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

In the Matter of)
)
MOBILEMEDIA CORPORATION, et al.)
)
Applicant for Authorizations and Licensee)
of Certain Stations in Various Services)

WT DOCKET NO. 97-115

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED COMMENTS
ON APPLICATIONS FOR TRANSFER OF CONTROL AND
PETITION TO TERMINATE AND FOR SPECIAL RELIEF

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PETITION TO TERMINATE AND FOR SPECIAL RELIEF

1. On September 2, 1998, MobileMedia Corporation, debtor-in-possession ("MobileMedia") and Arch Communications Group, Inc. ("Arch") jointly filed a series of applications and a request for relief pursuant to *Second Thursday Corp.*, 22 FCC 2d 515 (1970). The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the *Order*, FCC 98I-40 (released September 29, 1998), and the *Public Notice*, "MobileMedia Corporation, Debtor-in Possession, and Arch Communications Group, Inc. Seek Consent to Transfer Control of Licenses," Public Notice, Report No. LB-99-05, WT Docket No. 97-115, DA 98-2080 (released October 15, 1998), now submits its comments on the applications and petition. The Bureau submits that MobileMedia appears to be eligible for *Second Thursday* relief, but as explained below, it believes that the Commission should either withhold action on MobileMedia's request pending receipt of a report detailing further violations of the Commission's Rules by MobileMedia, or condition the grant of the applications upon any enforcement action the Bureau or the Commission may deem appropriate, and the payment in full by MobileMedia of any forfeiture deemed appropriate by the Bureau or the Commission.

Also, the Bureau believes that certain of MobileMedia's requests for waivers of the Commission's Rules or for special relief should be denied.

2. The Bureau's comments will begin with an introduction to the MobileMedia proceeding and background concerning MobileMedia's request. Next, the Bureau will analyze MobileMedia's compliance with the standards contained in *Second Thursday*. Third, the Bureau will discuss the disposition of further additional violations of the Commission's Rules by MobileMedia that appeared to have been discovered during the implementation of MobileMedia's compliance program, and the impact of such violations upon MobileMedia's request for *Second Thursday* relief. Fourth, the Bureau will comment upon several request for waivers of the Commission's Rules or for other relief MobileMedia has made in its petition. Finally, pursuant to *NYNEX Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19985 (1997), the Bureau will analyze the impact of the proposed transaction upon competition in the relevant markets.

I. INTRODUCTION AND BACKGROUND

3. From 1993 through 1996, MobileMedia filed at least 289 false FCC Forms 489, misrepresenting to the Commission that unconstructed stations were constructed, operating, and providing service to subscribers.¹ MobileMedia also filed with the Commission at least 94 false "40-Mile Rule" applications for new paging facilities that were predicated upon unbuilt facilities. *Id.* On April 8, 1997, the Commission commenced a hearing proceeding to determine whether MobileMedia is qualified to remain a Commission licensee. *Id.* Among

¹ Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, 12 FCC Rcd 14896, 14897 (1997).

other things, the Commission sought to determine which corporate officers, directors and senior managers of the company participated in, approved of, or knew about the false filings. *Id.* at ¶¶ 9, 14(a), (c) and (d). The hearing was scheduled to commence on June 10, 1997.

4. On April 23, 1997, MobileMedia requested a 10-month stay of the proceedings to provide the company an opportunity to avail itself of special relief under the *Second Thursday* doctrine to benefit its innocent creditors holding more than \$1.1 billion in debt. On June 6, 1997, the Commission granted this requested relief.² However, to ensure that no potential wrongdoer of MobileMedia benefited from the stay, the Commission imposed conditions in paragraphs 17 and 18 of the *Stay Order*. The Commission defined "potential wrongdoers" as including "all former and current officers, directors, and senior managers."³ The Commission directed MobileMedia to demonstrate in its *Second Thursday* showing that "its former and current officers, directors and senior managers will not receive compensation for their equity interests and will have no role in the future operation and management of the company."⁴ Third, the Commission prohibited MobileMedia's current officers, directors, and senior managers from selling their MobileMedia stock during the pendency of the stay. *Id.*

5. In paragraph 18 of the *Stay Order*, the Commission directed that no application in which any former or current officer, director or senior manager of MobileMedia has an

² *MobileMedia Corporation*, 12 FCC Rcd 7927 (1997) ("*Stay Order*").

³ *Stay Order*, ¶17.

⁴ *Id.*

attributable interest shall be granted until the issue as to that individual's involvement in the MobileMedia wrongdoing is resolved. Pursuant to the *Stay Order*, on June 25, 1997, the Bureau developed and distributed a list of 43 MobileMedia former and current officers, directors and senior managers, to assist other Bureaus and Offices of the Commission in identifying those applications in which potential wrongdoers have an attributable interest.⁵

6. After issuing the *Stay Order*, the Commission received six petitions for reconsideration or clarification, from interested entities and employees, contending, among other things, that paragraph 18 of the Stay Order was overly broad. On August 8, 1997, in response to the petitions it had received, the Commission concluded that paragraph 18 "was overly broad in scope and that the allegations against MobileMedia are sufficient to raise questions only as to the qualifications of four individuals."⁶ The Commission thus reduced the applicability of the restrictions in paragraph 18 from 43 individuals to four -- Gene Belardi, Kenneth McVay, John Kealey and Gregory Rorke. Based on all the information before it, the Commission found that substantial and material questions of fact remained unresolved with respect to those four individuals. Further, the Commission indicated that "no application in which any of these four individuals has an attributable interest may be granted until the qualifications question has been resolved in that [proceeding] or the MobileMedia

⁵ Pursuant to the Order, the Bureau distributed an initial list on June 16, 1996. Counsel for MobileMedia subsequently informed the Bureau that certain information they had provided for the purpose of preparing the list was erroneous. Thereafter, counsel for MobileMedia provided revised and corrected information. As a result, a revised and corrected list was distributed on June 25, 1997.

⁶ *MobileMedia Corporation*, 12 FCC Rcd 11861 (1997) ("*Reconsideration Order*").

proceeding."⁷ In response to petitions for clarification of the *Reconsideration Order* filed by three employees of MobileMedia (Mark Witsaman, Debra P. Hilson and Santo J. Pittsman), the Commission issued another order clarifying that the limitations contained in paragraph 17 of the *Stay Order* did not apply to those individuals other than the four individuals previously identified as suspected wrongdoers (Belardi, McVay, Kealey, and Rorke) because there was no evidence that the other individuals "participated in or approved of misconduct. . . ."⁸ Finally, on June 11, 1998, the Commission extended the stay of the hearing proceeding until October 6, 1998.⁹

7. On September 2, 1998, MobileMedia and Arch jointly filed their "Petition to Terminate and for Special Relief," along with a series of assignment and transfer of control applications. MobileMedia and Arch propose a merger in which the existing MobileMedia stockholders will have their stock interests extinguished, MobileMedia's secured creditors will be paid in full, the operations of MobileMedia and Arch will be merged, MobileMedia's unsecured creditors will hold the majority of the equity, and Arch's existing shareholders will hold a minority interest in the new company (the "Combined Company").¹⁰ MobileMedia and Arch also request several waivers or other request for relief in connection with their proposed transaction. First, they request a waiver of Section 24.101 of the Commission's Rules, the

⁷ *Id.*

⁸ *MobileMedia Corporation*, 13 FCC Rcd 10634, 10637 (1998).

⁹ *MobileMedia Corporation*, 13 FCC Rcd 14770 (1998).

¹⁰ Letter dated October 5, 1998 from Peter D. Shields, Esq. to the Commissioners.

Narrowband Personal Communications service spectrum aggregation limit because they own overlapping attributable interests in narrowband PCS licenses.¹¹ Second, the parties request that they be granted standard license authority to operate certain stations that were not timely constructed and for which the licenses were cancelled but which MobileMedia is currently operating pursuant to interim operating authority.¹² Specifically, on January 13, 1997, although the licenses for the stations in question were canceled because the stations were not timely constructed, MobileMedia was granted interim authority to operate these stations pending the conclusion of the hearing proceeding.¹³ Third, MobileMedia requests a refund of the filing fees incurred by MobileMedia in connection with its filing of transfer of control applications because of MobileMedia's status in bankruptcy.¹⁴ Fourth, the parties request that the authorization to proceed with a transfer of control retain the flexibility to correct and complete the scope of the authorizations that the parties may obtain or modify after their filing.¹⁵ Fifth, the parties request that in a situation where an application is pending at the time the transfer is consummated, that the Commission waive the applicable cut-off rules when such applications are amended to reflect the consummation of the transfer of control.¹⁶ Finally, the parties request a waiver of Section 310(b)(4) of the Communications Act to allow

¹¹ MobileMedia/Arch Petition, pp. 12-18.

¹² *Id.*, pp. 18-20.

¹³ *Public Notice*, Wireless Narrowband Branch Information, 12 FCC Red 792 (Jan. 13, 1997).

¹⁴ *Id.*, pp. 20-22.

¹⁵ *Id.*, p. 23.

¹⁶ *Id.*, pp. 23-24.

foreign investment of up to thirty-five per cent in the transferee.¹⁷

II. ANALYSIS

A. Request for Second Thursday Relief

8. Under the policy first enunciated in *Second Thursday Corp.*, *supra*, 22 FCC 2d at 516, a licensee whose licenses have been designated for hearing and is in bankruptcy may, with Commission consent, assign or transfer control of its licenses if "the individuals charged with the misconduct will have no part in the proposed operations and will either derive no benefits from favorable action on the application or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." The *Second Thursday* policy is an exception to the general rule that licenses and applications that have been designated for hearing may not be granted until the issues concerning their basic qualifications are favorably resolved.¹⁸ In this case, the Commission has determined "that the public interest considerations underlying *Second Thursday* apply to publicly traded corporations as well as to privately held companies."¹⁹ Moreover, the Commission has identified the four individuals who are charged with misconduct: Gene P. Belardi, former secretary and Regulatory Counsel; Kenneth R. McVay, former Secretary, Vice President; and General Counsel, John M. Kealey, former Director, President, and Chief Operating Officer; and Gregory M. Rorke, former

¹⁷ Letter Dated October 5, 1998 from Peter D. Shields, Esq. to Commissioners, Attachment B.

¹⁸ *Jefferson Radio Company, Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

¹⁹ *Stay Order*, 12 FCC Rcd at 7931.

Director and Chief Executive Officer.²⁰ Accordingly, the Bureau's analysis under *Second Thursday* will be limited to those four individuals.

9. With respect to the first prong of the *Second Thursday* test, the parties have shown that the four individuals charged with misconduct will have no role in the future operation or management of the licensee after the transfer.²¹ Indeed, none of these individuals are currently employed by MobileMedia or Arch,²² and only Mr. Kealey is a stockholder in MobileMedia.²³ Furthermore, none of the individuals will be employed by the Combined Company. The agreement provides that all stockholders of MobileMedia shall have their stock interests canceled without receiving any compensation whatsoever.²⁴

10. With respect to the second prong of the *Second Thursday* test, the parties have adequately shown that none of the suspected wrongdoers have benefited from the sale of stock during the pendency of the stay.²⁵ Indeed, only Mr. Kealey is currently a stockholder of MobileMedia. Furthermore, since current stockholders of MobileMedia are not receiving any compensation for their stock interests, Mr. Kealey will not benefit from the transaction by receiving compensation for his stock.

²⁰ *Reconsideration Order, supra*, 12 FCC Rcd at 11863-11864.

²¹ MobileMedia/Arch Petition, Section VII G, Declaration of Paul H. Kuzia.

²² MobileMedia/Arch Petition, p. 28.

²³ MobileMedia/Arch Petition, Section VII G, Declaration of Joseph A. Bondi.

²⁴ MobileMedia/Arch Petition, Section VII A (Agreement and Plan of Merger), p. 4.

²⁵ MobileMedia/Arch Petition, Section VII G, Declaration of Charles Zade.

11. The parties note, however, that Messrs. Belardi and Kealey have submitted proofs of claim that "for amounts they assert are due them under their employment contracts."²⁶ If the transaction goes forward, it appears possible that Belardi and Kealey could obtain some benefit if the transaction goes forward in the form of stock in the surviving licensee (if Belardi and Kealey are treated as unsecured creditors). At the Bureau's request, MobileMedia submitted additional information on November 13, 1998. MobileMedia notes that Mr. Belardi has filed claims totalling \$15,051.59 for payments allegedly due for insurance premiums and \$408,856.49 in payments allegedly due pursuant to provisions for performance bonuses in his employment contract, and Mr. Kealey has filed claims for \$17,321.14 in insurance premiums and \$1,162,854.90 in performance bonuses.²⁷ MobileMedia also argues that these claims should not be a basis for concern because they arise from the employment contracts as opposed to favorable Commission action on the applications.²⁸ MobileMedia also disputes the validity of the claims and argues that any recovery would be minute (less than one-quarter of one per cent of the Combined Company) in relation to the overall transaction. The Bureau has reviewed the additional information submitted by MobileMedia and concludes that, in this case, any incidental benefit Belardi and Kealey may obtain if their claims are honored is far outweighed by the equitable considerations in favor of innocent creditors. MobileMedia's secured creditors will be paid \$649 million if this transaction is consummated, and its unsecured creditors, who have claims of over \$460 million, will, collectively, control the new

²⁶ MobileMedia/Arch Petition, p. 30.

²⁷ Letter dated November 13, 1998 from Robert L. Pettit, Esq. to Secretary, Federal Communications Commission, pp. 1-2.

²⁸ *Id.*, p. 2.

company. In determining whether any benefit suspected wrongdoers would receive is an undue benefit, the Commission has examined the following factors:

the amount of money likely to go directly to suspected wrongdoers; the percentage of the total sales price likely to go directly to suspected wrongdoers; whether suspected wrongdoers are likely to receive a direct monetary benefit or only an indirect benefit such as a reduction of a liability; and whether suspected wrongdoers are in bankruptcy so that any money paid to them will be available to pay their creditors.²⁹

While the Bureau is concerned that the gross amounts of the claims are large, under the unusual circumstances of this case, the Bureau believes the proposed transaction is acceptable under *Second Thursday* because any benefit Belardi and Kealey could receive would be a minuscule portion of the transaction. MobileMedia's secured creditors would receive \$647 million if the transaction goes forward, and the other unsecured creditors would also receive substantial relief for \$460 million in claims. The Bureau also finds it significant that any benefit Belardi and Kealey would receive would result from their employment contracts, as opposed to the underlying transfer of control. Accordingly, the Bureau concludes that any benefit Belardi and Kealey may receive would be outweighed by the major benefits that innocent creditors would receive. Accordingly, the Bureau believes that the transaction proposed by the parties appears to comply with the requirements of the *Second Thursday* doctrine.

²⁹ *Walter M. Kelley, Trustee*, 10 FCC Rcd 4424, 4426 (1995).

B. Other Possible Violations of Commission's Rules

12. MobileMedia has instituted "a company-wide compliance plan that included a review of all Company facilities to confirm compliance with FCC licensing requirements" ³⁰ MobileMedia has informally advised the Bureau that in connection with that compliance program, it has discovered numerous discrepancies between its records and the Commission's records. MobileMedia has informed the Bureau that in a small, but indeterminate, number of situations, such discrepancies may be indicative of a violation of the Commission's Rules by MobileMedia. For example, MobileMedia has discovered at least one instance of unlicensed operation by the company. MobileMedia has informed the Bureau that a comprehensive report on the compliance program and any possible violations of the Commission's Rules is being prepared. MobileMedia hopes to submit the report by the end of this year.

13. Under these circumstances, the Bureau believes the Commission should either withhold action on MobileMedia's request pending receipt of a report detailing further violations of the Commission's Rules by MobileMedia (and the receipt of comments by the Bureau on such report), or condition the grant of the applications upon any enforcement action the Bureau or the Commission may deem appropriate, and the payment in full by MobileMedia of any forfeiture deemed appropriate by the Bureau or the Commission. Such a course of action is necessary for two reasons. First, MobileMedia's report may uncover additional licenses which in fact automatically canceled for failure to construct in a timely

³⁰ MobileMedia/Arch Petition, p. 5.

manner. The Commission should know that each of the licenses being transferred to the Combined Company is valid. Second, to the extent that MobileMedia has new evidence that the Commission's Rules have been violated, the Commission may decide it is appropriate to take enforcement action against MobileMedia depending upon the number and scope of additional violations. Once the transfer of control is consummated, it would be too late to take any enforcement action against MobileMedia for such violations. Accordingly, the Bureau requests that the Commission defer action on the parties' request until MobileMedia has filed its compliance report and the Bureau has had an opportunity to file supplemental comments addressing MobileMedia's report.

C. Requests for Additional Authority

1. Request for Waiver of NPCS Spectrum Aggregation Limit

14. MobileMedia and Arch request a waiver of the NPCS spectrum cap to last until 90 days after the conclusion of the NPCS spectrum cap rulemaking.³¹ The NPCS spectrum cap seeks to enhance competition by prohibiting an entity from holding more than a 5% ownership interest in more than three NPCS providers in a given geographic area.³² After the proposed merger, the Combined Company³³ would violate this cap because Arch currently holds attributable interests

³¹ Application at 12.

³² See 47 C.F.R. §24.101.

³³ MobileMedia and Arch may also be referred to jointly as "Applicants" and the new entity to be formed by the merged MobileMedia and Arch may be referred to as the "Combined Company."

in two NPCS providers,³⁴ and MobileMedia holds one nationwide NPCS license, and an additional NPCS regional license for each of the five NPCS regions.³⁵ On April 23, 1997, the Commission issued a *Further Notice of Proposed Rulemaking* that sought comment on the NPCS spectrum cap, and the Applicants request a waiver to last until 90 days after this rulemaking proceeding is terminated.³⁶ For the following reasons, the Bureau recommends that the Commission deny the Applicants' request and grant only a 90-day waiver of the NPCS spectrum cap.

15. To justify their waiver request, Mobilemedia and Arch generally argue that they fulfill the waiver standard set out in section 24.819 and Section 1.3 of the Commission's rules³⁷ because (1) grant of waiver would be consistent with general mandate to accommodate policies of federal bankruptcy law, as it would permit MobileMedia to emerge from bankruptcy and preserve the value of the company for its innocent creditors; and (2) the rule is being reconsidered in a rulemaking proceeding.³⁸

³⁴ Arch holds a 49.9% interest in Benbow PCS Ventures, Inc. (Benbow) and a 10.5% interest in CONXUS Communications, Inc., the parent of CONXUS Spectrum, Inc. (collectively Conxus). Benbow and Conxus each hold an NPCS regional license for each of the five NPCS regions. Application at 12-13.

³⁵ Application at 13.

³⁶ Application at 13. See, *Amendment of the Commission's Rules to Establish New Personal Communications Service, Narrowband PCS*, 12 FCC Rcd 12972 (1997) (*Further Notice*).

³⁷ 47 C.F.R. §§ 24.819, 1.3

³⁸ Application at 14-15.

16. The Bureau recommends that the Commission deny this waiver request. Section 24.819 provides that waivers will not be granted except upon an affirmative showing that: (1) the underlying purpose of the rule will not be served, or would be frustrated by its application in a particular case, and that the grant of the waiver is otherwise in the public interest; or (2) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.³⁹ Applicants must also show that there are no reasonable alternatives. We believe the Applicants have not met this burden nor the more general "good cause" standard set forth in Section 1.3.⁴⁰

17. The NPCS spectrum cap was designed to serve the public interest by facilitating competition and allowing for the market to be open to new entrants.⁴¹ The Applicants have failed to adequately demonstrate how the Combined Company's proposed ownership of attributable interests in four Narrowband PCS licenses would facilitate competition or would constitute unique circumstances.⁴² The Commission's spectrum aggregation limits are currently under review, but contrary to the Applicants' unsupported contentions, this does not justify grant of a waiver.⁴³

³⁹ The Section 24.819, 47 C.F.R. 24.819, waiver standard is consistent with the Commission's general waiver standard. *See WAIT Radio v. FCC* 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *see also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁴⁰ 47 C.F.R. § 1.3.

⁴¹ *See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order*, 8 FCC Rcd 7162 (1993).

⁴² We discount Applicants' unsupported arguments that they need not address section 24.819(a)(1) because the pending rulemaking re-assesses the purpose of the rule. We do not recommend that Section 24.819(a)(1) be considered satisfied based simply on a reference to a pending rulemaking proceeding.

⁴³ We note that the rulemaking cited by the Applicants does not directly seek comment on eliminating the Narrowband PCS spectrum cap. Rather, it seeks comment on relaxing disclosure requirements. *See* 12 FCC Rcd at 13019.

18. The Bureau recognizes that the Commission is required to consider other federal policies not unique to our area of administrative expertise, such as the policies of federal bankruptcy law, when fulfilling its public interest mandate.⁴⁴ *LaRose* cautions however, that the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest.⁴⁵ The NPCS spectrum cap rules pre-dated the bankruptcy proceeding and we do not believe that Arch can justify its waiver request based simply on the fact that it will be acquiring these licenses through bankruptcy procedures.⁴⁶ Additionally, its argument that grant of this waiver will protect the value of MobileMedia for its creditors is flawed. To comply with our NPCS spectrum cap, the Combined Company could divest itself of a 5.6% interest in Conxus at fair market value. Applicants have not explained why divesting this interest, or any other interest, at fair market value would harm innocent creditors. We are not persuaded that this requirement is inequitable, unduly burdensome or otherwise contrary to the public interest.

19. Further, the Bureau believes that MobileMedia and Arch have not supported their contention that Commission precedent requires grant of a waiver to last until the conclusion of the rulemaking proceeding. To support their request, the parties cite *Western PCS*, but they

⁴⁴ *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

⁴⁵ *Id.* at 1146.

⁴⁶ See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, *First Report and Order*, 8 FCC Rcd 7162 (1993).

misquote the decision in an attempt to bolster their argument.⁴⁷ In *Western PCS*, Western had previously been granted a temporary waiver of section 20.6 and requested an extension of time to comply with the rule.⁴⁸ The Commercial Wireless Division granted an extension of the waiver to last until 90 days after adoption of a Report and Order in the Partitioning and Disaggregation Rulemaking or six months from the grant of the waiver, whichever is earlier.⁴⁹ In their waiver request, Applicants assert that the Commission granted the waiver until the conclusion of the rulemaking proceeding.⁵⁰ In fact, the Commission granted a waiver to last for a maximum of six months. Therefore, we recommend that the Commission find that the Applicants have not supported their argument that precedent requires granting a waiver to last until the conclusion of the rulemaking.

20. Although we have demonstrated that Mobilemedia and Arch have not justified their waiver request, we recognize that the Combined Company will be providing service to customers who may have been adversely affected by MobileMedia's financial troubles. Therefore, we recommend that the Combined Company be granted a temporary waiver, to last 90 days after consummation of the transaction, to come into compliance with the NPCS spectrum cap. This

⁴⁷ *Western PCS III License Corporation Request for Waiver of Section 20.6 of the Commission's Rules*, 11 FCC Rcd 14487 (1996) ("*Western PCS*").

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The Application first states "The Commission agreed and granted a limited waiver that allowed Western to exceed the CMRS spectrum cap for a period of either (1) six months; or (2) 90 days after the adoption of a Report and Order in the Commission's PCS partitioning and disaggregation proceeding." This omits the phrase "whichever is earlier." Application at 17. The Application then quotes the Commission Order but ends the quote in mid-sentence. The remainder of the sentence reads, "or six months from adoption of this Order, whichever is earlier." Compare Application at 17, and 12 FCC Rcd 14488.

would be consistent with the broadband spectrum cap divestiture requirements for non-controlling attributable interests.⁵¹

2. *Request for Standard License Authority*

21. Mobilemedia and Arch request that the Commission grant the Combined Company standard license authority to operate stations which are currently being operated by MobileMedia under a grant of interim operating authority.⁵² In the alternative, they request that the Commission allow the Combined Company to operate the stations at issue under interim operating authority.⁵³

22. The Bureau recommends that the Commission deny the Applicants' request. In a *Public Notice* released January 13, 1997, the Bureau automatically terminated certain facilities contained in Attachment C of the *Public Notice* because they were not constructed by the expiration date. Although these authorizations were terminated, the Bureau determined that MobileMedia Corporation, its affiliates and subsidiaries, may continue to operate these facilities on an interim basis until such time that the Commission takes further action and without prejudice to any enforcement related action that the Commission deems appropriate.⁵⁴ The *Public Notice* did not grant MobileMedia the right to obtain permanent operating authority for the cancelled

⁵¹ See 47 C.F.R. 20.6.

⁵² Application at 19.

⁵³ Application at 20 n.46.

⁵⁴ *Public Notice*, Wireless Narrowband Branch Information, 12 FCC Rcd 792 (Jan. 13, 1997).

channels. MobileMedia was granted authorization to operate the facilities on an interim basis in order to prevent undue disruption to its subscribers. In the 22 months since the Bureau permitted MobileMedia to operate these facilities on an interim basis, MobileMedia had the opportunity to switch subscribers to licensed operations or make other alternative arrangements, but it failed to do so. Additionally, we believe that at least some of the frequencies in question would be subject to auctions. As such, if the Combined Company desires to acquire these channels, it may do so by participating in the auction process.

3. Request for Waiver of FCC Application Fees

23. MobileMedia requests a waiver and refund of filing fees associated with the 27 applications for consent to transfer of control of the licenses held by MobileMedia and its subsidiaries.⁵⁵ MobileMedia states that the filing fees, which are approximately \$97,000, represent a substantial expenditure which would be borne by innocent creditors in the bankruptcy proceedings.⁵⁶

24. The Commission's Managing Director is responsible for fee decisions in response to requests for waivers or refunds of fees, as well as pleadings associated with the fee collection process. The Managing Director's decisions are made on a case-by-case basis. We therefore recommend that the Commission seek guidance from the Managing Director on this issue.

⁵⁵ Application at 20.

⁵⁶ *Id* at 21.

4. *Request for Authority to Exceed the Foreign Ownership Limit*

25. Applicants request that the Commission authorize indirect foreign ownership up to a non-controlling level of 35%, with not more than 15% of that controlling interest held by entities from countries that are not members of the World Trade Organization (WTO). Applicants state that under the merger, Credit Suisse First Boston Corporation could hold up to a 20.5% ownership in Arch notwithstanding any Arch holdings it may acquire outside the terms of the merger. Applicants further state that the parent company of Credit Suisse First Boston Corporation is Credit Suisse Group, a corporation organized under the laws of Switzerland (a WTO member country).⁵⁷

26. The Bureau does not object to the Applicants' request. The Commission's *Foreign Participation Order* created an open entry standard for applicants from WTO Member countries.⁵⁸ The Commission determined that applicants from WTO Member countries will no longer be required to demonstrate that their markets offer effective competitive opportunities in order obtain authorization to exceed the foreign ownership benchmark established in section 310(b)(4) of the Communications Act.⁵⁹ Additionally, the *Foreign Participation Order* directed the International Bureau to streamline the grant of authorizations to exceed the 25% foreign ownership benchmark.⁶⁰ In this situation, the Applicants have stated that the additional foreign interests will

⁵⁷ Supplement, Attachment B.

⁵⁸ *Id.*

⁵⁹ *Id.* at 23906.

⁶⁰ *Id.* at 24032-24033.

be held by an entity from a WTO member country and that this will comply with Commission precedent. Therefore, we do not object to their request. We recommend, however, that the Commission condition its approval on the Applicants' compliance with the Commission's *Foreign Participation Order*⁶¹ and all procedures established by the International Bureau.

5. *Requests for Additional Authorizations and Blanket Exemptions to Cut-off Rules*

27. MobileMedia and Arch request additional authority to utilize two "housekeeping" procedures that are used by applicants in large transactions to protect against processing delays caused by minor inadvertent omissions to applications, changes in licensing status during the pendency of the proceeding, or minor amendments to ownership structures necessary to complete consummation. Consistent with the Commission's past decisions, the Bureau does not object to the use of these procedures in this transaction.⁶² This consent is subject to the condition that grant of these requests will not shield the Applicants from any action the Bureau or the Commission deems appropriate.

D. Analysis of the Impact the Merger would have on Competition

28. Assuming the Commission otherwise determines that MobileMedia qualifies for Second Thursday Relief, the Bureau recommends that the Commission find that this merger will not have an adverse impact on competition. Although MobileMedia and Arch are actual

⁶¹ *Id.*

⁶² See *Applications of Pacificorp Holdings, Inc. and Century Telephone Enterprises, Inc.*, 13 FCC Rcd 8891,8915-16 (1997); *Applications of Pacific Telesis Group and SBC Communications, Inc.* 12 FCC Rcd 2624, 2625 (1997); *Applications of Craig O. McCaw and American Telephone and Telegraph Co.*, 9 FCC Rcd 5836, 5909 n.300 (1994).

competitors in certain markets, we believe this merger will not confer upon Arch the ability to exercise market power. Moreover, we believe this merger could enhance competition in paging markets because it will enable Arch to become a more effective competitor by improving its ability to market paging services nationwide. We also believe that, if MobileMedia qualifies for Second Thursday Relief, this transfer could preserve the interests of creditors and improve services to its customers.

1. *Legal Standard*

29. In determining whether a proposed transfer of control is in the public interest, convenience, and necessity under section 310(d) of the Communications Act, as amended, the Commission considers, where appropriate, the effects of the transfer on competition.⁶³

The public interest standard of section 310(d) is a flexible one that encompasses the "broad aims of the Communications Act."⁶⁴ These broad aims include, among other things, promotion of the competition policies of the Sherman and Clayton Acts.⁶⁵

⁶³ *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980) (*en banc*). 47 U.S.C. §§ 214(a), 303(r), 310(d) (1994); *see also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, ¶ 29; *BT/MCI Order*, 12 FCC Rcd at 15364, ¶ 28. The Commission also has jurisdiction under Sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *See* 15 U.S.C. § 18 (1994); 15 U.S.C. § 21(a).

⁶⁴ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, ¶ 2 & n.2 (and cases cited therein); *BT/MCI Order*, 12 FCC Rcd at 15353, ¶ 3.

⁶⁵ 15 U.S.C. §§ 1-7 (1994); 15 U.S.C. §§ 18 *et seq.* (1994). *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, ¶ 2; *BT/MCI Order*, 12 FCC Rcd at 15354, ¶ 3 & n.6.

30. The Commission's analysis of the competitive effects of the proposed transaction is informed by antitrust principles,⁶⁶ but is not governed by the scope of the antitrust laws.⁶⁷ Applicants must demonstrate, *inter alia*, not merely that the merger will not "substantially . . . lessen competition . . . [or] . . . tend to create a monopoly,"⁶⁸ but that the "public interest, convenience, and necessity would be served by the [merger]."⁶⁹ The Telecommunications Act of 1996⁷⁰ sets a clear national policy that competition rather than regulation shall be the preferred means for protecting consumers. Ultimately, the Commission must determine whether MobileMedia and Arch have demonstrated that the proposed transaction, on balance, serves the public interest.⁷¹

2. Analytical Framework

31. In conducting its public interest analysis of competitive conditions in markets affected by this proposed merger, the Bureau followed the standards adopted by the

⁶⁶ See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); *United States v. FCC*, 652 F.2d at 81-82.

⁶⁷ See *United States v. FCC*, 652 F.2d at 88; see also *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20003-04, ¶ 32 & n.71 (distinguishing Commission's public interest analysis from Clayton Act Section 7 analysis regarding whether a proposed transaction will "substantially lessen competition").

⁶⁸ 15 U.S.C. § 18 (1994).

⁶⁹ 47 U.S.C. § 309(a). With respect to Section 214(a), the Commission must find that the "present or future public convenience and necessity require or will require" operation of the acquired wired telecommunications line, and that the discontinuation of the operation by the transferee is required by public convenience and necessity.

⁷⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et seq.*) (1996 Act).

⁷¹ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20001, 20007, ¶¶ 29, 36; *BT/MCI Order*, 12 FCC Rcd at 15367, ¶ 33.

Commission in its decisions to grant consent to the mergers of Bell Atlantic and NYNEX ("BA-NYNEX") and British Telecommunications and MCI Communications Corp. ("BT-MCI").⁷² Our analysis also is consistent with the Bureau's decisions to grant approval to the merger between Nextel Communications, Inc. and Pittencrieff Communications, Inc., and the acquisition by American Mobile Satellite Corporation of Motorola's Ardis division.⁷³ All of these orders followed the approach used in the *LEC In-Region Interexchange Order*, where the Commission found the Department of Justice and Federal Trade Commission 1992 *Horizontal Merger Guidelines*⁷⁴ (as revised in 1997) to be a useful analytical tool for evaluating the likely competitive effects of mergers and acquisitions. As a result, the framework the Bureau applies ensures that its assessment of the competitive effects of a merger is based on generally accepted economic principles relating to market analysis.⁷⁵

3. *Competitive Analysis*

32. The Bureau's analysis of the Arch-MobileMedia merger follows the four steps that the Commission uses pursuant to section 310(d) of the Act to determine the impact a transfer of control will have on competition. First, the Bureau will define the relevant

⁷² Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second and Third Reports and Order*, 12 FCC Rcd. 15,756 (1997) ("*LEC In-Region Interexchange Order*").

⁷³ Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 8935, ___, ¶ 10 (WTB 1997) ("*Pittencrieff Order*"); Application of Motorola, Inc. and American Mobile Satellite Corporation for Consent to Transfer Control of Ardis Company, *Memorandum Opinion and Order*, 13 FCC Rcd. 5182, ___ (WTB 1997).

⁷⁴ *Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992), 57 Fed. Register 41,552 (Sept. 10, 1992) ("*Guidelines*").

⁷⁵ *LEC In-Region Interexchange Order*, 12 FCC Rcd. at 15,774, ¶ 26.

product and geographic markets.⁷⁶ Second, the Bureau will identify current and potential participants in each relevant market, especially those that are likely to have a significant competitive effect.⁷⁷ Third, the Bureau will evaluate the effects that the merger may have on competition in the relevant markets.⁷⁸ Fourth, the Bureau will consider whether the proposed transaction will result in merger-specific efficiencies such as cost reductions, productivity enhancements, or improved incentives for innovation.⁷⁹ In addition to an analysis of merger-specific efficiencies, which is consistent with the approach taken in the *1997 Revised Guidelines*, the Bureau will consider whether the merger is likely to produce other public interest benefits. The Bureau's analysis will also weigh any competing harmful and beneficial effects to determine whether, on balance, the merger is likely to enhance competition in the relevant markets.

i. Market Definition

33. The Bureau begins its analysis by identifying the relevant product and geographic markets. To do so, we identify the products (or herein, services) offered by Arch and MobileMedia, and evaluate the extent to which services offered by other communications companies compete for the business conducted by the merging parties.

⁷⁶ See *BA-NYNEX Order*, 12 FCC Rcd. at 20014, ¶ 49; *BT-MCI Order*, 12 FCC Rcd. at 15368, ¶ 35.

⁷⁷ See *Pittencrieff Order* at ¶¶ 13-14 and *Ardis Order* at ¶¶ 12-13 for elaboration on the Bureau's rationale for not defining precluded competitors in the context of wireless mergers.

⁷⁸ *Guidelines*, 57 Fed. Reg. at 41,558 §§ 2.1, 2.2.

⁷⁹ See *Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission*, Revised: April 8, 1997 ("*Revised Guidelines*").

(a) Relevant Product Markets

34. In general, a relevant product market encompasses a group of similar services, where each service is a good substitute for another service, but where, for the group as a whole, there are no other close substitutes in demand.⁸⁰ Arch and MobileMedia each provide various types of paging and messaging services and, therefore, both are participants in the messaging service industry. The Bureau believes the relevant product market encompasses traditional one-way paging services, as well as two-way messaging, voice messaging, and data transmission because all of these services are close substitutes to one another.⁸¹ This definition is consistent with the Bureau's previous determination that these paging/messaging services should be distinguished from other wireless communications products such as mobile voice services⁸² and two-way mobile data services.⁸³ For purposes of our analysis, the Bureau also includes narrowband personal communications service (NPCS) in the relevant product market because some of the key technical differences between traditional paging and NPCS are transparent to the user.⁸⁴ Furthermore, the Bureau believes that other differences, including price and capabilities, are not significant enough to be an obstacle to the projected

⁸⁰ *LEC In-Region Interexchange Order*, 12 FCC Rcd. at 15,761, 15,777, 15,782, ¶¶ 5, 31, and 40.

⁸¹ We did not include digital mobile phone services in the relevant product market because, although these services offer a messaging functionality, consumers perceive these products to be quite different. *See Third Annual CMRS Competition Report* at 48. Analysts note that stand alone messaging services provide significant advantages over similar services bundled into mobile phone service packages, including flat rate pricing, lower service costs, lower device costs, longer battery life, and size. The Strategic Group, "U.S. Mobile Data Marketplace - 1997" at 98. There is also evidence that mobile phones and pagers may be complements, rather than substitutes. *Third Annual CMRS Competition Report* at 48.

⁸² *See Pittencrieff* at ¶ 42.

⁸³ *See Ardis* at ¶¶ 28, 32. *See also, Third Annual CMRS Competition Report* at 39, 55.

⁸⁴ *Third Annual CMRS Competition Report* at 45-46. *Appl.* at 38.

migration of demand toward NPCS.

(b) Relevant Geographic Markets

35. A properly defined geographic market aggregates consumers that face similar choices regarding vendors of a particular product or service.⁸⁵ For communications services, the relevant geographic market encompasses territories over which a particular relevant product is or could readily be marketed.⁸⁶ For purposes of our analysis, the Bureau defines the relevant geographic market as those geographic areas where both Arch and MobileMedia are capable of supporting demand from the same group of potential customers using their own facilities. To be more specific, we define a relevant geographic market to be the service area generally covered by those paging operators who enjoy exclusive use of their frequencies in and around each corresponding market center.⁸⁷ These relevant geographic areas cannot be reliably defined in terms of a uniform distance around each market center, although an envelope extending approximately 25 to 30 miles around each metropolitan center may be typical.⁸⁸ Thus, the Bureau concurs with Arch and MobileMedia that the relevant markets

⁸⁵ See, e.g., *Tampa Elec. Co. v. Nashville Co.*, 365 U.S. 320, 327 (1961).

⁸⁶ For mobile communications products, services are not always marketed wherever access to a service is available. For example, firms may offer their customers nationwide access to paging services, but market these services only where they can meet subscriber demand through their own facilities. In practice, facilities-based telecommunications firms typically confine their marketing of services to areas where they maintain facilities.

⁸⁷ See *Pittencrieff* at ¶ 41.

⁸⁸ Generally, traditional paging carriers can reliably deliver services on their assigned frequencies within a 20-mile radius around their designated transmitter sites.

are principally individual metropolitan markets throughout the country,⁸⁹ and the Bureau will analyze competition in these markets accordingly.

(c) Relevant Markets—Analysis

36. MobileMedia offers local, regional, and nationwide paging services to subscribers in all 50 states and the District of Columbia.⁹⁰ MobileMedia is licensed to provide coverage to each of the 100 largest markets and 198 of the 200 largest markets. Arch operates in 41 states and in 183 of the 200 largest markets in the United States, offering local, regional, and nationwide paging services.⁹¹ Although Arch operates radio transmitters in each of these 183 markets, Arch does not maintain a marketing presence in 53 of these markets.⁹² Accordingly, Arch and MobileMedia compete for subscribers in as many as 183 relevant paging markets implicated by this merger application. These relevant markets include 53 markets where Arch is a potential competitor to MobileMedia because it holds one or more licenses, yet does not now market paging services.

37. In light of the large number of markets potentially affected by this merger, it would have been impractical for the Bureau to analyze the impact the merger would have on competition in each specific market. Accordingly, for the purpose of conducting a detailed

⁸⁹ Appl. at 38.

⁹⁰ Appl. at 4, Supp. at 3.

⁹¹ Appl. at 4, Supp. at 2.

⁹² Supp. at 2, Att. C.

analysis, we identified a subset of these markets that would likely have become the most concentrated if the Commission were to approve this merger. We excluded the top 30 metropolitan areas because the Bureau believes that paging markets tend to be highly competitive in the largest metropolitan markets, and because Arch stated that its competitive strategy focuses on mid-sized and smaller urban markets. In response to an informal request from the Bureau, Arch identified the five markets outside the top 30 metropolitan areas where it held the largest number of paging licenses⁹³ and where it overlapped with MobileMedia. MobileMedia identified ten markets outside the top 30 metropolitan where it held the largest number of paging licenses and where its paging channels overlapped with Arch.⁹⁴ For each of these 15 markets, Arch and MobileMedia filed data with the Bureau on their own mobile channel holdings as well as for their merger partner.

38. Based upon this information, the Bureau selected three markets for further analysis: Columbus, Ohio; Dayton, Ohio; and Manchester, New Hampshire. We selected Columbus and Dayton for detailed analysis because they were the two markets where Arch and MobileMedia reported that they would collectively control the largest number of mobile frequencies -- at least 20 channels in each market. The Bureau also selected Manchester, NH

⁹³ Paging frequencies may be distinguished as base channels, control channels and mobile channels. A carrier's ability to support subscribers most closely corresponds to the number of mobile channels over which it has authority.

⁹⁴ MobileMedia also furnished data initially on five markets, but ranked the markets based on total frequencies controlled, including control channels rather than strictly mobile channels as requested. The Bureau requested that Arch and MobileMedia rank these markets on the basis of mobile channels without including control channels because a carrier's ability to support subscribers most closely corresponds to the number of mobile channels it is authorized to use. To compensate for the possibility that the rankings may have been affected by the inclusion of the control channels, the Bureau asked MobileMedia to provide data on the ten most concentrated markets based on a ranking on their terms.

because together Arch and MobileMedia collectively control 19 frequencies, which we believe would constitute a relatively large share of this market's total capacity, given the relatively much smaller size of this market.⁹⁵ The Bureau also selected Manchester because Arch and MobileMedia reported that each now exercises independent control over a substantial amount of paging capacity in this market.⁹⁶

ii. Market Participants

(a) Overview of Competition in Paging/Messaging Services

39. There has been considerable consolidation within the U.S. paging industry in recent years.⁹⁷ The five largest paging firms, for example, accounted for over 50 percent of industry revenues in 1997. Arch and MobileMedia are two of these five largest paging carriers, accounting for over 7 million of the nation's 50 million paging subscribers.⁹⁸ Yet, individual markets still feature a large number of paging competitors. As Arch and MobileMedia have noted, the "25 largest cities in the United States have an average of 29 paging licensees, not including resellers, while the 25 smallest MSAs have an average of 12 paging licensees per area."⁹⁹

⁹⁵ Indeed, our investigation subsequently revealed that Manchester, which ranks 133rd among MSAs, is served by only 69 active paging channels. By contrast, Columbus, ranked 31st, is served by 91 channels while Dayton, ranked 40th, is served by 80 channels.

⁹⁶ Indeed, Arch and MobileMedia are the second and third largest holders of traditional paging capacity in this market, after PageNet.

⁹⁷ *Third Annual CMRS Competition Report* at 40.

⁹⁸ Appl. at 40, citing Radio Communications Report (August 3, 1998), and the *Third Annual CMRS Competition Report* at Figure 5.

⁹⁹ Appl. at 39, citing *Third Annual CMRS Competition Report* at 41.

40. Accordingly, this analysis focuses on local paging markets. The Bureau identified the participants in each of the markets we designated for further analysis by reviewing our licensing records for these markets.¹⁰⁰ The Bureau used spectrum as a proxy for production and sales capacity, and for traditional paging operators, the Bureau limited our attention to constructed licenses to ensure that these licenses are valid and that the spectrum is being used.¹⁰¹ In each locality, 160 mobile frequencies are potentially available for use to provide traditional one-way paging services, as part of a total allocation of 5.1 MHz.¹⁰² In most communities, however, far fewer channels are actually in active use.¹⁰³ The Commission has also awarded 17 narrowband PCS licenses totalling 1.6 MHz of spectrum for service to each market.¹⁰⁴ Several operators are currently providing NPCS services. However, most licensees have yet to commence service.

¹⁰⁰ The largest paging carriers are able to provide their subscribers with access to messaging services throughout the country. Hence, they can accommodate consumer demands for access to these services, whether nationwide, regional, or merely local services are desired. However, consumers will likely subscribe only from among those paging providers that advertise and market services where they live and work. Typically, only carriers with local radio facilities and distribution capabilities will have the incentive to market services in a given community.

¹⁰¹ The Commission is not issuing site licenses to any new market entrants. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732, 2739 ¶ 6 (1997). In each locality, 160 frequencies are potentially available for use to provide traditional one-way paging services, totalling 5.1 MHz. Of these, five are licensed on a shared basis. Section 90.494 For the most part, the remaining 155 frequencies are assigned on an exclusive basis. Section 90.493, 22.531, 22.561.

¹⁰² We do not assign the five shared paging frequencies to any particular carriers, but do include them in the market total. Where two firms hold exclusive authorizations on the same frequency within a metropolitan area, we ascribe this capacity to the carrier operating the most sites using this frequency within the market.

¹⁰³ CWD Licensing Branch. *See also* Applications for Transfer of Control filed by McCaw RCC Communications and Metrocall Inc. at page 14 of public interest showing (filed August 5, 1998).

¹⁰⁴ The Strategis Group, "U.S. Mobile Data Marketplace: 1997," at Table 5.3. These licenses are either nationwide or regional in geographic scope, and were offered in three bandwidth formats -- 50 kHz for both downlink and uplink, 50kHz downlink and 12.5kHz uplink, and 50kHz downlink. *Id.*

41. Arch presently holds an attributable interest in two entire sets of five regional NPCS licenses.¹⁰⁵ MobileMedia also holds an interest in one nationwide NPCS license and five regional NPCS licenses of its own. Hence, post-merger, Arch would hold an attributable interest in four NPCS licenses in every market throughout the country.¹⁰⁶

(b) Market for Messaging Services in Columbus, Ohio

42. Approximately 35 competitively independent companies are licensed to provide access to paging services in Columbus. Aside from Arch and MobileMedia, competitors include Airtouch, Ameritech Mobile, Metrocall, PageMart, PageNet, SkyTel, and TSR Wireless. Each of these companies hold both traditional paging licenses and NPCS licenses capable of being used to serve this market. At present, 86 exclusive and five shared paging frequencies are being used in this market. Of these, Arch and its subsidiaries and affiliates are currently authorized to operate 30 exclusive paging frequencies, while MobileMedia has exclusive authority over four frequencies.¹⁰⁷ Paging Network (PageNet) operates eight frequencies, Airtouch operates on six frequencies, and Metrocall has authorization to operate

¹⁰⁵ Appl. at 12-13.

¹⁰⁶ Such an interest is in violation of our rules. Section 24.101. Appl. at 13. Applicants have applied for a waiver of this rule to last until the conclusion of a rulemaking proceeding. In section C of these comments, we recommend that the Commission deny the Applicant's request and grant only a 90-day waiver to permit divestiture. If the Commission adopts the Bureau's recommendation to have Arch divest one of these licenses, then post-merger, Arch would have an attributable interest in three of the 17 NPCS licenses.

¹⁰⁷ CWD Licensing Branch. Supp. at Att. B, Page 1. Excluded from our tabulations are three licenses held by USA Mobile (35.20, 35.22, 35.66) that Arch contends were cancelled before Arch acquired USA Mobile, and three licenses assigned to MobileMedia (454.025, 931.2125, 931.2375) that MobileMedia claims have been cancelled or will be cancelled as part of the ongoing review. Facsimile from Peter Shields, Counsel for MobileMedia, to Pieter van Leeuwen, dated November 2, 1998.

four frequencies. No other paging carrier controls more than three mobile paging channels in this market.

43. Ten distinct carriers obtained authority to provide NPCS to Region 3, which includes Columbus. Arch presently holds an attributable interest in two of these licenses,¹⁰⁸ while MobileMedia holds an interest in two others. Presently, only SkyTel and PageMart are offering facilities-based NPCS services.¹⁰⁹ Various other carriers also offer NPCS services as resellers.

(c) Market for Messaging Services in Dayton, OH

44. Approximately 30 distinct competitors are licensed to provide access to paging services in Dayton. Aside from Arch and MobileMedia, competitors include Airtouch, Ameritech Mobile, Metrocall, PageMart, PageNet, SkyTel, and TSR Wireless. Each of these companies have traditional paging licenses and NPCS licenses capable of serving this market. At present, 75 exclusive and five shared paging frequencies are being used in this market. Of these, Arch and its subsidiaries and affiliates are currently authorized to operate 20 traditional paging frequencies, while MobileMedia has authority over six frequencies.¹¹⁰ PageNet is licensed on seven channels, while AirTouch and Danny's Two-way are each control five

¹⁰⁸ Appl. at 12-13.

¹⁰⁹ *Third Annual CMRS Competition Report* at C-8, Table 6.

¹¹⁰ CWD Licensing Branch. Applicants report holding authorizations totaling 21 and 5 frequencies, respectively. Supp. at Att. B, Page 1.

channels for service to this market. Presently, only SkyTel and PageMart are offering NPCS services on a facilities-based basis.

(d) Market for Messaging Services in Manchester, NH

45. Approximately 20 independent entities are licensed to provide access to paging services to consumers in Manchester. Aside from Arch and MobileMedia, competitors include Airtouch, Metrocall, PageMart, PageNet, SkyTel, and TSR Wireless. Each of these companies have traditional paging licenses and NPCS licenses capable of serving this market. At present, 64 exclusive and five shared paging frequencies are being used in this market. Of these, Arch and its subsidiaries and affiliates are currently authorized to operate eight traditional paging frequencies,¹¹¹ while MobileMedia has authority over ten frequencies.¹¹² Six other firms each have authority over at least three channels, amounting to significant capacity relative to the size of this market. Presently, only SkyTel and PageMart are now offering NPCS services on a facilities-based basis.

iii. Competitive Effects of Acquisition

46. Having described the conditions of existing and potential competition in the relevant markets, the Bureau will next determine the likely effects of the acquisition of the

¹¹¹ Our tabulation includes 152.15, excluded by Arch in their tabulation due to their use of a different set of coordinates for the market center. We determined that use of either set of coordinates is legitimate.

¹¹² Applicants report holding authorizations totaling 7 and 12 frequencies, respectively. Supp. at Exhibit 1 Excluded from our tabulations are twelve licenses assigned to MobileMedia (43.20, 43.22, 43.42, 43.58, 152.09, 152.12, 152.15, 454.10, 454.25, 454.30, 931.2375, 931.6375) that MobileMedia claims have been cancelled or will be cancelled as part of the ongoing review. Facsimile from Peter Shields, Counsel for MobileMedia, to Pieter van Leeuwen, dated November 2, 1998. We note that, according to our records, 152.15 is not assigned to MobileMedia but rather to Arch.

merger Arch on competition in the relevant markets. A merger may have an anticompetitive effect due to its horizontal aspects if the merger enables the combined entity to achieve unilateral market power, or if it reduces the number of competitors in the relevant market so that the remaining firms can collectively exercise market power through coordinated interaction.¹¹³ Alternatively, a merger may have a procompetitive effect if, as a result of the merger, the merged entity can more quickly or effectively challenge a dominant firm possessing unilateral market power in the relevant market, or if the merged entity becomes a stronger maverick that can prevent or limit coordinated interaction.¹¹⁴

47. The Bureau believes that the risk of coordinated behavior in paging markets will generally be low, due primarily to the large number of independent competitors that provide access in most markets, the presence of significant excess capacity, and the presence of substantial resale competition. Accordingly, this analysis focuses on the potential for unilateral effects, and specifically, the potential for Arch to obtain and exercise market power in these markets.

¹¹³ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20038, ¶¶ 101-02; *BT/MCI Order*, 12 FCC Rcd at 15397-98, ¶¶ 123-125. *See also Guidelines*, 57 Fed. Reg. at 41558-41560 §§ 2.1-2.2. Coordinated interaction consists of a group of firms' actions that are profitable for each firm only because of the accommodating reactions of the others. *See Guidelines* at 41558, § 2.1. A firm has unilateral market power if it can elevate price and suppress output on its own and remain profitable. *See id.* at 41559, § 2.2

¹¹⁴ *BT/MCI Order*, 12 FCC Rcd 15397-98, ¶¶ 124-25.

(a) Effects on Market for Messaging Services in Columbus, OH

48. Post-merger, Arch would hold authorizations for 34 of the 91 commercial paging frequencies currently serving this market. Arch would, therefore, hold 37 percent of total market capacity for traditional paging services in Columbus. Regulatory authorities generally scrutinize a merger if a firm would thereby obtain a market share exceeding 35 percent. The Bureau believes, however, that the apparent risks of anti-competitive conduct emanating from this merger diminishes when operational NPCS capacity is factored into the analysis. Presently, SkyTel and PageMart each provide facilities-based service to Columbus.¹¹⁵ We estimate that the admission of these services effectively adds at least 14 channels of operational capacity to the market, when measured in units of traditional paging bandwidth.¹¹⁶ As a result, Arch's share of existing capacity in the Columbus market for paging services would increase through the merger from 29 to 32 percent, and market concentration would increase about 200 points from 1378 to 1595. Although Arch's share of the Columbus paging market would increase, and supply in the provision of paging services in this market would become more concentrated, we believe that Arch would not be in the position to exercise market power.¹¹⁷ We base this conclusion on the highly dynamic nature of competition and innovation in the paging and messaging business. In particular, we anticipate that further entry by existing NPCS licensees will likely mitigate any risks of anticompetitive conduct.

¹¹⁵ PageNet provides service on a resale basis.

¹¹⁶ Most of the traditional paging licenses provide for 25kHz of channel separation, while narrowband PCS spectrum was allotted in parcels of 50kHz, 62.5kHz, and 100kHz when uplinks and downlinks are considered.

¹¹⁷ See also Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, WT Docket No. 96-59, 11 FCC Rcd 7824, 7869 (1996).

(b) Effects on Market for Messaging Services in Dayton, OH

49. Post-merger, Arch would hold authorizations for 26 out of the 80 commercial paging frequencies currently in operation in this market. This would provide Arch with 33 percent of the capacity to offer traditional paging services to consumers in Columbus. Accordingly, without taking directly into consideration the provision of services by narrowband PCS carriers, this merger would appear to elevate market concentration modestly, with the HHI rising from 933 to 1308. While this constitutes a considerable increase in market concentration, we believe that this merger does not pose a meaningful threat to competition in this market. We base this conclusion on the presence of a large number of other carriers that currently offer paging services in Dayton. In addition, the presence of several NPCS carriers, and the anticipated entry by other NPCS licensees, further supports our belief that the present competitive environment in the provision of paging services will not be seriously eroded through the effects of this merger.

(c) Effects on Market for Messaging Services in Manchester, NH

50. Post-merger, Arch would hold authorizations for 18 out of the 69 commercial paging frequencies currently in operation in this market. This would provide Arch with 26 percent of existing capacity to offer traditional paging services in Manchester. Accordingly, without taking directly into consideration the provision of services by NPCS carriers, this merger would appear to elevate market concentration modestly, with the HHI rising from about 815 to 1151. While this constitutes a considerable increase in market concentration, we believe that this merger does not pose a meaningful threat to competition in this market because there are a large number of

other carriers that currently offer paging services in Manchester. The presence of NPCS carriers in this market, and the anticipated entry of additional NPCS licensees, further supports our belief that the current competitive environment in the provision of paging services will not be undermined by this merger.

iv. Pro-Competitive and Efficiency Benefits

51. The Bureau next examines the potential pro-competitive benefits attributable to the transaction. These pro-competitive benefits include efficiencies arising from the transaction if such efficiencies are achievable only as a result of the merger, are sufficiently likely and verifiable, and are not the result of anticompetitive reductions in output or increases in price.¹¹⁸ Efficiencies are the pro-competitive benefits of a merger that improve market performance.¹¹⁹ Efficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and, therefore, result in reductions in price, improved quality, and enhanced services or new products. Applicants bear the burden of showing both that merger specific efficiencies will occur, and that they sufficiently offset any harm to competition such that we can conclude that the transaction is pro-competitive and therefore in the public interest.¹²⁰

¹¹⁸ See *BA-NYNEX Order*, 12 FCC Rcd. at 20,063, ¶¶ 158-159.

¹¹⁹ *Id.*

¹²⁰ *Id.*

52. If the Commission ultimately determines that MobileMedia qualifies for *Second Thursday* relief, the Bureau recommends that the Commission find that the pro-competitive efficiency benefits of this merger outweigh any concerns over concentration of ownership in certain markets. If MobileMedia qualifies for *Second Thursday* relief, the merger could protect, for example, the interests of innocent creditors. According to Arch and MobileMedia, approval of this merger would help to preserve over \$1.1 billion in value owed to MobileMedia's creditors.¹²¹ The record indicates that these creditors include banks, investment firms, pension funds, companies, individual bondholders and several thousand individuals, including employees, who have furnished services to MobileMedia.¹²²

53. Approval of this merger may also enable MobileMedia to complete its Chapter 11 reorganization and thereby benefit over 3.2 million customers who rely on MobileMedia for the provision of paging services.¹²³ This merger also could help ensure that service to MobileMedia's customers is not interrupted or terminated.¹²⁴

54. Finally, the record indicates that this proposed transaction would result in the formation of a more effective competitor in the nationwide market for messaging services.¹²⁵ The

¹²¹ Appl. at 35.

¹²² Appl. at n.89.

¹²³ Appl. at 36.

¹²⁴ *Id.*

¹²⁵ Appl. at 36.

merger would add MobileMedia's assets in large markets to Arch's capabilities in smaller and mid-sized markets.¹²⁶

v. Conclusions re Competitive Analysis

55. Accordingly, if the Commission finds that MobileMedia qualifies for Second Thursday Relief, the Bureau recommends that the Commission find that the proposed merger will not have an adverse impact on competition. Although in some markets Arch will control a large portion of the currently licensed traditional paging spectrum as a result of this merger, there are a number of mitigating factors. First, in each market there are a large number of other independent firms with licenses and operational capacity to provide paging services. Second, NPCS is currently available from several entities, and further entry by remaining licensees with NPCS spectrum is likely within the relatively near term. Moreover, we believe this merger will enhance competition because it will enable Arch to become a more effective competitor by improving its ability to market paging services nationwide. We also believe that, if MobileMedia qualifies for *Second Thursday* relief, this transfer could preserve the interests of creditors and improve services to MobileMedia's customers.

¹²⁶ Arch and MobileMedia also claim that the combined company will be able to reduce operating costs by \$25 million annually. They assert that the merger will enhance Arch's ability to access capital markets, and thereby enable it to expand and improve its delivery of paging and messaging services. In particular, they contend that the addition of MobileMedia's narrowband PCS licenses will allow Arch to accelerate the deployment of a nationwide narrowband PCS network, lower its costs, and thereby expedite the introduction of new paging products. Appl. at 37. However, while there are reasons to suspect that these claims may have merit, Applicants have not satisfied their burden of proof because these claims are "vague or speculative, and cannot be verified by reasonable means." *BT/MCI Order*, 12 FCC Rcd 15397-98, ¶208.

III. CONCLUSION AND SUMMARY

56. The Bureau concludes that MobileMedia appears to be eligible for relief under *Second Thursday*, but it requests that the Commission defer action on the request until MobileMedia has filed its compliance report and the Bureau has had an opportunity to file supplemental comments on the compliance report. The Bureau opposes the requests for waiver of the NPCS spectrum cap and for permanent operating authority for stations which MobileMedia is operating pursuant to interim authority. The Bureau supports the parties' request for authority to exceed the foreign ownership limit contained in Section 310(b)(4) of the Communications Act. The Bureau takes no position on MobileMedia's request for waiver

of the filing fees. Finally, the Bureau concludes that the proposed transaction will not have an adverse impact on competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, by first class U.S. mail, this 16th day of November, 1998, sent copies of the foregoing "Wireless Telecommunications Bureau's Consolidated Comments on Applications for Transfer of Control And Petition to Terminate And for Special Relief," to:

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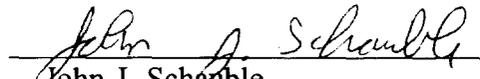
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