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BEFORE THE

# Federal Communications Commission

WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**REPLY COMMENTS OF**
**BENBOW PCS VENTURES, INC.**

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**BENBOW PCS VENTURES, INC.**

Benbow PCS Ventures, Inc. ("Benbow"), by its attorney, hereby replies to the comments filed in response to the *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-referenced proceeding.[1] As a small, woman-owned business holding two regional NPCS authorizations, Benbow filed comments in response to the *NPRM* and has a direct and clear interest in the issues raised in the instant proceeding.

## I. THERE IS OVERWHELMING CONSENSUS THAT BTA LICENSING SHOULD BE ELIMINATED

Comments filed in response to the *FNPRM* reveal an industry consensus, among carriers both large and small, opposing the use of BTAs as NPCS service area designations.[2] As a preliminary matter, commenters agree that there is no longer a policy rationale for using BTAs. The Commission's original decision to use BTAs for NPCS

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1 Report and Order and Further Notice of Proposed Rulemaking, 62 Fed. Reg. 27507 (May 20, 1997).

2 Comments of AirTouch Paging, Inc. ("AirTouch") at 2-5; American Paging at 3; Arch Communications Group, Inc. ("Arch") at 8; Celpage at 5; Metrocall at 4-5; PageMart at 2-3; PageNet at 17; the Personal Communications Industry Association ("PCIA") at 5-6.

was based on the Commission's conclusion that these smaller service areas "may be necessary to assure small business participation in narrowband auctions."[3] The results in the regional NPCS auction provide strong evidence to rebut this conclusion; specifically, the opportunity to acquire licenses for regional areas prompted several small businesses — including Benbow — to participate in the regional NPCS auction, with four small businesses winning a total of 10 regional licenses.

More importantly, however, commenters agree that BTA-sized areas do not afford licensees the optimum combination of coverage, population density and reasonable capital costs necessary for NPCS licensees to be competitive in a market that is already highly competitive with regional service offerings.[4] As PCIA notes, BTA-based networks are "too expensive to construct, relative to the amount of revenue they can be expected to produce . . . BTAs are simply too small to be economically viable, particularly for new entrants seeking to serve a single BTA."[5]

In addition, commenters agree that BTA licensing will produce unacceptable interference in many circumstances. For example, in congested areas like the North East, one commenter points out that BTAs "are so small that the ability to operate a full-powered narrowband PCS station is compromised by the protection criteria that must

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3 Comments of PageNet at 17 *citing In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, Gen Docket No. 90-314, ET Docket No. 92-100, First Report and Order, 8 FCC Rcd 7162, 7167 at ¶ 27 (1993) ("We believe that by providing channels at the local level, we will foster broader participation in narrowband PCS, allow entry by smaller firms and businesses, increase competition and promote diversity in the provision of narrowband PCS services.")

4 Comments of Benbow at 3; AirTouch at 3-4; Celpage at 5-7; Metrocall at 4-5.

5 Comments of PCIA at 3.

be abided by to avoid causing interference to adjoining markets."[6] For these reasons, the Commission should eliminate BTAs as NPCS service areas.

## II. ECONOMIES OF SCALE AND ADVANTAGES FOR SMALL BUSINESSES WARRANT THE CREATION OF ADDITIONAL REGIONAL AREAS

Most commenters agree, and Benbow concurs, that additional MTA licenses should be established.[7] There is no clear consensus, however, as to whether the Commission should create additional licenses covering even larger service areas. Not surprisingly, four of the parties most vehemently opposed to the creation of additional regional and nationwide service areas (PageNet, CONXUS, PageNet, AirTouch) are already licensed to provide regional and/or nationwide coverage. These carriers argue that changing the status quo to increase the number of regional or nationwide licenses will somehow devalue their existing regional or nationwide licenses, and that a modification to the existing channelization will introduce harmful regulatory uncertainty into the NPCS marketplace.[8] These obviously self-serving arguments are made in an effort to preserve a

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6 Comments of AirTouch at 3; *see also* PageNet at 16-17.

7 Comments of AirTouch at 2-5; PageNet at 17-18; Metrocall at 5-6; PageMart at 2-3; PCIA at 5-6; Celpage at 6-7.

8 One nationwide licensee, which by its own account is prepared to commence providing NPCS September 1, 1997, claims that its business plan "is dependent on the FCC's regulatory treatment of narrowband PCS[,]"and asks that "the Commission carefully consider its proposal which would dramatically alter the allocation and structure of the narrowband PCS service." Comments of CONXUS at 2. Ameritech Mobile Services, Inc. ("Ameritech") also claims that creating additional, larger service areas will somehow reduce the value of the licenses already acquired at auction. Comments of Ameritech at 6. Other than pure speculation, Ameritech offers no explanation for this result. Another nationwide licensee claims that changing NPCS service area designations at this time (even though it supports the elimination of BTAs) has created a concern in the industry that previous bidders in the nationwide and regional narrowband auctions may have paid too much for their licenses, and that creation of additional regional and

competitive edge these incumbents have been developing for several years. Their rationale for maintaining the status quo is anticompetitive and contrary to the Commission's overall spectrum policy, and should be rejected in favor of creating additional regional areas.

The Commission has explicitly stated that the "goal of [the Commission's] spectrum policy is not to preserve the value of licenses that auction winners acquire, but to promote competition and serve the public interest."[9] Auctioning additional licenses for larger service areas, such as MTAs and regions, will in fact encourage carriers of all sizes to participate in NPCS auctions and, subsequently, in the provision of NPCS.[10] If past is prologue, the success of Benbow, CONXUS, PageCall and InstaCheck in the regional NPCS auction demonstrates that regional areas provide real opportunities for small businesses to acquire licenses without jeopardizing their financial wherewithal to construct a network and provide service. This is because regions "appropriately balance the needs of larger carriers, or consortia of carriers, to establish wide-area networks, while retaining genuine opportunities for small businesses."[11]

Benbow therefore strongly supports those commenters that agree with the Commission's tentative conclusion that it should create additional, larger service areas such as MTAs and regions. Benbow also joins in the virtually unanimous support for the

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nationwide channels at this time is contrary to "sound spectrum management policy." Comments of AirTouch at 5, 7.

9 *FNPRM* at ¶ 32.

10 Comments of Benbow at 3-4; Metrocall at 5; Celpage at 6-7.

11 Comments of Metrocall at 5.

adoption of partitioning rules.[12] Such provisions will allow licensees to conform their service areas to better suit their business plans, and will further promote small business entry into the NPCS industry by allowing those entities who do not want to serve entire MTAs or regions to obtain smaller, tailored partitioned licenses.[13]

## III. THE COMMISSION SHOULD MODIFY ITS COVERAGE BENCHMARKS

Benbow suggested in its comments that the Commission eliminate the five year benchmark, and instead require NPCS licensees to provide coverage to 37.5% of the population within their service area by year ten.[14] Although there was great hope and optimism for the rapid development of advanced messaging services to compliment and enhance conventional paging systems, the severe delays in NPCS equipment and software development have significantly delayed the actual construction of NPCS systems. Benbow believes that this situation will not change in the foreseeable future. Therefore, Benbow reiterates its proposal that the Commission amend its rules to adopt a more rational construction benchmark schedule that takes into consideration the delays in equipment development and service deployment inherent in the NPCS industry.

Should the Commission decline to adopt Benbow's proposal, Benbow strongly suggests that the Commission adopt the proposals made by both CONXUS and PCIA pursuant to which the beginning of the five-year build-out period is tolled until the

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12 Comments of PageMart at 8; Ameritech at 8; Celpage at 13-14; CONXUS at 17; Merlin at 21; Metrocall at 10-11; PCIA at 18; Rural Telecommunications Group at 21-23.

13 Comments of Ameritech at 8; Celpage at 13; Metrocall at 10-11; Merlin Telecom, Inc. at 21; PCIA at 18.

14 Comments of Benbow at 15.

date the last market area license in the original two MHZ of NPCS spectrum is issued.[15] Benbow believes this approach balances the reality of NPCS equipment and software delay with the goal of ensuring that NPCS spectrum is developed.

## IV. THE COMMISSION SHOULD POSTPONE CHANNELIZING AND LICENSING THE ONE MHZ OF RESERVE SPECTRUM

Benbow concurs with the vast majority of commenters that oppose the Commission's proposal to allocate the one MHZ of reserve spectrum at this time. The Commission created the one MHZ of reserve spectrum because "the service proposals for narrowband PCS did not require the use of the entire narrowband PCS spectrum allocation."[16] Commenters fully agree that barely two years since the initial regional NPCS licenses (the last NPCS licenses to be auctioned) were granted, NPCS is still in its infancy; despite expenditures of tens of millions of dollars on research, development and infrastructure, the service proposals announced by existing licensees still do not require the use of the entire three MHZ of NPCS spectrum.[17] At this early stage, when less than one-half of the initial two MHZ has been licensed, Benbow agrees that it is much too early

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15 See Comments of PCIA at 15-16; CONXUS at 11-12.

16 *Amendment of the Commission's Rules to Establish New Personal Communications Services,* First Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7162, 7165 ¶ 19 (1993).

17 Comments of American Paging at 3-4; PageMart at 4-5; PageNet at 3-7; AirTouch at 14-16; PCIA at 8-10; Celpage at 7-8; CONXUS at 5; Metrocall at 6-8; Morgan Stanley Partnerships at 4; Motorola at 7; Arch at 9. As a practical matter, "the already-licensed nationwide and regional narrowband PCS systems have yet to come to market in any reasonable way . . . . Manufacturers and, thus, carriers, have only recently completed the technical validation of the first narrowband PCS systems. Concomitantly, they have only begun the substantial buildout of the networks required to bring service to the public. . . ." Comments of PageNet at 7.

to predict whether and when the reserve spectrum will be needed by licensees of the initial two MHZ in order to expand their systems.

Benbow supports PCIA's request that the Commission defer channelizing the one MHZ of reserve spectrum until PCIA has had a chance to produce a study of NPCS spectrum uses and needs; PCIA states that it will coordinate this study and will make a report to the Commission by June 30, 1988.[18] This study will allow the Commission to carefully evaluate the costs and benefits of releasing additional NPCS spectrum, as well as the most appropriate channelization plan.

## V. THERE IS STRONG RECORD SUPPORT FOR RETAINING EXISTING ELIGIBILITY RESTRICTIONS FOR PAGING RESPONSE CHANNELS AND RESTRICTING THEIR USE TO MOBILE-TO-BASE TRANSMISSIONS

Commenters generally agree that traditional, one-way paging licensees desperately need additional, interference-free response spectrum to be able to compete effectively with other two-way licensees, including NPCS licensees that won multiple channels during the nationwide auction.[19] Commenters warn, however, that modifying the eligibility restrictions to make response channels accessible to non-narrowband service providers could jeopardize the competitive viability of both incumbent paging licensees as well as NPCS licensees.[20] These response channels remain critical elements in the ability of narrowband messaging service providers to become full CMRS competitors. Therefore, the proposal to allow non-narrowband service providers to apply for these channels must be rejected.

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18 Comments of PCIA at 9.

19 Comments of PageNet at 21-22; Celpage at 12; Metrocall at 9; CONXUS at 11.

20 Comments of Celpage at 12; Metrocall at 9; Arch at 12.

As Benbow, CONXUS and PageNet noted in their comments, however, NPCS licensees have the same need for talk-back channels as one-way paging carriers.[21] Thus, the Commission should slightly modify the eligibility restrictions on response channels to allow any narrowband licensee, as well as conventional paging carriers, to apply for and obtain response channels, as long as the applicant has the necessary geographic relationship to the licensed service area for which it is seeking the response channel(s).

Benbow agrees with the majority of the commenters that agree response channels should be used solely for mobile-to-base transmissions.[22] Allowing response channels to be used for transmitting will cause a proliferation of unacceptable, harmful interference, thereby rendering these channels useless as response channels. Furthermore, there is nothing in the record to date to suggest that the current use restrictions are creating inefficiencies or underutilization. Therefore, no changes are warranted.

## VI. AUCTION RULES

A number of parties commented on the specific rules that will govern future NPCS auctions. Benbow's response to these comments is as follows: Benbow agrees with Celpage that the Commission should streamline the ownership reporting requirements for NPCS applications, consistent with the Commission's decision to do so in previous auctions.[23] This will eliminate an unnecessary paperwork burden for both the

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21 Comments of Benbow at 12; CONXUS at 11; PageNet at 22.

22 Comments of Celpage at 13; Metrocall at 10; Motorola at 8-10; PageNet at 21-22.

23 Comments of Celpage at 10.

Commission and auction participants, thereby expediting the commencement of NPCS auctions.

Benbow also strongly supports the suggestion that the Commission provide NPCS auction participants with complete information throughout the auction, including the identity of competing bidders.[24] During the regional NPCS auction, Benbow found that knowing the identity of other bidders was a critical factor in being able to devise a successful bidding strategy. If the Commission now minimizes the amount of information available during an auction, the Commission may well force small businesses like Benbow to dissipate critical resources gathering competitive intelligence without any corresponding benefit. The Commission has consistently recognized the benefit that such information provides in allowing bidders to accurately gauge the value of licenses.[25] No changes are needed now.

Finally, Benbow agrees with the suggestion of both PCIA and PageMart that the Commission create a safe-harbor from the anti-collusion rule. Benbow concurs that this will facilitate acquisition negotiations and/or inter-carrier agreements by enabling carriers engaged in non-auction related business negotiations prior to the auction to continue their discussions and reach final agreements even while an auction is pending. Small businesses, in particular, cannot afford to simply shut down all business discussions with other paging carriers during the course of an auction - - an unintended but required result if the anti-collusion rules are conservatively construed. A reasonable safe harbor

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24 Comments of PageMart at 8; PageNet at 23-24; PCIA at 17.

25 *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Memorandum Opinion and Order. 9 FCC Rcd 7245 at ¶ 42 (1994).

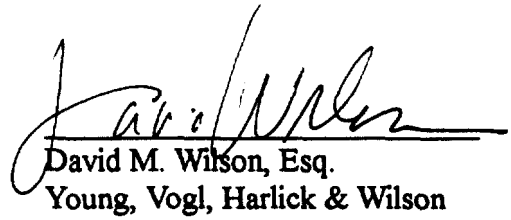
allows for ordinary business discussions without seriously jeopardizing the fairness of the auctions.[26]

## VII. CONCLUSION

Benbow respectfully requests that the Commission adopt the proposals set forth herein, all of which are made in furtherance not only of creating opportunities for small businesses, but also to facilitate robust competition in the provision of advanced messaging services.

Respectfully submitted,

**BENBOW PCS VENTURES, INC.**

By: 

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[26] Comments of PageMart at 9; PCIA at 17.

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