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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
Federal Communications Commission
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		

**COMMENTS IN OPPOSITION OF CERTAIN
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

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TABLE OF CONTENTS

	<u>Page</u>
Summary	ii
I. Nationwide PCP Channels Should Not Be Subject to Competitive Bidding	1
II. The Commission Should Not Adopt Clarifications Or Revisions That Would Reward Speculation, Create Confusion, Engender Needless Litigation, Or Slow The Build-Out Of Geographic Systems	8
A. Expired Construction Permits Should Not Be Counted In Determining Composite Interference Contours Of Incumbent Systems	8
B. Incumbent Licensees Should Be Entitled To Interference Protection For Operational Transmitter Sites	9
C. Alternative Formulas And "Real World" Engineering Should Not Be the Basis For Fill-In Transmitters	11
D. Geographic Licensees Should Not Be Under An Obligation To Coordinate With The Incumbent Licensee Prior To Commencement Of Operation	12

Summary

Paging Network, Inc. ("PageNet") hereby comments in opposition to certain aspects of petitions for reconsideration and clarification filed with respect to the *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, PP Docket Nos. 93-253, released February 24, 1997 ("*Second R&O*").

PageNet vigorously opposes any notion that the nationwide channels are available for competitive bidding because nationwide PCP licensees held nationwide licenses, or the equivalent thereof, prior to the initiation of this proceeding. Simply put, as a matter of law, the nationwide licenses must be exempt from the competitive bidding process. Moreover, it is not a proper exercise of the Commission's authority to alter the nationwide licenses to the detriment of the nationwide licensee. Such action would constitute an unlawful taking under the Fifth Amendment of the United States Constitution and an improper retroactive rule change.

In its Petition For Reconsideration and Clarification of the *Second R&O*, ProNet, Inc. ("ProNet") requested that the Commission clarify that incumbents may count expired construction permits in their determination of composite interference contours. PageNet opposes this clarification because it would mean that any speculator or insincere permittee would be allowed to hold an area within a geographic license area without ever having built a system to serve the public. Because loss of construction permits is due to non-construction of facilities within the time period specified by the permit, there is no public interest benefit or other compelling reason to justify the inclusion of expired construction authorizations for facilities that are neither built nor licensed within the composite contour of incumbent systems.

In its petition, ProNet sought clarification that "non-geographic incumbents' composite interference contours are grandfathered." PageNet supports the ability of incumbent licensees to modify their systems and to improve reception in the service areas that are totally encompassed within the composite interference contour of the incumbent licensees. However, if the licensee permanently discontinues operation of facilities that comprise the composite contours of an incumbent system, that system's composite contour should be modified accordingly. As such, there should be no "grandfathering" of incumbent contours.

ProNet also requested that the Commission modify its definition of "fill-in" transmitters to employ alternative formulas and other "real world" engineering. PageNet opposes this proposal because such options will only lead to endless litigation between the incumbent licensee and the geographic licensee. If the incumbent licensee wishes to expand the

composite interference contour of the incumbent system, the incumbent will have to seek permission from the geographic licensee. This will ensure co-channel protection to both systems without endless controversy regarding the accuracy and effectiveness of alternative formulas and other engineering, and will ensure that the rules regarding co-channel protection are consistent.

PageNet vigorously opposes the adoption of obligations that would require the geographic licensee to notify incumbent co-channel licensees prior to activation of transmitters which are located closer than 70 miles from existing facilities, and allow the incumbent licensee to request interference testing prior to operation of the geographic licensee's transmitters. Such obligations are absolutely unnecessary, place the incumbent in a position to slow or block the initiation of service by the geographic licensee, and will engender litigation. Moreover, the incumbent's ability to request interference testing places the incumbent in a position to slow or block the build-out and operation of the geographic system. Because geographic licensing is meant to provide flexibility for licensees, ease administrative burdens on the Commission, and speed service to the public, the Commission should not adopt provisions that would slow the build-out and activation of geographic paging systems that comply fully with the co-channel separation requirements.

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To: The Commission

**COMMENTS IN OPPOSITION OF CERTAIN
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Paging Network, Inc. ("PageNet"), by its attorneys and pursuant to 47 C.F.R. § 1.429(f), hereby comments in opposition to certain aspects of petitions for reconsideration and clarification filed with respect to the *Second R&O* in the above-referenced proceeding.¹ In support of these comments, the following is respectfully shown:

I. Nationwide PCP Channels Should Not Be Subject to Competitive Bidding

One petition for reconsideration filed with respect to the *Second R&O* sought reconsideration of the Commission's determination not to subject nationwide paging licensees to

¹ *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, PP Docket Nos. 93-253, released February 24, 1997 ("*Second R&O*").

competitive bidding.² PageNet vigorously opposes any notion that the nationwide channels are available for competitive bidding.

PageNet acquired its PCP nationwide licenses pursuant to Section 90.495(a)(3) of the Commission's Rules. Section 90.495(b) of the Commission's Rules stated:

If a paging licensee qualifies for exclusivity under paragraph (a) of this section, no co-channel authorization may be granted to another applicant except in compliance with the separation requirements set forth in this paragraph.³

For nationwide exclusive licensees, the separation requirements were set forth in Section 90.495(b)(3) of the Commission's Rules. Section 90.495(b)(3) stated:

No co-channel authorization will be granted in the continental United States, Alaska, Hawaii, or Puerto Rico on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section.⁴

As such, under Section 90.495 of the Commission's Rules, nationwide PCP licensees held nationwide licenses, or the equivalent thereof, prior to the initiation of the above-referenced proceeding. Simply put, as a matter of law, the nationwide licenses must be exempt from the competitive bidding process.

² Petition for Reconsideration on behalf of various carriers filed by the law firm of Blooston Mordkofsky Jackson & Dickens, dated April 11, 1997 ("Blooston Petition") at 5-6.

³ 47 C.F.R. § 90.495(b).

⁴ 47 C.F.R. § 90.495(b)(3).

It is not a proper exercise of the Commission's authority to alter the nationwide licenses to the detriment of the nationwide licensees. If the Commission were to strip the nationwide licensees of their licenses and subject the nationwide channels to competitive bidding, the Commission would be taking a portion of the economic benefit upon which the nationwide licensees have relied. As such, by subjecting channels that have already been authorized on a nationwide basis, the Commission would engage in an unlawful "taking" of property for which it lacks authority or, in any case, would face an obligation to pay just compensation pursuant to the Fifth Amendment of the United States Constitution.

In determining whether a federal agency action qualifies as a "taking" forbidden by the Fifth Amendment, the Supreme Court has primarily relied on *ad hoc* factual inquiries into the circumstances of each case.⁵ The Court has increasingly looked to three factors as being of particular significance:

1. The extent to which regulation has interfered with distinct investment-backed expectations;
2. The character of the government action; and
3. The economic impact of the regulation on the claimant.⁶

⁵ See e.g., *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1026 (1986).

⁶ *Id.*

As demonstrated below, a review of these factors with respect to subjecting nationwide channels to competitive bidding would qualify as a compensable taking.

Interference with distinct investment-backed expectations.

Stripping the nationwide licensees of their nationwide licenses will interfere with PageNet's investment-backed expectations regarding its nationwide PCP licenses.⁷ In investing more than 100 million dollars in the construction of its nationwide systems, PageNet's expectation was that if it met the requirements for nationwide exclusivity, it would have the right to construct and operate facilities on the subject nationwide channel anywhere in the United States without any additional licensing by third parties. These investment-backed expectations would be thwarted if the Commission auctioned the nationwide channels, which would constitute the loss of the nationwide licenses of which the licensees are already fully possessed. PageNet and other carriers have acted in reliance on the terms of their licenses, as originally issued pursuant to Section 90.495 of the Commission's Rules, to invest in the design, construction, operation and expansion of nationwide PCP systems to provide service to the public. Because PageNet has met all of the

⁷ It has long been recognized that governmental licenses to pursue lines of business qualify as "private property" for the purpose of the taking clause of the Fifth Amendment. See e.g., *Jackson v. United States*, 103 F. Supp. 1019 (Ct. Cl. 1952) (federal government abrogation of commercial fishing license).

conditions of its original nationwide exclusive licenses, the Commission cannot now reduce PageNet's rights under its nationwide licenses without incurring an obligation for the reduced value of PageNet's investment.

The character of the government action. The Supreme Court has held that an unconstitutional taking more readily may be found when the interference with property "can be characterized as a physical invasion" by the government.⁸ In such cases, the governmental action represents more than just "interference" which "arises from some public program adjusting the benefits and burden of economic life to promote the common good."⁹ When the effect of the governmental regulation is a physical intrusion that reaches the extreme form of a permanent occupation, a taking has occurred. In such cases, the character of the government's action becomes "determinative" of whether a taking has occurred.¹⁰ Moreover, the government's invasion of interest other than full ownership in property, such as an easement, can also give rise to an unconstitutional taking.¹¹

These principles have full applicability here, where subjecting nationwide channels to competitive bidding would

⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164, 3171 (1982).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Kaiser Aetna v. United States*, 100 S.Ct. 383, 393 (1979).

effect a significant diminution in the scope of the nationwide licenses already held by PageNet and other nationwide licensees. The Fifth Amendment's guarantee that private property not be taken for public use without just compensation is designed to bar the government from forcing some people to assume burdens that should be borne by the public as a whole.¹² Competitive bidding imposed upon channels already assigned to nationwide licenses would do just that because the Commission would recover white space from these nationwide licensees to auction in the future. The Commission should not attempt to secure a public financial benefit at the expense of individual licensees who have relied in good faith on the Commission's prior rules and have made an investment decision on the basis of the existing terms of their licenses. This is particularly so when the government will harm the public interest by restricting the public's ability to receive high quality nationwide paging services.

The "economic harm" to PageNet. PageNet has proceeded diligently to construct its nationwide facilities in reliance upon Section 90.495 of the Commission's Rules. If the Commission subjects PageNet's nationwide channels to competitive bidding, it will circumscribe the area in which PageNet has exclusive rights to provide service. It is certainly not hard to imagine that, after spending hundreds of millions of dollars in the construction and operation of nationwide PCP systems and after

¹² *Armstrong v. United States*, 80 S.Ct. 1563, 1569 (1960).

having fulfilled the Commission-imposed exclusivity requirements, PageNet and all of the other nationwide PCP carriers would have an investment-backed expectation that they would be able to retain the scope of their earned nationwide licenses. The scope of the license included the ability to continue to build-out nationwide facilities even after the minimum construction threshold was met. If any nationwide PCP licensees lost the ability to expand their systems, such licensees would have a cause of action against the Commission on the grounds that the modification of the rights the licensees had earned under their licenses was a taking under the Fifth Amendment of the Constitution of the United States.

Finally, subjecting nationwide channels to competitive bidding would violate the 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. Reauctioning the nationwide channels where the nationwide licensees have already satisfied existing coverage requirements would retroactively impair their rights to an exclusive license.¹⁴ As such, subjecting the nationwide channels to

¹³ See *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1505 (1994).

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 (continued...)

competitive bidding would constitute an improper retroactive rule change.

II. The Commission Should Not Adopt Clarifications Or Revisions That Would Reward Speculation, Create Confusion, Engender Needless Litigation, Or Slow The Build-Out Of Geographic Systems

A. Expired Construction Permits Should Not Be Counted In Determining Composite Interference Contours Of Incumbent Systems

In its Petition For Reconsideration and Clarification of the *Second R&O*, ProNet, Inc. ("ProNet") requested that the Commission clarify that incumbents may count expired construction permits in their determination of composite interference contours.¹⁵

PageNet opposes this clarification because it would mean that any speculator or insincere permittee would be allowed to hold an area within a geographic license area without ever having built a system to serve the public. Even though ProNet claims that non-construction of the stations may, in part, be due to delays in the processing of applications by the Commission, these perceived delays cannot be the basis for allowing permittees to hold white space after their construction permits have expired. This would reward speculators or insincere permittees who filed applications, but never intended to serve the public.

¹⁴(...continued)
conduct, or impose[s] new duties with respect to transactions already completed." *Landgraf*, 114 S.Ct. at 1505.

¹⁵ ProNet Petition For Reconsideration and Clarification, filed April 11, 1997 ("ProNet Petition") at 4.

Loss of construction permits is due to non-construction of facilities within the time period specified by the permit.¹⁶ If a permittee fails to construct, the permittee loses the authorization to construct the station, and is therefore not licensed to operate the facilities for which the construction permit had been issued. The Commission's Rules provide that the construction period for paging stations is one year.¹⁷ Moreover, if service to subscribers has not begun by that commencement deadline, the authorization terminates without action by the FCC.¹⁸ Accordingly, there is no public interest benefit or other compelling reason to justify the inclusion of expired construction authorizations for facilities that are neither built nor licensed within the composite contour of incumbent systems.

B. Incumbent Licensees Should Be Entitled To Interference Protection For Operational Transmitter Sites

In its petition, ProNet sought clarification that "non-geographic incumbents' composite interference contours are grandfathered."¹⁹ This issue was raised in the context of the deconstruction of facilities by incumbent licensees. PageNet supports the ability of incumbent licensees to modify their systems and to improve reception in the service areas that are

¹⁶ 47 C.F.R. § 22.142.

¹⁷ See 47 C.F.R. § 22.511; see also 47 C.F.R. § 22.142.

¹⁸ 47 C.F.R. § 22.142.

¹⁹ ProNet Petition at 8.

totally encompassed within the composite interference contour of the incumbent licensees -- where such areas could not be served by the geographic licensee under the co-channel protection standards. Such modifications, however, should be achieved within the confines of the composite contour of the licensee's operating system. If the licensee permanently discontinues operation of facilities that comprise the composite contours of an incumbent system, that system's composite contour should be modified accordingly.²⁰ As such, there should be no "grandfathering" of incumbent contours.

PageNet does agree with ProNet on one point. Transmitters that are true "fill-ins" within the service area of an incumbent composite contour may later be utilized as an external transmitter site if the original external site is discontinued.²¹ In this circumstance and in order to avoid confusion, the incumbent should be required to file an FCC Form 489 specifying the discontinuation of one site and the designation of another site (a previously fully encompassed site) as the new external site. The incumbent should be required to serve a copy of the filing on the geographic co-channel licensee.

²⁰ See 47 C.F.R. §§ 22.142 and 22.317.

²¹ A fill-in never expands the amount of the incumbents composite contour. Fill-ins refers to the practice of filling-in poor service areas within an existing composite contour.

If the incumbent permanently discontinues²² operation of facilities and that discontinuance creates unserved area that could be served by the geographic licensee under the co-channel separation standards, that area is reserved and is exclusively available only to the geographic licensee. As such, incumbents should be required to maintain their existing contours by operation of their facilities in order to be eligible for co-channel protection from the geographic licensee. Finally, it presently is, and must continue to be, impermissible to claim that transmitters are "fill-ins" when such transmitters are used to bridge non-contiguous coverage areas in order to serve new area.²³

C. Alternative Formulas And "Real World" Engineering Should Not Be the Basis For Fill-In Transmitters

ProNet also requested that the Commission modify its definition of "fill-in" transmitters to employ alternative formulas and other "real world" engineering. PageNet opposes alternative formulas and "real world" engineering with respect to fill-in transmitters because such options will only lead to endless litigation between the incumbent licensee and the

²² 47 C.F.R. § 22.317 provides that authorizations terminate automatically if service is "permanently discontinued." Under Section 22.317, a station is considered permanently discontinued if it has not provided service to subscribers for more than ninety (90) continuous days.

²³ See 47 C.F.R. § 22.165(d)(1); *Second R&O* at ¶¶ 19 and 57.

geographic licensee. It should be emphasized that the ability to place fill-in transmitters anywhere within the composite interference contour of an incumbent system, as long as the transmitter does not increase the composite interference contour, provides licensees with significant flexibility. This is particularly so when one assumes that the incumbent licensee chose its transmitter sites based upon the service requirements of customers rather than haphazardly acquiring white space prior to auction. Moreover, if the incumbent licensee wishes to propose facilities that will expand the composite interference contour of the incumbent system, the incumbent will have to seek permission from the geographic licensee.²⁴ This will ensure co-channel protection to both systems without endless controversy regarding the accuracy and effectiveness of alternative formulas and other engineering, and ensure that the rules regarding co-channel protection are certain and consistent.

D. Geographic Licensees Should Not Be Under An Obligation To Coordinate With The Incumbent Licensee Prior To Commencement Of Operation

One petition suggested that geographic licensees be required to notify incumbent co-channel licensees prior to activation of transmitters which are located closer than 70 miles from existing facilities, and require the geographic licensee to comply with a request by the incumbent licensee for interference testing prior

²⁴ See *Second R&O* at ¶¶ 19 and 57.

to operation.²⁵ PageNet vigorously opposes the adoption of such obligations because they are absolutely unnecessary, place the incumbent in a position to slow or block the initiation of service by the geographic licensee, and will engender litigation. For decades, the Commission has licensed paging channels without notification of co-channel operation or interference testing. Since the Commission did not modify co-channel interference standards in the *Second R&O*,²⁶ it is clear that notification and testing are simply unnecessary.

Moreover, the incumbent's ability to request interference testing places the incumbent in a position to slow or block the build-out and operation of the geographic system. In addition, no suggestion has been made as to how the licensee should handle a situation where the incumbent perceives interference from the geographic system. If the geographic licensee has maintained the appropriate co-channel separation distance under the Commission's Rules, the incumbent licensee would have no legitimate objection to the operation of the geographic licensee's facilities. Certainly, because geographic licensing is meant to provide flexibility for licensees, ease administrative burdens on the Commission, and speed service to the public,²⁷ the Commission should not adopt provisions that would slow the build-out and

²⁵ Blooston Petition at 16-17.

²⁶ *Second R&O* at ¶ 69.

²⁷ *Second R&O* at ¶ 15.

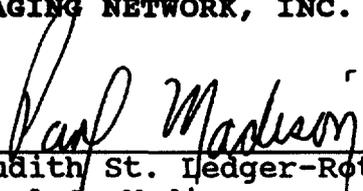
activation of geographic paging systems that comply fully with the Commission's co-channel separation requirements.

Finally, adopting such provisions would lead to endless litigation between incumbents and geographic licensees. Some incumbents may seize such an opportunity to delay the provision of service by the geographic licensee, thereby reducing the ability of the public to receive service and stranding the geographic licensee's investment in the build-out of its system.

WHEREFORE, for the foregoing reasons, PageNet requests that on reconsideration of the *Second R&O*, the Commission not adopt the aforementioned clarifications and modifications.

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I hereby certify that I have, this 9th day of May, 1997, mailed a copy of the foregoing "Comments in Opposition of Certain Petitions for Reconsideration and Clarification" via first-class mail, postage prepaid, to the following:

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