

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

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APR 17 1997

Federal Communications Commission
Office of Secretary

WT Docket No. 96-18

PP Docket No. 93-253

In the Matter of

Revision 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

To: The Commission

COMMENTS ON FURTHER NOTICE OF PROPOSED RULE MAKING

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April 17, 1997

No. of Copies rec'd 024
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ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.421 of the Commission's Rules, 47 C.F.R. § 1.421, hereby comments on the Commission's Further Notice of Proposed Rule Making ("FNPRM")^{1/} in the above captioned proceeding.

I. INTRODUCTION AND STATEMENT OF INTEREST

ProNet is among the largest paging carriers in the nation, operating in all commercial mobile radio service ("CMRS") bands and serving over 1.2 million subscribers throughout the country. Of the three nationwide 931 MHz paging licenses, one (931.9125 MHz) is held by a wholly-owned

^{1/}The *FNPRM* was released simultaneously with the Commission's *Second Report and Order* in this proceeding ("*2nd R&O*") on February 26, 1997, and was published in the Federal Register on March 12, 1997.

ProNet subsidiary.^{2/} Since this proceeding's inception, ProNet has been an active participant—generally supporting the Commission's plan to implement geographic paging licensing, while advocating those modifications made essential by incumbent operators' continuing obligation to provide high quality service to the public.

In these comments, ProNet urges the Commission to refrain from superimposing a second layer of coverage and construction requirements on licensees who have already complied with such conditions and have amply demonstrated a genuine commitment to public service. These characteristics best define the three nationwide 931 MHz licensees but may describe nationwide 929 MHz licensees, as well. In any event, coverage and construction requirements for nationwide paging licensees in the 900 MHz band serve none of the objectives traditionally associated with these standards and should be rejected.

II. NO COVERAGE REQUIREMENTS SHOULD BE IMPOSED ON NATIONWIDE PAGING LICENSEES

In the FNPRM, the Commission asks whether minimum coverage requirements should be imposed on the three nationwide 931 MHz licensees and 23 nationwide exclusive 929 MHz licensees.^{3/} At the same time, however, the 2nd R&O (at ¶46) recognizes that the 931 MHz nationwide licensees have been operating for over 10 years, and that most 929 MHz nationwide

^{2/}ProNet acquired its 931.9125 MHz nationwide paging licenses and transmitting facilities from EMBARC Communications Services, Inc. during the pendency of this proceeding.

^{3/}Although the 2nd R&O asserts that 929 MHz nationwide exclusive licenses have been assigned to 23 entities, ProNet is constrained to note that its wholly-owned subsidiary, Contact Communications Inc., is engaged in litigation that, *inter alia*, challenges the claim of Paging Network of Alaska, Inc. to a nationwide exclusive assignment on 929.7375 MHz.

licensees qualified for exclusivity on or before February 9, 1996. The Commission also acknowledges (at ¶50) that these licensees, especially the 931 MHz carriers, have already met and (in most cases) exceeded rigorous construction and coverage requirements under either current or pre-existing Commission rules or policies.

In this context, imposing a second set of coverage requirements on nationwide licensees will be utterly unjustified, contrary to the public interest and will constitute a license modification.

A. Nationwide 931 MHz Licensees Have Already Exceeded Their Construction Requirements

Nationwide 931 MHz licensees have already complied with substantial coverage requirements imposed when three channels in this band were set aside for nationwide paging. Each 931 MHz nationwide licensee was required to serve a minimum of 15 standard metropolitan statistical areas ("SMSAs") within one year of grant, and to offer service on a "nationwide level" within two years of grant.^{4/} Two of the original nationwide 931 MHz licensees, including ProNet's predecessor on 931.9125 MHz, fully satisfied these construction requirements.^{5/}

Nor have nationwide 931 MHz licensees merely complied with minimum construction benchmarks. Eight years ago, in the Flexible Allocation Order, the Commission noted that

^{4/}*Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, Memorandum Opinion and Order on Reconsideration, 93 FCC 2d 908, 917-918 (1983); Third Report and Order, 97 FCC 2d 900, 901 (1984).*

^{5/}*See Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service for Paging and Other Services, 4 FCC Rcd 1576, 1581 (1989) ("Flexible Allocation Order"). The third nationwide authorization was initially canceled by the Commission and ultimately reassigned; it is currently held by a subsidiary of MobileMedia Corporation.*

nationwide 931 MHz licensees “[a]t their initial ‘nationwide’ level of operation, were providing service in approximately 25 of the top 40 MSAs” and that “[e]ach has continued to expand around the large MSAs and also into new areas.”^{6/} This expansion of operations has continued; even in the 2nd R&O the Commission observed that nationwide paging licensees:

have developed successful and efficient nationwide networks under the pre-existing rules-- in fact, *in most cases they have substantially exceeded the construction thresholds required to earn nationwide exclusivity under those rules.*^{7/}

Thus, 931 MHz nationwide licensees have scrupulously complied with the construction and coverage requirements imposed by the Commission when these frequencies were allocated and assigned. The FNPRM identifies no inadequacy or defect with this compliance; nor does it explain why requirements deemed sufficient to meet the Commission’s public interest calculus in 1983, when the nationwide 931 MHz frequencies were allocated, suddenly need to be supplemented with new criteria. In short, there is no principled basis for retroactively imposing a second set of construction and coverage requirements on 931 MHz nationwide licensees.

B. Coverage Requirements Will Disserve The Public Interest

Imposing minimum coverage requirements on nationwide paging licensees will serve no discernible purpose and will be contrary to the public interest. None of the Commission’s standard justifications for coverage requirements-- rapid deployment of service, discouraging speculation, or efficient use of spectrum-- are relevant to nationwide 931 MHz paging. As shown above, nationwide

^{6/}*Flexible Allocation Order*, 4 FCC Rcd at 1585, n.21.

^{7/}2nd R&O, at ¶50 (emphasis added). For illustration, ProNet’s recently acquired nationwide 931.9125 MHz network comprises over 400 transmitters in 44 states; virtually every transmitter is located within or adjacent to a major population center.

931 MHz paging licensees are, by definition, incumbents operating hundreds of transmitters each in major metropolitan areas throughout the United States. These licensees have already constructed sufficient transmitters, at substantial cost, to alleviate concerns of speculation or spectrum warehousing.^{8/} More fundamentally, in an industry as competitive as paging and with over twenty nationwide licensees, the theory that a licensee would withhold service on the hope that the license, by itself, will appreciate in value elevates conjecture to the level of fanaticism and cannot be taken seriously.

The 2nd R&O intimates (at ¶54) that consistency with narrowband PCS constitutes a separate basis for obliging nationwide paging licensees to comply with new coverage requirements.^{9/} Such sentiment, however, arises from an unsound comparison; coverage requirements were imposed on nationwide narrowband PCS to ensure that newly-allocated spectrum would be used efficiently, and to foster universal access to a nascent service.^{10/} Paging, by contrast, is a mature, highly competitive service, in which market forces compel licensees to use their allocations efficiently. Moreover, as already demonstrated, nationwide 931 MHz licensees have already satisfied coverage requirements that the Commission deemed fully adequate when they were imposed roughly fourteen years ago. Imposing additional regulatory burdens on licensees who have already demonstrated their

^{8/}By contrast, the population coverage requirements imposed on MTA or EA geographic licensees may be met using a handful of transmitters, depending on terrain and other factors, requiring only a minimal capital investment.

^{9/}Section 24.103(a) of the Rules requires nationwide PCS licensees to cover 750,000 square kilometers or 37.5% of the U.S. population within 3 years; and 1,500,000 square kilometers or 75% of the population within 10 years.

^{10/}*Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 1309, 1313-1314 (1994).

commitment to public service should be avoided absent the most compelling circumstances, which certainly are absent here.

The Commission should also note that at least one nationwide licensee (*i.e.*, ProNet), and perhaps others as well, have an overwhelming incentive to deploy that spectrum in the most efficient and effective manner possible. To acquire its 931 MHz nationwide license and related assets from its predecessor licensee, ProNet incurred a substantial, multi-million dollar capital cost for which it must earn a positive return. More than any arbitrary, governmentally-imposed requirements, the economics of this acquisition are impelling ProNet to provide high quality service over a large swath of territory that bounds the nation's major population centers. The Commission should resist interfering with this process.

Finally, the FCC's proposal to extend partitioning rights to nationwide licensees, if adopted, will allow further development of service on nationwide channels in geographic areas that may represent higher priority for the partitionee than for the nationwide licensee. In addition, Section 22.551(c) of the Rules provides for "network affiliation" arrangements between 931 MHz nationwide licensees, allowing other carriers to be licensed on the nationwide channels to provide local paging and carry nationwide pages to subscribers traveling in the network affiliate's service area.

**C. The Proposed Coverage Requirements May
Constitute A License Modification**

Superimposing a second set of population-based or geographic coverage requirements on nationwide licensees will result in a modification of their licenses, thus triggering the procedural protections provided by Section 316 of the Communications Act of 1934, as amended (the "Act"). ProNet's predecessor received its nationwide authorization on August 8, 1985, nearly twelve years

ago; the authorization has remained in full force and effect since that time, and will be ripe for renewal on April 1, 1999. Renewal of this authorization must be based upon the terms and conditions of the authorization, which do not include any specific coverage criteria beyond initial qualifying standards already met by ProNet's predecessors.^{11/}

In an SMR case, the Commission held that deleting channels for failure to comply with an existing channel loading requirement was *not* a Section 316 modification, but constituted instead merely the enforcement of construction and loading conditions placed upon all similarly-situated licensees at the time their licenses were initially granted.^{12/} By analogy, the post-grant construction and coverage conditions contemplated by the FNPRM, which are separate and apart from those placed on nationwide 931 MHz licensees at grant, must constitute a Section 316 modification. Accordingly, should the Commission proceed to implement these additional requirements, ProNet will insist on exercising the procedural rights and protections afforded by Section 316.

III. THE COMMISSION SHOULD ADOPT THE PARTITIONING RULES PROPOSED IN THE FNPRM WITH MINOR MODIFICATIONS

The Commission's proposals to allow nationwide licensees to partition spectrum and to establish additional rules governing partitioning of geographic licenses are sound and, for the most part, should be adopted as set forth in the FNPRM.

^{11/}See *Flexible Allocation Order*, 4 FCC Rcd at 1581 (1989). ProNet also notes that the Commission explicitly declined to adopt detailed coverage requirements for 931 MHz nationwide licensees in the *Flexible Allocation Order*, opting instead to preserve licensee flexibility to develop networks based on different concepts of "nationwide" service.

^{12/}*AAT Electronics Corp.*, 53 Rad. Reg. 2d (P&F) 1215, 1226 (1983).

A. Nationwide Licensees Should Be Allowed To Partition

ProNet agrees with the Commission (FNPRM at ¶204) that partitioning should be extended to nationwide 929/931 MHz licensees as a means to provide increased flexibility to tailor service offerings and to encourage increased participation by small businesses and rural telephone companies. The increased flexibility obtained from the right to partition will free up spectrum for local and rural operations where the nationwide network is unlikely to expand due to the licensee's business judgment. That nationwide licensees are not subject to competitive bidding should in no way deter application of partitioning to these licensees. As detailed above, nationwide licensees have made sufficient investment in developing their networks to obviate any concerns over speculation or spectrum warehousing.^{13/}

B. Rules Governing Partitioning By Geographic Licenses Should Be Adopted To Deter Speculation And Warehousing

ProNet supports the Commission's proposal to apply coverage requirements to partitionees within the partitioned area, *i.e.*, 33% of the population in the partitioned area within three years and 66% of that population within five years. The timetable for compliance should be based on grant of the initial geographic license, regardless of when the partition occurs.^{14/} These requirements will further deter speculation and warehousing by acquirers of partitioned geographic areas. As ProNet

^{13/}Nor should the Commission be concerned that conveying the right to partition on nationwide licensees would constitute an unfair advantage. As the Commission noted in its *Flexible Allocation Order*, 4 FCC Rcd at 1581, nationwide licensees face substantial competition from wide-area regional networks and *de facto* nationwide systems on other paging channels, all of which will have the right to partition.

^{14/}Likewise, partitionees should be issued licenses for the remainder of the license term acquired from the geographic licensee, and should be entitled to the same renewal expectancy.

has stated throughout this proceeding, however, the Commission should reject the "substantial service" alternative to population coverage; "substantial service" is too subjective and vague to guard against speculation, and is likely to foment litigation over coverage requirements.^{15/}

Similarly, the Commission's proposals with respect to partitioning by licensees qualifying for bidding preferences are reasonable and should deter insincere applicants looking to "flip" geographic license partitions for a quick profit. Specifically, ProNet supports subjecting small business partitioners to the Commission's unjust enrichment provisions when selling to a non-small business; and requiring accelerated repayment of installment payments.^{16/}

IV. ADDITIONAL SAFEGUARDS ARE NEEDED TO CURTAIL SHARED CHANNEL LICENSING FRAUD

ProNet applauds the Commission's efforts to further curtail application mill fraud on the shared Part 90 channels. While the Commission's proffered modifications to FCC Form 600 are a beginning, *i.e.*, to contain warnings to unsuspecting applicants that they may be the victims of fraud, it is uncertain whether these modifications are likely to be effective. ProNet suspects that many victims of application mill fraud provide personal information in response to a solicitation, then sign the completed Form 600 without careful review. Likewise, merely requiring certification by the application preparer that the applicant has received warnings about fraudulent and speculative

^{15/}Instead, as ProNet argued in its April 11, 1997 Petition for Reconsideration of the 2nd R&O (at 20-21), the Commission should define "substantial service" using objective criteria, *e.g.*, coverage of fifty percent (at three years) and seventy-five percent (at five years) of the geographic area not covered by incumbent co-channel licensees in the subject MTA, EA or, in this case, partitioned area. Alternatively, the Commission could require licensees attempting to prove "substantial service" to satisfy specified levels of infrastructure investment by the three and five year deadlines.

^{16/}The proportion of installment payments to be repaid on an accelerated basis should be based on the *pro rata* value of the partitioned area, as determined by population.

applications is unlikely to deter unscrupulous application mills who will merely give "lip service" to such requirements.

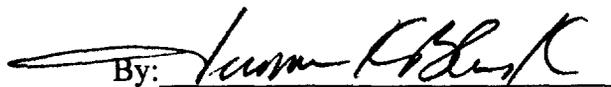
The Commission's further suggestions regarding additional frequency coordination procedures hold greater promise. In this regard, ProNet suggests that the Commission should require coordinators to inform a shared frequency applicant of the number of co-channel incumbents and existing pagers within a ten or twenty mile radius of the proposed site and to provide a statement regarding the implications those statistics have for the amount of air-time available to a newcomer. In addition, the coordinator should be given the discretion to deny processing any application until the applicant has acknowledged receipt of this information in writing.

V. CONCLUSION

WHEREFORE, the Commission should decline to impose coverage requirements on nationwide paging carriers, and otherwise modify its proposed rules consistent with the foregoing.

Respectfully submitted,

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April 17, 1997