Dockets

Federal Communications Commission
Washington, D.C. 20554

JUN 2 1997

The Honorable Susan M. Collins
United States Senator
11 Lisbon Street
Lewiston, Maine 04240

Dear Senator Collins:

Thank you for the letter of March 13, 1997, from your State Office Representative, Dan Demeritt, on behalf of your constituent, Robert Kester, regarding the Commission's policies with regard to licensing of 931 MHz paging systems. Dr. Kester expresses concern that his paging application has not been granted and that paging frequencies will be awarded in a competitive bidding process.

On February 20, 1997, the Commission released a Second Report and Order and Further Notice of Proposed Rule Making in WT Docket 96-18 and PP Docket 93-253, which adopted rules governing geographic area licensing for Private Carrier and Common Carrier paging licenses and established competitive bidding procedures for those systems. For your convenience and information, enclosed is a copy of the Press Release concerning the Second Report and Order and Further Notice of Proposed Rule Making, which includes a summary of the principal decisions made. Specifically, all mutually exclusive applications for non-nationwide Common Carrier Paging licenses and exclusive non-nationwide Private Carrier Paging channels will be subject to competitive bidding procedures. Additionally, all pending mutually exclusive applications filed with the Commission on or before February 20, 1997, will be dismissed.

The Commission's interim paging freeze did not require prior issuance of a Notice of Proposed Rule Making. Indeed, the Commission has imposed freezes in a number of other proceedings to facilitate the transition to geographic licensing and auctions, including Multipoint Distribution Service, 800 and 900 MHz Specialized Mobile Radio (SMR) Service, Location and Monitoring Service, 220 MHz Service and 39 GHz Service. Our decision in these proceedings to suspend acceptance of applications while the related rulemaking was pending advances two critical goals -- preservation of our ability to assign licenses through auctions, and deterrence of license fraud and speculation. In particular, we are concerned that the potential benefits of geographic area licensing, with competitive bidding used to select from among competing applicants, would be undermined by continuing to invite site-specific applications for "free" spectrum on a first-come, first-served basis.

Assigning frequencies by auction, in turn, helps deter fraud and speculation and ensures that this valuable public resource is assigned rapidly and efficiently to the parties who value it the most, rather than given away to the first party who files its application with the Commission. The Commission has stated its belief in other contexts (such as Specialized Mobile Radio) that auctions will minimize administrative or judicial delays in licensing, particularly in comparison to other licensing methods such as comparative hearings, lotteries (which are specifically prohibited by the statute if the service is auctionable), or "first-come, first-served" procedures.

The Commission's newly adopted rules to auction paging frequencies is consistent with Section 309(j) of the Communications Act, which sets forth certain criteria for determining when auctions should be used to award spectrum licenses. Pursuant to these criteria, auctions are to be used to award mutually exclusive initial licenses or construction permits for services likely to involve the licensee receiving compensation from subscribers. The statute also requires that the Commission determine that auctioning the spectrum will further the public interest objectives of Section 309(j)(3) by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use.

Moreover, the Commission has taken a number of steps to ensure that paging providers that are small businesses are not adversely affected by the transition to geographic area licensing and the use of competitive bidding procedures to award paging licenses. Additionally, the Part 90 shared paging channels will not be auctioned; instead they will be licensed on a site-by-site basis. We are establishing licensing areas of a size that will provide realistic bidding opportunities for small and medium-sized operators. We have also adopted special provisions in our competitive bidding rules for small businesses to facilitate their participation in the auction process, including bidding credits and installment payment provisions. In the Further Notice of Proposed Rule Making, we have proposed to allow paging licensees to partition their licensing areas in order to promote quicker build-out of small markets and rural areas.

Thank you for your inquiry.

Sincerely,

David L. Furth /sc

David L. Furth
Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

Enclosure

SUSAN M. COLLINS
MAINE

United States Senate

WASHINGTON, DC 20510-1904

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11 Lisbon Street
Lewiston, Maine 04240
March 13, 1997

Federal Communications Commission
(Lou Sizemore) Room 808
1919 M Street, N.W.
Washington, DC 20554

Dear Mr. Sizemore:

I am writing on behalf of Dr. Robert Kester, M.D. of Lewiston, Maine. Dr. Kester's legal application for 931 Mhz pager licenses has been frozen by the FCC, and he has asked Senator Collins to inquire as to the reasons behind this decision.

Please respond in writing to the following questions:

1. Why was Dr. Kester's application frozen?

2. What is the current status of his application?

3. Can any action be taken by Senator Collins or Dr. Kester to resolve this issue?

For your convenience I have enclosed a copy of the letter and enclosure that Dr. Kester sent to Senator Collins. His social security number is 222-40-2629. If you need additional information from me, I can be reached at (207)784-6969.

Thank you in advance for responding to this inquiry. I look forward to your reply.

With best regards, I am

Sincerely,

Dan Demeritt

Dan Demeritt
State Office Representative to
Susan M. Collins
United States Senator

Robert R. Kester, M.D.
Adult And Pediatric Urology
10 High Street, Suite 301
Lewiston, Maine 04240
(207) 782-5055

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February 28, 1997

Senator Susan Collins
B-40 Dirksen Building
Washington, DC 20510

RE: F.C.C. Expropriation of Existing Legitimate 931 MHz Pager License Applications, and Proposed Auction Sale of the Enslaved Applications

Dear Senator Collins:

Your predesceor monitored this situation for me last year. Well, things have gotten worse. Now, Chairman Hundt, I am informed by his minion Sam Gumbert, has frozen the legal applications I made in 1995 and 1996 to acquire 931 MHz pager licenses. Why? The good Chairman is either dyslexic and reads his agency's initials as "I.R.S.", or he may be playing out his political ambitions on me and my fellow applicants.

It is grossly unfair, and likely illegal since there is no precedent for F.C.C.'s action, for F.C.C. to have held my applications hostage since February 8, 1996. F.C.C. is considering changing its rules to hold an auction for the very frequencies I have applied for (See enclosed Exhibit), in a transparent attempt to drive up auction revenues and to deny potential service in the interim.

I am considering retaining both a consulting firm as well as legal counsel, and I would like your opinion regarding this problem. I am available at my office number, above, and in the evenings at home (207-777-5994).

Thank you for your attention.

Cordially,

Robert R. Kester, M.D.

encl. (1) Exhibit
(2) Memorandum from John Pellegrin, Esq.

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MEMORANDUM FOR 931 MHZ APPLICANTS

From: John D. Pellegrin

Date: February 20, 1997

Re: **Report For Paging Applicants/Processing Status and Strategy**

This memo is designed to bring 931 MHz paging applicants current as to the status of their applications pending at the FCC. The memo will also discuss FCC policies which have contributed to this situation, and suggested strategies and possible remedies for applicants whose applications have not yet been processed.

Background

While we were successful in having the FCC overturn its original official freeze instituted in February 1996, the FCC has now imposed an unofficial *de facto* freeze since then. We are not aware of any applications which have been processed. Indeed, none have been dismissed, and none have been granted.

Why would the Commission do this? Where is the benefit to allow this backlog of applications to languish at the FCC? The Commission benefits because it has announced it is going to auction all remaining paging licenses in the near future, which will raise revenue for the US Treasury. The FCC will divide the country into geographic areas (roughly equivalent to the 50 states) and auction off the right to own all licenses remaining available in that particular geographic area. Obviously, the more licenses available the more valuable the geographic region, and the bigger the anticipated auction revenue for the FCC. While the Commission could theoretically limit the auctions to applicants already on file, this is not likely, if it chooses to maximize revenue.

Of course, the Commission would never admit it is higher auction prices which drives any of its policies with respect to trying to deny pending applications. But this practice is clear from the FCC treatment of licenses in auctions for other radio services, such as wireless cable (MMDS).

In order to give the FCC some justification for this policy, we have learned in our discussion

with engineering consultants that the FCC has adopted a very liberal interpretation of its rules to result in applications on file to block the processing of applications filed for other markets!

Assuming there are 30 931 MHZ applications available in a given market, if 31 applications are filed, then no one applicant can be granted under the Commission's existing processing policies. However, the Commission has expanded the possibility of an application being blocked by counting applications in other markets as well as the given market. The Commission does this by applying a so-called "daisy chain" theory.

Under the daisy chain theory, if one application in a market is overlapped by one application in another market, which could be 40 miles away, the Commission takes the position that in determining if it can award the 30 licenses in either market, it will consider the applications in the given market (Market A) as well as all applications in the distant market (Market B) which is overlapped by only one application from Market A! Despite the fact that there is only one link between the markets, i.e., one channel overlap out of 30 possible overlaps, the Commission still treats the two markets as the same market for mutual exclusivity purposes. Using this new approach, it is easy to see that very few applications could ever be granted.

Compounding the problem, our research does not find any instance where the Commission has clearly delineated this policy in its prior orders or decisions with respect to the 931 MHz service. Since your applications were filed pursuant to then-existing standards, we believe the FCC's imposition of this new processing standard without any notice or advisory is arbitrary and capricious.

Possible Solutions

The first possible solution is for each applicant to once again turn to your elected representatives in Congress. Essentially a letter-writing campaign should focus on the unfairness of holding your applications hostage while the FCC considers changing the rules to hold an auction for the frequencies you previously applied for, in a transparent attempt to drive up auction revenues and deny potential service in the interim.

Each applicant could also hire a consulting firm to perform an engineering search of the Commission's database to see if your application is actually blocked, using the Commission's "daisy chain" approach. If it is not, there is no reason for the Commission not to grant the application. We can recommend various firms, if you wish.

It is clear that the Commission intends to withhold processing your applications until it issues new auction rules. Only then will it probably dismiss all pending 931 MHz applications. Whenever those applications are dismissed, it would seem that a legal appeal could be filed based on the unfair and improper use of this "daisy chain" approach in the processing of 931 MHz paging applications. However, we do not recommend that you wait for this likely event.

We would consider approaching the FCC for a meeting to confirm the above scenario, and to determine with particularity that the Commission is indeed using the daisy chain interpretation of the rules described above, and to see if it will change its approach. We would then consider filing an appeal of any continued FCC processing freeze and attempt at denying your properly-filed

application, under the appropriate circumstances. Unfortunately, we are unable to guarantee we can undertake such an appeal at this time, unless the resources for doing this work become available.

We have also discovered that a Commission decision is imminent regarding the pending Rulemaking proceeding which commenced a year ago and which has had the effect of imposing an application processing freeze. The FCC will undoubtedly adopt an auction licensing regime. However, if pending applications can be shown not to be mutually exclusive, then they should not be subject to any auction protocol. Once the Commission decision is released, we should have more information available as to strategy alternatives.

We realize that all applicants have been extremely patient, and we will continue to work as best we can to find some solution to this processing stalemate at the Commission. We would be glad to suggest language for letters to Congressional representatives, and your thoughts and comments regarding this memo are welcome.

*** * * Law Offices of John D. Pellegrin, Chartered * * ***