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

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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

REPLY COMMENTS OF METROCALL, INC.

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SUMMARY

Metrocall concurs with the vast majority of commenters, who oppose the imposition of additional construction requirements on nationwide paging licensees. The two commenters who support such requirements argue that additional coverage benchmarks are necessary to avoid warehousing and to ensure service in rural areas. Those commenters essentially challenge the sufficiency of the construction requirements imposed upon 931 MHz and 929 MHz nationwide systems by the FCC's former rules; those comments are no more than grossly untimely petitions for reconsideration of the nationwide paging rules and should be dismissed. Substantively, any "warehousing" concerns are refuted by the record in this proceeding; nationwide licensees have already exceeded the coverage requirements imposed by the FCC's rules. Moreover, there is no unfairness to future MTA/EA licensees in the refusal to retroactively apply new construction requirements to previously constructed and operational systems.

The majority of comments concur that actions must be taken to eliminate fraudulent schemes on the shared PCP frequencies. There is some consensus that providing applicants with greater information concerning the FCC's rules is vital to efforts to combat fraud. Metrocall remains unconvinced, however, that requiring application preparers to disseminate such information will have the intended effect of ensuring that applicants receive accurate disclosures concerning the FCC's rules.

Flexible partitioning rules will serve the public interest, as long as the rules do not permit parties to circumvent their build out requirements. General disaggregation rules should not be adopted at this time; disaggregation proposals should be considered on a case-by-case waiver basis.

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REPLY COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Sections 1.415(c) and 1.421 of the Commission's Rules, 47 C.F.R. §§ 1.415(c); 1.421, hereby submits its Reply to the Comments filed in response to the "Further Notice of Proposed Rule Making" ("FNPRM") in the above-captioned rule making proceeding.¹

I. Summary of the Comments

Of the commenters addressing the FNPRM's inquiry concerning additional construction requirements for nationwide licensees, the Personal Communications Industry Association ("PCIA"), Paging Network, Inc. ("PageNet"), PageMart II, Inc. ("PageMart"), ProNet Inc. ("ProNet"), Airtouch Paging ("Airtouch"), and Metrocall all strenuously object to any additional coverage requirements. These parties generally base their objections on similar grounds: the FCC's prior rules imposed substantial construction requirements on nationwide paging licensees,

¹ The Second Report and Order and Further Notice of Proposed Rule Making in this proceeding were released in a single document, FCC 97-59. The respective portions of that document are herein referred to separately as the Second Report and Order and the FNPRM.

which have already been met or exceeded; the imposition of additional requirements would divest these licensees of their substantial investments and their reasonable expectations of nationwide exclusivity made in reliance upon the prior rules; imposition of additional construction requirements upon licensees who have already met their construction requirements would be an unlawful modification of their license grants and would constitute impermissible retroactive rule making. PageNet also notes that divesting these licensees of their nationwide authorizations in the hopes of gaining additional spectrum for auction would constitute a taking under the Fifth Amendment of the U.S. Constitution. See PageNet Comments at 5-9. PCIA notes the Commission's own recognition of the success of the market in spurring the construction of nationwide systems, and states that further, arbitrary coverage requirements are unnecessary and may adversely affect the nationwide service being provided. See PCIA Comments at 5-6

Small Business in Telecommunications ("SBT"), an organization of undisclosed "telecommunications operators," proposes additional coverage requirements for nationwide licensees, more stringent than those imposed upon MTA or EA licensees, "[t]o avoid the consequences of spectrum warehousing[.]" See SBT Comments at 2. SBT expresses concern that the issuance of these frequencies on a nationwide basis has the result of "making such channels unavailable for use by local operators who require additional spectrum" and that, as a result of the Commission's rules, "those carriers which can afford to hold in inventory such spectrum are allowed to withhold access to spectrum from small businesses." Id. at 2-3. SBT suggests that, should a nationwide carrier fail to meet the proposed additional coverage requirements, the unserved areas (or the entire nation, if less than 50% of the proposed additional requirements are not met) be auctioned on a BTA basis to small businesses only. Id. at 7. The

law firm of Blooston, Modkofsky, Jackson & Dickens ("Blooston") also supports the adoption of additional coverage requirements for nationwide licensees, claiming that such licensees have been "unfairly exempted" from the auction process, and that absent coverage requirements, nationwide carriers will be inclined to serve only high-density population areas while rural areas will lack service. Blooston Comments at 2.

A number of parties also addressed the FNPRM's proposed methods to deter application fraud on the shared channels. Airtouch, like Metrocall, urges that some form of exclusivity is necessary to limit fraud, speculation and overcrowding on the shared PCP frequencies. See Airtouch Comments at 8.

The Federal Trade Commission ("FTC") supports amending FCC Form 600 to include additional disclosures, and requiring application preparers to identify themselves and certify on the Form 600 that they have provided applicants with information concerning the FCC's rules. See FTC Comments at 11-13. SBT similarly supports the adoption of such disclosure and certification requirements. See SBT Comments at 21. Airtouch also supports prominent disclosures of the risks of shared frequency investments on the Form 600. See Airtouch Comments at 8-9. ProNet expresses doubt that revisions to Form 600 will be sufficient to deter fraud, and questions the care with which application mill victims review the completed application forms. See ProNet Comments at 9. PCIA supports the proposed revisions to the Form 600, but observes that many application mill victims do not read the Form (and may not even see a complete Form) before signing. See PCIA Comments at 10. Additionally, PCIA suggests modifying FCC Form 800-A, so that the Form will only be sent when a license is issued for a new station or modification requiring some additional construction and requiring the

certification of the party who actually performed that construction. See id. at 14. The FTC additionally suggests modified requirements for disclosing the real parties-in-interest to applications, see FTC Comments at 14-18; and SBT suggests that applicants be required to demonstrate site availability upon the Commission's request. See SBT Comments at 21-22.

The FTC and ProNet urge the adoption of procedures for frequency coordinators to make disclosures directly to applicants, such as information concerning the FCC's rules and the number of co-channel licensees in proposed service areas. See FTC Comments at 13-14; ProNet Comments at 10. PCIA indicates that it is in the process of instituting these proposed suggestions, see PCIA Comments at 12-13; and suggests that, since application mill and build-out schemes are not limited to paging, all frequency coordinators should take steps to reduce fraud. Id. at 9-10. SBT disagrees with any attempt to "increase the investigative capacity of coordinators." See SBT Comments at 22.

The majority of commenters addressing the issue support partitioning for paging licensees, generally in accordance with the proposals in the FNPRM, although some modifications are suggested. PageNet believes that partitioning should only be permitted on a waiver basis. See PageNet Comments at 12. Only two parties, Airtouch and SBT, support the adoption of rules for disaggregation at this time. See Airtouch Comments at 6-8; SBT Comments at 19-20.

II. No Additional Coverage Requirements Should be Imposed on Nationwide Licensees.

Metrocall concurs with the vast majority of commenters addressing this issue that no further construction requirements should be imposed on nationwide licensees.

Both Blooston and SBT charge that, absent additional coverage requirements, nationwide

licensees will serve only the most populous areas, leaving rural areas unserved. See Blooston Comments at 2; SBT Comments at 2-3. However, the build out requirements for nationwide paging in effect at the time these licensees sought, and received, nationwide authorization mandated that transmitters be constructed in certain areas.

Nationwide licensees on the 929 MHz frequencies were required to provide service to at least 50 of the markets listed in Section 90.741 of the Commission's Rules, including 25 of the top 50 markets, and to two markets in each of seven regions modeled on the RBOC regions. See 47 C.F.R. § 90.495 (a)(3); Amendment to the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, Report and Order, 8 FCC Rcd. 8318 (1993) ("PCP Exclusivity Order"). Licensees on the nationwide 931 MHz frequencies were required to construct stations in at least 15 Standard Metropolitan Statistical Areas ("SMSAs") within one year of grant. See 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 & Order on Reconsideration, 93 FCC 2d. 908, ¶ 26 (1983) ("Nationwide Paging Order"). The then-extant rules provided that licensees meeting the foregoing requirements would be entitled to an authorization encompassing the entire nation. See, e.g., 47 C.F.R. § 90.495(b)(3).

The crux of Blooston's and SBT's Comments is that the 931 MHz nationwide allocations and the 929 MHz nationwide exclusivity rules did not impose sufficient construction requirements in rural areas or allow other licensees the opportunity to fill in unserved areas. See Blooston Comments at 2-3; SBT Comments at 3-6. To the contrary, in adopting its PCP

exclusivity rules, the FCC specifically considered, and rejected, suggestions for more stringent nationwide coverage requirements and for allowing other parties to "fill in" unserved areas on nationwide frequencies. See PCP Exclusivity Order at ¶¶ 14-15. Nonetheless, Blooston and SBT are, in essence, asking the FCC to reconsider the adequacy of the construction requirements adopted in the 1993 PCP Exclusivity Order and the 1983 Nationwide Paging Order.² The time periods for seeking reconsideration of those rule making decisions have long since past. See 47 U.S.C. § 405; 47 C.F.R. § 1.429. Since Blooston's and SBT's contentions on this issue are no more than grossly untimely petitions for reconsideration of the FCC's nationwide paging rules, those contentions should be summarily dismissed by the Commission. See, e.g., Commercial Realty St. Pete, Inc., 4 CR 1409, ¶ 7 (1996) (opposition of licensee to notice of apparent liability for violation of anti-collusion and IVDS auction rules, challenging the legality of those rules, was an untimely petition for reconsideration); Association of College and University Telecommunications Administrators, 8 FCC Rcd. 1781, ¶¶ 5-6 (1993) (petition for declaratory ruling concerning definition of "call aggregators" was in substance a petition for reconsideration of rule making adopting definition; petition dismissed as untimely where it was filed nearly nine months after the statutory reconsideration deadline).

² Moreover, contrary to the assumptions of Blooston and SBT, coverage benchmarks do not necessarily ensure that licensees will construct systems in areas where there is little or no public demand. For example, the New York MTA (total population 26,401,597) extends from southeastern New Jersey, through portions of eastern Pennsylvania, most of the States of New York and Vermont, and substantially all of Connecticut. An MTA licensee could exceed its five-year, two-thirds coverage benchmark by building out only the New York City BTA (population 18,050,615); that licensee would be under no compulsion to expand service into other areas of the MTA; *e.g.*, the rural areas of Vermont or upstate New York. Marketplace demand, along with the flexibility afforded by FCC's proposed partitioning rules, will do far more to ensure service in smaller communities than will arbitrary regulatory requirements.

Turning to the substance of the Comments, Blooston's claim that nationwide licensees have been afforded preferential treatment ignores the fact that the nationwide licensees are incumbents who complied with the construction requirements imposed upon them *prior* to the rule changes in this proceeding. There is a difference between imposing coverage requirements prospectively upon wide-area licenses awarded after the adoption of the new rules, and retroactively imposing additional coverage requirements on previously-constructed paging systems. See, e.g., Landgraf v. USI Film Productions, 114 S.Ct. 1483, 1497, 1498, n.21 (1994) ("settled expectations should not be lightly disrupted" and "if a challenged statute is to be given retroactive effect, the regulatory interest that supports prospective application will not necessarily also sustain its application to past events"); Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745-746 (D.C. Cir. 1986) ("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief[;]" in balancing that mischief with any benefits of retroactivity, an agency must consider the "obvious and less drastic alternative" of prospective application).

SBT's "concerns" about "warehousing" are simply contrary to the facts. As the FCC found: "The record indicates that [the nationwide 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." See Second Report and Order at ¶ 50. SBT offers nothing but surmise to support its allegations that the nationwide licensees will warehouse spectrum. To the contrary, in light of the millions of dollars that Metrocall and other nationwide licensees have spent in constructing their networks, SBT's "warehousing" allegations defy logic; and in light of the nationwide

licensees' history of exceeding the Commission's construction benchmarks, those allegations defy the record evidence as well.

In short, to obtain the status they now have, the nationwide licensees were required to comply with stringent build out requirements, at significant costs; and they have exceeded those requirements. Their nationwide authorizations have fully vested, and their nationwide "status should not be injuriously affected, except for compelling reasons." See Journal Company v. Federal Radio Commission, 48 F.2d 461, 463 (D.C.Cir. 1931). There is no sound legal or policy reason to belatedly reconsider the nationwide paging rules, and deprive these licensees of their investments, at the untimely request of parties who were unable or unwilling to make similar commitments.

III. Shared Frequency Licensing Methods Should be Revised to Prevent Fraud and Speculation.

Metrocall and the other commenters in this proceeding have provided the Commission with a number of suggestions to prevent "application mill" and "build out scheme" frauds in the licensing of the shared PCP frequencies; many of these suggestions have strong merit, and should be adopted without delay. Other suggestions, while well-intentioned, seem likely to impose excess burdens on legitimate paging operators with little deterrent effect on abusive filings.

Metrocall and Airtouch have both urged the Commission to adopt some form of exclusivity on the shared channels. See Metrocall Comments at 10-12; Airtouch Comments at 8. Unless and until some limitations on the number of licensees that are permitted on the shared channels are adopted, those channels will continue to present the application mills with opportunities to defraud persons unfamiliar with the paging industry and the FCC's rules.

There appears to be some consensus among the commenters that making information available to the public is vital to combating fraudulent schemes. See, e.g., FTC Comments at 10; PCIA Comments at 11; Airtouch Comments at 8-9; Metrocall Comments at 20. Metrocall applauds the procedures being adopted by PCIA to provide applicants with greater information concerning the FCC's rules and requirements.

Metrocall, along with the other commenters, generally supports the inclusion of additional disclosures on FCC Form 600. Nonetheless, Metrocall shares the doubts expressed by PCIA and ProNet as to how carefully most application mill victims review the Form 600 (if, indeed, the complete Form is provided to them). Moreover, as PCIA points out, persons in the business of committing fraud have been known to lie to their victims about the FCC's interpretation of its application, licensing and construction rules. See PCIA Comments at 11. It seems overly optimistic to assume that those same persons will be any more honest in explaining the official "interpretation" of the new Form 600 disclosures.

Metrocall believes there is merit in PCIA's suggestion that the FCC issue Public Notices interpreting its requirements for applications, licensing, construction, assignments and management agreements. See PCIA Comments at 12. Metrocall also supports PCIA's suggested means of distribution of those Public Notices; e.g., through frequency coordinators, on the FCC's web site, and attached to FCC mailings to applicants.

Metrocall remains unconvinced that requiring application preparers to disseminate such information, and certifying that they have done so, will serve its intended purpose. See also, ProNet Comments at 9-10. As Metrocall indicated in its Comments, an application mill could simply "ghostwrite" its victims' applications without acknowledging that it prepared those

applications. See Metrocall Comments at 19. Also, it is by no means clear that the same mills which flagrantly abuse the FCC's licensing processes and defraud unsuspecting individuals of thousands of dollars per application, will have many scruples about submitting false certifications. Rather, it appears to Metrocall that making any application preparer a guarantor of the applicant's knowledge of and compliance with the FCC's rules will have the primary result of making it more difficult for legitimate applicants to obtain the assistance of legal and engineering consultants.

Generally, the legitimate operator determines the frequency it desires and where it needs to install transmitters, obtains assurances of availability from site landlords, and then instructs the engineering and/or law firms it retains to prepare the necessary schedules to the Form 600. Since the process is driven by the applicant, not by the law firm or engineering firm, those outside consultants will be hesitant to undertake application preparation if they are required to certify to the accuracy and authenticity of information provided by their clients. Hardest hit will be *bona fide* small businesses, who cannot afford in-house legal and technical support, and rely upon outside legal and engineering firms to prepare their applications on an as-needed basis. Absent some compelling evidence that the proposed certification requirements will actually deter application mills, Metrocall respectfully submits that the harm of chilling communications between legitimate operators and their consultants outweighs the possible benefits of obtaining the certifications of unscrupulous application preparers.³

³ Similarly, while Metrocall supports the FTC's suggested disclosure of real parties-in-interest on pre-auction short form filings, see FTC Comments at 16-18; Metrocall is concerned that the proposal to require bidding representatives to certify that they have sent a bidder's package to all general partners or limited liability company shareholders may increase the costs of legitimate applicants doing business in those forms, without dissuading the mills.

Metrocall reiterates its comments that strengthening the application requirements concerning demonstrations of need, disclosures of real parties-in-interest, certifications of financial qualifications and site availability, and inclusion of public interest statements will make the mass preparation of speculative applications more difficult, and will provide the FCC with more warning signs, earlier in the licensing process, that an application or applications may not have been prepared in accordance with the FCC's rules or with the intention of providing a legitimate paging service.

IV. Partitioning and Disaggregation.

Metrocall agrees with the majority of commenters addressing the issue that partitioning should be permitted by all paging licensees. PageNet's proposal that partitioning be permitted only on a waiver basis, for "good cause," will unnecessarily restrict licensee flexibility in the mature paging industry. Any concerns regarding unlawful contact during the auction to reach partitioning arrangements are already addressed by the FCC's anti-collusion rules; negotiations to partition a market are as much within the reach of those rules as other negotiations affecting applicants' bidding strategies. See 47 C.F.R. § 1.2105(c).

On the other hand, the formation of bidding consortia, with agreements concerning the post-auction partitioning of the market(s), may be vital for smaller paging companies to effectively participate in the auctions. Additionally, since the current development of paging systems does not conform neatly to MTA or EA boundaries, incumbents of all sizes may find

Since there is a charge to obtain additional copies of bidder's packages from the Commission, and the costs of privately photocopying these several-hundred page documents could quickly add up, the proposed requirement to disseminate copies to investors seems likely to be ignored by the mills, while imposing administrative burdens on the *bona fide* applicants who seek to comply.

partitioning arrangements useful to allow co-channel systems room to expand where one or more systems each cover a portion of an MTA or EA. As long as those arrangements are fully disclosed on the parties' short-form applications, they would be consistent with the anti-collusion rules and would not prejudice other bidders.

The commenters generally share concerns that partitioning arrangements not be used to circumvent the coverage requirements for auction winners. See, e.g., PCIA Comments at 7; Airtouch Comments at 5-6; SBT Comments at 12, n.7; Metrocall Comments at 22. These concerns are generally met by holding the partitioner responsible for the coverage benchmarks based upon the entire MTA/EA. See, PCIA Comments at 7; PageMart Comments at 11; Metrocall Comments at 22. As suggested in Metrocall's Comments, a narrowly-drawn exception to this requirement could be made for partitioning among members of a joint venture or bidding consortium that was disclosed on the parties' "short form" applications. See Metrocall Comments at 22.

Metrocall also agrees with the majority of commenters that general disaggregation rules should not be adopted at this time; rather, requests for waiver should be considered on a case-by-case basis. The two commenters who do support disaggregation do not address how a viable paging service can be provided on a fraction of a 25 kHz channel. See Airtouch Comments at 6-8 and SBT Comments at 19-20. Additionally, PCIA's concerns of possible interference among disaggregated channels are well-taken. See PCIA Comments at 8. Metrocall continues to believe that the waiver process will afford sufficient relief to parties who can demonstrate a technically viable disaggregation proposal. See Metrocall Comments at 23; see also PCIA Comments at 8.

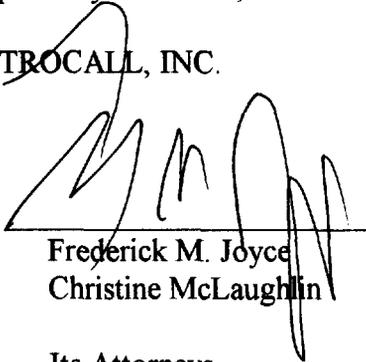
CONCLUSION

For all the foregoing reasons, Metrocall respectfully requests that the FCC should not impose additional coverage requirements on nationwide paging licensees, but should adopt rules concerning the other issues raised in the FNPRM in accordance with its Comments and these Reply Comments.

Respectfully submitted,

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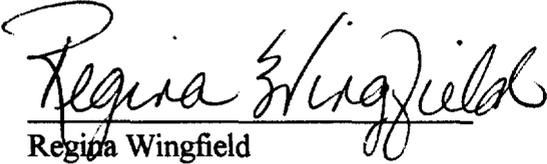
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