ORIGINAL

ORIGINAL

WILEY, REIN & FIELDING

EX PARTE OR LATE FILED

1776 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 429-7000

KATHERINE M. HARRIS
(202) 429-7245

FACSIMILE
(202) 429-7049

September 18, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 Street, NW, Room 222
Washington, DC 20554

RECEIVED
SEP 18 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: WT Docket No. 96-18
Ex Parte Presentation

Dear Ms. Roman Salas:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, this is to notify the Commission that on September 17, 1998, Robert L. Hoggarth and I met with Dan Phythyon, Roz Allen, Kathleen O'Brien Ham, Steve Markendorff, Roger Noel, Janine Poltronieri, Steve Weingarten, and Margie Wiener concerning WT Docket No. 96-18.

The purpose of this meeting was to discuss PCIA's proposals for market area licensing for paging. The subjects discussed are fully set forth in the enclosed materials, which were left with the participants from the Commission's staff.

Two copies of this letter and the associated presentation materials are being filed with the secretary's office, as required by Section 1.1206

Should you have any questions regarding this matter, please call me.

Respectfully submitted,

Katherine M. Harris

Katherine M. Harris

KMH/rg
Enclosures
cc (w/out enclosures): Dan Phythyon, Roz Allen, Kathleen O'Brien Ham, Janine Poltronieri, Steve Markendorff, Margie Wiener, Roger Noel, Steve Weingarten

658601

No. of Copies rec'd _____
List A B C D E

SUMMARY

1. Based on recent discussions with Commission staff, PCIA has detected a willingness to reexamine the Commission's approach to market area licensing for paging – Docket No. 96-18. As a result, members of the industry spent much of the last several weeks discussing practical alternatives to the existing auction scheme.

2. The paging industry welcomes this opportunity. It believes that many of the solutions it has proposed in the record merit a closer examination. They are effective because they avoid potentially serious interference concerns, should minimize post-auction disputes, and will more effectively limit possible service disruption for consumers.

3. Members of the industry recognize that any licensing transition for a mature incumbent industry can be difficult for both industry members and regulators. PCIA's recommendations ameliorate many of those obstacles.

4. Adoption of PCIA's suggestions will ensure undisrupted service to the public, will ultimately streamline FCC licensing obligations, and will provide practical opportunities for new entrants into the fiercely competitive paging industry.

5. The PCIA solution combines four factors, several of which have already been acknowledged by the FCC.

   a) The need to move to market area licensing to reduce administrative burdens for both licensees and the Commission.

   b) Recognition of the rights of incumbent licensees who have built out and serve large customer bases.

   c) Creation of opportunities for new entrants to build and operate viable competitive networks.

   d) A licensing methodology that achieves this transition fairly, efficiently, and effectively.

BACKGROUND/PROCEDURAL HISTORY OF DOCKET NO. 96-18

1. Since 1992, PCIA has sought to work with the FCC staff to develop assignment and licensing policies and rules that would meet the needs of the paging industry and its subscribers while accommodating the objectives of the Congress and the Commission. Over the last six years, resolution of this issue has been delayed by several intervening forces, including changes in Congressional mandates and reactions to the results of other licensing proceedings. These forces have caused the paging industry to make a number of accommodations and compromises in an effort to secure the use of market area licenses for incumbent and future paging licensees.

2. PCIA has advocated adoption of market area licensing for 931 MHz paging facilities since 1992. *See* comments of Telocator filed in October, 1992, in the Part 22 Rewrite proceeding, in which the association supported the licensing of 931 MHz paging frequencies on a market area basis.

3. In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993, giving the Commission certain defined auction authority.

4. Again, in 1994, in response to a supplemental *Notice* in the Part 22 Rewrite proceeding as well as in the Regulatory Parity proceeding, PCIA endorsed market area licensing for 931 MHz operations. During this same time period, PCIA members held a series of meetings, including sessions with members of the Commission's staff, to discuss proposals for streamlining the authorization process for 931 MHz paging facilities.

5. By spring 1995, PCIA developed an industry consensus plan for implementing 931 MHz market area licensing. That plan was informally presented to the Commission staff in May 1995. The proposal contemplated a transition to market area licensing that would grant geographic area licenses to 931 MHz licensees already covering a certain amount of the market (70 percent). PCIA also proposed a two-step application process and an oral outcry auction. At that time, PCIA favored market area licensing only for 931 MHz.

6. In January 1996, PCIA reiterated these positions in meetings with the staff, stating that market area licensing should not be extended more broadly to UHF or VHF common carrier paging frequencies (due to their maturity) or the 929 MHz private carrier frequencies (since licensees in this service were midway through implementation of a Commission-adopted geographic licensing scheme). With respect to 931 MHz, PCIA argued in support of MTAs as the basis for licensing. PCIA also sought to strike a balance between maintaining the quality of service now available to the public, not unduly impeding the

expansion plans of licensees providing wide area 931 MHz service, protecting existing licensees operating more limited 931 MHz systems, and deterring disruptive speculation and "blackmail." PCIA reiterated its proposal for a two-step application process.

7. The *NPRM* in this docket was released February 9, 1996, announcing the agency's intent to assign market area licenses by auction and including a partial freeze on new applications. The *NPRM* also sought comment on interim licensing proposals.

   PCIA filed comments on the interim licensing proposals as well as the overall proposals for revising the rules for the licensing of paging facilities and operation. PCIA sought an elimination or relaxation of the freeze.

8. The *First Report and Order*, released April 23, 1996, modified the freeze to a limited extent by permitting incumbent licensees to add new sites to their systems so long as any new site is located within 40 miles of authorized facilities.

   a) The interim licensing rules were further modified in an *Order on Reconsideration of First Report and Order* released June 11, 1996.

   b) PCIA filed a petition for partial reconsideration on June 10, 1996.

9. The *Second Report and Order and Further Notice of Proposed Rulemaking* detailing specific auction rules for nearly all paging frequencies was released February 24, 1997.

   a) PCIA filed a petition for reconsideration of the *Second Report and Order* on April 11, 1997.

   b) PCIA also filed comments and reply comments in response to the *Further Notice*.

10. Court appeals of the *Second Report and Order* have been filed by several parties, including Metamora Telephone Company, Benkelman Telephone Company, Frederick W. Hiort d/b/a/ B&B Beepers, Supercom, L.P., Wauneta Telephone Company, Radiofone, Inc., and Paging Network, Inc.

    a) Some of these appeals fundamentally challenge the Commission's plan for licensing paging frequencies by auction.

    b) PCIA has intervened in all of the appeals.

c) The D.C. Circuit Court of Appeals is awaiting resolution of the pending reconsideration petitions before the appeals will be allowed to proceed.

PCIA COMMENTS ON THE *NPRM*
FILED MARCH 18, 1996 AND APRIL 2, 1996

1. In its opening comments on the Commission's *NPRM* (filed March 18, 1996) and consistent with its prior positions, PCIA strongly endorsed the use of market area licensing for the 931 MHz frequencies.

2. Considering the mandates of the Omnibus Budget Reconciliation Act of 1993, PCIA reluctantly supported market area licensing for the 929 MHz exclusive frequencies.

3. PCIA also reluctantly concurred in the Commission's proposals to adopt geographic licensing for the lower band common carrier frequencies, balancing the difficulty of overlaying a new licensing scheme on already mature usage of the frequencies with a desire for expeditious resolution of the Commission's proceeding and the resumption of application processing.

4. PCIA opposed adoption of market area licensing for the Part 90 shared channels.

5. PCIA set forth a number of recommended steps to promote the provision of competitive paging service to the public and to protect the existing services provided to the public within a market area licensing scheme.

   a) PCIA promoted use of MTAs as the appropriate service area definition.

   b) PCIA believed incumbent operators should receive full protection for their authorized facilities.

   c) PCIA endorsed the Commission's proposed coverage requirements (one-third of the population within 3 years, two-thirds of the population within 5 years), and recommended that the Commission also require the geographic licensee's interference contour cover at least 10 percent of the population at the end of one year. PCIA also urged the Commission to eliminate the exception from the population coverage standard for licensee providing "substantial service."

   d) Where a geographic area licensee fails to meet the coverage requirements, PCIA agreed with the Commission that the service area license should *automatically* terminate. Where that geographic area licensee had pre-existing facilities in the market, it would be permitted to retain and have protected its operations as they existed at the time of award of the geographic license.

6. PCIA emphasized the need to ensure that incumbent operations would be fully protected from interference from geographic licensees.

   a) For lower band common carrier channels, PCIA agreed with the Commission's proposal to rely on the mathematical formulas and contour overlap provisions already in place.

   b) For 929 and 931 MHz operations, PCIA recommended that the Commission use the standards reflected in Table E-1 and E-2 as contained in Section 22.537 of the Rules.

7. PCIA generally agreed with the Commission's proposal to require adjacent geographic licensees either to reduce signal level or reach agreement about operations at border areas. PCIA also urged the Commission to adopt formulas to accommodate the standards for adjacent licensee interference protection with the proposed standards for the protection of incumbent operations. As promised in its comments, PCIA submitted a proposal for doing so on May 31, 1996.

8. PCIA also urged the Commission to deploy a two-step application process — essentially the same application process the association had previously advocated — to recognize the existing operations of licensees already providing service throughout a substantial portion of a market.

   a) The only entities eligible for the initial round of applications for market area licenses would be existing licensees desiring to obtain a market area license and that can certify that they can cover at least 70 percent of the population of a particular license area.

   b) Existing licensees meeting these criteria would be granted a geographic license for the particular service area, and that market on that frequency would be removed from the pool of licenses available for auction.

   c) The Commission would then open a subsequent window for the filing of applications for those markets where authorizations are not granted in the first round; eligibility for submitted applications in this round would be open.

   d) If mutually exclusive applications were filed for any such market, the competitive bidding rules and policies adopted in this proceeding would be applied to determine the license holder.

9. PCIA addressed a number of specific issues involving the competitive bidding design for paging auctions.

a) Application and upfront payment requirements should be established to permit participation by entities with legitimate paging business plans and to discourage speculators and others seeking to obstruct competitive paging operations. Applicants should be required to identify each specific frequency in each specific market for which they seek authorization. Similarly, upfront payments should be calculated on a per market/per frequency basis. Entities not already covering 10 percent of the population of a licensed service area should be required to post a performance bond.

b) The Commission should employ a non-simultaneous closing rule.

c) The Commission should conduct simultaneous electronic bidding for all markets and all frequencies in each of the bands. The 929 and 931 MHz markets should be auctioned at one time, and the lower band common carrier frequencies should be included in a separate auction.

d) PCIA concluded that no special treatment of designated entities was required in order to comply with Congressional mandates.

e) Auction winners should be permitted to proceed with construction, at their own risk, immediately as the conclusion of the auction.

10. PCIA's reply comments, filed April 2, 1996, reiterated these positions. In addition, in light of the opening round comments, PCIA urged the Commission to ensure that its anti-collusion rules would not be interpreted to impede unrelated business and operational discussions among existing paging licensees.

PCIA'S PETITION FOR RECONSIDERATION OF THE
SECOND REPORT AND ORDER
FILED APRIL 11, 1997

Reserving its rights to ultimately appeal any auction rules, PCIA sought modifications to the Commission's new rules. Those modifications are detailed below.

1. An incumbent licensee providing coverage to 70 percent or more of the population of a geographic service area should have sole initial eligibility to seek the license for that area.

2. In order to deter speculators and unscrupulous application mills, the FCC should not permit a "substantial service" alternative for market area licensees to meet applicable coverage requirements.

3. To ensure that every applicant has given consideration to the licenses for which it seeks to bid, applicants should be required to post an upfront payment for each and every license on which they propose to bid.

4. The Commission should provide complete bidding information, specifically including the identity of competing bidders, during the course of the auctions.

5. Because the protection to be afforded 929 MHz incumbent non-exclusive licenses by market area licensees would effectively grant them exclusivity where it has not been earned, the Commission should revise the standard.

6. The Commission should process all applications pending as of February 19, 1997, under the rules in effect prior to the adoption of the *Second Report and Order*.

7. The Commission should hold auctions for the lower band frequencies first, followed by auctions for the 929/931 MHz frequencies.

8. The Commission should replace MTAs with MEAs as the basis of geographic license areas for exclusive 929 and 931 MHz frequencies.

9. Due to the special characteristics of the paging industry, bidding credits and installment payments for designated entities are unnecessary.

10. The Commission should establish a safe harbor from the anti-collusion rules for carriers engaged in acquisition negotiations or inter-carrier agreements.

11. The Commission should clarify that all facilities constructed pursuant to the grant of a geographic area license must be terminated if the licensee fails to meet applicable coverage requirements.

PCIA PROPOSAL FOR EFFECTIVELY ISSUING MARKET AREA LICENSES WHILE PRESERVING PUBLIC RELIANCE ON EXISTING SERVICES

1. On particular frequencies in paging markets, there is so little white space that a new entrant would be unable to build an economically viable system meeting the Commission's criteria for interference protection to be accorded co-channel incumbents in the same and adjacent markets.

   a) This is true whether the Commission retains MTAs as the basis for its market area licensing, or instead adopts MEAs as urged by PCIA in its petition for reconsideration.

   b) PCIA anticipates that auctioning such market area licenses, where the license winner is not the incumbent operator already providing service throughout the market, will result in increased interference cases as the market area licensee attempts to construct and operate a system to recoup its auction expenditures.

   c) As a result of such interference, existing subscribers confront the real possibility of disruptions in service on which they rely, particularly if the problem cannot be promptly resolved.

   d) This situation is illustrated by a number of sample maps.

2. PCIA accordingly proposes a two-step application process that recognizes the public's interest in access to reliable, uninterrupted service.

   a) In Step 1, incumbents covering a specified percentage of the existing population or geographic area of a defined service area would be permitted to file an application for the market area license.

      i) If the incumbent filed an acceptable application and met the qualification standards, it would be granted the market area license.

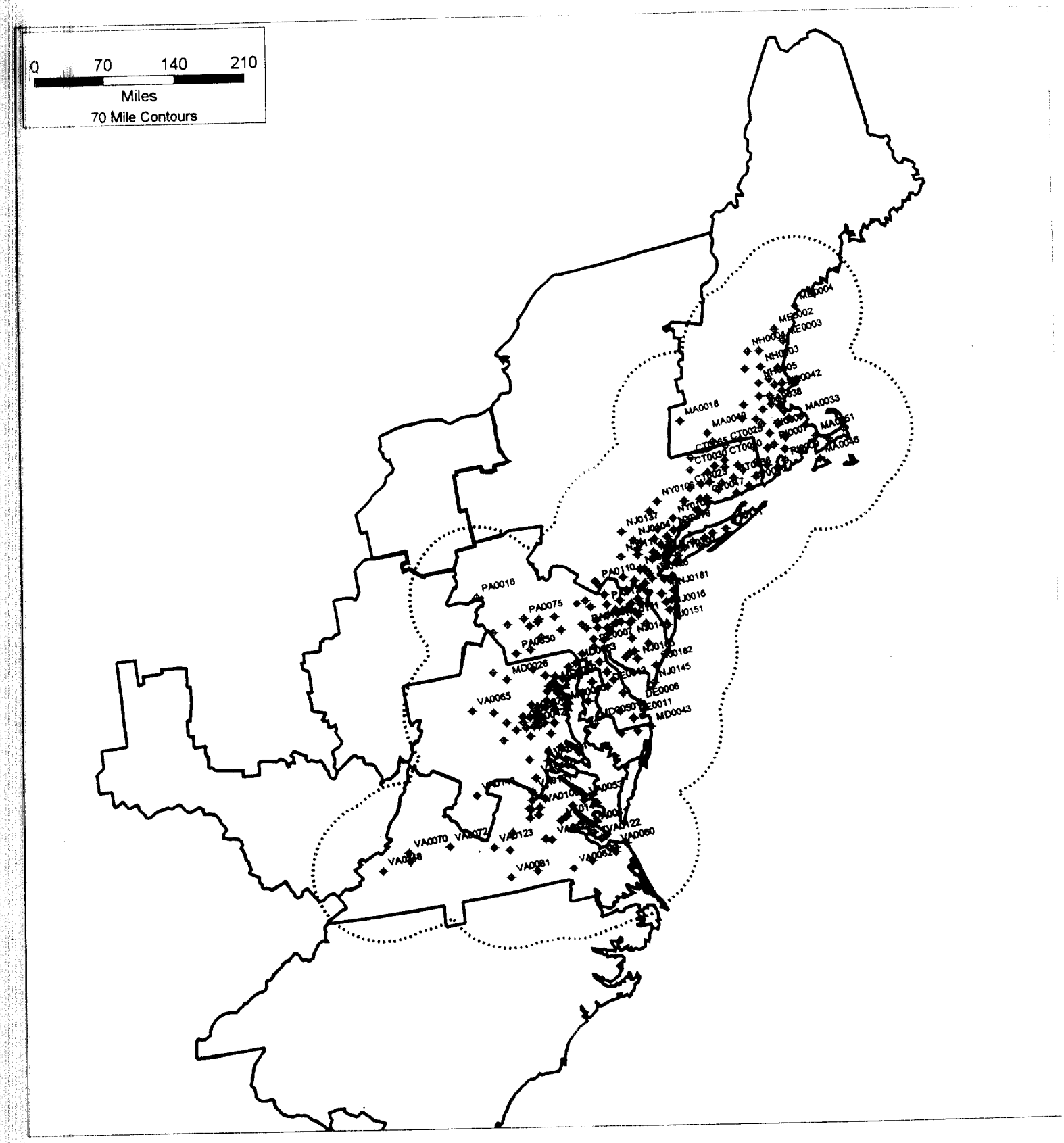
      ii) PCIA believes that the appropriate benchmark should be 70 percent coverage of population or geographic area, since this level of coverage exceeds the five-year construction benchmark adopted by the Commission. Where an operator meets the 70 percent coverage test, the remaining area within the market that could technically be served under the Commission's Rules would not support an economically viable system.

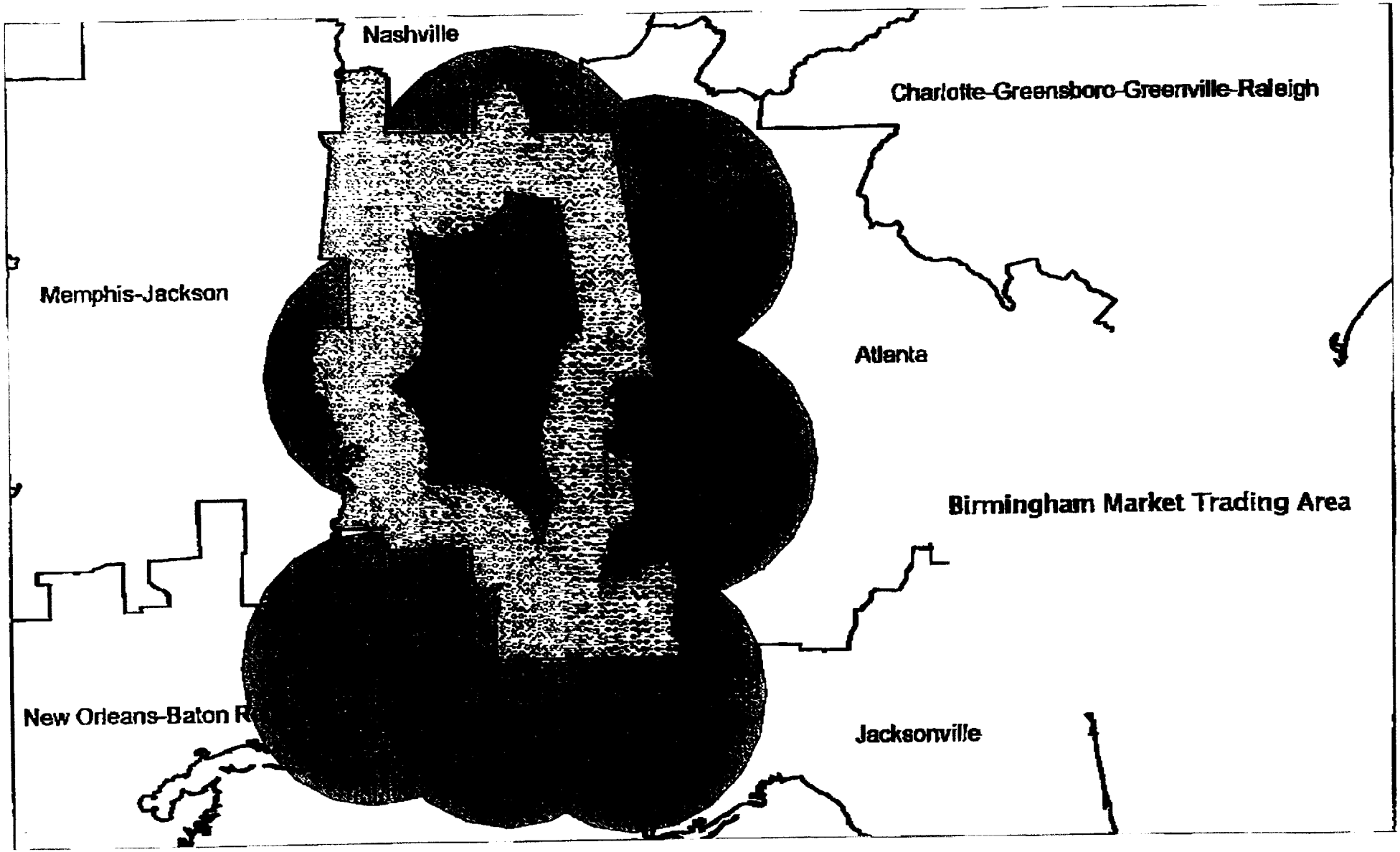
iii) If multiple incumbents within a market together cover 70 percent, and they wish to seek a joint market area license, they could jointly file an application that demonstrates their joint coverage, and receive a market area license on that basis.

b) Step 2 would follow the filing and processing of the applications by incumbents covering over 70 percent of the geographic area on which the market area license is based. At that time, all interested parties would be permitted to file applications for market area authorizations in the remaining markets on the available frequencies.

c) PCIA believes that this approach would more effectively serve the public interest than the policies currently in place by protecting the reliance of existing subscribers on their current service arrangements and minimizing the likelihood that unscrupulous parties simply will use the auction process to disrupt service or extract inappropriate financial benefits.

Composite Overlay




Nashville
Charlotte-Greensboro-Greenville-Raleigh
Memphis-Jackson
Atlanta
Birmingham Market Trading Area
New Orleans-Baton R
Jacksonville