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Before the **DOCKET FILE COPY ORIGINAL** FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
OFFICE OF SECRETARY

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

To: The Commission

REPLY COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc ("PageNet"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, hereby submits these reply comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding released on February 24, 1997 ("Notice").¹ In support of these Reply Comments, the following is respectfully shown:

I. INTRODUCTION

The Commission should not adopt additional coverage requirements for nationwide private carrier paging ("PCP") licensees.² The record overwhelmingly supports the conclusion

¹ In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-18, released February 24, 1997.

² See Notice at ¶ 202.

that additional nationwide PCP coverage requirements will not serve the Commission's public interest objectives or competitive goals for nationwide PCP service.³ Furthermore, with respect to partitioning, additional safeguards are necessary to prevent abuse of partitioning to evade geographic license build-out requirements.⁴

II. ADDITIONAL COVERAGE REQUIREMENTS SHOULD NOT BE IMPOSED ON NATIONWIDE PCP LICENSEES.

Imposing additional coverage requirements on nationwide PCP licensees will not serve any public interest objectives. Additional coverage requirements are not necessary because nationwide paging licensees already have built out substantial and far-reaching systems and continue to expand such systems. Moreover, additional build-out requirements would improperly subject nationwide paging PCP licensees to "retroactive rulemaking," and the reauctioning of area already exclusively licensed to existing nationwide PCP licensees based on a failure to meet new and unforeseen coverage requirements would amount to

³ See Comments of Paging Network, Inc., filed in WT Docket No. 96-18 on April 17, 1997 at 2-11 ("PageNet Comments"); see also Comments of AirTouch Paging, filed in WT Docket No. 96-18 on April 17, 1997 at 2-3 ("AirTouch Comments"); Comments of Metrocall, Inc., filed in WT Docket No. 96-18 on April 17, 1997 at 3-9 ("Metrocall Comments"); Comments of PageMart II, Inc., filed in WT Docket No. 96-18 on April 17, 1997 at 2-4 ("PageMart Comments"); Comments of the Personal Communications Industry Association, filed in WT Docket No. 96-18 on April 17, 1997 at 4-6 ("PCIA Comments"); Comments of ProNet, Inc., filed in WT Docket No. 96-18 on April 17, 1997 at 2-7 ("ProNet Comments").

⁴ See PageNet Comments at 12.

an unconstitutional taking.⁵ Finally, in the record in this proceeding, there is absolutely no support for the notion that the nationwide PCP build-out requirements, which were essentially population-based build-out requirements, are substantially different than the requirements for MTA or that additional coverage requirements are necessary to prevent "cream-skimming"⁶ or "spectrum warehousing."⁷

The Commission's nationwide PCP paging licensing rules already require at a minimum that the nationwide PCP licensees construct and place in operation 300 transmitters on a nationwide basis in order to qualify for an exclusive nationwide license.⁸ Nationwide paging licensees have built out far-flung and highly competitive wireless paging networks under this licensing framework.⁹ PageNet, in particular, already serves over 600,000 nationwide customers on its nationwide systems and has spent over 100 million dollars on the build-out of facilities on its nationwide exclusive channels.¹⁰ In fact, the PCP licensees have

⁵ See PageNet Comments at 12.

⁶ See Comments of Blooston, Mordkofsky, Jackson & Dickens on behalf of its paging clients filed in WT Docket No. 96-18 on April 17, 1997 at 2-3 ("BMJD Comments").

⁷ See Comments of Small Business in Telecommunications, filed in WT Docket No. 1 96-18 on April 17, 1997 at 2-6 ("SBT Comments").

⁸ See 47 C.F.R. §§ 90.495(a)(3), 90.741; see also *Private Carrier Paging Systems at 929-930 MHz (Channel Exclusivity)*, 74 Rad. Reg. 2d (P&F) 131 (1993).

⁹ See, e.g., AirTouch Comments at 2-3.

¹⁰ See PageNet Comments at 3.

already been effectively subject to population-based build-out requirements under Section 90.495 of the Commission's Rules. Specifically, Section 90.495(a)(3) required the PCP nationwide licensees to place in operation 300 transmitters that provide service in 50 of the city center markets listed in Section 90.741, including 25 of the top 50 markets, and two markets in each of the seven Bell regions.¹¹

In addition, given the extent to which nationwide PCP licensees have already built out their systems and met existing coverage requirements, there is no danger of "spectrum warehousing" or "cream skimming."¹² It is axiomatic that spectrum warehousing cannot occur where nationwide PCP carriers already have made substantial investment in and extensively built out their nationwide systems. Moreover, "cream skimming" is contrary to the interests of existing nationwide PCP licensees in light of the market realities they face. *Customers demand high quality and wide-area service and any carrier that were to attempt to "skim the cream" by serving only select portions of a market would lose its ability to compete. Accordingly, additional coverage requirements are not necessary to ensure the build out of nationwide PCP systems.*

The forfeiture sanctions implicit in the Notice's proposal to reauction licenses of nationwide paging licensees that fail to meet the new coverage requirements would violate the

¹¹ 47 C.F.R. § 90.495(a)(3).

¹² Cf. BMJD Comments at 2; SBT Comments at 2-6.

prohibition against agency retroactive rulemaking.¹³ Existing nationwide paging licensees received exclusive licenses on the condition that they meet the existing coverage requirements of Section 90.495 of the Commission's Rules. The Commission's proposal to reactivate the licenses of nationwide PCP licensees that fail to meet new coverage requirements where they have already satisfied existing coverage requirements would unfairly impose new duties on existing licensees and retroactively impair their rights to an exclusive license.¹⁴ The additional nationwide PCP coverage requirements proposed in the Notice thus would constitute an improper retroactive rule change.

An agency may change a rule retroactively if it meets the standard of reasoned decision making, i.e. if it "provides a reasoned explanation for doing so."¹⁵ The Commission's rationale for imposing additional coverage requirements does not meet this standard. The Notice suggests that additional nationwide PCP coverage requirements are necessary to achieve symmetry with population-based requirements imposed on MTA and EA licensees.¹⁶ However, "regulatory symmetry" means that similarly situated

¹³ See *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1505 (1994); see also *AirTouch Comments* at 2-3; *Metrocall Comments* at 7-9; *PageMart Comments* at 2-4.

¹⁴ There are three ways in which a rule can be retroactive: if it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." See *Landgraf*, 114 S.Ct. at 1505.

¹⁵ See *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1317 (D.C. Cir. 1995).

¹⁶ See Notice at ¶ 202.

carriers are subject to the same or similar rules. To the extent that nationwide licensees and other geographic licensees are required to construct a certain number of transmitters either to meet a numeric transmitter requirement or to meet a numeric population requirement, there is symmetry because such requirements essentially specify a minimum build out of transmitters to retain or obtain the license. Beyond the symmetry that already exists between the nationwide PCP build-out requirements and the MTA and EA build-out requirements, the markets, through customer demand, will mandate additional build out or modification of existing systems to meet the needs of the customers. Accordingly, because the nationwide PCP licensees have already met construction requirements that are similar to the construction requirements the MTA and EA licenses must meet, additional coverage requirements for nationwide PCP licensees would arbitrarily and capriciously impose a new rule retroactively on existing licensees and should not be adopted.

Finally, subjecting existing exclusive nationwide PCP licensees to potential forfeiture and reauction for failure to meet new coverage requirements would result in an unlawful taking of an economic benefit upon which nationwide PCP licensees have relied.¹⁷ The Commission lacks the authority to engage in such an unlawful taking and, in any case, would be obligated to pay

¹⁷ See PageNet Comments at 5-10; see also Metrocall Comments at 5-7; ProNet Comments at 6-7 (arguing that *ad hoc* modification of nationwide PCP licenses by imposition of new rule is impermissible).

just compensation pursuant to the Fifth Amendment of the United States Constitution.¹⁸

III. THE COMMISSION SHOULD ADOPT SAFEGUARDS TO PREVENT ABUSE OF PARTITIONING RULES TO EVADE BUILD-OUT REQUIREMENTS

The Commission states its belief that allowing geographic partitioning of paging licenses is an "effective means of providing paging licensees with the flexibility they need to tailor their service offerings to meet market demands."¹⁹ Some commenters endorse this view of geographic partitioning.²⁰ PageNet does not question that, in the abstract, partitioning may afford paging licensees some degree of flexibility in configuring their systems.²¹ However, some licensees could evade build-out requirements under an unlimited rule by partitioning to a "straw man" those portions of the market that they would otherwise have to cover. Absent additional safeguards, an MTA or EA licensee may "partition" an uncovered segment of its market simply to avoid the obligation to cover one-third of the population within three years and two-thirds of the population within five years of

¹⁸ See *id.*

¹⁹ See Notice at ¶ 204.

²⁰ See AirTouch Comments at 3-4; PCIA Comments at 6-7; ProNet Comments at 8.

²¹ PageNet generally opposes the partitioning of the nationwide licenses on a permissive basis. Communications systems with the potential to be used on a nationwide basis will become increasingly valuable to customers in the future. As such, applicants seeking the partitioning of nationwide licenses should be required to seek such partitioning on a waiver basis, showing how the public interest would benefit by such partitioning.

license grant. Partitioning would serve to invalidate the construction requirements.

The Commission should adopt the following safeguards to prevent abuse of partitioning rules. The original MTA or EA licensee should be required to have covered two-thirds of the population as a condition precedent to the right to partitioning. In other words, partitioning should be allowed on a permissive basis only after the initial geographic licensee has met the build-out requirement for an entire MTA or EA license.²² In the case in which the geographic licensee wishes to partition prior to meeting its build-out requirements, such partitioning should be allowed only on a waiver basis where good cause is shown, e.g., why partitioned systems would serve the public interest in the stead of a wide-area system. This would provide a procedural mechanism to distinguish partitioning proposals truly designed to promote system flexibility from those which are intended to avoid the build-out rules. In the case of a waiver, each licensee that participates in the partitioning should be subject to license cancellation at the appropriate benchmarks if the construction requirements for the entire geographic area have not been met. If the failure to construct by any individual licensee that is a party to the partitioning should cause the overall coverage requirements for the MTA or EA not to be met, then all of the partitioned licenses within the MTA or EA should be cancelled

²² Permissive partitioning of the geographic license among incumbents should be allowed if the incumbents together satisfy the build-out requirements for the geographic license.

automatically. Otherwise, the build-out requirements and automatic termination provisions in the rules will have no effect.

IV. CONCLUSION

Nationwide PCP licensees have earned their licenses by making substantial investment in and extensively building out their systems in compliance with the existing coverage requirements of Section 90.495 of the Commission's Rules. Accordingly, additional coverage requirements are not necessary to advance the competitive deployment of nationwide PCP service. The market will ensure that any additional build out that customers would require will be made by the nationwide licensees. Subjecting existing nationwide PCP licensees to potential forfeiture of their licenses by the retroactive imposition of new coverage requirements is arbitrary and capricious and will impact unfairly upon nationwide PCP licensees vis-a-vis MTA and EA licensees. The proposal to reactivate exclusive nationwide PCP licenses for failure to meet new coverage requirements also would amount to an unlawful taking for which the Commission lacks authority, and which in any case would require just compensation.

If the Commission adopts a geographic partitioning rule, the rule should be limited in order to prevent abuse by licensees seeking to evade build-out requirements. Partitioning should be allowed permissively only after the build-out requirements for the MTA or EA have been met or by waiver of the construction benchmarks have not been met. Such an approach will

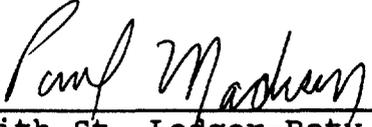
preserve the Commission's goal of affording paging licensees with flexibility in designing their systems while safeguarding against evasion of the geographic license build-out requirements.

WHEREFORE, for the foregoing reasons, PageNet requests that the Commission adopt rules in accordance with the reply comments herein presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of May, 1997, mailed a copy of the foregoing "Reply Comments of Paging Network, Inc." via first-class mail, postage prepaid, to the following:

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