RECEIVED

MAY 9 1997

Federal Communications Commission
Office of Secretary

DOCKET FILE COPY ORIGINAL

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

In the Matter of:	)	
	)	
Replacement 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

METROCALL, INC. RESPONSE TO PETITIONS FOR RECONSIDERATION

Frederick M. Joyce
Christine McLaughlin
Its Attorneys

JOYCE & JACOBS, Attys. at Law, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
(202) 457-0100

Date: May 9, 1997

TABLE OF CONTENTS

SUMMARY i

I. Summary of the Petitions 1

II. Reconsideration of the Treatment of Nationwide Licensees Should be Denied 6

III. The FCC Erred in Opening Highly Encumbered Markets for Auction 11

IV. Incumbents Must Not Be Subject to *De Facto* Modifications of Their Licenses 12

V. The Dismissal of Pending Applications is Contrary to Law 15

VI. The "Substantial Service" Alternative is Vague And Insufficient to Deter Speculaton 16

VII. Not Revealing Bidder Identities Will Encourage Speculation 17

VIII. Shared Frequency Interference Protection Issues 17

CONCLUSION 20

SUMMARY

Metrocall opposes Blooston's Petition to the extent that it challenges the FCC's determination to exempt existing nationwide licensees from auction. That exemption does not discriminate in favor of nationwide licensees. Having met the previously-applicable construction requirements to obtain nationwide status, these licensees are not being given an opportunity to expand their authorized service area; rather, their authorized, nationwide service area is being afforded the protection that these licensees previously earned. To subject those licenses to competing applications and auctions would unlawfully modify their existing authorizations, and would require an unlawful retroactive application of the new rules.

Metrocall supports those Petitions which argue for the exemption of substantially built-out service areas from the auction. As indicated in those Petitions, and Metrocall's, opening such areas to auction would invite speculation, and block incumbent expansion of necessary paging services. Moreover, as Metrocall and other Petitioners have urged, the FCC should reconsider any of its rules that would cause *de facto* modifications to existing paging licenses. The rules should be revised or clarified to ensure that incumbents are not required to undertake modifications to avoid interference to MTA/EA licensees, and that they will be fully protected from harmful interference from MTA/EA licensees. Additionally, incumbent, "non-exclusive" 929 MHz operations must not be relegated to secondary status, and the FCC should clarify how affected parties on those frequencies are to share those frequencies.

Metrocall supports the proposals of ProNet and PNI to limit interim applications on the shared paging channels. Some restrictions on interim applications are necessary to avoid devastating overcrowding on those channels pending final rules to govern them.

Metrocall also supports the various Petitioners who seek reconsideration of the "substantial service" coverage alternative and the decision not to reveal bidder identities. For the reasons stated in those Petitions, and in Metrocall's, those provisions of the Second R&O will encourage speculative or anti-competitive applications and bidding. The FCC should not invite such abuses of its auction process. Additionally, Metrocall concurs with those Petitions that challenge the dismissal of pending applications; there is no legal or policy justification to support those dismissals.

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

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

RESPONSE TO PETITIONS FOR RECONSIDERATION

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C.§ 405 (a), and Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby responds to the Petitions for Reconsideration (collectively, the "Petitions") of the FCC's "Second Report and Order" ("Second R&O") in the above-captioned rule making proceeding.[1]

I. Summary of the Petitions

Priority Communications, Inc. ("Priority") challenges the Commission's authority to impose "geographic overlay" licenses on the same frequencies and areas where incumbent licensees are already serving the public, and to open those frequencies and service areas to competitive bidding. See Priority Petition at 4. Priority states that the geographic overlay concept creates mutually exclusive applications, in violation of Section 309(j)(6)(E) of the Act,

[1] Public Notice of the filing of Petitions for Reconsideration of the Second R&O was published in the Federal Register on April 24, 1997; thus, this Response is timely.

which orders the FCC to undertake solutions to avoid mutual exclusivity. Id. at 5-6. Blooston, Mordkofsky, Jackson & Dickens ("Blooston") likewise challenges the FCC's authority for auctions in paging services generally, and states that the FCC failed to consider less drastic alternatives to its auction proposal. See Blooston Petition at 3-4. Blooston further argues that exempting nationwide licensees from auctions discriminates in favor of those licensees. Id. at 5-6.

Priority, and nearly all other Petitioners, oppose the Commission's decision not to issue automatic geographic licenses to incumbents who already provide a substantial service in their markets. Id. at 7. Paging Network, Inc. ("PageNet") requests the Commission automatically license those incumbent operators which already serve two-thirds of the population of a geographic area, because failure to do so leaves the auction winner unable to meet construction benchmarks. See PageNet Petition at 4-5. PageNet notes that opening substantially built-out areas to auction may lead to "greenmail" applications, and will likely increase the cost of service to the currently unserved areas. Id. at 5.

PCIA likewise requests that, at least initially, only existing licensees serving 70% or more of the population of a particular geographic area be allowed to submit an application for that market area license. See PCIA Petition at 5. Advanced Paging, Inc., *et al.* (collectively, "API") and Arch Communications Group ("Arch") similarly oppose the Commission's decision to open markets to auction where an incumbent meets or exceeds the five-year benchmark. See API Petition at 4; Arch Petition at 7.

ProNet, Inc. ("ProNet") requests that the FCC clarify the parameters of non-geographic incumbent systems, and that valid construction permits be included in determining the

parameters of incumbents' existing systems. See ProNet Petition at 4. ProNet also argues for more flexible rules for "fill-in" transmitters. See ProNet Petition at 10. ProNet urges that the rules be revised so as not to prevent incumbents from making changes in response to unforeseen events, including the loss of proposed transmitter sites in pending or recently granted applications, due to inordinate delays in processing. See ProNet Petition at 14. Arch objects to certain provisions of the Second R&O which prevent existing licensees the flexibility to modify and maintain their systems. See Petition at 3.

PCIA, PageNet, API, Arch, Blooston and ProNet also request reconsideration of the "substantial service" alternative construction benchmark, particularly in conjunction with the "open eligibility" standard for applications in already-served areas. See PCIA Petition at 8-9; PageNet Petition at 7-8; API Petition at 11; Arch Petition at 2, 6; Blooston Petition at 8; ProNet Petition at 22. The Petitioners note that the substantial service alternative may lead to the filing of insincere mutually exclusive applications. See, *e.g.*, PCIA Petition at 5; PageNet Petition at 8. Indeed, the "substantial service" alternative seems designed to encourage application mill frauds. See, *e.g.*, PCIA Petition at 8, PageNet Petition at 8. Petitioners note the "substantial service" alternative would allow a non-incumbent to block incumbent expansions within a geographic area for a period of five years, without the newcomer being required to provide service itself. See, *e.g.*, PCIA Petition at 7; PageNet Petition at 8.

The vast majority of Petitioners object to the dismissal of pending paging applications. Schuylkill Mobile Fone, Inc. ("Schuylkill"), Western Paging I Corporation and Western Paging II Corporation (collectively, "WPC"); Nationwide Paging, Inc. ("Nationwide"); Morris Communications, Inc. ("Morris"), Western Maryland Wireless Company ("Western"); Priority;

Blooston and ProNet all protest this decision. Schuylkill and WPC note that the dismissal of previously filed applications does not meet any compelling public interest, while the applicants have strong equities which may not be ignored in accordance with recent judicial precedent. See Schuylkill Petition at 2; WPC Petition at 2. See, also, PCIA Petition at 17-18. Schuylkill and WPC also state that the FCC does not have the statutory authority to use competitive bidding until after it has exhausted other means of avoiding mutual exclusivity in application and licensing proceedings. Schuylkill Petition at 2; WPC Petition at 2. Western raises the same challenges, and adds that these dismissals would violate the applicants rights' to comparative consideration under Section 309(e) of the Act as interpreted by Ashbacker Radio Corp. v. FCC and its progeny. See Western Petition at 2.

Schuylkill and WPC also seek clarification as to whether, in the case of an application with multiple sites, the entire application would be dismissed or whether only those sites subject to a mutually exclusive application would be dismissed. Schuylkill Petition at 2-3; WPC Petition at 2-3. They seek clarification with regard to the treatment of applications which appear to be mutually exclusive, in cases where the outcome of pending litigation may resolve that mutual exclusivity. Schuylkill Petition at 3; WPC Petition at 3.

A number of Petitioners address the application and bidding procedures adopted for the auction process. PageNet and PCIA argue that the "all" box on the short form application itself artificially creates mutually exclusive applications in violation of Section 309(j)(6)(E) and should be removed. See PageNet Petition at 10-11; PCIA Petition at 10. See also, Arch Petition at 5-6. These parties further support requiring upfront payments for each license applied for. See PCIA Comments at 11-12; PageNet Comments at 12. PageNet supports a license by license

stopping rule. See PageNet Petition at 15. PageNet and PCIA argue that bidding credits are unfair and unnecessary in the paging context, and that the installment payment system works to the detriment of incumbent licensees. Id. at 16; PCIA Petition at 22.

Petitioners also object to withholding information concerning bidder identities, because withholding that information will prevent bidders from accurately valuing licenses, see, *e.g.*, PageNet Petition page 13; and is likely to increase speculative or anti-competitive bidding conduct. Id. at 13-14; PCIA Petition at 13-15. PCIA favors the holding of lowerband auctions first, to be followed by the 929 and 931 MHz auctions, because many of the operators on the lower band are smaller businesses which might suffer hardship. See PCIA Petition at 19.

Several Petitioners address shared frequency licensing issues. TSR Paging, Inc. ("TSR") protests the Commission's refusal to address licensing on the shared PCP channels immediately. See TSR Petition at 2-3. TSR states that the FCC's refusal to cap the number of licensees on the shared frequencies to incumbents, at the same time it refused to subject any future applications for these frequencies to competitive bidding, will be disruptive to existing operations, and will overburden that part of the spectrum. Id. at 3, 5. TSR requests a "freeze" on new licensees on the shared 929 MHz PCP frequencies, except as authorized pursuant to an auction process. Id. at 5. It further recommends that winners of that competitive bidding process on the shared PCP frequencies be required to work out time-sharing agreements with existing licensees, see id. at 6; and, barring a contrary agreement with the geographic licensee, the incumbent licensees be permitted to add or modify sites on their existing systems so long as any modification does not lead to an expansion of existing service contours. Id. at 5.

Teletouch Licenses, Inc. ("Teletouch") supports the Commission's decision not to convert

lower-band shared PCP channels to exclusive use, but has a number of other concerns about the shared PCP frequencies. It urges the Commission to adopt limits on interim applications for shared frequencies, by limiting the expansion applications to a 75 mile radius from an applicant's existing co-channel facility (10 miles for private, internal systems) and requiring non-incumbent entities in need of internal communications to obtain their services from a CMRS provider. See Teletouch Petition at 2. Preferred Networks, Inc. ("PNI") suggests similar changes to the interim processing rules for shared frequencies. See PNI Petition at 3-6.

PSWF Corporation ("PSWF") requests reconsideration of that part of the Second R&O which deals with the elimination of Section 90.496 of the Commission's Rules, which permitted extended implementation schedules for licensees building out exclusive systems on the 929 MHz frequencies. PSWF states that the FCC fails to give any explanation for the deletion of that rule part and suggests that it was eliminated, retroactively, for the sole purpose of foreclosing pending requests. See PSWF Petition at 6. PSWF further states that the elimination of existing slow growth requests is not only contrary to the position previously taken by the FCC before the U.S. Court of Appeals for the D.C. Circuit, but also violates Section 553 of the Administrative Procedure Act. Id. at 5. PSWF asks that the Commission allow licensees, who both qualified for non-grandfathered exclusivity and had slow growth waiver requests pending prior to the release of the Second R&O, to be permitted to continue build-out under the extended implementation rule. Id. at 3.

II. Reconsideration of the Treatment of Nationwide Licensees Should be Denied.

Blooston argues that exempting nationwide licensees from auctions violates the Commission's obligation to treat similarly situated parties differently. See Blooston Petition at

5-6. To the contrary, the exemption of nationwide licensees does no more than recognize the validity of licenses granted prior to this rule making proceeding, and should be upheld.

Contrary to Blooston's assumptions that nationwide licensees have somehow been given a "free ride," these licensees were subjected to substantial construction requirements under the prior rules. 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).

At the heart of Blooston's Petition is the contention that the 931 MHz nationwide allocations and the 929 MHz nationwide exclusivity rules did not impose sufficient construction requirements, and therefore these frequencies would provide more "white space" for auction than other paging channels. See Blooston Petition at 5. However, in adopting its PCP exclusivity

rules, the FCC specifically considered, and rejected, suggestions for more stringent nationwide coverage requirements. See PCP Exclusivity Order at ¶¶ 14-15. Nonetheless, Blooston is, 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. 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 Petition, with regard to this issue, is no more than an untimely petition for reconsideration of the FCC's nationwide paging rules, its contentions on this issue 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).

Turning to the substance of the Petition, 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 principled 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).

The applicable rule provisions stated that licensees meeting specified, significant construction requirements would be awarded an authorization with a nationwide service area. The nationwide licensees met their construction requirements prior to this rule making proceeding, and their nationwide grants were therefore no longer conditional. For the Commission to now impose further coverage requirements or revoke portions of the nationwide licensees' previously-authorized service area would constitute unlawful retroactive rule making, and a modification of those outstanding authorizations. See, *e.g.*, P&R Temmer, d/b/a, Mobile Communications Service Company v. FCC, 743 F.2d 918, 927-928 (D.C.Cir. 1984) ("a license is modified for purposes of Section 316 when an unconditional right conferred by the license is substantially affected"); Landgraf v. USI Film Productions, 114 S.Ct. 1483, 1497 (1994) ("settled expectations should not be lightly disrupted" by retroactive application of new laws).

In contrast, non-nationwide licensees' pre-Second R&O authorizations afforded them service areas based upon either signal strengths or minimum distance separations from individual transmitters. See 47 C.F.R. §§ 22.537(c)-(f); 90.495(b). What non-nationwide licensees have lost is the potential opportunity to apply for new service areas; their previously-authorized

service areas should remain unaffected.[2]

This does not necessarily indicate that Metrocall agrees with many of the restrictions that will be placed on non-nationwide incumbents by the new rules; it does not. Metrocall is also the licensee of numerous non-nationwide frequencies, and objects to many of the same rule changes that Blooston does on grounds that they will impose unnecessary costs on incumbent operators, inhibit the future development of wide-area paging systems by incumbents, invite speculative or anti-competitive filings, and generally disserve the public interest.

Metrocall does distinguish, however, between the loss (or impairment) of an opportunity to obtain additional authorizations on one frequency, and the loss of service area under a previously-granted authorization on another. The former, while not necessarily reasonable or in the public interest, does not in all cases deprive the licensee of rights guaranteed it by the U.S. Constitution or the Act; the latter most certainly does. See, *e.g.*, L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 799, 802 (D.C.Cir. 1948) ("to alter the rules so as to deprive [a licensee] of what has been assigned to it, and to grant an application which would create interference...was in fact and in substance to modify [its] license[;]" the grant of license confers a property right which may not be deprived without due process of law) (internal citations omitted).

In short, the Commission correctly decided that the licensees found to be qualified for nationwide authorizations as of February 8, 1996 should be "grandfathered" in their nationwide status, and the affected frequencies should be excluded from the upcoming auctions.

---

[2] To the extent that any of the rules adopted in this proceeding would deprive non-nationwide licensees of the use of their previously-authorized service areas, Metrocall and other Petitioners have requested that the FCC reconsider any such diminution of existing licensee rights, or clarify that no such diminution is intended by the rules. See Section IV, *infra*.

III. The FCC Erred in Opening Highly Encumbered Markets for Auction

The majority of parties seeking reconsideration of the Second R&O challenge the FCC's failure to adopt automatic MTA/EA licensing for incumbents that already serve the vast majority of the geographic area. See, *e.g.*, PCIA Petition at 5; Priority Petition at 7; PageNet Petition at 5-6. Metrocall concurs with those parties that the Commission's decision was arbitrary and capricious, and contrary to the public interest. Moreover, that action may be beyond the FCC's limited statutory auction authority.

A number of Petitioners point out that the FCC's "open auction" policy will have the effect of creating artificial mutually exclusive situations, in areas that no party other than the incumbent can legitimately serve. See, *e.g.*, PCIA Petition at 5. As Petitioners note, the creation of mutual exclusivity directly contravenes the statutory grant of auction authority. See 47 U.S.C. § 309(j)(6)(E).

Petitioners demonstrate that the weight of evidence in this proceeding supports an exemption of heavily-encumbered service areas from auctions. See, PCIA Petition at 4-5; Arch Petition at 7; Priority Petition at 7; API Petition at 4; PageNet Petition at 4-5; Blooston Petition at 10-11. Numerous parties, both in comments and on reconsideration, have demonstrated how opening these markets to all potential applicants will serve only to attract speculators seeking to "greenmail" the incumbent, or unscrupulous parties seeking to raise a competitor's costs of doing business through the auction process. See *e.g.*, id. Metrocall urges the Commission to heed the compelling weight of the record evidence in this proceeding, and grant the Petitions insofar as they support, on statutory and factual grounds, exemption from auctions for incumbents who meet (or exceed) the five-year coverage benchmark. The FCC's failure to recognize these

arguments could well be found to be "arbitrary and capricious" by a court of appeals. See, *e.g.*, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

IV. Incumbents Must Not be Subject to *De Facto* Modifications of Their Licenses.

In various contexts, several petitioners object to provisions of the new rules which will have the practical, if unintended, effect of depriving incumbents of the full use of their existing, authorized service areas. For example, Metrocall objected to the impact that the FCC's imposition of auctions on heavily encumbered service areas will have on incumbents, due to possible harmful interference at the borders of the incumbent's service area. See Metrocall Petition at 9-10. Some Petitioners requested reconsideration or clarification of the definition of incumbents' interference contour and "contiguous" sites for "system-wide" licensing purposes, noting that the new rules could be interpreted to cause a forfeiture of "non-contiguous" sites. See, Blooston Petition at 8-9; ProNet Petition at 9-18. Additionally, ProNet notes that relying solely on the interference contours determined pursuant to Section 22.537(e) of the rules may subject incumbents to a loss of part of their existing areas should exterior transmitters need to be relocated, and may overly restrict what is deemed a "fill-in" transmitter within existing systems. See, ProNet Petition at 9-18.

Metrocall strongly urges the Commission to grant the foregoing Petitions to the extent of reconsidering any rule provisions which will reduce or otherwise impair an incumbent licensee's previously-authorized footprint. As previously noted, there is a principled difference between impairing a licensee's future expansion, and revoking or modifying part of that licensee's previously-authorized coverage. The Commission should therefore grant the Petitions requesting it to reconsider any of its rule provisions that have the effect of decreasing

incumbent's actual existing service areas or subjecting incumbents to harmful interference. If the Commission did not intend for the above-referenced portions of the Second R&O and the rules to have those effects upon incumbents, it should clarify that the MTA/EA licensee will be responsible for resolving any interference at the borders of incumbents' systems, and in no event will the incumbent be required to modify its existing system to avoid interference to the MTA/EA licensee.

On a related issue, several Petitioners object to the Second R&O to the extent that it would grant *de facto* exclusivity to licensees on the shared PCP channels or to licensees on the exclusive 929 MHz frequencies who did not previously qualify for exclusivity. See PageNet Petition at 17-19; PCIA Petition at 16-17; ProNet Petition at 23-24.

Metrocall notes that the Commission has never fully addressed nor explained the legal status of and relationship between multiple licensees who operate paging systems on the "exclusive" 929 MHz frequencies in the same service areas. Prior to 1993, all of these frequencies were shared; a number of "non-exclusive" licensees remain on those channels, and have been providing services to subscribers for many years. It is by no means apparent from the FCC's rules or its 929 MHZ exclusivity Orders, that by granting "exclusivity" to "new" licensees, the FCC intended to relegate incumbent, non-exclusive licensees to "secondary" status. Those Petitioners who want to relegate these incumbent licensees to "secondary" status, seem to have missed the more fundamental issue here: the Commission needs to clarify how "non-exclusive" incumbents, "exclusive" incumbents, and MTA licensees are all to equitably share these channels in areas where their authorizations overlap. The FCC's rules do not state that one licensee is "primary" while another is "secondary"; nor do the rules explain how 60 seconds of

airtime each minute are to be equitably shared by multiple licensees. These issues will not go away with the conversion to wide-area licensing, and should be resolved by this agency. In no event should "non-exclusive" incumbents be relegated to secondary status; subsequent licensees should be required to equitably share the affected frequency with pre-existing "non-exclusive" systems.

Metrocall also opposes those Petitions to the extent that they would deprive any licensee on the exclusive 929 MHz frequencies who met the requirements of Section 90.495 for exclusivity prior to the adoption of the Second R&O, or was constructing under an extended implementation schedule requested prior to that date, and had been approved by PCIA for exclusivity as of that date.

With regard to non-nationwide exclusivity requests, the Commission has not formally "granted" exclusivity to any licensee since it released a single public notice in 1994. See, Public Notice, DA 94-546 (released May 27, 1994). Nonetheless, in the intervening three years, numerous licensees have applied for, been granted licenses for, and constructed systems that fully complied with the Commission's exclusivity rules. Those licensees received approval as "exclusive" from the Commission's designated frequency coordinator for 929 MHz paging services, and their systems are providing local and regional paging services to customers in areas throughout the United States.

Metrocall further concurs with PSWF that pre-February 8, 1996 extended implementation schedules should not be disturbed. Those licensees who have undertaken the task of building out complex, wide-area systems, in accordance with the then-applicable rules, should not be deprived of their investments to date. As with outstanding construction permits, those licensees

should be permitted, in the time remaining under their extended construction schedules, to complete the systems that they have, in many cases, substantially constructed over the past several years.

In short, the substantial investments made by licensees who qualified for exclusivity or are constructing under extended implementation schedules, in good faith reliance on the prior rules, warrant full protection from interference by subsequent licensees. See, *e.g.*, Journal Company v. Federal Radio Commission, 48 F.2d 461, 463 (D.C.Cir. 1931) (where a radio station "has been constructed and maintained in good faith, it is in the interests of the public and the common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons"). The Commission should reconsider its rules to the extent they disturb the good faith, reasonable expectations of those licensees in retaining their "exclusive" status; alternatively, the Commission should clarify that it does not intend to divest such licensees of the exclusivity they have earned.

V. The Dismissal of Pending Applications is Contrary to Law

The majority of Petitioners seek reconsideration of the Commission's proposed dismissal of pending applications. See, *e.g.*, ProNet Petition at 6-7; PCIA Petition at 17-18; Priority Petition at 5-6; Western Petition at 1-6; Blooston Petition at 11-16. Metrocall also challenged this portion of the Second R&O,[3] and supports the other Petitioners on this issue.

Many Petitioners cite to the D.C. Circuit's recent decision in McElroy Electronics Corporation v. FCC, 86 F.3d 248 (D.C.Cir. 1996) ("McElroy II"), which held that timely filers

---

[3] Metrocall concurrently filed a Motion for Stay of the Second R&O, including the provisions mandating the dismissal of pending applications. The Commission has not yet acted upon that Motion.

have "an equitable interest in the enforcement of the cut-off rules" and the FCC "may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors." See McElroy II, 86 F.3d at 257. Petitioners also direct the Commission's attention to the mandates of Sections 309(j)(3)(A) and 309(j)(6)(E) that, in adopting competitive bidding procedures, the FCC is to strive to expedite service to the public, and is to attempt to resolve or avoid mutually exclusive situations. See 47 U.S.C. §§ 309(j)(3)(A); 309(j)(6)(E). See also, Priority Petition at 5-6; Blooston Petition at 12-14.

As Petitioners note, the Second R&O not only ignores the judicially-recognized rights of applicants who have timely filed in compliance with the FCC's then-applicable rules, see, *e.g.*, Western Petition, *passim*; but also directly contradicts the Congressional commands to expedite services to the public and avoid unnecessary mutual exclusivity. See, *e.g.*, Blooston Petition at 12-14. The FCC should grant the Petitions on this issue for the legal and public interest reasons give therein, and continue to process all paging applications filed prior to the adoption of the Second R&O.

VI. The "Substantial Service" Alternative is Vague and Insufficient to Deter Speculation

Petitioners also overwhelmingly challenge the FCC's "substantial service" alternative for MTA/EA licensees demonstrating compliance with the coverage requirements of new Section 22.503 of the rules. See, *e.g.*, ProNet Petition at 21-22; PCIA Petition at 7-10; Blooston Petition at 6-8; PageNet Petition at 6-9; API Petition at 11-12. For the reasons stated in its Petition, and in the foregoing Petitions, Metrocall urges the Commission to reconsider the vague "substantial service" alternative, and to apply strict coverage benchmarks to deter speculative applications. In the alternative, Metrocall requests that the Commission grant the clarifications of this standard

requested by Metrocall and ProNet, to give parties adequate notice of the levels of construction and operation that would qualify as "substantial service," so that MTA/EA licensees who have made no more than a token investment in establishing paging systems cannot indefinitely block expansion by incumbents who have demonstrated their willingness and ability to provide *bona fide* paging services to the public.

VII. Not Revealing Bidder Identities Will Encourage Speculation.

All Petitioners addressing the issue object to the FCC's decision not to reveal bidder identities during the paging auction. See PCIA Petition at 13-15; PageNet Petition at 12-14. Several Petitioners, including Metrocall, described how insincere bidders could use this "blind" auction procedure to harm legitimate paging companies. See Metrocall Petition at 19; PageNet Petition at 14.

The Commission should grant the Petitions as to this issue, and provide participants in the paging auctions the same information about bidder identities as participants in other auctions have had. Only by revealing bidder identities will the Commission be able to ensure that all auction participants have equal access to information about competing bidders, and that bidders who abuse the auction process by targeting their competitors for anti-competitive purposes can be identified and sanctioned.

VIII. Shared Frequency Interference Protection Issues.

Numerous Petitioners seek reconsideration of various aspects of the Commission's treatment of shared frequencies in the Second R&O. As indicated in Section IV, *supra*, PageNet, PCIA, and ProNet request the Commission to clarify that the interference protection standards adopted in the Second R&O do apply to confer *de facto* exclusivity on shared frequency

licensees. Metrocall and TSR urged the Commission to immediately address shared frequency licensing issues and adopt some form of exclusivity for licensees on those frequencies. See Metrocall Petition at 20-22; TSR Petition at 4. Teletouch and PNI requested limitations on applications for shared channels during the pendency of the Further Notice of Proposed Rule Making in this proceeding, so that incumbent operations will not be jeopardized by increased overcrowding on those channels before the Commission adopts final rules to govern them. See Teletouch Petition at 2; PNI Petition at 2-6.

Metrocall concurs with those Petitioners who suggest that opening the shared channels to any paging licensee, anywhere in the country, is likely to cause substantial harm to the quality of shared-frequency paging operations. Although Metrocall opposes Teletouch's statements supporting non-exclusivity on the shared frequencies, Metrocall respectfully submits that Teletouch's interim proposal to limit shared frequency paging applications to incumbents operating at least one co-channel base station within 75 miles of the proposed station has merit, as long as the Commission also adopts the proposal to allow additional "75-mile expansion" sites from a constructed and operational expansion site. See Teletouch Petition at 3-7. Metrocall also agrees that the special needs of medical and emergency services may require them to obtain licenses without complying with the foregoing limitations, but that such applicants should be required to provide the certification of the appropriate frequency coordinator that none of the channels primarily allocated for their services are available to meet their needs. Id. at 9-10.

Metrocall therefore requests that the Commission grant Teletouch's and PNI's Petitions to the extent of adopting their proposal for shared frequency licensing on an interim basis. Metrocall additionally requests that the Commission grant Metrocall's own Petition, and adopt

rules to protect shared frequency paging operations on an expedited basis.

CONCLUSION

For all the foregoing reasons, Metrocall respectfully requests that the FCC reconsider and clarify its Second R&O in this rule making proceeding consistent with the foregoing recommendations.

Respectfully submitted,

METROCALL, INC.

By: _____
Frederick M. Joyce
Christine McLaughlin

Its Attorneys

JOYCE & JACOBS, Attorneys at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor - PH2
Washington, D.C. 20036
(202) 457-0100

Date: May 9, 1997

CERTIFICATE OF SERVICE

I, Nicole Stoner, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 9th day of May, 1997, copies of the foregoing Response to Petitions for Reconsideration were mailed, postage prepaid, to the following:

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Commissioner Rachelle B. Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Daniel Phythyon, Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW., Room 5002
Washington, D.C. 20554

David Furth, Chief*
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Heather Hippsley, Esq.
Federal Trade Commission
6th Street and Pennsylvania Ave. NW
Washington, DC 20580

Jay Kitchen, President
Robert Hoggarth, Vice President
PCIA
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

ITS *
1919 M Street, N.W., Room 246
Washington, DC 20554

A. Thomas Carroccio, Esq.
Bell, Boyd & Lloyd
1615 L Street, NW., Suite 1200
Washington, D.C. 20036

John L. Crump
d/b/a ACE Communications
11403 Waples Mill Road, P.O. Box 3070
Oakton, VA 22124

George V. Wheeler, Esq.
Koteen & Naftalan
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Donald J. Evans, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W., Suite 810
Washington, D.C. 20006

Mika Savir, Esq.*
Legal Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554