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

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

TO: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's adoption of paging auction rules was arbitrary and capricious because the Commission ignored the relevant evidence of record and failed to consider the less restrictive alternative of self-defined market areas. Existing paging services will be disrupted by the auction scheme, which forces paging systems into geographic areas that do not necessarily match the current coverage. Moreover, small businesses will not be able to effectively compete in the auctions, despite bid credits. The arbitrary nature of the rules is compounded by the discriminatory affect of exempting nationwide carriers, who compete for the same paging customers as other carriers.

The Commission must eliminate the substantial service option, because it encourages speculation, and henders wide-area paging coverage. The Commission has already found in PR Docket No. 93-35 that the public interest is better served by incumbent licensee expansion.

The Commission should process pending mutually exclusive applications, because such applications were filed before the adoption of auction rules. The FCC does not have statutory authority to apply these rules retroactively. Applications filed after July 31, 1996 should be processed, because these filings fulfill the public interest goal of incumbent expansion.

The Commission should clarify its new rules, including the "trade-in" option for existing licensees, modification rights for 900 MHz licensees, the small business qualification rules, and its rules for coordination between co-channel operations. Other aspects of the rules should be clarified, as indicated herein.

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PETITION FOR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its paging carrier clients listed in Attachment A hereto (hereinafter the "Petitioners") and pursuant to Rule Section 1.429, hereby requests reconsideration of the Commission's Second Report and Order and Further Notice of Proposed Rulemaking in the above captioned proceeding (62 Fed. Reg. 11616, March 12, 1997) (hereinafter the "Order"). As discussed below, the adoption of an auction scheme for the heavily encumbered paging industry is inconsistent with the Commission's auction authority, and is adverse to the public interest. In addition, the auction rules have been structured in a way that will lead to disruptive bidding activity by speculators and competitors.

I. Auctions Are Contrary to Law and Adverse To The Public Interest.

In adopting its paging auction scheme, the Commission failed to adequately address the record in this proceeding. This record clearly shows that the mature, heavily licensed paging industry should not be forced into conforming its paging operations into Major Trading Areas (MTAs), Economic Areas (EAs) or other market areas, when existing systems were not planned and constructed with such boundaries in mind. The record established that the vast majority of the industry opposed the Commission's auction proposal. In particular, 53 of the 74 parties commenting on the proposal opposed auctions outright. See April 2, 1996 Reply Comments of Ameritech Mobile Services, Inc. on Market Area Licensing Proposal, at p. 2, Attachment

A. An additional four parties opposed MTA auctions, and proposed smaller market sizes. Id. Of the parties supporting auctions, many were very large carriers (such as Airtouch Paging, Paging Network, Inc., Arch Communications Group, American Paging, Inc., and Mtel) that have nationwide paging channels, and thus are exempt from auctions.

Despite the overwhelming opposition to the auction proposal, the Commission adopted its market area licensing scheme. In so doing, the Commission ignored the record showing that such auctions would be adverse to the public interest because (1) the paging industry is mature, and much of the licensing has already taken place (thereby minimizing the purported benefit of reduced site-by-site licensing); (2) paging systems have not been planned based on MTAs, Economic Areas (EAs) or other defined geographic boundaries; (3) many carriers have invested millions of dollars in constructing systems which are not yet completed, and their investment may be stranded if they are not the auction winner; and (4) small businesses will have difficulty competing in such auctions, despite the availability of bid credits and installment payment plans. See, e.g., Reply Comments of the Paging Coalition at p. 2.

A. The Commission Must Base Its Decision On The Record.

Section 553 of the Administrative Procedure Act provides, in part, that an agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . . After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The purpose of this statement is to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." Rodway v. U.S.D.A., 514 F.2d 809, 817 (D.C. Cir. 1975). While this statement need not be an exhaustive account of the rulemaking proceeding, agencies should avoid neglecting the views of all concerned parties, for as one court has pointed out, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." HBO v.

F.C.C., 567 F.2d 9, 35-36 (D.C. Cir. 1977). In the interest of reasoned decision making, courts have held that rational process dictates that agencies must answer comments that are of cogent materiality and are significant to the decision. See United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

The Petitioners, and other commenters, expressed to the Commission in strong and consistent terms that the proposed rules would have a severe disruptive impact on paging carriers, including small and medium-sized businesses. See, e.g., Paging Coalition Reply Comments at 2. These parties demonstrated that the proposed rules would discourage participation by small businesses by forcing them to bid for licenses that they cannot afford and which are ill-suited to their areas of operation. Id. at 4-5. Thus discouraged from expanding in an efficient manner, these small businesses, once thriving, would become marginal players in the market - an outcome directly at odds with Congressional intent.

Despite this evidence, the Commission, without addressing the valid concerns expressed by the majority of commenters, imposed its auction rules. In so doing, it completely ignored the record to which the commenters, at the Commission's invitation, had gone to great time and expense to compile. The Commission's Order literally ignored the arguments raised by the vast majority of commenters. An agency decision is not a reasoned one if it ignores vital comments regarding relevant factors and does not provide adequate rebuttal. See Alabama Power Co. v. Costle, 636 F.2d 323, 384-85 (D.C. Cir. 1979). The Commission's Order is not based on reasoned decision making, and should be reconsidered in light of this evidence.

B. The Commission Failed To Explain Its Rejection Of Less Restrictive Alternatives.

The Commission also failed to adequately consider the alternative proposed by several commenters, whereby existing licensees could define their own market areas based on existing coverage, and auctions would be held only for those specific base station proposals which are

mutually exclusive because two co-channel systems have expanded towards each other.[1] Under the Commission's approach, many incumbent licensees will have to consider bidding on various MTAs and EAs which contain large areas that they may not wish to cover (or may not be able to afford to cover) so they can protect their existing operations. The Commission's only response to this dilemma is to say that partitioning rights will allow such carriers to modify their market areas to better fit their coverage need. Order at pp. 13-14. However, the Commission assumes that each of these carriers will either be able to find an entity willing to purchase the unwanted portions of the market area (if the carrier is the winning bidder), or an entity willing to sell the desired portions of these market areas to the carrier (if it is not the winning bidder). There is no guarantee that such transactions will come together.

The "self-defined market" area suggestion of the industry would allow incumbent licensees to fill in holes within their composite coverage, and "pockets" on the exterior of their coverage. Under the auction scheme, the Commission will not allow such fill-in operations unless they either qualify as minor modifications under the Commission's existing rules, or an arrangement is negotiated with the winning bidder. If the winner is uncooperative, such gaps in coverage could go unserved. The proposed alternative would garner most of the purported benefits of market area licensing (e.g., greater flexibility in expanding coverage and fewer site specific applications) without the disruption of existing services that will be caused by auctions. While the Commission acknowledges the existence of this alternative proposal, (Order at p. 12, n. 46), it utterly fails to address the specifics of the proposal or explain why it is not acceptable. It is arbitrary and capricious for an agency to fail to consider reasonable alternatives presented in a rulemaking. Telocator Network of America v. FCC, 691 F. 2d 525, 537 (D.C. Cir. 1982) ("We will demand that the Commission consider reasonably obvious

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[1]See Comments of Ameritech Mobile Services, Inc. (Ameritech) at pp. 11-12; Comments of Sunbelt Transmissions Corporation and Snider Communications at p. 3; Comments of the Paging Coalition at pp. 5-6; Comments of ProNet, Inc. at p. 12.

alternative . . . rules, and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.").

C. The Commission's Exemption Of Nationwide Licensees From The Auctions Is Discriminatory And Further Exacerbates The Obstacles It Has Created For Small Businesses.

The Commission has decided that nationwide paging licensees are exempt from the auction process, even though many wide-area 931 MHz and regional 929 MHz carriers have nearly as many transmitters operating as part of their regional system as many of the nationwide carriers have operating across the country. As noted in many of the comments filed in this proceeding, this exemption creates a distinct competitive imbalance, since most nationwide carriers can and do compete directly with other licensees for regional and local customers. Despite the raising of this issue during the comment cycle, the Commission fails to adequately explain why nationwide carriers will receive preferential treatment.

In this regard, the exemption for nationwide carriers is arbitrary and capricious, because it is well established that similarly situated applicants cannot be treated in a disparate manner. See Green Country Mobilephone, Inc. v. FCC, 765 F. 2d 235 (D.C. Cir. 1985). The Commission indicates that the nationwide exemption is justified because "it would not serve the public interest or be fair to take away exclusivity rights that these licensees earned before the commencement of this proceeding." Order at p. 30. However, other paging carriers had the same expectation that they would have a reasonable opportunity to expand their systems incrementally in response to customer demand, without being subjected to an "all or nothing" auction. Many of these carriers have constructed hundreds of sites at an expense of millions of dollars, and yet may not be able to complete their build out. Therefore, the fairness issue is not confined to nationwide licensees.

It is more likely that there are larger areas of "white space" on the nationwide frequencies than there are on other channels. Therefore, the nationwide frequencies constitute a far better auction target. In any event, the paging industry is already highly competitive, as

the Commission has recognized. First Report and Order, WT Docket No. 96-18, 11 FCC Rcd. 16570, 16581 (released April 23, 1996) ("[T]he paging industry is a dynamic and highly competitive industry . . ."). In this competitive environment, it is grossly unfair to allow 26 competitors in each market to forgo the costs and delays associated with auctions, while requiring all other competitors to suffer these burdens. This unfairness is exacerbated by the fact that the nationwide carriers are among the largest paging companies in the world, who are best positioned financially for a spectrum auction; in contrast, many of the carriers that will subjected to auctions are small, family owned businesses which are already at a competitive disadvantage.

II. The Commission Should Eliminate The "Substantial Service" Option In Its Buildout Requirement.

The Commission will require paging auction winners to serve one third of the population within three years, and two thirds of the population within five years; or the auction winner can demonstrate "substantial service" as an alternative to meeting these buildout requirements. Order at pp. 33-34. Substantial service is defined as "service that is sound, favorable and substantially above a level of mediocre service, which would barely warrant renewal." Id., at p. 35. This definition carries little meaning in the context of market area paging services, and thus is impermissibly vague. The Notice of Proposed Rulemaking in this proceeding suggests that "substantial service" could be shown by providing "niche" services or by serving the population outside those areas already served by incumbent licensees. Notice of Proposed Rulemaking, 11 FCC Rcd. 3108, 3118 (1996). Several commenters noted the vagueness issue and pointed out that the adoption of this substantial service option would create the danger that speculators or competitors will bid on an incumbent licensee's frequency in order to block its expansion, or to extort money from the incumbent; and that such improper motives are deterred

if the winner must buildout coverage to a substantial portion of the market area.[2] The Commission acknowledged these numerous objections. Order at p. 34. Indeed, the Commission stated that "[w]e agree with the commenters that coverage requirements are needed as performance requirements to deter speculation . . . [and to] promote service to rural areas." Order at p. 35 (Emphasis added). However, the Commission has facilitated speculation by adopting the "substantial service" option, without comment on whether the objections were unfounded, or why the need for a substantial service option overrides such concerns. The Order is simply silent on these issues. In this regard, the Commission's action ignores the record in this proceeding, and fails to provide a reasoned analysis in support of its decision. As explained in Section I above, these shortcomings render the Order arbitrary and capricious.

It should be noted that the concepts apparently underlying the "substantial service" proposal in other market area licensing situations (i.e., the provision of "niche" services and service to areas where an incumbent does not operate) do not support the use of this mechanism in the paging context. Unlike new services on relatively unlicensed spectrum (such as Personal Communications Services), or broadband services (such as the Specialized Mobile Radio Service), paging has little room for "niche" services. With only 25 kHz of spectrum, paging carriers have relatively little flexibility in what services they can offer. Moreover, the need to protect incumbent operations prevents any significant public benefit in allowing auction winners to serve areas not covered by incumbents. Such service would offer small islands of coverage removed from incumbent systems. The Commission has recognized that, in paging, the public interest is served by facilitating the expansion of wide area service to existing subscribers, not by establishing isolated pockets of coverage by new providers:

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[2]See, e.g., AT&T Wireless Comments at p. 8; Airtouch Comments at pp. 18-19; Ameritech Comments at p. 19; Arch Communications Group Comments at p. 8; PCIA Comments at p. 22; Paging Network, Inc. Comments at p. 33; ProNet Reply Comments at pp. 11-12; Puerto Rico Telephone Comments at p. 7.

> Because increased coverage allows customers greater mobility without loss of access to service, we believe that wider-area systems are generally more beneficial to paging customers and more responsive to the rising demand for paging services. Second, allowing existing licensees to expand their service area will result in broader coverage for existing users of those systems, whereas authorizing a new competing system would prevent such users from obtaining expanded coverage without subscribing to both services. Third, by encouraging expansion of existing systems, the restriction will promote rapid access to wide-area service for new users as such systems reach new areas, whereas applicants who have yet to construct any portion of their systems would generally require more time to make wide-area service available. [footnote omitted].

See Report and Order, PR Docket No. 93-35, 8 FCC Rcd. 8318, 8330 (1993). at para. 33. The same considerations apply to paging auctions: The substantial service option will result in fractured, incomplete coverage in the market areas. Moreover, it will allow the auction winner to avoid service to rural areas, by simply building a few transmitters and claiming it is providing a niche service. Therefore, the substantial service option is adverse to the public interest.

III. The Commission Should Clarify The Option For Incumbent Licensees to "Trade In" Their Licenses For A Geographic License.

In the Notice of Proposed Rulemaking ("NPRM") in this proceeding, the Commission suggested that existing licensees may be able to "trade" their current site specific authorization for a wide area license defined by the composite interference contour of their "contiguous" transmitters. Id. at para. 37. Various commenters specifically requested that the Commission clarify this idea. See, e.g., Comments of Ameritech at pp. 12-13. In particular, these commenters requested that the Commission indicate whether such licensees would have to give up their non-contiguous stations, of if instead such stations would be grandfathered; and whether a discontinuance or operation by an interior site may jeopardize the license, by disrupting the "contiguous" nature of the system. Id. The Order (at paragraph 58) repeats the indication that licensees may trade in their site-specific licenses for "a single system-wide license demarcated by the aggregate of the interference contours around each of the incumbents' contiguous sites operating on the same channel." However, the Commission should address the issues discussed

above, by clarifying whether non-contiguous sites will be protected, and whether loss of an internal site will threaten the license.

In addition, the Commission should clarify the definition of "contiguous." Must the service areas overlap? Or is it sufficient for the interference contours to overlap? In this regard, the Commission should confirm what seems obvious from the text of the Order, but which is not explicit in the rules: That incumbent carriers may continue to extend coverage to new service areas, as long as their composite interference contour is not extended. This right was implemented as part of the Commission's interim rules announced in the Notice of Proposed Rulemaking, and the Order seems to indicate that the same principle will be followed in the post-auction environment. See, e.g., Order at para. 19 (Incumbents "will not be required to file applications for additional internal sites."); at para. 25 ("Incumbent licensees will not be permitted to expand their composite interference contour," but no mention is made of the service area contour).

In addition, the Commission should take this opportunity to modify the "trade in" option, to include in the system license any areas which may not be contiguous with the existing licensee's system by virtue of overlap, but which the auction winners cannot serve because of the need to protect the incumbent's existing sites. The public interest would be served by allowing the incumbent to extend its coverage to such areas, which would otherwise go unserved. The newly adopted Rule Section 22.507 would seem to offer adequate flexibility to use this approach, since paragraph (c) of the rule allows licensees to request a consolidated license "if appropriate under paragraph (a) of this section." Paragraph (a) requires only that transmitters be "operationally related," and/or serve the "same general geographic area." It does not require that sites be "contiguous."

IV. The Commission Should Clarify The Modification Rights Of Incumbent 900 MHz Licensees.

During the pendency of this rulemaking, the Commission allowed 931 MHz licensees to establish or relocate transmitters on a permissive basis even if new service area was covered,

so long as the composite interference contour was not changed. More importantly, the Commission allowed 929 MHz and 931 MHz licensees to use the proposed 21 dBuV/m formula to calculate the new transmitter's interference contour. This allowed existing licensees to "squeeze in" modifications and fill-ins that would have been impossible under the existing Part 22 and Part 90 rules. In its Order, the Commission correctly declined to adopt the 21 dBuV/m formula as the standard for protecting incumbent licensees. However, the Order does not address whether this formula can still be used for permissive modification showings. It is respectfully submitted that the public interest would be served by allowing incumbent licensees to continue implementing permissive relocations of 900 MHz facilities using the 21 dBuV/m formula. This approach allows the flexible modification of an existing service area without encroaching on an auction winner's "white space."

V. The Commission Failed To Adequately Explain Its Rejection Of The Incumbent Licensee Exemption.

The Commission rejected the suggestion of several commenters that incumbent licensees be exempted from the auction if their system already covers a substantial majority of the population within the given market area.[3] The Commission decided against the exemption, indicating that "open eligibility for paging licenses will result in a more competitive auction and potentially will result in further wide-area coverage of paging services." Order at p. 27. It is respectfully submitted that this approach ignores the needs of existing paging customers, as well as the carriers who have spent millions of dollars implementing systems they may not be allowed to complete. When a licensee already has such a comprehensive presence in the market area, the auction process only invites competitive mischief. Open eligibility may "result in a more competitive auction," but the additional bidders are likely to be speculators or competitors

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[3]See Comments of the Paging Coalition at p. 8; Comments of PCIA at pp. 28-29; Comments of MobileMedia at p. 21; Comments of AirTouch at pp. 40-41; Comments of PageNet at pp. 39-40; Comments of Source One Wireless, Inc. at p. 3; Comments of Paging Partners Corporation at p. 3; Comments of A+ Communications, Inc. at p. 8; Comments of Ameritech at p. 13 and Comments of Metrocall at pp. 8-9.

trying to block expansion by the incumbent. Such motives should not be fostered by the Commission. In any event, the goal of a more competitive auction is at odds with the Congressional mandate that the auction rules not be designed with the goal of increasing auction revenues. By allowing such bidding activity, the Commission will actually inhibit rather than encourage further wide-area coverage of paging services, because the incumbent will be unable to expand if it is not the auction winner. If the incumbent already serves two thirds or more of the population, and the auction winner must provide a buffer zone around the incumbent's system for interference protection, auctioning such market area would only help to ensure that the rest of the population within this area remains unserved. As discussed above in Section I.B., the Commission already recognized in PR Docket No. 93-35 that the public interest is better served by allowing an incumbent licensee to expand continuous coverage to its existing customers, rather than facilitating competing services that will frustrate this goal.[4]

VI. The Commission Should Process All Pending Applications.

In the Order, the Commission has given the Wireless Telecommunications Bureau discretion to dismiss all pending applications that are mutually exclusive, as well as all applications filed after July 31, 1996. It is respectfully submitted that dismissal of the former class of applications would be improper, while dismissal of the latter class of applications would be adverse to the public interest and contrary to the Commission's own policy objectives.

A. Mutually Exclusive Applications Filed Prior to July 31, 1996 are Entitled to Processing.

The Commission has statutory authority under Section 309(j) of the Communications Act of 1934, as amended ("the Act"), to prospectively apply competitive bidding rules to applications for licenses for electromagnetic spectrum. However, it does <u>not</u> have authority to

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[4]It should be noted that the incumbent exemption may reduce the number of bidders for a particular frequency in a particular market, but it will not reduce competition in the provision of paging services within that market. The exempt licensee would operate only one of more than one hundred paging systems that will be authorized in each market area in the United States.

retroactively apply auction rules to pending applications that were properly submitted before the adoption of specific paging auction rules in WT Docket No. 96-18. Congress did not expressly authorize the Commission to apply its provisions retroactively. In particular, Section 6002 of the Omnibus Budget Reconciliation Act of 1993, (OBRA) (which amended Section 309) makes no mention of allowing such retroactive application. Instead, Section 309(j)(3) of the Act specifically requires that "[f]or each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology." (Emphasis added). Therefore, until the Commission issued regulations for paging auctions as required by Congress, it did not have the authority to apply auction rules to applications. Once adopted, the regulations must be applied prospectively. Administrative agencies do not possess the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. See e.g. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) (Retroactivity is not favored in law; statutory grant of rulemaking power generally requires express terms by Congress); Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Circuit 1986) ("Courts have long hesitated to permit retroactive rulemaking and noted its troubling nature.") Indeed, Section 309 (j)(6)(F) of the Act states that "[n]othing in this subsection, or in the use of competitive bidding, shall. . . be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits." This language suggests that Congress contemplates the continued issuance of licenses under the original paging rules for applications filed prior to the adoption of paging auction rules.

Even if it were assumed arguendo that the newly adopted paging auction scheme could be applied retroactively to existing mutually exclusive applications, the Act does not authorize dismissal of these applications. Instead, Section 309 (j)(1) requires as follows:

> If mutually exclusive applications are accepted for filing. . . then the Commission shall have the authority, subject to paragraph 10, to grant such license or permit to a qualified applicant through

> the use of a system of competitive bidding that meets the requirements of this subsection.

Thus if auction rules were to be applied to pending mutually exclusive applications (all of which have been "accepted for riling"), the Act would require that the auction be held between those applications. Outright dismissal is not an option.

In this regard, Section 309 (j)(6)(E) instructs that nothing in the auction legislation shall "be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means in order to avoid mutual exclusivity in application and licensing proceedings." The applicants involved have met all threshold qualifications and service regulations that existed at the time they filed. The Commission has never attempted to resolve the mutual exclusivity between the applications it now proposes to dismiss, through engineering solutions or negotiations. Dismissal of these applications would violate the mandate of Section 309(j)(6)(E).

The Courts should not grant any deference to the FCC's interpretation of Section 6002 of OBRA, which merely establishes the FCC's authority to prospectively impose competitive bidding rules for exclusive, non-nationwide paging channels. Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court mandated that where a statute is silent or ambiguous with respect to a specific issue, the Court must assess whether the agency's answer is based on a permissible construction of the statute. The Court also held that if the statute is ambiguous, the agency's interpretation must be reasonable in order to be valid. As stated above, in absence of express statutory grant of the power to apply rules retroactively, the rule is that laws are to be applied prospectively. See Bowen, 488 U.S. at 204; Yakima Valley Cablevision, 794 F.2d at 737. Therefore, the statute's plain meaning is contrary to the FCC's proposed application of the competitive bidding rules, and a reviewing court would have to invalidate this action. Even if the statute as ambiguous, the court could not defer to the Commission's interpretation of OBRA, because the Commission cannot creditably make reference to either statutory text, or legislative history to suggest that

retroactive application of the competitive bidding rules conforms with the Congressional intent of the statute. Nowhere in either the text, or the legislative history of OBRA did Congress indicate it was permissible to apply Section 6002 retroactively.

Indeed, the Commission's proposal to dismiss all mutually exclusive applications appears to violate the Congressional intent underlying the Commission's auction authority. In their February 9, 1996 letter to Chairman Hundt of the Commission (copy attached), Senators Larry Pressler and Thomas Daschle warned the Commission that its retroactive dismissal of mutually exclusive 38 GHz applications would exceed its statutory authority. The Senators addressed this issue as follows:

> By virtue of either completing the application process or amending already submitted applications to eliminate mutual exclusivity concerns, applicants have in essence established a fairly reasonable expectation that they would not be subjected to the competitive bidding process. . . . It therefore seems anomalous to the clearly expressed intent of Congress within the [1993 Budget] Act that applicants who have completed the application process would subsequently be exposed to having to compete for the spectrum in auctions.

The Commission pointed to its proposal to retroactively apply auctions to 38 GHz applications as a model for imposing the same regime on paging applications. NPRM at para. 139. Its proposal to dismiss mutually exclusive paging applications suffers the same infirmity identified by Senators Pressler and Daschle. Paging applicants who have gone through the application process should be allowed to amend their applications to resolve mutual exclusivity, or should be entitled to have their applications processed as a site-specific proposal, if they choose not to amend. However, the outright dismissal of these applications for the purpose of creating more auctionable territory violates both the express restriction of Section 309(j)(7) against designing rules for revenue purposes, and the Congressional intent evidenced in the Pressler/Daschle letter.

B. Processing of post-July 31, 1996 applications would serve the public interest.

When the Commission modified the paging freeze to allow the filing of expansion applications by incumbent licensees, it indicated to the industry that the processing of all applications filed after July 31, 1996 was not guaranteed, but stated that "the Bureau also intends to process initial applications filed after July 31, 1996. However, the extent to which post-July 31 applications are processable may be affected by the timing of a final order in the proceeding and the transition to new licensing rules." See Public Notice, Mimeo No. DA96-930, released June 10, 1996. After July 31, 1996, the Commission continued to accept expansion application, and engaged in the initial processing of these applications by reviewing them for basic acceptability, assigning a Commission file number, and placing the applications on public notice for the required 30-day period. In doing so, the Commission invited the industry to expend its resources by continuing to file expansion proposals, by reviewing the applications listed on public notice, and by preparing and filing petitions to deny against those applications which were deficient in some manner.

It is respectfully submitted that, given the Commission's announcement that it intended to process post-July 31 applications and subsequent course of conduct, it would be grossly unfair to dismiss these applications. Many have been pending for several months. More importantly, the same important public interest considerations which lead the Commission to modify the paging freeze, apply to these pending applications. In particular, the Commission found that it was important to ensure that incumbent licensees were able to expand their existing coverage by a reasonable distance (40 miles or 65 kilometers), so that the coverage needs of their existing subscribers could be met. See First Report and Order, supra 11 FCC Rcd. at 16581. In particular, the Commission concluded as follows:

> We recognize, however, that an across-the-board freeze imposes significant costs on legitimate paging licensees with operating systems. As we recognized in the Notice, the paging industry is a dynamic and highly competitive industry that is experiencing rapid growth. . . To meet customers needs and improve service to the public in this highly competitive environment, paging

> operators need flexibility not only to make modifications within their existing service areas, but to add sites that extend the coverage of their systems into areas of new growth, such as outlying suburbs and new business centers. Even a short-term freeze has the potential to harm the paging industry and the public by deterring this growth and stifling investment. Moreover, the impact of the freeze is felt most acutely by local and regional paging systems, who are prevented from expanding while more that a dozen nationwide carriers operating in each market have no such limitation on their ability to respond to increased demand in high-growth areas. [footnotes omitted].

Id. The July 31, 1996 date was arbitrarily chosen, and in fact gave incumbent carriers (especially smaller ones) little time to locate suitable expansion sites, and prepare and file their applications. The coverage expansions proposed in applications filed after the arbitrary July 31, 1996 date will further the Commission's public interest objectives as much as those filed prior to that date. In contrast, the dismissal of these applications would only deprive existing customers of needed coverage, and serve to arguably increase auction revenues, in contravention of Section 309(j)(7) of the Act.[5]

VII. The Commission Should Adopt Notification and Testing Rights for Incumbents.

Various commenters pointed out that, if the market area licensing approach were to be adopted, the rules should require that the auction winner notify the incumbent in advance of activating co-channel transmitters. See, e.g. Comments of the Paging Coalition at pp. 19-20; Comments of Ameritech at pp. 16-17. This procedure is needed because, if interference is caused, by the time a complaint is resolved by the Commission, the incumbent's customers may have already suffered significant disruption of service for a substantial period of time.

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[5]The Coalition also notes that Rule Section 22.503(i) should be clarified with regard to the protection to be afforded to existing operations. In particular, this rule section requires protection "to all co-channel facilities of other licensees within the paging geographic area that were authorized on [insert effective date of this rule] and have remained authorized continuously since that date." The effective date of the rule has now been established as May 12, 1997. Pursuant to the above quoted language, facilities authorized after May 12, 1997 will not be protected even if the underlying applications were filed prior to July 31, 1996 (or even prior to the inception of the auction legislation). The wording of this rule is in direct contravention of the Commission's decision (at page 6 of the Order) that all non-mutually exclusive applications filed on or before July 31, 1996 would be processed. The Commission should correct this obvious error in the wording of the rule.

Therefore, it was suggested that the Commission should require market area auction winners to give advance notice to co-channel incumbents before activating transmitters that are located less than 70 miles from existing facilities; and that the Commission should require that the auction winner comply with a request by the incumbent for interference testing prior to operation. Id.

In its Order, the Commission failed to address the notification and testing proposal. While the Commission acknowledged the proposal (Order at pp. 38-39), the Order is silent as to the Commission's position on this matter. Instead, the Commission discusses only the requirements for negotiations between adjacent geographic area licensees. Id. It is respectfully submitted that the Commission should address the issue of notification to incumbent carriers. Auction winners will have an incentive to drive incumbents off of the channel, and if these incumbents must endure a formal complaint process to resolve interference situations, they may be driven out of business before the matter is resolved.

VIII. The Commission Should Clarify Its Requirements For Coordination Between Market Area Licensees.

The Commission has imposed on neighboring market area licensees an obligation "to negotiate in good faith" in establishing co-channel facilities near the border separating the market areas. Order at pp. 39-40. The punishment for not negotiating in good faith is that such behavior "could reflect adversely at renewal" for the offending licensee. Id. at p. 40. This vague good faith obligation, and equally vague threat of punishment, creates an undesirable potential for litigation and even license cancellation for market area licensees. The industry has had experience in the cellular realm with coordination between neighboring licensees. However, coordination between paging licensees will be much more difficult, because they operate on only one frequency (whereas cellular carriers have dozens of channels with which to negotiate). Therefore, it is respectfully submitted that this matter warrants clarification.

IX. The Commission Should Adopt A Mechanism For Expedited Canadian/Mexican Coordination.

Various commenters pointed out that currently, it is necessary for licensees to file a full Form 600 application, and await Commission approval in order to establish a transmitter in the VHF or UHF band that requires Canadian coordination. See Comments of Ameritech at pp. 19-20. This is true even if the proposed transmitter would otherwise qualify as a fill-in or permissive relocation. The Commission's Order is unclear about whether the auction winner will have to file an application in order to install a transmitter above Line A, or if instead it can obtain Canadian coordination directly from Industry Canada and simply notify the Commission. Paragraph 6 of the Order suggests that an application is needed. However, Paragraph 82 suggests that the auction winner will merely "be responsible for advising the Commission" of any transmitter requiring international coordination. More importantly, the Order (at paragraph 6) seems to indicate that an incumbent licensee must file a full application and await approval before it can implement fill-in transmitters and permissive relocations above Line A. The Commission did not explicitly address the commenters' suggestion that the Commission create a mechanism for licensees to merely notify the Commission, after direct Canadian coordination. In the absence of such mechanism, permissive modifications above Line A will continue to be an unnecessarily cumbersome process. Therefore, the Commission should establish an expedited procedure for such coordination.

X. The Commission Should Clarify The Applicability Of The Anti-Collusion Rule And The Commission's Anti-Trust Concerns To Bidding Consortia And Other Arrangements Between Incumbent Licensees.

The Commission indicates that its anti-collusion rule will apply to the paging auction upon the filing of short form applications. However, because the paging auction is to be imposed on an established industry, the anti-collusion rule must recognize that there are a number of arrangements already in place and/or which will be put into place in the near future, which will require communications on a regular basis between paging carriers that may be bidding on the same licenses. In particular, paging carriers operating on the same frequency

often enter into intercarrier agreements designed to allow more effective service to the public. While co-channel systems normally require several miles of separation between their composite contours in order to avoid interference, intercarrier agreements allow coordinated operation between licensees, so that the "no man's land" required for interference protection becomes unnecessary. Such arrangements allow the public subscribers of all participating carriers to enjoy uninterrupted paging coverage over a much broader area. However, it could be argued that the Commission's anti-collusion rule prohibits such on going coordination between licensees, because this rule has been interpreted to preclude any communications which could "directly or indirectly affect bids or bid strategies." See letter of Chief, Auctions Division to David Nace, 11 FCC Rcd. 11363 (September 17, 1996).

Moreover, the paging industry is in the midst of a significant consolidation. At any given time, dozens of acquisitions are occurring, in the form of a sale of assets, a sale of stock, or a merger. Often, such consolidation allows all involved carriers to more effectively compete and widen the range and coverage of services for their respective customers. Again, such negotiations could be construed as violating the anti-collusion rule as presently interpreted.

Because these ongoing negotiations and arrangements between paging carriers substantially benefit the public, the Commission should clarify that these transactions are not prohibited by the anti-collusion rule. The industry has already suffered artificial delays spanning more than a year due to the paging application freezes instituted in the above caption proceeding. To prohibit routine negotiations, transactions and communications between paging carriers would only exacerbate this situation, to the detriment of the public interest. The anti-collusion rule must be interpreted in this auction in a way that recognizes the unusual circumstances which are present. In particular, the paging industry is a mature one, which has moved forward without regard to the artificial constraints of the auction rules. Carriers will not be able to gain a significant advantage in the auctions through such routine dealings.

XI. The Commission Should Further Improve Its Safeguards Against Inadvertent Bidding Errors.

During the comment cycle in this proceeding, the Paging Coalition pointed out that the Commission should take steps to reduce the possibility of typographical bidding errors, since bidders should not be liable for huge withdrawal or default penalties as the result of minor keying errors. See Order at para. 142. The Commission agreed with this comment, and indicated that "the Bureau has recently instituted an additional procedure that warns bidders of the possibility of a mistaken bid, and this procedure will be utilized in the paging license auctions." Id. at para. 146. However, the Commission did not explain the mechanics of the additional procedure. And, while the Commission discussed in footnote 345 other cases in which it recently addressed mistaken bids, the applicants in those cases were assessed penalties of tens or hundreds of thousands of dollars for their typographical errors. See Atlanta Trunking Associates, Inc. and MAP Wireless LLC Request to Waive Bid Withdrawal Payment Provisions, FCC 96-203, Order (Released May 3, 1996) (Summarized in 61 Fed. Reg. 25807, May 23, 1996), recon pending.[6] Small paging carriers can take little comfort in such outcome.

The paging auction will include some of the smallest businesses in the telecommunications industry. Many of these entities will be participating in a spectrum auction for the first time. Indeed, some of the bidders may have only one or two persons that will be available to submit the bids, while at the same time seeing to the needs of their paging customers. Such businesses may have to rush to enter their bids (especially when multiple rounds are implemented in later stages of the auction) and cannot afford to pay even the "reduced" bid penalties embodied in the Commission decisions cited above. Therefore, the Commission should modify its rules to allow the withdrawal of a bid, without penalty, where

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[6] Atlanta Trunking Associates, Inc. was required to pay a penalty of $45,594. MAP Wireless LLC was required to pay a penalty of $206,400. Another bidder, Georgia Independent PCS Corporation, was required to pay a penalty of $569,898 for a similar typographical error. See Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision (DA-96-706, released May 6, 1996).

it can be demonstrated that the erroneous bid is the product of a typographical or clerical error, and this error is brought to the Commission's attention before other bidders have relied on the information when placing bids in subsequent rounds.

XII. The Commission Should Clarify Its Small Business Rules.

At paragraph 180 of the Order, the Commission indicates that "we will attribute the gross revenues of all controlling principals in the small business applicant" for purposes of determining eligibility for bid credits and other small business benefits. It is respectfully requested that the Commission clarify what is meant by the term "gross revenues of all controlling principals." In particular, the Commission should clarify that "gross revenues" does not refer to personal income (including salaries) of the principals, but instead refers to the revenues reported to the Internal Revenue Service (IRS) by the businesses that these principals own or control. This clarification would make unnecessary the disclosure of personal and confidential financial information that is not normally made available to the public. It would also avoid "double counting" of revenues, where the principals' salaries are paid by the applicant.

The Commission should also clarify what constitutes "significant equity" for qualification as a small business principal. The Order (at para. 180) indicates that "we choose not to impose specific equity requirements on the controlling principals that meet our small business definition." However, in that same paragraph, the Commission states that "while we are not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a bona fide small business." Since the penalty for disqualification as a small business can include loss of license, forfeiture of substantial amounts of money, and other severe sanctions, it is respectfully submitted that small businesses are worse off with this vague warning about failure to have adequate equity than they would be if the Commission imposed a specific equity requirement. The Commission should eliminate this uncertainty by either dispensing with the equity

requirement altogether (and instead rely on its other established criteria for de facto control), or should define the acceptable range of equity participation.

Finally, the Commission should clarify that intercarrier agreements and other recognized arrangements between otherwise independent paging carriers which allow better service to their customers, will not result in a finding of affiliation for purposes of determining small business status under Rule Section 22.223(d). While such arrangements can arguably be interpreted to create affiliation through "identify of interest," common facilities, contractual relationships, or joint venture arrangements under Rule Sections 22.223(d)(1), (8), (9), and (10), the Commission must recognize the important role played by such arrangements in a mature industry. The retroactive imposition of an auction scheme should not be allowed to undo such arrangements. Small paging carriers should not be forced to choose between providing extended service to their customers through an intercarrier arrangement, and discontinuing such service for the sake of a bidding credit at the auction. Creating such Hobson's choice would only serve to deprive the public of the benefits of such arrangements, with little in the way of offsetting value to the auction process.

XIII. The Commission Should Ensure That Existing Control Links Will Be Protected From Interference.

In CC Docket No. 87-120, the Commission adopted its flexible frequency allocation plan for the UHF and VHF paired channels originally allocated for mobile telephone service. Pursuant to the flexible allocation scheme, paging carriers have been allowed to utilize these two way channels as control links, which are vital to the operation of their paging systems. In reliance on this action, numerous carriers have configured their paging systems on basis of their protected use of a VHF or UHF frequency to link their base stations. The Order is silent as to what protection, if any, will be provided to existing control link operations once the auction for the UHF and VHF common carrier channels, has been completed. Given the justifiable reliance of incumbent licensees on the Commission's action in CC Docket No. 87-120, and the public interest in avoiding the draconian result of a disruption of valuable paging services to the