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JUN 18 1997

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

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS	)	GEN Docket No. 90-314 ET Docket No. 92-100
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS	)	PP Docket No. 93-253

COMMENTS OF METROCALL, INC.

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SUMMARY

Metrocall urges the FCC to license the remaining, allocated Narrowband PCS on an MTA and regional basis only. BTAs are too small to support viable NPCS systems, and will increase inefficiencies and costs to applicants attempting to aggregate multiple BTA licenses. Nationwide licenses, however, will be far too large and costly for small and mid-size businesses to obtain at auction and build out. Regional and MTA licenses will permit carriers of all sizes to participate in the provision of NPCS services.

Eligibility restrictions for the paging response channels should remain in place. Paging companies are in a position to immediately put that spectrum to use in serving the public, and many have foregone the opportunity to compete in previous auctions in reliance upon the availability of those channels. Since the only parties requesting open eligibility are paging companies who would be eligible for these channels in any event, any "non-conforming" use they propose would be more appropriately addressed by waivers.

The Reserved Spectrum should not be channelized and licensed at this time. Much of the original allocation has not yet been auctioned. The FCC should license the remaining allocated channels, and give the industry time to develop, before "flooding the market" with the Reserved Spectrum.

Construction benchmarks should be retained for NPCS. While flexible benchmarks may be more appropriate for a new service like NPCS than for existing services, applicants and the public need clear, understandable construction rules to ensure that NPCS spectrum is not warehoused.

Metrocall supports the FCC's proposals for partitioning of NPCS licenses; however,

Metrocall is not certain that disaggregation is technically feasible for NPCS. At a minimum, the FCC should not permit disaggregation of the response channels.

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To: The Commission

COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these Comments in response to the Further Notice of Proposed Rule Making ("FNPRM")[1] in the above-referenced proceeding. In support hereof, the following is respectfully shown:

I. Statement of Interest.

Metrocall is one of the largest publicly traded paging companies in the nation (NASDAQ trading symbol: "MCLL"). Through its licensee-subsidiary, Metrocall USA, Inc., Metrocall provides commercial radio paging services throughout many areas of the United States. Through its corporate predecessors, Metrocall has provided paging services for more than a decade, and it continues to undergo tremendous growth. Metrocall's paging facilities serve the Northeast, Mid-Atlantic, Southeast, Southwest and West Coast, and it is in the process of expanding that network throughout other regions of the country through "new" applications and through

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[1] The FNPRM was released as part of a Report and Order and Further Notice of Proposed Rule Making, FCC 97-140 (released April 23, 1997).

acquisitions. Over its paging facilities, Metrocall currently serves more than two million subscribers, and is actively pursuing business plans to increase its customer base nationwide.

Like many paging companies, Metrocall is interested in the development of narrowband personal communications services ("NPCS"), both as a prospective provider of NPCS services, and as an incumbent licensee who will almost surely compete with other carriers' NPCS offerings. Therefore, Metrocall has standing as a party in interest in this proceeding.

II. Summary of the FNPRM.

The FNPRM proposes broad changes to the Commission's Rules governing the allocation and licensing of NPCS. Only those proposals which are addressed in these Comments are summarized here.

The FNPRM proposes a reallocation of the remaining NPCS channels that have been allocated and channelized, but not yet auctioned. The Commission proposes to eliminate licensing on a Basic Trading Area ("BTA") basis, and license these channels based on a combination of nationwide, regional and Major Trading Area ("MTA") service areas. See FNPRM at ¶ 31. Under the Commission's proposal, the two remaining 50 kHz pairs would be redesignated as nationwide channels. Id. Of the five 50/12.5 kHz pairs, one would be redesignated for nationwide licensing; three for regional licensing; and one for MTA licensing. Id. The four BTA-based 12.5 kHz response channels would be redesignated for regional licensing. Id. The Commission seeks comment on the effect of this proposed rechannelization on small businesses, as well as incumbent nationwide and regional NPCS licensees. Id. at ¶¶ 31-32. The FNPRM appears to indicate that the MTA-based response channels will remain allocated on an MTA basis. Id. at ¶ 40.

The Commission further proposes to channelize and license the one MHz of NPCS spectrum which is currently reserved (the "Reserved Spectrum"). Id. at ¶ 34. The Commission requests comment on a channelization plan for the Reserved Spectrum, and questions whether paired or unpaired channels should be created. Id. The Commission also seeks comment on whether the current NPCS aggregation limit of three 50 kHz channels should be modified in light of the proposal to license the Reserved Spectrum. Id. at ¶ 35.

The FNPRM also proposes to lift the eligibility restrictions on the response channels; eligibility for those channels is currently limited to one-way paging licensees. Id. at ¶ 40. The Commission also proposes eliminating the restriction that these channels be limited to mobile-to-base communications. Id.

The Commission also proposes revising the construction benchmarks for NPCS licensees, by allowing NPCS licensees to make a showing of "substantial service." Id. at ¶ 44. The FCC questions whether the geographic coverage requirements imposed by the current Rules remain necessary if a "substantial service" coverage requirement is adopted. Id. If those coverage benchmarks are retained, the Commission asks whether they should be conformed to the benchmark periods for paging services. Id. at ¶ 45. Finally, the Commission questions whether to eliminate all coverage requirements for NPCS Id. at ¶ 46.

The FNPRM proposes a partitioning scheme for NPCS similar to that adopted for broadband PCS. Id. at ¶ 88. The FNPRM proposes that NPCS licensees would be permitted to partition portions of their service areas to any entity qualified to hold an NPCS license, although it questions whether partitioning should be limited to rural telephone companies, as was the case for the initial broadband PCS rules. Id. The Commission proposes that partitioning be permitted

at any time during the license term, and that partitionees would hold their partitioned licenses for the remainder of the partitioner's 10-year license term. Id. at ¶¶ 89-90. The Commission also proposes that partitioning be permitted based on any geographic area defined by the parties. Id. at ¶ 91. The Commission seeks comment on the construction requirements applicable to partitioned licenses, and proposes two options: one by which the partitionee certifies that it will meet the requirements for the partitioned area and the partitioner certifies that it will meet the requirements in the area it retains; the other by which the original licensee/partitioner certifies that it will meet the requirements for the entire area. Id. at ¶ 92. The Commission also proposes to apply its unjust enrichment provisions where small businesses seek to partition to entities that do not qualify for bidding credits and installment payments (or that qualify for less favorable credits and installment plans). Id. at ¶¶ 93-95.

The FNPRM seeks comment on the feasibility of spectrum disaggregation for NPCS, including whether minimum standards for disaggregation should be required. Id. at ¶ 96. The Commission seeks comment on the respective construction obligations that should be imposed on parties to a disaggregation arrangement, id. at ¶ 97; and how to apply its unjust enrichment provisions to disaggregation by small businesses. Id. at ¶¶ 98-99.

III. The Commission Should Rechannelize the Allocated NPCS Spectrum to Regional and MTA Licenses Only.

Metrocall concurs with the Commission and commenters that BTA-based licensing will generally not provide licensees with a sufficient service area, and will increase the burdens on licensees in attempting to aggregate BTAs at auction. See FNPRM at ¶¶ 27, 29. Metrocall believes that advanced services such as NPCS are best suited to wide-area licensing; since the spectrum on which NPCS services are to be provided is unencumbered, it makes sense to grant

the initial licenses for this service on a wide-area basis. Metrocall further submits that BTAs are simply too small to allow for the efficient development of wide-area NPCS networks. Metrocall therefore supports the Commission's proposal to allocate the channels currently allocated on a BTA basis to larger service areas.

Nonetheless, Metrocall respectfully submits that the Commission's proposal to create more nationwide channels will have the effect of precluding smaller businesses from effectively competing for NPCS licenses. Small and mid-sized companies generally lack the ability to compete against the largest firms for large geographic areas. Indeed, as the licensee of two nationwide networks on 929 MHz paging frequencies, Metrocall is well aware that the construction and operation of a nationwide network is a daunting task even for a large carrier. When the cost of obtaining a license at auction are added to those substantial build-out costs, nationwide licensing would likely place many of the remaining NPCS channels beyond the reach of most prospective licensees. Moreover, recent requests for modification of the FCC's PCS license payment requirements strongly suggest that PCS licensees are having difficulty paying for their FCC licenses, while trying to build and operate wide-area networks. See Public Notice, DA 97-679 (released June 2, 1997).

Metrocall therefore recommends adopting a channelization plan for the remaining channels that combines regional and MTA licenses. A combination of regional and MTA licensing appropriately balances the needs of larger carriers, or consortia of carriers, to establish wide-area networks, while retaining genuine opportunities for entry by smaller businesses.

Metrocall strongly supports rechannelizing some of the remaining spectrum for regional licensing. Issuing licenses on a regional basis will allow for economies of scale that may not be

possible with smaller license areas, and will provide licensees with the most efficient licensing area for the construction of wide-area networks. Additionally, while regional licensing may be of greatest value to large carriers, the other proposals in the FNPRM, such as the Commission's proposed partitioning rules, may enable small businesses to compete effectively for those large license areas as well.

MTA licensing for some of the remaining channels will allow for service areas that companies other than the largest firms can realistically compete for and build out. Conversely, MTAs are still large enough to allow license winners to offer competitive, wide-area NPCS services, without the inefficiencies and costs attendant to bidding for multiple BTAs. Additionally, to the extent that the Commission retains the current eligibility restrictions for the response channels, those channels should be licensed on an MTA basis, so that they can be more readily integrated with existing 900 MHz paging operations.

IV. The Reserved Spectrum Should Not be Opened for Licensing at this Time.

Metrocall respectfully submits that the Commission's proposal to channelize and license the Reserved Spectrum is premature. The NPCS industry is still in the developmental stages, and the demand for NPCS services is still uncertain. For example, without a history of operational NPCS systems, it is difficult to respond to the FNPRM's queries as to whether channelizing the Reserved Spectrum into larger blocks would be appropriate or useful. Moreover, there is still a significant amount of spectrum from the initial two MHz allocation to be licensed; auctions have not yet been held for the current "MTA," "BTA" and "response" channels.

Metrocall submits that the Commission should rechannelize and auction the remaining,

previously-allocated spectrum before deciding issues connected to the Reserved Spectrum. Merely placing more spectrum "on the block" for auction is contrary to the Commission's statutory auction authority, and disserves the public interest. Nothing in Section 309(j) instructs the Commission to ignore good spectrum management policies. To the contrary, that statutory provision, by requiring the Commission to make sure that new services are rapidly deployed, reminding the Commission of its obligations to avoid mutual exclusivity, and prohibiting the Commission from basing allocation decisions on projected auction revenues, reaffirms the Commission's core obligation to license radio facilities in the public's interest. See 47 U.S.C. § 309(j).

Creating a spectrum "glut" does not meet those statutory directives. For a fledgling service such as NPCS, licensing too much spectrum immediately may prevent any single licensee from earning a return on its investment, potentially depriving the public of new and innovative services. Again, the many recent requests for relief from the FCC's PCS license payment requirements surely suggest that the industry is having difficulty finding the capital to build out the spectrum that the FCC has *already* licensed. See Public Notice, DA 97-679, *supra*. Moreover, making excess spectrum available for licensing may skew auction results, leading to either a "gold rush" mentality on the part of applicants (as may have been the case for many in the first IVDS auction) or bids that substantially undervalue the offered channels (as was apparently the case in the recent WCS auction).

Metrocall respectfully submits that the more reasoned approach would be to proceed with licensing the remaining allocated channels, and providing the NPCS industry with an opportunity to establish itself somewhat, before licensing the Reserved Spectrum.

V. Coverage Requirements are Necessary.

Metrocall respectfully submits that the Commission should retain the current construction benchmarks for NPCS. The five and ten year coverage benchmarks for NPCS should not be conformed to the three and five year benchmarks for paging. Paging is a well-established industry; the technology is mature and equipment is readily available. The paging market is also highly competitive and many geographic areas are heavily encumbered; if a paging geographic licensee cannot meet strict benchmarks, within relatively brief periods of time, it is imperative that that geographic licensee not be permitted to block expansion by incumbents or otherwise warehouse channels for which others have a proven need. In contrast, NPCS is a young service; it remains largely untried in the market. Providing longer benchmark periods for NPCS will provide participants in this new industry the necessary flexibility to design their systems most efficiently.

The need for flexibility, however, does not justify an elimination of construction requirements. While warehousing may be less of a threat where licensees have paid large sums of money for their licenses, the Commission nonetheless has an obligation to ensure that spectrum does not lie fallow. Indeed, one of the overriding goals of Section 309(j) is "the rapid deployment of new technologies and services to the public." See 47 U.S.C. § 309(j)(3)(A). To this end, Congress specifically instructed the Commission to adopt performance standards for licenses obtained through auction. See 47 U.S.C. § 309(j)(4)(B). Reasonable construction requirements further the statutory goal of expediting service to the public.

Although Metrocall objected strongly to the adoption of a "substantial service" construction alternative in the context of wide-area paging licensing, a flexible alternative

standard (in addition to the existing coverage benchmarks) might be appropriate for a new and developing service like NPCS. Nonetheless, that alternative should not be adopted without a clearer statement of what will constitute "substantial service." Such a vague requirement is readily susceptible to abuse, and will be difficult for the Commission to enforce. Without standards to which to hold licensees, a "substantial service" alternative would allow speculators and warehousers an opportunity to maintain their licenses without any significant investment in providing services to the public. Conversely, *bona fide* NPCS licensees are entitled to "rules ... that are reasonably comprehensible to [people] of good faith" defining the conduct that is required of them to maintain their licenses. See, *e.g.*, McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (citations omitted). Unless the Commission can devise a "substantial service" showing that provides licensees and the public with some certainty as to the requirements governing NPCS construction, it should leave the current geographic and population benchmarks unaltered.

VI. Eligibility Restrictions for the Response Channels Must be Maintained.

The paging industry has patiently waited for the FCC to license the 900 MHz "talk-back" channels for several years now. In the interim, there have been no new spectrum allocations for paging, *and*, the FCC has imposed a licensing freeze on new paging grants. To change the rules now, and open those response channels to anyone, whether they've operated paging systems or not, is entirely unfair and will ultimately prove counterproductive.

Paging system operators *alone* are most likely to put those channels to immediate use, since they would be paired with constructed and operational paging systems. Paging licensees also have reliance interests in this spectrum: many paging operators "bowed out" of previous

NPCS auctions, since the FCC had promised that these channels would be available to them. The market size and channelization made them an inherently better choice for many paging systems. The reasonable reliance of those paging licensees must not be defeated by retroactive rule making. See, *e.g.*, 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").

The FCC should not now change the eligibility rules without any public interest justification. The FNPRM states that eliminating the eligibility restrictions will "increase competition for these channels." FNPRM at ¶ 40. To the extent that the Commission's justification is to drive up auction prices, that is unlawful. See 47 U.S.C. § 309(j)(7)(A).

That justification may be factually misguided as well. Oddly, the only requests to open these channels to all comers are made by two paging licensees, who would be eligible to bid on them in any event. See FNPRM at ¶¶ 37-39. The record, as summarized by the FNPRM, reveals no interest in obtaining these channels by *any* party which does not already hold paging licenses. Id. To the extent that one or two paging licensees - who are already eligible for the response channels - would like to use them for purposes other than as "talk-back" channels for their existing paging frequencies, those individualized uses would be more appropriately addressed through requests for waiver than through wholesale reallocation of the channels.

VII. Partitioning and Disaggregation.

Metrocall generally supports the Commission's proposal to allow NPCS licensees to partition and disaggregate their channels. For other auctionable services, the Commission has noted the benefits that partitioning affords in terms of enhancing licensee flexibility to tailor

their service offerings in response to public demand, and promoting small businesses entry in telecommunications industries. See, *e.g.*, Second Report & Order and Further Notice of Proposed Rule Making in WT Docket No. 96-18 and PP Docket No. 93-253, FCC 97-59, ¶¶ 203, 209 (released February 24, 1997). There does not appear to be any principled reason to treat NPCS licensees differently than licensees in other services with regard to partitioning. Partitioning should be permitted on any geographic area determined by the parties, and any party eligible to hold an NPCS licensee should be permitted to become a partitionee. As proposed, partitionees should hold their licensees for the remainder of the partitioner's ten-year license term.

Disaggregation may hold similar benefits for NPCS licensees; however, Metrocall is not certain that the Commission's proposal to allow disaggregation for these channels is technically feasible. In particular, Metrocall is concerned that the unpaired 12.5 kHz response channels may not be suitable for disaggregation. In the Commission's paging licensing and auction docket, Metrocall and other commenters responding to the Further Notice of Proposed Rule Making voiced skepticism that viable services could be provided through disaggregated portions of 25 kHz paging channels. See, *e.g.*, Comments of Personal Communications Industry Association at 8; Comments of Metrocall, Inc. at 23. The NPCS response channels are one-half the bandwidth of standard paging channels; Metrocall doubts that such small channels could be further divided and still provide useful services to subscribers. Consequently, even if the Commission permits disaggregation for the 50 kHz pairs, the 50/12.5 kHz pairs, and the 50 kHz unpaired channels, Metrocall does not believe it is advisable to allow disaggregation of the response channels at this time. The Commission's waiver procedures provide sufficient flexibility in the event that a

licensee can demonstrate a technically viable disaggregation proposal.

Metrocall supports the Commission's proposals to allow the parties to partitioning arrangements the choice of one of two alternatives for meeting the construction benchmarks; if disaggregation is permitted, Metrocall suggests that similar provisions be adopted for disaggregation. Metrocall supports the Commission's proposed application of the general Part 1 "unjust enrichment" provisions to all NPCS transactions, including partitioning arrangements and, if permitted, disaggregation arrangements. For partitioning, the relative value of the area partitioned should be determined based upon the population of the partitioned area compared to the area retained by the initial licensee. If disaggregation is permitted, the relative value of the disaggregated channel should be based upon the amount of spectrum granted to the disaggregatee compared to the amount retained by the original licensee.

Conclusion

WHEREFORE, the foregoing premises considered, Metrocall respectfully requests that the Commission adopt modified rules for narrowband personal communications services in accordance with these Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Regina Wingfield, a secretary in the law firm of Joyce & Jacobs, Attys. at Law, L.L.P., certify that on this 18th day of June, 1997, copies of the foregoing Comments of Metrocall, Inc. were sent via first class U.S. mail, postage prepaid, to the following:

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