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Federal Communications Commission
Office of Secretary

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

ERRATA

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its paging carrier clients listed in Attachment A hereto (herein the "Petitioners"), hereby submits the following errata to their Petition for Reconsideration of the Commission's Second Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding, filed on April 11, 1997, to correct typographical/clerical errors, as follows:

At the second paragraph, second line of the summary, the spelling of the word "hinders" is corrected.

On page 8, the seventh line of Section III, the word "of is changed to "or"; and on the eighth line, the word "or" is changed to "of."

On page 13, the first full paragraph, second line, the word "filing" is corrected.

On page 14, the last full line of the block quote, the word "that" is substituted for the word "the."

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On page 15, the first full paragraph, seventh line beginning with the word "expansion", the letter "s" is added to the word "application."

On page 15, the second full paragraph, second line, the word "its" is added before the word "subsequent."

Attached hereto are replacement pages incorporating these changes, as well as a corrected Attachment A, showing the carriers participating in the foregoing Petition.

Respectfully submitted,

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Filed: April 15, 1997

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 hinders 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.

> 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, or if instead such stations would be grandfathered; and whether a discontinuance of 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

> 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 filing"), 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 that 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 applications, 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 its 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

ATTACHMENT A

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Penasco Valley Telephone Cooperative, Inc.

Clifford D. Moeller and Barbara J. Moeller d/b/a Valley Answering Service

AzCOM Paging, Inc.

Oregon Telephone Corporation

Ventures in Paging L.C.

Professional Answering Service, Inc.

Prairie Grove Telephone Company

Cascade Utilities, Inc.

Cleveland Mobile Radio Sales, Inc.

Telephone & Two-Way, Inc.

Lubbock Radio Paging Service, Inc.

Com-Nav, Inc. d/b/a Radiotelephone of Maine

Robert F. Ryder d/b/a Radio Paging Service

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