications as "permissive modifications" (since the filing of all other 929 MHz applications is frozen); however, the Second R&O gives no indication that that is the case. Nor does the Second R&O indicate when the FCC will accept and process such applications, whether such applications will require frequency coordination, whether power increases will be permitted at the "exterior" sites of a licensee's system, etc. Nationwide respectfully submits that a clear statement on these procedural issues is necessary to apprise applicants of the steps they should take.

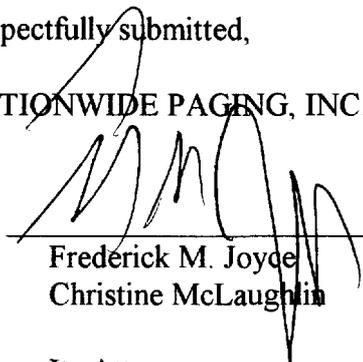
**CONCLUSION**

For all the foregoing reasons, Nationwide respectfully requests that the FCC reconsider and clarify its Second R&O in this rule making proceeding consistent with the foregoing recommendations.

Respectfully submitted,

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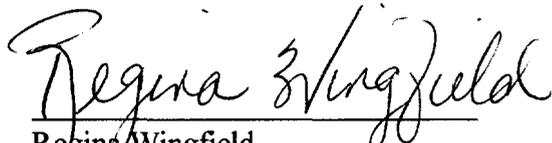
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