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FEDERAL COMMUNICATIONS COMMISSION

Before the

Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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

PARTIAL OPPOSITION TO PETITION FOR RECONSIDERATION

Comes now PageMart II, Inc. ("PageMart") and by its attorneys, as provided for in §1.4(b)(1) of the Commission's Rules, submits this its opposition to that part of the Petition for Reconsideration filed by the law firm of Blooston, Mordkofsky, Jackson & Dickens on behalf of its paging clients (hereinafter "Law Firm"), urging repeal of the exemption of nationwide licensees from auctions. 1/

Introduction

1. PageMart, Inc., PageMart's parent company (together, "PageMart"), filed Comments (March 1, 1996) and Reply Comments (March 11, 1996) in connection with

1/ There were approximately thirty (30) petitions for reconsideration filed in this proceeding, and PageMart has directed its opposition to only a portion of the Law Firm Petition for Reconsideration. PageMart's action here, should not be construed as either support for or opposition to the various other issues raised by the parties in their petitions for reconsideration.

the Interim Licensing Proposal in this proceeding, as well as Comments on March 18, 1996 in connection with the overall proceeding.

2. PageMart is a medium-sized, innovative paging company that provides low-cost, nationwide services. PageMart holds both 931 MHz and 929 MHz Commercial Mobile Radio Service licenses for paging services throughout the United States, including PCP licenses for which it qualifies for nationwide exclusivity.

Background

3. The three (3) nationwide 931 MHz channels (931.8875, 931.9125 and 931.9375 MHz) have been allocated for exclusive nationwide network paging for over ten (10) years. [2] Nationwide exclusivity was extended to the 929 MHz band by the Commission in 1993. [3] The Commission in its Notice of Proposed Rulemaking, 11 FCC Rcd 3108 (1996), in this proceeding recognized nationwide exclusivity on the three (3) 931 MHz channels and on eighteen (18) 929 MHz channels based on compliance with coverage requirements of then existing rules. [4]

4. The Commission in its Second Report and Order in this proceeding, excluded nationwide exclusive licensees from competitive bidding. The Commission refused to take away the rights earned by these licensees under prior rules. In taking this position, the Commission emphasized:

2/ 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 and 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).

3/ Report and Order In Re Amendment of Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, 8 FCC Rcd 8313 (1993).

4/ Nationwide exclusivity was extended in the Second Report and Order to 929 MHz paging licensees including PageMart II, Inc. with sufficient authorizations as of February 8, 1996 to qualify for nationwide exclusivity on a conditional basis.

> The record indicates that they have developed successful and efficient nationwide networks under the pre-existing rules - in fact, they have in most cases substantially exceeded the construction thresholds required to earn nationwide exclusivity under those rules. Thus, we do not believe imposition of competitive bidding is needed to further the goal of developing competitive nationwide paging networks on these channels. Second Report and Order at ¶50.

No Basis For Reconsideration of Decision to Exempt Nationwide Exclusive Licensees From Competitive Bidding

5. The Law Firm, on behalf of its paging clients, seeks reconsideration of, among other things, the decision in the Second Report and Order, to exempt from the auction process nationwide exclusive licensees. The Law Firm argues that this exemption is arbitrary and capricious "because it is well established that similarly situated applicants cannot be treated in a disparate manner" citing Green County Mobilephone, Inc. v. FCC, 765 F2d 235 (D.C. Cir. 1985).

6. The Law Firm argues that other paging carriers had the same expectation that the nationwide exclusive licensees had to a reasonable opportunity to expand their systems incrementally in response to customer demand. Petition for Reconsideration at page 5. However, the regulatory framework for nationwide exclusive licensees and site by site incumbent licensees is radically different. The expectations of these licensees, premised on different foundations, are not the same.

7. The Commission has found that nationwide exclusivity at 931 and 929 MHz is in the public interest. Those actions have long ago become final, and this is not the place to reconsider those decisions. Based upon those earlier Commission decisions, various applicants, including PageMart, made business and investment decisions under the assumption that by meeting the then existing Commission criteria for nationwide exclusivity, it would not have to compete with other applicants for the exclusive

frequencies. In other words, after meeting the threshold requirements, as spelled out in the Rules, the nationwide exclusive licensee could build out, as it saw fit, when it saw fit, to meet the demands of the marketplace.

8. In contrast, the incumbent non-nationwide licensees, under the old Rules, were never entitled to additional coverage. Each site had to be licensed by filing an application and demonstrating compliance with the FCC's technical rules. In this process, competing applicants could, and often did, block expansion by filing mutually exclusive applications. Incumbent licensees on particular frequencies in one geographic portion of the country could be preempted in another area if another applicant filed first for the particular frequency. Thus, any comparison clearly shows that nationwide exclusive licensees and incumbent non-nationwide licensees are different and have been treated differently based upon the regulatory scheme in existence at the time of licensing. Thus, nationwide exclusive applicants and incumbent non-geographic licensees cannot be said to be similarly situated. Accordingly, different treatments based upon these different circumstances are not arbitrary or capricious.

9. To change the nationwide exclusivity rules retroactively raises due process questions. Generally, administrative agencies may not promulgate retroactive rules. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). The Commission having established a regulatory framework for nationwide exclusivity cannot, by retroactive application, take away these vested rights.

10. PageMart opposes the efforts by the Law Firm to have nationwide exclusive licensees subject to competitive bidding for any existing white space. The Commission's action in the Second Report and Order with respect to the nationwide exclusive exemption is supported by the record and by legal precedent. Notwithstanding, PageMart takes no position as to whether there may be a rationale to support the exemption of other licensees from the competitive bidding process. PageMart here urges

only that the exemption for nationwide exclusive licensees be affirmed. [5/] The Law Firm has failed to demonstrate any basis for reconsideration of the decision to exempt nationwide 931 and 929 MHz licensees from competitive bidding.

Respectfully submitted,

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5/ The Commission must also ensure that the nationwide exclusive licensees are able to realize the full potential of these nationwide authorizations. The Commission should promptly clarify that it did not intend that exclusive 929 MHz licensees provide full co-channel protection to grandfathered and secondary systems. See PageNet's Petition for Reconsideration, page 17 and Petition for Reconsideration and Clarification by ProNet, Inc., page 23.

CERTIFICATE OF SERVICE

I, Gladys L. Nichols, do hereby certify that on this 9th day of May, 1997, the foregoing **OPPOSITION TO PETITION FOR RECONSIDERATION** was served to the following persons by first-class mail, postage prepaid:

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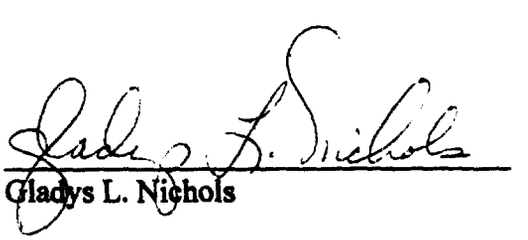

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