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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Daniel B. Phythyon, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, DC 20554

Re: CC Dockets Nos. 96-98 and 95-185
Ex Parte Presentation

Dear Mr. Phythyon:

Paging Network, Inc. ("PageNet"), AirTouch Paging ("AirTouch") and the Personal Communications Industry Association ("PCIA") (collectively, the "Respondents") submit this letter in response to an invitation made by the staff of the Wireless Telecommunications Bureau at an *ex parte* meeting on Monday, June 23, 1997. The meeting was held to discuss issues related to certain petitions for reconsideration of the Commission's August 8, 1996, First Report and Order in CC Dockets Nos. 96-98 and 95-185. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15996 (1996)(subsequent history omitted) ("Local Competition Order"). Specifically, the Respondents took the opportunity to address why they believe that commercial mobile radio paging service should be classified as "telephone exchange service" under the Communications Act of 1934 (the "Act") as amended by the Telecommunications Act of 1996 (the "1996 Act"), an issue raised in petitions for reconsideration by PageNet and AirTouch. *See* Petition for Limited Reconsideration, filed by PageNet in CC Dockets Nos. 96-68 and 95-185 (Sept. 30, 1996) at 13-17 ("PageNet Petition"); Petition for Partial Reconsideration and/or Clarification, filed by AirTouch in CC Dockets Nos. 96-68 and 95-185 (Sept. 30, 1996) at 7-12 ("AirTouch Petition"). During the meeting, the Bureau asked

the Respondents to address the significance, if any, of the general description of telephone exchange service articulated by the Commission over twenty years ago in *Midwest Corp.*, 53 FCC 2d 294 (1975) on whether CMRS paging is "telephone exchange service," as defined in the Act. *See* 47 U.S.C. § 153(47). In these decisions, the Commission said that telephone exchange service is "ordinarily characterized by the provision of two-way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area." *Midwest Corp.*, 53 FCC 2d 294, 300 (1975). *See also Domestic Public Radio Service*, 76 FCC 2d 273, 281 (1980) ("DPRS"); *Offshore Telephone Company*, 3 FCC Rcd 4513 (1988); *Offshore Telephone Company v. South Central Bell Telephone Company, et al.*, 2 FCC Rcd 4546 (1987)("OTC v. SCBT"). The Bureau invited the Respondents to address this matter in writing.

As detailed below, the Commission should not apply the *Midwest Corp.* general description to resolve on reconsideration the issue of whether paging is "telephone exchange service." As PageNet and AirTouch amply demonstrated in their petitions for reconsideration, paging carriers do, in fact, provide "telephone exchange service" within the meaning of Section 154(47) of the Act and that the Commission has always held that view. *See decisions discussed in PageNet Petition* at 14-15; *AirTouch Petition* at 7-10. The description provided in *Midwest Corp.*, which in this context should be considered *dicta*, is far narrower than the scope of the term as set forth in the Act even prior to the 1996 Act. At most, the general description provided in *Midwest Corp.* described a category of telephone exchange service, but is not all inclusive. The 1996 Act broadened the previous definition by *adding* an alternative definition for "comparable service" without disturbing the validity of the pre-existing definition. Therefore, any service, such as paging, meeting the statutory definition *prior* to the 1996 Act must meet the definition since the passage of the recent amendments. Moreover, in its *Local Competition Order*, the Commission, without analysis, explanation, or citation, suggested that paging carriers do not provide telephone exchange service. 11 FCC Rcd at 15996. Under the expanded definition, paging should continue to be treated as "telephone exchange service," as the Commission has done historically; the Commission should reconsider its unsupported statements in the *Local Competition Order* to the contrary.

1. Previous Invocations of the Midwest Corp. *Description of "Telephone Exchange Service" Involved Services Extremely Dissimilar to Those Provided By Traditional Local Exchange Carriers and Paging Carriers.*

Midwest Corp., like *DPRS*, addressed the issue of whether, under the pre-1996 Act and the Commission's then current regulations, applications for multipoint distribution service ("MDS") radio licenses required demonstration of state authority for local exchange service in order to be acceptable for filing. Respondents in *Midwest* successfully defended

against challenges to their MDS applications, which lacked such demonstration, on the grounds that MDS was not a telephone exchange service regulated by the states. The Commission analyzed the status of MDS in the context of Section 221(b) of the Act, which provides that

> [s]ubject to the provisions of Section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service. . . .[1]

The Commission reasoned that, if MDS were not a telephone exchange service, the Commission was not constrained from accepting MDS license applications for filing on the basis that state certificates had not been granted to MDS applicants.

The Commission described MDS stations as providing "omnidirectional one-way radio transmission of information [usually video] for simultaneous reception at multiple fixed points within the station's service area." *Midwest Corp.*, 53 FCC 2d at 296. *Accord DPRS* 76 FCC 2d at 281 ("MDS utilizes what is essentially a broadcasting technology to distribute multiple address broadband communications (usually forms of television) simultaneously to the members of commercial and other institutional subscribers in accordance with their specific transmission, reception, and informational requirements.") In contrast, the Commission said that telephone exchange service is "*ordinarily* characterized by the provision of two-way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area." *Midwest Corp.*, 53 FCC 2d. at 300 (emphasis supplied); *compare DPRS* 75 FCC 2d at 281 (same definition, except "generally" as opposed to "ordinarily").

The Commission found that MDS was not "telephone exchange service" principally because the service did not involve communications between individuals. Rather, MDS transmissions were intended for reception by a large number of diverse individuals, more akin to broadcasting and cable television. *Midwest Corp.*, 53 FCC 2d at 300-01. Although the Commission also noted that the transmissions were primarily one-way, this was not on its own sufficient to exclude MDS from the definition of "telephone exchange service." *See Id.* Accordingly, the Commission concluded that MDS was not a "telephone exchange service"

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[1] 47 U.S.C. § 221(b).

as referenced in Section 221(b).[2] The Commission in *Midwest Corp.* upheld the acceptance of the applications at issue without state certificates. In *DPRS*, the Commission codified the *Midwest Corp.* decision into its regulations.

Since *DPRS*, the Commission has invoked the *Midwest Corp.* description in only one other circumstance, specifically in a pair of cases concerning the Offshore Telephone Company ("OTC"). OTC used point-to-point microwave radio facilities to provide channels linking offshore oil platforms, rigs, and vessels to onshore local exchange companies.[3] In 1988, the Commission determined that OTC did not provide telephone exchange service as required to be eligible for membership in the National Exchange Carriers Association ("NECA"), The *Offshore Telephone Company*, 3 FCC Rcd at 4517-18. A year earlier, the Commission had concluded that OTC failed to demonstrate that in the mid-1970's it provided telephone exchange services that were like those provided by local exchange carriers with whom AT&T had a toll settlements procedure. Accordingly, OTC's complaint against AT&T and South Central Bell for excluding OTC from joint provision of service agreements in alleged violation of the antidiscrimination provisions of Section 202(a) of the Act was denied. *OTC v. SCBT*, 2 FCC Rcd 4546.[4]

In both OTC cases, the Commission's primary emphasis in excluding OTC was on the facts that OTC served only one type of user, performed no switching of its own, and provided no evidence that the facility could be used for any significant inter-rig calling between unassociated subscribers.[5] The Commission's decisions suggest that it was the totality of these factors that dictated the result it reached, and that none of these factors would have been sufficient, standing alone, to disqualify OTC's services from the scope of "telephone exchange services." *See, e.g.*, 3 FCC Rcd at 4519, 2 FCC Rcd at 4554.

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[2] It should also be noted that MDS did not involve either switching of telecommunications (which is required under the Act) or interconnection with the public switched network. Paging services do both.

[3] OTC, however, did not provide any switching of the calls and indeed passed through the LEC switching and local access charges. OTC's service was very akin to a private line service.

[4] It is apparent from the record in this case that the resolution regarding OTC was very fact specific and in the context of a complaint. For example, the Commission disregarded certain arguments because they were not supported by record evidence.

[5] The Commission also spent considerable time reviewing the cost basis of OTC's service and concludes that this service did not fall within the toll settlement rate band.

As the description of the MDS and OTC cases makes clear, the *Midwest Corp.* general description of "telephone exchange service" has been invoked in only limited circumstances. In fact, it has been used to distinguish only two unique types of service from "telephone exchange service," neither of which bears any resemblance to paging service.

MDS, for example, is a broadcast-type service which involves no switching or interconnection with the PSTN, but merely the point-to-multipoint transmission of video programming. Each paging call, in contrast, is a single communication by a system interconnected with the PSTN involving switching of the call between two individuals of numeric, alphanumeric ("text"), or voice communications.

Similarly, the OTC service was markedly different from paging. Unlike CMRS paging service, which is equally available to all, OTC's service was available only to offshore oil companies and related entities and was a point-to-point service. In addition, the OTC facilities performed no switching of their own. Rather, the land-based local telephone companies provided switching.[6] Paging companies, in contrast, utilize mobile terminal switching offices, which provide switching functionalities to terminate paging calls originated on the LEC networks. In short, the services distinguished from "telephone exchange services" in the MDS and OTC cases are markedly different from paging service.

2. *The Commission Historically Has Treated Paging Service as Telephone Exchange Service.*

Not only are the MDS and OTC services substantially different from paging services; but, as detailed in the *PageNet* and *AirTouch Petitions*, the FCC historically has treated paging service as "telephone exchange service" under Sections 3 and 221(b) of the Act. Indeed, subsequent to the *Midwest Corp.* and *DPRS* decisions, the Commission reaffirmed that, under Section 221(b), common carrier paging involves "telephone exchange service." In a decision addressing the ability of states to regulate common carrier paging service offered over FM subcarrier channels, the Commission explained that it

> has generally considered the type of service here in question *(i.e., paging service interconnected with the public switched telephone network) to be "telephone exchange service" within the meaning of Section 221(b). See*

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[6] Although OTC argued that other LECs had subcontracted out switching, the Commission rejected this conclusion for lack of record evidence. It is not clear whether the result would have been the same if OTC had provided this evidence. Nonetheless, the fact remains that paging networks do perform switching functions.

> Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 FCC 2d 830 (1965); FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); and MTS and WATS Market Structure, Phase I, FCC 84-36, 49 Fed. Reg. 7810 (March 2, 1984), at para. 149. *See also United States v. American Telephone and Telegraph Co.*, slip Op. 82-0192 (D.D.C. November 1, 1983), at pp. 4-6.[7]

The Commission explained further that, "[a]t the federal level, paging appears to have been viewed historically as an adjunct or complement to two-way mobile telephone services and therefore deserving of identical regulation."[8] The need for identical regulation of paging with other CMRS providers still applies in this context, especially given that many providers of broadband CMRS service — cellular, PCS, and SMR — also provide paging services in direct competition with traditional paging carriers, such as PageNet and AirTouch. Thus, the Commission itself has never applied *Midwest Corp.'s* two-way voice description of "telephone exchange services" to paging in the over twenty years since it was articulated, presumably because it has always been clear that common carrier paging is "telephone exchange service" under Sections 3 and 221(b) of the Act and that two-way voice was not a requirement.[9]

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[7] *Subsidiary Communications Authorization*, 98 F.C.C. 2d 792, 805 n. 29 (1984) (emphasis in original). Importantly, in this decision, the Commission acknowledged the *Midwest Corp.* case as providing support for the Commission's authority, despite Section 221(b)'s preservation of state regulation over telephone exchange services, to preempt state regulation that has the effect of impeding entry of local/intrastate common carrier paging services. *Id.* at 804 & n. 25.

[8] *Id.* at 805 n. 29.

[9] The ILECs have also argued that paging was an exchange service in other contexts as well *when* it suited them. For example, at divestiture, the ILECs and the Department of Justice concluded that paging was an exchange service and therefore the assets should be awarded to the LECs and not AT&T. *See United States of America v. Western Electric Company, Inc. and American Telephone & Telegraph Co.*, 1983 U.S. DIST. LEXIS 10190 p. 4.

3. *The* Midwest Corp. *Description Is Narrower Than the Statutory Definition Contained in the 1934 and 1996 Acts.*

The two-way voice description in *Midwest Corp.* should not be viewed as any indication of the proper meaning of telephone exchange service because the description is not on all fours with either the pre-1996 Act or the 1996 Act's definition of "telephone exchange service." As an initial matter, on its face, the *Midwest Corp.* description contains several exclusionary terms not contained within the statutory language, such as "voice" and "two-way." The statutory definition following passage of the 1996 Act mentions neither of these terms, nor are they implied:

> TELEPHONE EXCHANGE SERVICE. — The term "telephone exchange service means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[10]

Indeed, the description of "telephone exchange service" in *Midwest Corp.*, *DPRS*, and the OTC cases was not intended to be anything more than a general description, as a reading of those decisions demonstrates. The Commission stated in *Midwest Corp.* that the description it provided was what was "ordinarily" considered to be "telephone exchange service," making clear that other services falling outside the "ordinary" description are considered "telephone exchange service," as the Commission had treated paging for years (until the anomalous *Local Competition Order*). Similarly, in *DPRS*, the Commission observed that the *Midwest Corp.* description was "generally" appropriate.

Moreover, it is significant that, as detailed earlier, in none of the few isolated cases where the two-way voice description in *Midwest Corp.* was articulated were the services at issue even close to meeting the "general" description. Stated otherwise, a precise phrasing of what was included within the scope of "telephone exchange service" was not called for in the MDS and OTC cases, fatally undermining the reliability of the *Midwest Corp.* description

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[10] 47 U.S.C. § 153(47). Notably, subsection (A) of this definition represented the entire definition prior to the 1996 Act. Accordingly, the definition of "telephone exchange service" is broader than it had been. The previous, narrower definition, nonetheless, was sufficiently broad to include CMRS paging services, as the FCC found on numerous occasions, so the broader definition must *a fortiori* support paging services.

as a standard. Further, these services are all markedly different from paging. Accordingly, the two-way voice description in *Midwest Corp.* should not be used for evaluating whether a service is "telephone exchange service" under the Act.

To the contrary, first, "telephone exchange service" must not be limited to voice communications, but includes other basic service offerings, such as ISDN, frame relay, asynchronous transfer mode (ATM), and switched multimegabit data service (SMDS). *See, e.g., Independent Data Communications Manufacturers' Association, Inc.*, 10 FCC Rcd 13717 (1995) (finding frame relay is basic service); *Bell Operating Companies Joint Petition for Waiver of* Computer II *Rules*, 10 FCC Rcd 13758 (1995) (BOCs provision of ISDN, ATM, frame relay, and SMDS are basic network service offerings that must be tariffed). Accordingly, any effort at interpreting or applying the statutory definition of "telephone exchange service" must include non-voice basic services. Accordingly, it would include tone and alphanumeric paging services.

Second, the definition does not require "telephone exchange services" to be two-way. Nonetheless, the paging services provided do have a two-way exchange, as the paging network, a surrogate for the called party, does respond to the calling party. The statutory definition does not refer to two-way service. Moreover, because the communications are between two individuals, paging is an "intercommunicating" service. *Webster's Collegiate Dictionary* at 596 (G&C Merriam Company, Springfield, MA, 1973), includes within its definition of "intercommunicate" "to afford *passage from one to another.*" An interactive, two-way exchange is not required under Section 153(47). Whenever a calling party calls a paging unit, it receives a response alerting the calling party that it may leave a number or message and a response that the number or message has been accepted for delivery.[11] In addition, many wireline two-way service providers, such as broadband PCS and cellular carriers, offer paging and voice messaging services over interconnected facilities that are identical to the services of PageNet, AirTouch, and other paging carriers. When provided by these broadband licenses, these services have been accorded the status of "telephone exchange service" under the 1996 Act and the *Local Competition Orders*, for purposes of 251(c)(2) interconnection as well as numbering issues. To exclude services provided by CMRS paging carriers would be discriminatory and confer an artificial regulatory advantage upon paging services adjunct to other CMRS services.

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[11] In addition, the paging carriers are introducing several new two-way offerings that will enhance the in-bound and out-bound communications capabilities of paging services. Specifically, in new "two-way" services offered by paging carriers, a communication may be returned from the paging unit to the calling party to acknowledge receipt of the page.

Third, paging involves single communications "between individuals." The calling party and the holder of the mobile unit (presumably the party the caller wants to page) are the only two individuals aware of the communications. In contrast, the MDS service that led to the discussion in *Midwest Corp.* was an indiscriminate, omnidirectional service that could be received by a multitude of subscribers, much as is broadcast service. Some have questioned whether paging really is communications between the calling party and the mobile unit, suggesting that paging really involves two communications, the first between the calling party and the paging carriers' switch, and the second between the switch and the mobile unit over the paging carriers' facilities. Such attempt to dissect a paging communication is mere sophistry and does not withstand any reasonable analysis. The paging call is no different than the reorigination of the calling party's call in many other current basic services, including 1-800-CALL-ATT and 1-800-OPERATOR. The fact that a "middleman" may reoriginate a call to deliver it to its final destination does not defeat the unitary nature of the call. *See, e.g.*, *The Time Machine, Inc.*, 11 FCC Rcd 1186, 1190 (1996) (debit card services, whereby the caller first dials an 800 number, are single end-to-end communications); *Teleconnect Company*, 77 RR 2d 409, 411, 413 (1995) (intermediate switching of call at platform reached by an 800 number did not defeat the nature of the communication as a single, end-to-end call; from the caller's perspective, any switching during the call is transparent).[12] The Commission and Bureau should therefore conclude that a page involves a single communication between the calling party and the mobile unit, *i.e.*, between individuals.

4. Conclusion.

In sum, the Commission should find the service provided by paging carriers to be "telephone exchange service." The Commission should grant the *PageNet* and *AirTouch Petitions* and conclude that paging service continues to meet the definition of "telephone exchange service" in Section 153(47) of the 1996 Act, as it has for at least three decades. The *Midwest Corp.* description of "telephone exchange service" is, in fact, narrower than that contained in the Act, and was never meant to be used as a precise definitional formulation. It has been invoked in only two isolated circumstances involving offerings substantially distinct from traditional local exchange services, including paging.

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[12] By implication, debit card calls that originate and terminate in the same exchange are telephone exchange service, even though a platform may have first been dialed in another state.

An original and one copy of this letter are being provided to the Secretary of the FCC pursuant to the *ex parte* rules, 47 C.F.R. § 1.1206.

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