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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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)
)
Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

WT Docket No. 96-18

To: The Commission

REPLY TO OPPOSITIONS AND COMMENTS ON PETITIONS FOR RECONSIDERATION

The law firm of Blooston, Mordkofsky, Jackson & Dickens, on behalf of its paging carrier clients listed in Attachment A hereto (hereinafter, the "Petitioners"), and pursuant to Section 1.429(g) of the Commission's Rules, hereby submits its reply to the oppositions and comments filed by various parties with regard to the Petitioners' April 11, 1997 Petition for Reconsideration filed in the captioned proceeding. As demonstrated below, it would appear that nationwide paging carriers have reevaluated the appropriateness of auctions when applied to the paging industry. However, they have not refuted the Petitioners' showing that auctions should be used for the nationwide frequencies, if they are to be used at all.

I. The Commission Should Apply Auctions to Nationwide Frequencies, or Should Refrain from Paging Auctions Altogether.

Several nationwide paging carriers (including AirTouch Paging (AirTouch), Paging Network, Inc. (PageNet), Arch

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Communications Group (Arch), American Paging, Inc. and Mobile Telecommunications Technologies (Mtel)) supported the concept of paging auctions during the comment phase of this proceeding, when their nationwide operations were exempt from the auction proposal. However, once the prospect of applying auctions to nationwide channels was raised by the Petitioners, these same carriers vehemently oppose the auction concept. The chief arguments advanced by these carriers against the auctioning of nationwide channels are: (i) nationwide carriers have already been required to meet certain buildout benchmarks; (ii) there can be no mutually exclusive applications for nationwide channels (and thus no auctions); (iii) an auction would disrupt the reliance of these carriers on their right to expand coverage without restriction; and (iv) the imposition of an auction scheme would constitute an improper retroactive rule making and an unconstitutional taking of property under the Fifth Amendment. The Petitioners agree that auctions are inappropriate for heavily licensed paging spectrum, for many of the same reasons now advanced by the nationwide carriers. However, if the Commission proceeds with paging auctions nonetheless, regulatory parity dictates that nationwide channels be auctioned as well.

PageMart II, Inc. argues at page 4 of its Partial Opposition, that nationwide carriers are not "similarly situated" to non-nationwide licensees, because their licensing scheme has been different. Other carriers make the same argument, adding that the nationwide carriers have had to meet certain buildout

requirements, and thus have "earned" their nationwide licenses. However, none of the nationwide licensees actually provides coverage to the entire Continental United States, and it is probable that they never will. Indeed, 931 MHz nationwide carriers have been required to build out only 15 SMSAs, which represent a small fraction of the total population of the country. A more stringent requirement has been applied to the 929 MHz nationwide carriers, but they can still satisfy this requirement while serving less than half the population. Therefore, in point of fact, existing "nationwide" systems are nothing more than glorified wide-area paging systems. In many parts of the country, the nationwide frequencies will lie fallow for the foreseeable future. Moreover, none of the commenters has refuted the Petitioners' showing that nationwide carriers compete for the same customers as regional and local paging carriers. Petition for Reconsideration at p. 5.

Using the auction philosophy which many of the nationwide carriers espoused, should not this "white space" be auctioned, to (a) recover the value of the spectrum for the American public; (b) make service available in rural areas, in furtherance of Section 309(j) of the Communications Act of 1934, as amended (the Act); and (c) make more efficient use of scarce spectrum?

Arch argues (at page 5 of its Opposition) that it is impossible to auction the nationwide channels, because there can be no mutual exclusivity on channels that have already been awarded on a nationwide basis. However, there is likewise no

mutual exclusivity on many of the non-nationwide channels throughout much of the country. Instead, the Commission is artificially creating mutual exclusivity by dividing the country into discrete market areas, and inviting competing applications for those newly created licenses. The Petitioners agree with Arch that the Commission should not be able to create mutual exclusivity in this fashion, given the requirement of Section 309(j)(6)(e) of the Act that the Commission seek to avoid mutual exclusivity through engineering and other solutions. See Arch Opposition at p. 5. However, many nationwide carriers supported the Commission's proposal to manufacture mutual exclusivity for non-nationwide paging channels. This approach can and should be followed for the nationwide channels if it continues to be applicable to the non-nationwide channels.

The nationwide carriers complain that they have a reliance interest in their ability to expand without restriction, and that an auction for unused areas would disrupt "investment backed expectations." See Opposition of PageNet at p. 3; Metrocall Response at p. 9. However, nationwide carriers did not pay for their spectrum, and thus have no greater reliance interest than non-nationwide licensees. The latter have the same reliance interests, including the reasonable expectation that they would be able to expand their coverage incrementally, as the need arises, and modify their systems as necessitated by unforeseen circumstances such as propagation problems or the loss of an antenna site. While these carriers, in addition, faced the

possibility of competing applications, most have been able to expand as desired, as evidenced by the vast wide-area systems licensed on non-nationwide frequencies. These carriers now face the prospect of having their reliance interests disrupted, because coverage areas lost due to unforeseeable circumstances are now likely to "escheat" to the market area licensee. Also, these carriers will now be unable to fill-in gaps in their system coverage which could not be served by other applicants under previous rules, due to co-channel interference limitations. Because the market area licensee is entitled to all such white space, these gaps are now likely to go unserved, because the existing carrier is forbidden from expanding its co-channel interference contour, while the auction winner will be unable to establish a co-channel facility that would protect the existing carrier's nearby operations.

Most nationwide carriers have had more than enough time to implement their immediate business plans. Any remaining expectations can be satisfied through the same measure applied to the rest of the paging industry: Each nationwide carrier can be given three months in which to file notifications proposing construction of expansion sites within 40 miles of stations which the nationwide licensee had constructed and rendered operational as of May 12, 1997, the effective date of the Second Report and Order in the captioned proceeding. These carriers would be given one year to construct the facilities listed on their notifications. Thus, nationwide carriers would be allowed to

keep facilities already operational, and even expand their coverage in the same limited manner afforded other paging licensees. Contrary to the assertions of Metrocall (at page 10 of its Response), there would be no loss of service area.

Nationwide carriers also argue that they would suffer a denial of due process and an unconstitutional taking, and that auctioning the nationwide frequencies would constitute an impermissible retroactive rulemaking. The use of auctions for these frequencies would be no more of a denial of due process than the use of auctions for other paging channels. In this regard, the Petitioners agree with PageNet that "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." PageNet Comments at page 6.

The Petitioners also agree with Metrocall that, when balancing the interests to be furthered by auctions against the mischief to be caused by retroactively applying this licensing scheme to the paging industry, the balance falls in favor of refraining from auctions. However, the Commission has interpreted this balance the opposite way, with the support of many of the nationwide carriers. If this conclusion is to be upheld, retroactive auctions must be applied evenhandedly to all

exclusive use paging licensees, pursuant to the mandate of Congress to implement regulatory parity. As shown above, while the regulation of nationwide paging carriers may not be identical to the regulation of the non-nationwide carriers, the two classes of licensees are in fact similarly situated. The imposition of auctions on the nationwide paging frequency white space would be similar to the Commission's modification of 470-512 MHz Part 22 licenses in CC Docket No. 87-120. In that proceeding, the Commission stripped licensees of all frequencies for which they did not have enough existing customers to warrant continued use. See Second Report and Order, 4 FCC Rcd. 6415 (1989). The Commission could likewise strip the nationwide carriers of the geographic areas they do not yet serve, minus the 40-mile expansion zone discussed above.

II. The Commission Should Adopt the Use of Alternative Contours for Permissive Modifications to 900 MHz Paging Systems.

The Petitioners support the proposal of Arch to allow the use of alternative formulas for permissive modifications to 929 and 931 MHz paging systems. The Petitioners have made a similar proposal in their April 11, 1997 Petition for Reconsideration at page 9. Arch supports the use of the formula developed by CompComm, Inc., while the Petitioners and others have expressed support for the continued use of the 21 dBuV/m formula which carriers were allowed to employ in making permissive modifications under the interim rules adopted in this proceeding. The Petitioners would be satisfied with either approach, as long

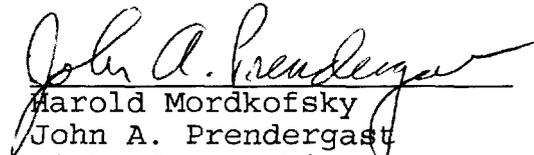
as 900 MHz licensees are given the flexibility to utilize formulas instead of fixed distances in modifying their facilities. Otherwise, there is a very real danger that these carriers will lose protected coverage because their authorized antenna sites become unavailable, either before or after construction. The sudden influx of Personal Communications Service licensees has created an extreme demand for antenna space. If displaced 900 MHz licensees can relocate a short distance and utilize a contour formula to show that the relocated facility will stay within the originally authorized contours, they will be able to preserve service to their existing customers.

Conclusion

In light of the foregoing, it is respectfully requested that the Commission modify its newly adopted paging rules consistent with the showings made by the Petitioners on reconsideration.

Respectfully submitted,

By


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ATTACHMENT A

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AzCOM Paging, Inc.

Oregon Telephone Corporation

Ventures in Paging L.C.

Professional Answering Service, Inc.

Prairie Grove Telephone Company

Cascade Utilities, Inc.

Cleveland Mobile Radio Sales, Inc.

Telephone & Two-Way, Inc.

Lubbock Radio Paging Service, Inc.

Com-Nav, Inc. d/b/a Radiotelephone of Maine

Robert F. Ryder d/b/a Radio Paging Service

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