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Before the
FEDERAL COMMUNICATIONS COMMISSION
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

REPLY OF PRONET INC.

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby replies to comments and oppositions on petitions for reconsideration of the Commission's Second Report and Order (the "2nd R&O")^{1/} in the above-captioned proceeding. Specifically, ProNet addresses oppositions and comments with respect to the following: (1) the Commission's processing of pending 931 MHz applications; (2) protection of incumbent systems, particularly in the 929/931 MHz bands; and (3) the need to resolve outstanding licensing matters, including litigation, before auctions.

^{1/} The 2nd R&O, 12 FCC Rcd 2732 (1997), was released February 26, 1997, and was published in the Federal Register on March 12, 1997.

I. THE COMMISSION IS BARRED FROM DISMISSING MUTUALLY EXCLUSIVE APPLICATIONS WITHOUT COMPARATIVE CONSIDERATION

ProNet supports the numerous petitioners who demonstrate that the Commission's directive to the Wireless Telecommunications Bureau to dismiss all pending mutually exclusive 931 MHz paging applications is contrary to law and disservices the public interest. The various petitions supporting this conclusion are well-summarized in Metrocall, Inc.'s ("Metrocall's") Response to Petitions for Reconsideration (at 15-16) and in ProNet's Comments on Petitions for Reconsideration (at 3-5); they need not be repeated here.

ProNet is compelled to add, however, that the Commission's use of its processing algorithm to classify 931 MHz applications for the purpose of their wholesale dismissal raises additional objections. Contrary to the Communications Act of 1934, as amended ("Act"), the Commission is apparently using the algorithm to contrive mutual exclusivity where none should exist.^{2/} Specifically, the Commission is employing an open-ended, "daisy-chain" standard for defining "blocked" applications (by regarding all 931 MHz channels as fungible) to preclude further processing or grant of numerous applications, and the Commission staff has indicated that all such "blocked" applications will be dismissed.

There are three problems with this use of the algorithm:

1. The algorithm fails to give preference to proponents of wide-area networks, contrary to the Commission's past public statements,^{3/}

^{2/} Section 309(j)(6)(E) of the Act requires the Commission to seek resolution of mutual exclusivity through engineering solutions, negotiation, threshold qualifications, service regulations and other means; and, if mutual exclusivity remains, Section 309(j)(1) requires the Commission to hold an auction among those mutually exclusive applicants rather than dismissing them and starting anew.

^{3/} Public Notice, *FCC Releases Results of Test Run of Its New Software for the Processing of*
(continued...)

2. The Commission has never equated applications "blocked" by the algorithm with "mutually exclusive" applications, and never suggested, either in developing the algorithm or in this proceeding, that "blocked" applications will be dismissed without further processing or comparative consideration;^{4/} using the algorithm to dismiss applications is therefore unauthorized by the Commission's Rules^{5/} and
3. Even assuming the Commission was authorized to use the algorithm to dismiss "blocked" applications, such use violates the Paperwork Reduction Act of 1980, 44 U.S.C. §3507(a) *et seq.* (the "PRA")^{6/} because no applicant can determine beforehand whether it will be classified as "blocked" (and, hence, dismissed) without ascertaining the status of a virtually unlimited number of applications;^{7/} ProNet agrees with

^{3/} (...continued)

931 MHz Paging Applications, Mimeo 1803, released August 14, 1995 ("August 14 Public Notice"). Nor is the Commission taking any additional steps to analyze these applications by according preferences to existing wide-area networks, consistent with Commission precedent. *See, e.g., John D. Word, 7 FCC Rcd 3201 (Mob. Svc. Div. 1992).*

^{4/} The Commission's database listing the results of the most recent algorithm run distinguishes between "blocked" and "MX" (*i.e.*, mutually exclusive) applications; the *2nd R&O* and the underlying Notice of Proposed Rule Making classify only the latter as subject to dismissal. Indeed, the algorithm explicitly provides that "a frequency that is available to a BLOCKED application cannot be granted to another applicant whose proposed station is within the calculated separation radius." August 14 Public Notice, at Mimeo 1807. If blocked applications were to be dismissed, however, there would be no reason for those applications to preclude grant of other applications within the calculated separation distance.

^{5/} Neither Section 22.131 (which was stayed by the Commission, *see Order* in CC Docket No. 92-115, 10 FCC Rcd 4146, 4147-4148 (1995)) nor former Sections 22.31-22.35 define "blocked" applications or authorize dismissal of timely-filed applications without comparative consideration.

^{6/} The PRA requires approval of new or revised information requirements (including agency rules) by the Office of Management and Budget ("OMB") prior to adoption. 44 U.S.C. §3507(a). It further provides that "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not display a current control number assigned by the [OMB] Director." 44 U.S.C. §3512. The algorithm was never submitted to OMB, and does not include an OMB control number; therefore, the Commission is barred from using it to dismiss applications without further comparative consideration.

^{7/} If an application cannot be granted because no frequencies are available, no other application can be granted within 70 miles of the site proposed in the first application. An application blocked by the first application may, in turn, preclude grant of other applications more than 70 miles from the first application, irrespective of frequency requested. Thus, to determine whether a given 931 MHz application could be granted, an applicant would have to have examined the Commission's licensed and pending database for all 931 MHz frequencies within an unspecified distance of its proposed site, and for an
(continued...)

Robert Kester *et al.* that applying the algorithm in this manner, without further processing, is precisely the type of information collection requirement that cannot be imposed without full compliance with the PRA.^{8/}

Minimally, therefore, the Commission must comply with its duties under Section 309(j)(6)(E) to determine which of the “blocked” applications can be granted, rather than dismissing valid applications deemed “blocked” by the algorithm.

II. INCUMBENT NON-GEOGRAPHIC LICENSEES MUST BE GIVEN FLEXIBILITY TO PERMISSIVELY RELOCATE AUTHORIZED SITES

In its Petition for Reconsideration and Clarification (“Petition”), ProNet requested that the Commission modify the 2nd R&O and new Sections 22.165(d) and 22.503(i) to afford additional protection to non-geographic incumbent licensees, by:

- including all valid construction permits (“CPs”) in determining incumbents’ composite interference contours (Petition at 3-4);^{2/}
- grandfathering composite interference contours to enable maximum flexibility for internal system modifications, including relocation of existing or authorized transmitters (Petition at 8);
- enabling 929/931 MHz licensees to utilize alternative formulas or real-world engineering showings, in lieu of the fixed-radii contours specified in Section 22.537(f), to define the interference contours of “fill-in” transmitters (Petition at 11-18); and

^{2/} (...continued)
indefinite number of 60-day cut-off periods prior to filing his or her application.

^{8/} Consolidated Petition for Reconsideration of Robert Kester, *et al.*, at 14-15.

^{2/} In addition, ProNet noted that new Section 22.503(i) inexplicably denies interference protection for incumbent non-geographic facilities for which applications were pending when the 2nd R&O was adopted if those applications were granted after the 2nd R&O’s rules became effective. This arbitrary denial of interference protection is inconsistent with the text of the 2nd R&O and should be corrected accordingly.

- broadening the definition of “fill-in” to include “gaps” in existing systems that cannot be served by geographic licensees (Petition at 18-19).

The foregoing positions received substantial support in comments filed in response to ProNet’s Petition and should be adopted.^{10/} Paging Network, Inc. (“PageNet”), by contrast, opposed each of the foregoing positions.^{11/} As shown herein, however, PageNet appears to have misinterpreted ProNet’s Petition and, to the extent the parties disagree, the compelling reasons for the relief ProNet has requested outweigh PageNet’s expressed concerns.

A. Treatment of Construction Permits

PageNet has misconstrued ProNet’s proposed clarification of the 2nd R&O and Section 22.165(d) of the Rules to include CPs in determining composite interference contours. By the term “outstanding CPs”, ProNet meant authorized, not-yet-expired CPs. ProNet agrees with PageNet (at 8-9) that where an incumbent licensee’s CP expires without any construction within the prescribed one-year construction period, the territory covered by that CP should be awarded to the geographic licensee, provided the geographic licensee can cover the territory without interfering with the incumbent’s other operational facilities. ProNet’s objection to the 2nd R&O (and revised Section 22.165(d)) is more narrow; it is intended to ensure that incumbents have recourse to relocate an authorized site within the prescribed one-year construction period as the Commission’s Rules

^{10/} See Metrocall’s Response to Petitions for Reconsideration, at 12-13; Comments of Airtouch Paging (“Airtouch”) on Petitions for Reconsideration, at 15-17; Comments of American Paging, Inc. (“API”), at 4-6; Arch Communications Group, Inc. (“Arch”) Petition for Partial Reconsideration and Request for Clarification (“Arch Petition”), at 4-5; Opposition and Comments of Arch, at 1-3; Petition for Reconsideration of Blooston, Mordkofsky, Jackson & Dickens (“Blooston”), at 8-9.

^{11/} See PageNet’s Comments in Opposition of Certain Petitions for Reconsideration (“PageNet Comments”), at 8-12.

allowed before the 2nd R&O became effective.^{12/} Where a site is lost due to circumstances beyond an incumbent licensee's control and the incumbent licensee is ready, willing and able to construct at a reasonably proximate alternative site, requiring geographic licensee consent merely because of a *de minimis* increase in the incumbent's composite interference contour is unreasonable because:

- CPs for which the originally authorized sites are no longer available expire in the next several months; unless auctions are conducted and geographic licenses assigned in what amounts to an agency "heart beat," no geographic licensee will exist to provide the mandatory consent; in these situations, "geographic licensee consent" is an impossible solution; and
- even if geographic licenses were assigned now for all frequencies and MTAs, these licensees would have no incentive to consent to *de minimis* contour extensions necessitated by incumbent CP relocations, because: (a) such consent will directly assist a competitor; and (b) if the subject CP terminates automatically for failure to construct, then the associated protected area is awarded to the geographic licensee.

B. Grandfathering Composite Contours

PageNet also misreads ProNet's request that the Commission grandfather incumbents' composite interference contours. As with CPs, ProNet nowhere suggests that non-geographic incumbents should be allowed to permanently discontinue service while preventing geographic licensees from serving the abandoned territory. Rather, ProNet views grandfathering as a tool to simplify licensing and provide incumbents with needed flexibility in two discrete situations:

- where a transmitter wholly internal to the incumbent system is discontinued, the geographic licensee will be unable to serve the subject territory; therefore, the geographic licensee must be barred from arrogating the protected area associated

^{12/} Section 22.142(d) provides for applications to relocate a site prior to expiration of the CP where the site was lost due to circumstances beyond the licensee's control; the CP deadline is automatically tolled while the relocation is pending. The 2nd R&O, however, bars all new site-specific applications. To date, the Commission has ignored ProNet's repeated requests for clarification of this inconsistency.

with the incumbent's defunct internal site;^{13/} and

- where an authorized incumbent transmitter is modified, relocated, replaced or temporarily discontinued due to circumstances beyond the incumbent's control, the Commission should preserve the incumbent's ability to reestablish service to the lost territory; in its Comments, PageNet fails to appreciate that sites may be lost due to natural disasters, new construction blocking coverage from the authorized transmitter, or arbitrary actions by site owners; in these cases, it may take several months, possibly more than a year, for complete coverage of the lost territory to be reestablished by the incumbent.^{14/}

C. Alternative Formulas for Fill-in Transmitters

PageNet's opposition to the proposed use of alternative formulas and engineering showings to determine the interference contours of 929/931 MHz fill-in transmitters is misguided. As discussed above, PageNet must appreciate the severity and magnitude of the challenges faced by incumbent 929/931 MHz licensees due to loss of transmitting sites, as well as the ongoing need to maintain and upgrade existing network facilities.^{15/} Allowing alternatives to the arbitrary fixed-radii circular contours prescribed by Section 22.537(f) will enable replacement sites to be installed without imposing additional regulatory burdens or needlessly taxing Commission resources.^{16/} Moreover, because alternative formulas are designed to provide flexibility to incumbents within their

^{13/} Indeed, PageNet agrees with ProNet regarding such situations. PageNet Comments, at 11.

^{14/} In addition, grandfathering the original contours instead of requiring the incumbent to provide a detailed record of all subsequent modifications will provide certainty, thereby avoiding, in PageNet's words, "endless litigation" (PageNet Comments, at 11) over the boundaries of the incumbent system.

^{15/} See, e.g., ProNet Petition, at 11-17; Airtouch Petition, at 3-4

^{16/} For example, a lost site could be replaced by a single nearby site or by multiple sites operating with reduced power, thereby obtaining comparable coverage without intruding on territory reserved for the geographic licensee. Absent this flexibility, incumbent licensees will be forced to seek emergency relief from the Commission. ProNet Petition, at 4.

composite interference contours, PageNet need not be concerned about co-channel protection to geographic licensees: an incumbent interfering with a geographic licensee in an area outside the incumbent's composite interference contours must resolve that interference.^{17/}

D. Gaps in Existing Incumbent Systems

PageNet is wrong to oppose coverage of gaps in incumbent systems by fill-in transmitters. ProNet agrees with PageNet that "unserved area that could be served by the geographic licensee under the co-channel separation standards . . . is reserved and is exclusively available only to the geographic licensee."^{18/} Territory that cannot be served by the geographic licensee-- e.g., creases, crevices, doughnut holes and the like-- should be available to the incumbent. Indeed, ProNet explicitly limited its request that incumbents be permitted to fill in gaps in their systems to areas that geographic licensees are barred from serving by the co-channel separation requirements imposed by Sections 22.503(i) and 22.537.^{19/} There is no reason to accord unwarranted leverage to geographic licensees in such situations, nor has PageNet offered any basis for preventing incumbents from serving these limited areas. The Commission should therefore modify Section 22.165(d) as requested by ProNet.^{20/}

^{17/} See Section 22.352(a) of the Rules.

^{18/} PageNet Comments, at 11 (emphasis added).

^{19/} ProNet Petition, at 18-19.

^{20/} In addition, ProNet notes that in their respective petitions for reconsideration, Metrocall, Inc. ("Metrocall") (at 24) and the Personal Communications Industry Association ("PCIA") (at 19-21) argue that the Commission should use major economic areas ("MEAs") rather than major trading areas ("MTAs") to define geographic license areas, as in the recently established Wireless Communications Service ("WCS"). See *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order in GN Docket No. 96-228, released February 19, 1997, at ¶54. In its Comments

III. THE COMMISSION IS OBLIGATED TO RESOLVE ALL PENDING LICENSING MATTERS BEFORE AUCTION

In its Petition (at 6-8), ProNet urged the Commission to resolve all outstanding litigation, including finder's preference requests under reconsideration or review, prior to conducting auctions, to enable auction participants to obtain complete information and to permit closure with respect to rules superseded by the 2nd R&O. In its Partial Opposition to Petition for Reconsideration, Nationwide Paging, Inc. ("NPI") opposes ProNet, arguing that a Finder's Preference Request filed by Airstar Paging, Inc. ("Airstar") and granted by the Commission prior to release of the 2nd R&O should be deemed dismissed in accordance with the concluding two sentences of the 2nd R&O's ¶18.

Although the Airstar/NPI Finder's Preference proceeding may be technically "pending" until final,^{21/} the Commission should decline to consider this and other similarly situated proceedings as within the ambit of ¶18. ProNet agrees with Airstar that the Commission's determination that NPI failed to comply with the terms of its authorizations must stand irrespective of its final decision on Airstar's entitlement to a Finder's Preference; absent reconsideration and reversal of the Commission's decision, NPI's licenses that are subject to Airstar's Finder's Preference should be terminated and made available for competitive bidding.^{22/} Accordingly, as stated in ProNet's

^{20/} (...continued)

on Petitions for Reconsideration (at 13-14), Airtouch supports Metrocall and PCIA. Should the Commission elect to use MEAs for paging geographic licensees, it should adopt the same MEAs and regional economic area groupings ("REAGs") adopted in the WCS proceeding. *Id.* at ¶¶54-59.

^{21/} NPI Partial Opposition, at 2.

^{22/} Airstar Petition for Clarification and Reconsideration, at 8. ProNet also agrees with Airstar that one sentence in the Commission's Notice of Proposed Rule Making was inadequate to advise parties that pending Finder's Preference Requests might be subject to dismissal. Moreover, by granting Airstar's Finder's Preference prior to issuance of the 2nd R&O, the Commission has treated this particular proceeding (continued...)

Petition, issues still pending on reconsideration in this and other similarly situated proceedings must be resolved before the relevant frequencies can be offered for competitive bidding.

IV. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission's Second Report and Order should be modified as set forth in ProNet's Petition and herein.

Respectfully submitted,

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^{22/} (...continued)

differently than other Finder's Preference Requests which the 2nd R&O formally dismissed. *See, e.g.*, March 13, 1997 Letter from William H. Kellett, Office of Operations, Wireless Telecommunications Bureau, to Frederick M. Joyce, Esq. and Paul G. Madison, Esq. dismissing Finder's Preference for Station WPDW380 (Reference No. 97F011).

CERTIFICATE OF SERVICE

I, Maleesha Spriggs, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 22nd day of May, 1997 caused copies of the foregoing "REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION" to be sent first class mail, and postage prepaid to the following:

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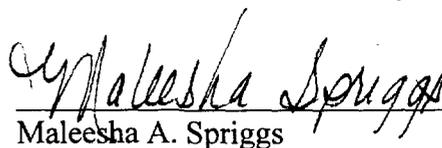
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